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卷首语

本期《中国海洋法学评论》的内容反映出了国内年轻学者专家较大的海洋政策研究能量。

首先，对于2007年春天才发生的伊朗扣押英国水兵事件，作者田士臣以其比较丰富的实务经验，从国际法的角度深刻分析了国际社会对此事件的立场，以及中国对本身领海内外国军用船舶的管理问题。近年来，外国军用舰机因机械故障、恶劣天气等原因强行进入中国领海、领空的事件并不少见，本文的内容自然会受到更多读者的重视。

其次，曾留学日本的国内海洋法年轻学者金永明以《日本在海洋问题上的动向及对我国的启示》为题进行论述，触及中日之间对于东海资源和其他海洋相关问题的未来解决之道，也很有政策研究的学术价值。徐祥民与孔晓明合撰的《日本〈濑户内海环境保护特别措施法〉的成功经验》，则为中国在渤海管理上的法制研究提供了宝贵的经验分析。另外，魏荣辉和傅崐成两位就中国大陆私人游艇的现状与其未来发展所进行的研究分析和管理制度的构想，也非常切合中国目前的发展需要，值得读者们注意。

从1996年联合国海洋法法庭开始审理海洋纠纷案件以来，10年之间，国际社会上的海洋争端解决机制发挥了一定的功用。值此海洋法法庭启动10周年之际，本期《中国海洋法学评论》针对《联合国海洋法公约》中的争端解决机制，提供了徐曾沧和卢建祥两位合撰的《〈联合国海洋法公约〉争端解决机制十年:成就、不足与发展》一文，以及关晶所撰写的《论国际海洋法法庭的临时措施管辖权》一文，作为评论。

当然，与此同时，中国政府于2006年8月26日依照《联合国海洋法公约》第298条规定，正式提交了排除性声明，表示对于《公约》第298条第1款(a)、(b)和(c)项所述的任何争端(即涉及海洋划界、领土争端、军事活动等争端)，中国政府不接受《公约》第15部分第2节规定的任何国际司法或仲裁管辖。这一文件具有极大的国际法价值，对于中国将来海洋纠纷的解决，具有最高的指导意义，理应受到各界的高度重视。本期也特别将这一声明文件列入，提供

各位读者参考。

当然，本期的内容还包括了很多其他重要的主题。

例如，关于水下文化遗产的保护，一直是国内外比较少人研究，但是在强调海洋研究的厦门大学特别受到重视的研究课题。作者赵亚娟所撰写的《论海难救助制度与水下文化遗产的保护》一文为这个主题提供了比较全面而深刻的分析，对于未来的水下文化遗产的保护工作，应该会带来重大的贡献。

此外，韦经建、姚莹两位合作撰写的《公共运输领域中回归契约自由的尝试》一文、褚晓琳提出的《风险预防原则发展历程的研究》一文、范云鹏《论大陆架界限委员会的法律地位》一文、徐洪霖和王建兰共同撰写的《海事赔偿责任限制基金程序面临的困境和解决》一文、以及徐伟力撰写的《试析沿海国防止船舶污染管辖权》一文等，都很有学术上的参考价值，请读者们予以注意。

由阮贞艳和董琳联合执笔，为由厦门大学海洋政策与法律中心和厦门市海洋与渔业局于 2007 年 4 月 21 日共同主办的“厦金海域管理问题”研讨会所撰写的综述，为所有不能到现场听会的读者们，提供了一份系统的会议纪实，对所有关心两岸海域（尤其是金门与厦门海域）管理问题的读者们，提供了有价值的服务。

最后，本期刊登了很多海洋法律相关的国内外法规与动态。尤其是由杨立敏、申政武、孙娜三位精心合译的《日本水产业协会法（三之三）》，是这一部富有参考价值的日本渔业法律全文的最后一部分。请读者们特别注意，也向三位译者郑重致谢。

编辑部　谨识

EDITOR'S NOTE

The current Issue of China Oceans Law Review reflects the relatively strong research ability of Chinese young scholars and experts in exploring maritime policies.

To start with, for the Iran's seizure of British navy soldiers in the spring 2007, the author, TIAN Shichen, explores the position of the international community on this event from the perspective of international law, based on his extensive practical experience. Additionally, Mr. TIAN also analyzes China's regulation of foreign military vessels in its territorial seas. During the last few years, foreign military vessels and aircrafts frequently entered into Chinese territorial seas or airspace without authorization by claiming mechanical failure, bad weather and other reasons. In this connection, this article will surely attract attention from more readers.

Secondly, JIN Yongming, a young scholar who has studied in Japan, expresses his views in the article titled Current Developments in Marine Affairs of Japan and Lessons for China. This article touches upon the method for future settlement of resources competition in the East China Sea and other maritime-related problems, which is of high academic value for policy research. Another article, The Success of Japan's Law concerning Special Measures for the Conservation of the Environment of the Seto Inland Sea and Lessons We Can Apply to the Management of China's Bohai Sea, co-authored by XU Xiangmin and KONG Xiaoming, provides valuable experiences for Chinese research on the legal system related to Bohai management. Moreover, WEI Ronghui and Kuen-chen FU's analysis on the current situation and future development of private yachts in China Mainland as well as the designing for the management system of such yachts, are in consistent with needs of development of China. Thus, this article is worth reading.

Since the International Tribunal for the Law of the Sea ("ITLOS") began to accept cases involving maritime disputes in 1996, the dispute settlement mechanism for maritime disputes in the international community has played its role for ten years. On the occasion of the tenth anniversary of the ITLOS, the current Issue of

China Oceans Law Review includes two articles providing some comments on the dispute settlement mechanism under the United Nations Convention on the Law of the Sea, namely, the article titled Ten Years for the Dispute Settlement Mechanism under the United Nations Convention on the Law of the Sea: Achievements, Deficiencies and Development co-authored by XU Zengcang and LU Jianxiang, and the article An Analysis on the Jurisdiction over Provisional Measures of the ITLOS, written by GUAN Jing.

At the same time, the Government of China formally submits its declaration on 26 August 2006 in accordance with Article 298 of the United Nations Convention on the Law of the Sea (the "Convention"), which states it does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention (namely disputes relating to sea boundary delimitations, territorial disputes, military activities and other disputes). This document is of high value in international law, which has overriding effect on maritime dispute settlement of China in the future and hence deserves high attention from all parties. The current Issue specifically incorporates the document for the readers' reference.

Needless to say, the current Issue also covers many other topics that are of significance.

For instance, protection of underwater cultural heritage receives little attention from foreign and domestic scholars. However, it is a valued topic in Xiamen University which emphasizes maritime research. The article The Legal System of Maritime Salvage and the Protection of Underwater Cultural Heritage: An Analysis of Relevant Provisions in the Convention on the Protection of Underwater Cultural Heritage by ZHAO Yajuan, provides a comprehensive and profound analysis for this topic, which would make significant contribution to the protection of underwater cultural heritage in the future.

Besides, the following articles contained in this Issue are of reference value in academia and thus are worth reading. These articles include: Attempts of Returning to Freedom of Contract in the Public Transport Field by WEI Jingjian and YAO Ying, The Evolution of the Precautionary Principle by CHU Xiaolin, A Study on the Legal Status of the Commission on the Limits of the Continental Shelf by FAN Yunpeng, Issues in the Procedure for the Constitution of Limitation Fund for Maritime Claims and Their Settlement by XU Honglin and WANG Jianlan and An Analysis of the Coastal State Jurisdiction on Preventing Vessel-Source Pollution by XU Weili.

This Issue also includes a review of Xiamen-Kinmen Sea Area Management Seminar written by RUAN Zhenyan and DONG Lin. This seminar was co-hosted on 21 April 2007 by Xiamen University Center for Oceans Law and Policy and Xiamen Ocean and Fisheries Bureau. The review offers systematic minutes of the seminar, which is valuable for the readers who concern about the management of the sea area (especially Xiamen-Kinmen sea area) between China Mainland and China Taiwan.

Finally, this Issue also covers some domestic and foreign legislations and updates relating to the law of the sea. Particularly, the elaborately translated version of Fisheries Cooperative Association Law (Part III of the Three Parts) by YANG Limin, SHEN Zhengwu and SUN Na is the last part of a Japanese fisheries law with high reference value. We earnestly request for particular attention from the readers to this translation and present our sincere thanks to the three translators.

COLR Editorial

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从伊朗扣押英国水兵事件看中国对其领海内的外国军用船舶的管理

田士臣 *

内容摘要: 近来，伊朗扣押英国水兵事件引起了国际社会的广泛关注，该事件是一个经典的国际法案例。本文试图站在中立的角度分析此事件涉及的主要国际法问题，并由此提出改善我国现行的领海内外国军事船舶管理制度的建议。

关键词: 水兵扣押事件　领海　外国军用船舶管理　《联合国海洋法公约》

一、引　言

2007 年 3 月 23 日，伊朗在其与伊拉克的交界水域[1]（伊拉克称为 Shatt-al-Arab waterway，伊朗称之为Arvand Roud）扣押了 15 名英国海军水兵和陆战队员，[2] 这些水兵正根据联合国决议乘坐属于 22 型英国皇家海军“康沃尔”号护卫舰的 2 艘橡皮艇执行反走私任务。经过双方外交的努力和多方斡旋，4 月 4 日，事件有了戏剧性的结局，伊朗主动释放了这些水兵，以此作为“送给英国人民的复活节礼物”。事件的发生正值联合国安理会讨论对伊朗核计划进行制裁、传言英美两国要对伊朗动武的敏感时期，加之美国此前在伊拉克扣押了伊朗外交官，国际社会对此予以高度关注。抛开复杂的国际政治和国际关系因素，单从国际法的角度对整个事件进行考查，该事件是一个经典的国际法案例，涉及国际海洋法、国家管辖

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* 田士臣，海军学术研究所海上安全政策研究室助理研究员。本文仅代表作者本人的学术观点，并不代表作者所在机构的立场。

1 伊朗和伊拉克曾于 1975 年 6 月 13 日根据同年 3 月 6 日两国间的《阿尔及尔协议》签署了《伊朗和伊拉克之间关于边界和邻国关系条约》，条约划定了两国间的陆地边界和从陆地边界在沙特阿拉伯河水道的终点到沙特阿拉伯水道入海口之间的水上疆界，这段水上疆界包括一部分领海疆界。该条约并未划定沙特阿拉伯水道入海口以外两国之间的水上疆界。1980 年两伊战争爆发前，伊拉克单方终止了该条约。条约全文下载于 http://www.meij.or.jp/text/border/Iran-Iraq/iraqiran1975.htm，2007 年 4 月 6 日。

2 中方新闻媒体报道统称为“水兵”，实际上按英国媒体的报道包括海军水兵和海军陆战队员。鉴于中文的这种通俗说法，本文所称“水兵”是指“海军水兵和陆战队员”。

豁免等诸多国际法问题，尤其应引起对中国领海外国军用船舶管理制度的反思。

伊朗扣押英国水兵事件的整个过程涉及诸多法律事实和行为，判断当事国双方谁是谁非需要对这些行为逐一进行考查。同时，由于最终没有诉诸司法程序，双方对案件事实部分争议最大的事件发生地点问题最终没有定论（见图 1）：英国认为事件发生在伊拉克水域，伊朗认为事件发生在伊朗水域，这为整个事件的法律定性带来了困难。因此，对此事件的国际法分析必需从中立的立场出发，以这个不确定的事实作为对当事国双方合法性考查的逻辑起点。为此，本文通过假设和逻辑推理，主要讨论了以下国际法问题：1. 如果事件发生在伊拉克领海，抑或发生在伊朗领海，伊朗是否对英国军舰和水兵享有管辖权？2. 如果事件发生在伊朗领海，英国可否主张其军舰在伊朗领海享有无害通过权？3. 如果事件发生在伊朗领海，伊朗对其扣押行为可以主张哪些法律事实和依据？4. 如果事件发生在伊朗领海，英国能否为其在伊朗领海的军舰和水兵主张国家管辖豁免权？5. 如果英国海军是根据联合国安理会决议行事，伊朗是否有容忍英国在其领海执行任务的义务？6. 如果事件发生在伊朗领海，伊朗能否以“间谍罪”起诉英军水兵？7. 如果事

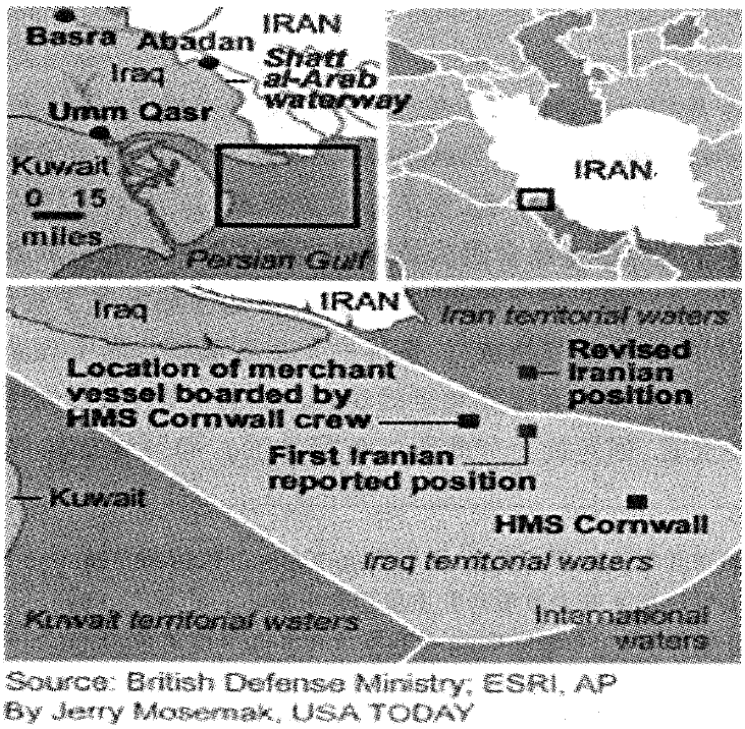

图 1　英国国防部提供之事件发生地点示意图 [3]

3　At http://www.mod.uk/DefenceInternet/DefenceNews/MilitaryOperations/ModBriefingShowsRoyalNavyPersonnelWerelnIraqiWaters.htm, 18 May 2007.

件发生在伊朗领海，伊朗扣押英国水兵后是否有义务通知英国驻伊朗领事馆？8. 如果事件发生在伊朗领海，英国能否对被扣押水兵行使外交保护权？9. 国际法为英伊双方争端的解决规定了哪些程序？10. 最后，值得反思的是，假如类似事件发生在中国领海，我们在立法和执法层面是否有充足的应对措施？

二、伊朗是否对英国军舰及其水兵享有管辖权

按照主权平等的国际法一般原则，任何国家享有对内最高权力和对外独立权，不得对其它国家和国民任意行使管辖权。为此，国际法规定了国家行使管辖权的一般原则，即属地原则和属人原则。按照属地原则，国家只能在本国领土范围内行使对一切人、事物或行为的管辖权；按照属人原则，国家可以对身处国外的本国国民以及针对本国国民的人或行为行使管辖权。国家管辖权涉及立法、行政和司法等多个方面，其中，国际刑事管辖权的行使还包括保护性管辖原则和普遍性管辖原则。根据保护性管辖原则，国家可以对外国人在外国针对其国家本身的犯罪行使管辖权。按照普遍性管辖原则，任何国家对适用普遍性管辖的国际罪行都可以行使管辖权，不论罪犯的国籍或犯罪的地点。但是，保护性管辖和普遍性管辖是属地优越权和属人优越权的补充和例外，国际法对此有严格的限制。对于本案，伊朗扣押英国水兵作为一种行使国家管辖权的行为，必须符合上述国际上普遍接受的国家管辖权行使原则。在本案中，执行反走私任务的英国水兵位于有争议的伊朗和伊拉克交界水域，而英国水兵不属于伊朗国民，其反走私行为也没有明显针对伊朗国民或伊朗国家，且没有明显犯下适用普遍性管辖的国际罪行，所以属人管辖原则、保护性管辖原则和普遍性管辖原则是明显排除予以适用的。这样，双方争论的焦点就集中在事件发生的具体地点上，这是伊朗能否依属地原则对英国水兵行使管辖权的关键所在。

按照伊朗的说法，扣押这些水兵是因为他们非法进入伊朗水域，根据本案情况，“水域”此处指领海。伊朗以英国水兵的坦白承认为证，并声称向英国提供了事件发生位置的地理坐标。英国则认为，这些水兵正在伊拉克水域执行反走私行动，并以其 GPS 数据为证。双方说法截然相反，也为事件的法律定性带来了困难。而且，伊朗和伊拉克在该水域的划界争端至今尚未解决。两国于 1975 年签署过一个划界条约，将 Shatt- al-Arab 水道主航道的中间线作为从两国陆地边界在沙特阿拉伯河水道的终点到沙特阿拉伯水道在波斯湾入海口之间的水上疆界。[4] 该

4 See Art. 2(1) of the Protocol concerning the Delimitation to the River Frontier between Iran and Iraq under the 1975 Treaty concerning the Frontier and Neighborly Relations between Iran and Iraq.

协议还规定，每隔 10 年两国应重新对水道进行测量。[5] 就该协定本身而言，一方面，双方已经有超过 20 年没有重新确认中间线的位置；另一方面，公约签署 5 年后两伊战争爆发，萨达姆单方面终止了该协定，[6] 而且战争对边界协定效力的影响在国际法上尚无定论。[7] 以上因素使得 1975 年两国划界协定很难说依然有效，也使得双方关于事件发生地点的争论更加复杂化。就该协定对本案的影响而言，由于案件发生在沙特阿拉伯河在波斯湾入海口之外两国争议的领海水域，协定是否有效对本案的影响是间接的，因为两国水上边界在界河入海口以外的延长线对确定两国在波斯湾海域的领海疆界并无直接的法律效力。从中立立场出发，只能按假定的事实根据国际法做出一些逻辑推论。如果事件发生的地点位于伊拉克领海，伊朗的扣押行为显然是非法的；反之，如果事件发生的地点位于伊朗领海，却不足以证明伊朗扣押行为的合法性，对伊朗扣押行为的合法性还须按照其它国际法规则做进一步考查，其中涉及军舰在外国领海的无害通过、国家在领海的保护权、军舰的国家管辖豁免以及外国国家的外交保护等一系列国际法问题。

三、英国军舰在伊朗领海是否享有无害通过权

根据 1982 年《联合国海洋法公约》（以下简称“《公约》”），沿海国在其领海享有完全排他的主权，但受外国船舶无害通过制度的限制。无害通过制度是指外国船舶在不损害沿海国和平、安全和良好秩序的情况下，继续不停且迅速通过沿海国领海的航行制度。对于外国商船在沿海国领海的无害通过权，《公约》有明确的规定，该规定也是对习惯国际法的编纂，各国并无争议。但是，对于外国军舰在沿海国领海是否享有同商船一样的无害通过权，国际社会一直以来都存在激烈争论。在制定《公约》的第三次联合国海洋法会议上，美国、苏联等海洋大国主张一切船舶，包括军舰，均享有无害通过权。中国和其他 20 多个发展中国家则主张，外国军舰通过领海必须事先通知或取得沿海国同意。最终，《公约》做了模糊处理，使国际协定法没有对军舰无害通过领海问题做出明确规定。《公约》通过以来，各

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5 See Art. 6 of the Protocol concerning the Delimitation to the River Frontier between Iran and Iraq under the 1975 Treaty concerning the Frontier and Neighborly Relations between Iran and Iraq; See also Craig Murray, “Fake Maritime Boundaries” and “Captured Marines (Again)”, at http://www.craigmurray.co.uk/, 3 April 2007. Craig Murray 是英国驻中亚乌兹别克斯坦共和国的前任大使，并作为英国政府的代表出席了第三次联合国海洋法会议。此外，他还多次参加英国与其周边国家（如爱尔兰、法国和丹麦等）的海洋划界谈判。

6 Dugdale-Pointon, TDP., Iran-Iraq War 1980–1988, at http://www.historyofwar.org/articles/wars_iraniraq.html, 3 April 2007.

7 有些学者主张，割让领土和划定国界的条约并不因战争爆发而终止。参见李浩培著：《条约法概论》，北京：法律出版社 2003 年版，第 469 页。

国关于外国军舰通过其领海的立法和实践表明，沿海国可以允许外国军舰无害通过其领海而不加特别限制，也可以规定此种通过须经事先通知或许可或履行其他义务，而意欲进行此种通过的外国军舰，有义务遵守沿海国关于外国军舰通过其领海的法律和规章。[8]

伊朗在签署 1982 年《公约》时发表声明，要求外国军舰进入其领海须经事先允许。[9] 伊朗 1993 年 5 月《关于伊朗伊斯兰共和国在波斯湾和阿曼海海洋区域的法令》第 9 条“无害通过的例外”进一步明确规定，军舰、潜艇、核动力船舶、以及任何运载核物质或其它危害环境的危险、有毒物质的船舶，在领海行使无害通过权须经伊朗政府允许。因此在本案中，如果伊朗的主张属实，英国海军水兵未经伊朗政府允许进入伊朗领海的行为就是非法的。另外，双方主要分歧集中于事件发生的地点，而不是英国军舰在领海是否享有无害通过权。这一点反过来可以说明，如果事件真是在伊朗领海发生的，即使是英国本国也会认为是非法的，因为英国并不主张其军舰在伊朗领海享有无害通过权。[10]

但是，即使英国军舰在伊朗领海不享有无害通过权，如果英国军舰仅仅违反伊朗国内法关于通过应得到事先允许的规定进入伊朗领海，仍不足以证明伊朗扣押英国军舰和水兵的合法性。《公约》第 30 条规定：“如果任何军舰不遵守沿海国关于通过领海的法律和规章，而且不顾沿海国向其提出遵守法律和规章的任何要求，沿海国可要求该军舰立即离开领海。”第 31 条规定：“对于军舰或其他用于非商业目的的政府船舶不遵守沿海国有关通过领海的法律和规章或不遵守本公约的规定或其他国际法规则，而使沿海国遭受的任何损失或损害，船旗国应负国际责任。”因此，对于英国水兵仅仅未经允许进入伊朗领海而未从事其它非无害通过行为的情况，原则上伊朗只能要求英国海军水兵及其所乘小艇立即离开领海，英国则应为其军舰的非法行为负国际责任。如果伊朗进一步采取措施扣留英国海军橡皮艇和水兵，必须主张其它的事实和法律依据。

与军舰无害通过外国领海相关的问题还有，军舰在遇险情况下是否可以直接

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8 邵津：《关于外国军舰无害通过领海的一般国际法规则》，载于《中国国际法年刊》1989 年卷，第 134~135 页。

9 “Declarations and statements”, prepared by the Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, at http://www.un.org/Depts/los/convention-agreements/convention-declarations.htm, 3 April 2007.

10 在 2004 年类似的伊朗扣押英国士兵事件中，英国正式向伊朗道歉，承认非法进入伊朗领海，原因是当时英国士兵不知道已经进入伊朗领海。

进入外国领海紧急避险，在发生海难的情况下军舰是否可以不经沿海国批准直接进入其领海实施救助，即所谓遇险进入权和救助进入权。对于这个问题，各国立法和实践依然不统一。有的允许军舰在任何情况下都可直接无害通过而不加特别限制，包括遇险和实施海难救助的情况；有的则要求事先通知或许可，但是在军舰因遇险而“被迫”进入领海的特殊情况下可以有所例外。比如，1999 年 5 月丹麦《关于外国军舰和军用飞机和平时期进入丹麦领土的法令》规定，外国军舰在领海停泊须经事先允许，但出于正常航行所“不可或缺”的或由于不可抗力或遇险所必须的除外。[11] 对于本案，没有直接的证据说明存在遇险进入或实施海难救助的情况，也没有任何当事国以此为依据主张权利。

四、伊朗扣押英国水兵可以主张哪些法律事实和依据

如前所述，对于英国水兵及其所乘橡皮艇非无害通过领海的行为并不能当然导致伊朗的扣押行为。如果伊朗要证明其扣押行为合法，必须主张能证明其行为合法的其它事实和法律依据。《公约》第 19 条对“无害通过的意义”做了规定，并特别列举了一些非无害通过的行为。《公约》第 27 条第 1 款规定：“沿海国不应在通过领海的外国船舶上行使刑事管辖权，以逮捕与在该船舶通过期间船上所犯任何罪行有关的任何人或进行与该罪行有关的任何调查，但下列情形除外：(1) 罪行的后果及于沿海国；（2）罪行属于扰乱当地安宁或领海的良好秩序的性质；（3）经船长或船旗国外交代表或领事官员请求地方当局予以协助；或（4）这些措施是取缔违法贩运麻醉药品或精神调理物质所必要的。”另外，《公约》第 25 条专门规定了“沿海国的保护权”，据此沿海国可以采取必要的步骤防止非无害通过，并可在妥为通知的情况下暂停特定领海区域的无害通过。对于《公约》的上述规定，伊朗在其 1993 年 5 月《关于伊朗伊斯兰共和国在波斯湾和阿曼海海洋区域的法令》中通过转化立法的方式都做了明确规定。据此可以推论，伊朗如欲主张其扣押行为合法，至少应证明英国水兵在其领海具有任何以下违法行为：(1) 英国水兵及其所乘小艇从事了上述《公约》第 19 条规定的非无害通过行为，而按伊朗国内法可以采取扣押措施；（2）英国水兵犯有伊朗根据《公约》第 27 条可以行使管辖权的犯罪行为；（3）英国水兵违反了伊朗根据《公约》第 25 条采取的防止非无害通过或暂停无害通过的措施和步骤；（4）在上述任何情况下，如果英国水兵对于伊朗在其领海的执法行为有暴力或武力抗拒行为，伊朗可以根据国际法在相称性和比例性的要求下行使自卫权，包括扣押英国水兵及其所乘小艇。

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11 Ordinance Governing the Admission of Foreign Warships and Military Aircraft to Danish Territory in Time of Peace, at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DNK-1999_Ordinance.pdf, 3 April 2007.

五、英国军舰和水兵在伊朗领海是否享有国家豁免权

不管是在公海、外国领海或内水，军舰都具有特殊的法律地位。从国际法的角度分析，军舰法律地位的特殊性表现为其享有的特权和豁免。[12] 首先，军舰属于国家财产，不能成为任何司法执行的对象，免于逮捕或扣押。其次，军舰具有国家领土的属性，经常从法律拟制的角度被称为“船旗国浮动的领土”，享有不受船旗国以外任何其他国家管辖的豁免权。警察和港口机构或沿岸国的任何官员，只有在军舰指挥官的允许下才能登船。军舰所载的人和物是在军舰所属国的专属管辖之下，即使在外国领水或内水也是如此。舰上服务人员在舰上的犯罪行为，专属于舰长和船旗国其他当局的管辖。第三，军舰是国家机关，其行为属国家行为，享有不受其它国家管辖的主权豁免。军舰不能被要求登临搜查或检查。军舰应按《公约》的规定遵守沿海国的交通管制以及对排污、卫生、检疫等规定的限制，但即使军舰违反了这些规定，沿海国所能采取的措施也只能是要求该军舰离开其领海。

但是，军舰享有特权和豁免并非意味着军舰可以不顾国际法和沿海国国内法任意行事，只是遇有外国军舰享有司法豁免的民事或刑事案件一般通过外交途径解决。而且，这种特权和豁免并非是绝对的，除前面提到的沿海国遭受的任何损失或损害船旗国应负国际责任外，对军舰享有的特权和豁免至少有以下几方面的限制。首先，军舰享有的特权和豁免主要适用于和平时期，并不适用于两国处于交战状态的情况，在战时军舰是当然的军事目标，可以进行武力攻击。当然，对于本案，由于两国处于和平状态，这一点并不适用。其次，对军舰特权和主权豁免的尊重主要适用于军舰合法进入一国领海的情况，对于非法入侵的军舰则另当别论。《公约》第 32 条“军舰和其他用于非商业目的的政府船舶的豁免权”特别规定：“A 分节和第三十及第三十一条所规定的情形除外，本公约规定不影响军舰和其他用于非商业目的的政府船舶的豁免权。”因此，对于军舰行为违反 A 分节“适用于所有船舶的规则”、第 30 条“军舰对沿海国法律和规章的不遵守”以及第 31 条“船旗国对军舰或其他用于非商业目的的政府船舶所造成的损害的责任”的情况，对其特权和豁免的尊重可以有所例外。如果军舰违反了上述规定，《公约》明确规定的例外措施只有 2 种：一是第 25 条规定的“沿海国可在其领海内采取必要的步骤以防止非无害的通过”，二是第 30 条规定的“沿海国可要求该军舰立即离开领海”。但是，有 2 个问题《公约》没有明确：一是沿海国可采取的“必要的步骤”到

12 詹宁斯、瓦茨修订，王铁崖等译：《奥本海国际法》（第一卷第二分册），北京：中国大百科全书出版社 1995 年版，第 589 页；龚刃韧著：《国家豁免问题的比较研究：当代国际公法、国际私法和国际经济法的一个共同课题》，北京：北京大学出版社 2005 年版，第 19、295 页；2004 年《联合国国家及其财产管辖豁免公约》第 21 条。

底包括哪些措施？是否包括扣押、逮捕、甚至使用武力的措施？二是如果被要求离开领海的军舰拒绝离开，沿海国可以采取什么措施？

在国际法规则不明确的情况下，有必要考查一下相关的国家实践。对于商船违反沿海国无害通过权的规定进入领海的案例可以提到“彩虹勇士号”案。1995 年，法国为在其领海进行核试验，根据《公约》第 25 条的规定在某个海域暂停无害通过权。为抗议法国核试验，“绿色和平组织”的“彩虹勇士号”船不顾禁令非法进入该海域。法国政府最后出动军舰，登临并扣押了该船，并逮捕了船上的船员，在执法过程中还使用了催泪瓦斯。对于军舰非法进入领海的案例可以提到 1981 年苏联潜艇进入瑞典领海的“U137 潜艇”案和 1968 年美国侦察船非法进入朝鲜领海的“普韦布洛号”案。在“U137 潜艇”案中，苏联 w 级“U137 潜艇”侵入瑞典领海并在海岸搁浅，瑞典向苏联提出强烈抗议。最后，瑞典讯问了潜艇相关人员后，“U137 潜艇”在瑞典军用舰机押送下驶离瑞典领海。苏联正式道歉，并向瑞典支付了赔偿金。在“普韦布洛号”案中，朝鲜对该美国侦察船实施了武力攻击，打死一名美国军人，打伤多人。最后，在美国道歉的前提下，朝鲜在扣押“普韦布洛号”海军侦察船 82 名官兵 1 年之久后才释放人员，但没有归还“普韦布洛号”侦察船。

从国家实践看，军舰享有的特权和豁免不是绝对的，国家对违法进入领海的军舰和民用舰船可以采取包括使用武力在内的必要执法或自卫措施。对于本案，如果英国军舰和水兵非法入侵伊朗领海成立，在上述非无害通过或伊朗采取自卫措施的特殊情况下，其特权和豁免将不受尊重，伊朗可以视情况对英国军舰和水兵采取扣押、逮捕甚至其它强制措施。

六、伊朗是否有容忍英国水兵根据联合国决议在其领海执行反走私任务的义务

一些英美媒体主张，英国海军是根据联合国安理会 1723 号决议在伊拉克水域执行任务，伊朗对此应该予以尊重。那么，伊朗作为联合国的成员国之一，是否有容忍英国海军根据安理会决议在其领海执行任务的义务呢？《联合国宪章》第 25 条规定，“联合国会员国同意依宪章之规定接受并履行安全理事会之决议。”第 2 条规定，“各会员国对于联合国依本宪章规定而采取之行动应予以协助。”该条同时规定，“本宪章不得认为授权联合国干涉在本质上属于任何国家国内管辖之事件”。因此，联合国安理会的决议对作为会员国的伊朗是有拘束力的，伊朗有义务

协助决议的履行。但是，详细考查 1723 号决议，[13] 并无任何授权在伊朗领海进行军事行动的规定。相反，1723 号决议“注意到多国部队的存在是经伊拉克政府的要求”，“确认维持伊拉克和平与稳定的所有部队根据国际法采取行动的重要性”。可见，决议并没有规定伊朗有容忍多国部队在其领海内执行军事行动的义务，决议也不可能不顾一个国家的主权让其履行国际义务。英国外交部官员也表示，英国在伊拉克领海内执行的反走私任务是根据与伊拉克政府签订的协议进行的。因此，1723 号决议不能成为英国进入伊朗领海执行反走私任务的法律依据，伊朗也没有相应的容忍义务。

七、伊朗能否以“间谍罪”起诉英国水兵

如果英国海军橡皮艇及水兵非法进入伊朗领海的事实成立，伊朗能否以“间谍罪”起诉英军水兵呢？国际法关于间谍行为的定义多规定于适用于武装冲突的国际条约。1899 年《陆战法规和惯例公约》（即 1899 年 7 月 29 日海牙第二公约）所附《陆战法规和惯例章程》和 1907 年《陆战法规和惯例公约》（即 1907 年 10 月 18 日海牙第四公约）所附《陆战法规和惯例章程》都对间谍行为作了规定，1977 年《日内瓦四公约第一附加议定书》对相关规定予以重申。这些规定都强调间谍行为必须以“秘密或伪装方式”收集情报，其中标志就是不穿军装。除了这些规定不适用于和平时期的两国关系外，对于本案，至少从表面证据看，英国水兵是穿着军装执行任务的。但是，各国国内法关于间谍罪的规定通常对于是否穿着军服并没有特别的要求。以 1997 年《中华人民共和国刑法》第 110 条对间谍罪的规定为例，其客观方面仅包括 2 种犯罪行为：参加间谍组织或者接受间谍组织及其代理人的任务、为敌人指示轰击目标。因此，如果伊朗按本国司法程序查明，非法进入伊朗领海的英国水兵从事了间谍行为，就可以按其国内法程序对这些水兵以间谍罪提起诉讼。在传言英美两国即将对伊朗动武的敏感时期，英国水兵进入伊朗领海的事实如果成立，仅仅是其存在都可以被怀疑为间谍行为，要找到证据似乎并不困难。

八、伊朗是否有义务通知英国驻伊领事官员

英国对伊朗处理此事件的指责，包括批评伊朗未能履行国际法义务将扣押事件通知英国驻伊朗领事馆，并告知被扣押人员的情况和具体地点。在国内法上，

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13 Security Council Resolution 1723, at http://www.un.org/News/Press/docs/2006/sc8879.doc.htm, 30 March 2007.

犯罪嫌疑人被传讯或采取强制措施后，通常有权聘请律师为其提供法律咨询、代理申诉控告。这通常也适用在本国内犯罪的外国人。为了加强对外国侨民的保护，国际法规定了对派遣国领事通知的义务。1963 年《维也纳领事关系公约》第 36 条规定："遇有领馆辖区内有派遣国国民受逮捕或监禁或羁押候审、或受任何其它方式之拘禁之事情，经其本人请求时，接受国主管当局应迅即通知派遣国领事。受逮捕、监禁、羁押或拘禁之人致领馆之信件亦应由该当局迅予递交。该当局应将本款规定之权利迅即告知当事人。"第 36 条还规定："领事官员有权探访受监禁、羁押或拘禁之派遣国国民、与之交谈或通讯，并代聘请法律代表。"以上是国际法关于领事通知权的部分规定，接受国承担"领事通知义务"，而派遣国领事享有"接收通知的权利"。但是，第 36 条还规定："本条第一项所称各项权利应遵照接受国法律规章行使之，但此项法律规章务须使本条所规定之权利之目的得以充分实现。"事实上，各国国内法关于犯罪嫌疑人会见律师或接受公开审判的权利都有一些限制性规定，这些规定通常涉及犯罪嫌疑人犯危害国家安全罪或涉及国家秘密之罪的情况。比如，《中华人民共和国刑事诉讼法》第 96 条规定："涉及国家秘密的案件，犯罪嫌疑人聘请律师，应当经侦查机关批准。"第 152 条规定："人民法院审判第一审案件应当公开进行。但是有关国家秘密或者个人隐私的案件，不公开审理。"因此，对于本案，如果伊朗国内法有类似的规定，伊朗就可以对领事官员会见被扣押英国水兵的权利予以限制，甚至不公开进行审判。

九、英国能否对被扣押水兵行使"外交保护权"

习惯国际法有国家对本国侨民受外国不法行为侵害而行使外交保护的规则。根据联合国国际法委员会一读通过的《关于外交保护的条款草案》第 1 条："外交保护是指一国针对其国民因另一国国际不法行为而受的损害，以国家名义为该国民采取外交行动或其它和平解决手段。"国家行使外交保护权通常应具备 3 个条件：[14] 1. 国际不法行为的侵害。本国国民（包括自然人和法人）因另一国的国际不法行为而受到伤害是外交保护的前提之一。2. 证明受害者具有本国国籍。《关于外交保护的条款草案》要求受害人具有主张行使外交保护国"持续的国籍"。3. 用尽当地救济。根据这项规则，在国家代表个人在国际上提出国际求偿或个人直接诉诸国际机构之前必须事先穷尽使其权利受到侵害的国家国内的一切司法或行政补救措施。

对于本案，对照前述 3 个条件，除了被扣押水兵具有英国国籍外，另外 2 个条件的满足是存在严重问题的。首先，双方对伊朗是否实施了国际不法行为存在严

14 白桂梅著：《国际法》，北京：北京大学出版社 2006 年版，第 269~270 页。

重争议。其次，在事件最终解决之前，伊朗的国内司法程序一直在进行之中，当然不能说已经用尽当地司法救济。因此，英国对被扣押水兵实行外交保护尚不符合相关国际法规则规定的条件。

十、国际法为双方争端的解决规定了哪些程序

和平解决国际争端是《联合国宪章》的原则之一，也是一项国际法基本原则，与禁止使用武力或武力威胁原则相辅相成，构成当代国际法的基础。[15] 当代国际法将解决国际争端的方法分为政治方法（也称外交方法）和司法方法（也称法律方法），前者主要包括协商与谈判、斡旋与调停以及调查与和解，后者主要是国际仲裁和国际法庭。对于本案，不管是通过政治方法还是法律方法，用和平手段解决两国争端是英国和伊朗所负的国际义务。事实上，英伊两国有过通过谈判这种政治方法解决类似争端的先例。2004 年，伊朗在相同水域发生的类似事件中扣押了 8 名非法入侵的英国海军士兵。英国政府对其部队非法进入伊朗水域正式道歉，称英国海军士兵不知道他们已经进入伊朗水域，伊朗在 3 天后释放了扣押的英国士兵。对于利用法律方法解决争端的可能性，由于涉及到仲裁协议和管辖权等复杂问题，当事国一般都不愿意将争端诉诸法律程序。对于英国和伊朗两个争端当事国而言，由于两国对事件的事实本身存在很大争议，任何一方要想清清白白地走上法庭，都必须具有足够和充分的法律证据。事件最终的解决表明，和平解决国际争端依然是处理国家间争端的基本原则，那种动辄使用武力解决国际争端的单边行为是违反国际法基本原则的。

十一、对中国领海外国军用船舶管理制度的反思

近年来，外国军用舰机因机械故障、恶劣天气等原因强行进入中国领海、领空的事件并不少见。2001 年 5 月，某国军舰因天气原因未经许可进入我国领海并长时间在领海航行，与我国执行监视任务的舰艇几乎发生磨擦。2003 年 5 月， 拟到上海访问的某国军舰因恶劣天气提前数天在非约定会合地进入我领海航行，也与我国执行巡逻任务的舰艇发生不快，该国驻华使馆对此事表示关注。[16] 最严重的事件是 2001 年 4 月 1 日中美撞机事件，撞毁我战斗机的美侦察机受损后强行进入我领空并迫降于海南岛陵水军用机场。随着中国国际军事交往与合作的深入发

15 白桂梅著：《国际法》，北京：北京大学出版社 2006 年版，第 548 页。
16 任筱锋、郑宏：《尽快完善和平时期外国军用舰机遇险进入我国领土的相关法律》，载于《海军军事学术》2003 年第 6 期。

展，因友好访问或联合军事演习经批准合法进入我领海的外国军舰也急剧增多，甚至如参加中俄联演的俄方军舰可能会长时间在我国领海驻泊。上述外国军舰，不管是从事合法军事活动还是从事非法军事活动，不管是在我国领海还是在其它管辖海域，其行为违反我国领海相关法律法规的情况都有可能出现。对于外国军舰非法进入我国领海的行为，或合法进入我国领海的外国军舰违反现行法律的行为，我国的领海管理体制在立法和执法层面都存在很大漏洞，亟待完善和改进。

（一）中国现行领海外国军用船舶管理制度

领海管理制度涉及基线制度、海上交通、矿产资源、渔业、环境保护、海洋科学研究、海关、移民、卫生等诸多方面，分别由不同的法律法规予以调整。在与领海管理制度相关的诸多法律法规中，涉及调整外国军用船舶的法律主要包括 1958 年 9 月 4 日《中华人民共和国政府关于领海的声明》、1992 年《中华人民共和国领海及毗连区法》、1982 年《中华人民共和国海洋环境保护法》、1983 年《中华人民共和国防止船舶污染海域管理条例》、1983 年《中华人民共和国海上交通安全法》、1992 年《中华人民共和国测绘法》、1996 年《中华人民共和国涉外海洋科学研究管理规定》等。[17]

对上述法律法规的考查表明，我国现行领海外国军用船舶管理制度至少存在以下几个方面的缺陷：

1. 现行立法对合法进入我国领海的军用船舶缺乏有效的管理细则。关于外国军舰在领海的航行制度，现行法律法规主要有如下规定：外国军用舰机未经中华人民共和国政府允许不得进入中华人民共和国领海及其上空；[18] 任何外国船舶在中国领海航行，必须遵守中华人民共和国政府的有关法令；[19] 外国潜水艇和其他潜水器通过中华人民共和国领海，必须在海面航行，并展示其旗帜；中华人民共和国政府有权采取一切必要措施，以防止和制止在领海的非无害通过；外国船舶违反中华人民共和国法律、法规的，由中华人民共和国有关机关依法处理；[20] 外国军用船舶通过中华人民共和国领海时违反中华人民共和国法律、法规的，中华人民共和国有关主管机关有权令其立即离开领海，对所造成的损失或者损害，船旗国应当负国际责任。[21] 但是，上述诸多规定却不能回答以下问题：外国军舰如欲进入中国领海由哪一级政府机关批准，程序如何？如果经批准合法进入中国领海的外国军

17 全文参见国家海洋局政策法规办公室编：《中华人民共和国海洋法规选编》（第 3 版），北京：海洋出版社 2001 年版。

18 《中华人民共和国政府关于领海的声明》；1992 年《中华人民共和国领海及毗连区法》第 6 条；1983 年《中华人民共和国海上交通安全法》第 11 条。

19 《中华人民共和国政府关于领海的声明》。

20 《中华人民共和国领海及毗连区法》第 7 条。

21 《中华人民共和国领海及毗连区法》第 10 条。

舰违反了适用于领海的法律法规，由哪一级“有关机关”按何种程序处理？必要措施包括哪些？如果外国潜艇或潜水器违反规定不上浮，是采取适当措施迫使其上浮，还是直接将其击沉？为防止和制止在领海的非无害通过而有权采取的一切必要措施到底包括哪些？是否包括使用武力？具体由哪一级“有关主管机关”命令违法的外国军舰离开领海？如果违法外国军用船舶拒不离开怎么办？关于环境保护、船舶污染、海洋测量和科研等相关立法在对军用船舶的适用上也存在类似问题。太多的上位法需要制定作为下位法的具体实施细则，否则，在操作层面对外国军用船舶在我领海的违法活动将很难处理。

2. 现行立法对非法或因遇险、救助进入我国领海的军用船舶以及经批准合法进入的军用船舶的非法活动的调整存在空白。现行立法对军用船舶经批准方可进入中国领海的规定是绝对的，对于未经允许非法进入或遇险进入我领海的军用船舶却没有做出规定。1983 年《中华人民共和国海上交通安全法》第 11 条规定：“外国籍非军用船舶，未经主管机关批准，不得进入中华人民共和国的内水和港口。但是，因人员病急、机件故障、遇难、避风等意外情况，未及获得批准，可以在进入的同时向主管机关紧急报告，并听从指挥。”该条对外国非军用船舶遇险进入我国领海的程序做了一般规定，但并未规定军用船舶遇险进入的情况。同样地，按照现行法律的规定，如果在我领海内出现船难，邻近领海的外国军舰仍不能以此为理由进入领海实施救助。对于因港口访问而短暂在我领海或内水停留的外国军用船舶，以及因联合军事演习需要长期在我领海驻泊的外国军用船舶，对其非法行为的管辖和其它相关问题在现行法律中还没有规定。

3. 对位于我领海的外国军用船舶的管理没有统一的执法力量和主管机关。在现行的领海管理体制中，既存在对同一事项有多个管理机关的情况，也存在多个管理机关对同一行为的不同方面进行管理的情况。比如，对于海洋环境污染事项，存在国务院环境保护行政主管部门、国家海洋行政主管部门、国家渔业行政主管部门、军队环境保护部门多个管理机关。另外，现行立法中，使用了太多“有关机关”、“主管机关”等术语，在实际操作中具体由哪一级哪一个国家机关处理，法律并无明确规定。上述诸多问题为领海内外国军用船舶的管理带来许多操作层面的困难。

（二）完善中国现行领海外国军用船舶管理制度的思考

综上，如果经批准合法进入我国领海的外国军用船舶违反了适用于我国领海的法律法规，比如搜集情报、非法测量、造成环境污染、实施犯罪行为；或如果外国军舰舰机未经允许或遇险进入我国领海，无论是在立法层面还是在执法层面，现行领海外国军用船舶管理体制还不足以提供有效的应对措施，我们很难防止第二个类似中美撞机事件的发生。当务之急，有两方面工作需要考虑：

一是完善相关立法。需要为上位法制定实施细则的情况前面已经做了详细说明，再就是修改现行立法和制定新法。1982 年《公约》第 25 条明确规定了沿海国的保护权，据此沿海国可在妥为通知的情况下暂停特定领海区域的无害通过（如为在领海进行军事演习的目的），但我国现行领海法对此还没有任何体现。对于短暂来访的外国军舰或为军事演习目的长期驻泊在接收国领海的外国军舰，我们可以借鉴国外的立法实践填补立法空白。国外的立法模式主要包括以下几种情况：一是专门制定和平时期外国军舰进入领海的法律，如 1996 年越南制定的《外国军舰来访法》，以及前面提到的瑞典、丹麦关于和平时期外国军用舰机进入领海领空的法律。二是在综合性的海洋法典中做出和平时期外国军用舰机进入领海的规定，伊朗就是这样的立法模式，还有许多其它东欧国家采取了类似做法。三是针对外国武装部队在接收国短暂经过或长期驻扎的情况制定《客军法》。比如，英国和许多英联邦国家如澳大利亚、新西兰、新加坡都制定了客军法，蒙古制定了《外国武装部队过境法》。四是派遣国与接收国签订武装部队地位协议。比如，美国与日本、韩国等盟国签署的驻军协议，北约与其成员国签署的驻军协议，在联合国维持和平行动过程中，联合国通常也与接收国签订部队地位协议。

二是统一执法力量，明确主管机关和权限。统一海上执法力量不是一个新话题，有老生常谈之嫌。这不仅仅涉及到领海执法，还涉及到毗连区、专属经济区等其它管辖海域的执法。关于统一执法力量的呼吁已经很多，在部门利益交错、相互冲突的背景下，这个建议恐怕在相当长的时间内只能停留在口号上。

目前，我国海域的海上安全形势依然复杂，美国海军测量船每年都在我东海、黄海实行长时间的非法海上科学调查活动（美方称之为不受沿海国管辖的“军事测量活动”），美韩、美日每年都进行例行性的联合军事演习，美日常年都在我管辖的专属经济区上空进行军事侦察。这些外国军用舰机非法或遇险进入我领海、领空的可能性很大，那些合法进入我领海的外国军舰也可能发生严重的违法犯罪行为，这些都迫切需要我们对中国领海外国军用船舶管理制度予以完善。

日本在海洋问题上的动向及对我国的启示

金永明 *

内容摘要：目前，世界一些重要国家已高度重视海洋开发，并相继制定了维护海洋权益的综合战略与法制。中日间关于东海问题的争议凸显后，日本在海洋问题上出台了一系列维护海洋权益的政策与法案，并采取了相应的措施。本文从三个方面，即针对东海争议的海洋对策、维护海洋权益的海洋立法、制定海洋综合战略，剖析日本在海洋问题上的动向，并指出完善我国海洋政策与法制及实施海洋开发战略的具体建议。

关键词：海洋对策　海洋立法　综合战略

一、引　言

21 世纪，各国对于海洋权益更为重视，如何维护海洋权益成为突出问题。一些世界重要的海洋国家已研制了关于海洋问题的战略或法制，主要有：2000 年《美国海洋法》、2004 年《美国与海洋报告》、2004 年《美国国家海洋行动计划》；2002 年《加拿大海洋战略》；2004 年《英国海洋研究开发基金》；2000 年《韩国 21 世纪海洋》、2005 年《韩国海洋宪章》；以及 2006 年《欧盟海洋政策绿皮书——面向未来的欧洲海洋政策：欧洲的海洋理念》。日本是个岛国，其生存与发展依赖于海洋，进入 21 世纪以来，对海洋权益问题上的工作更为重视。本文从针对东海争议的海洋对策、维护海洋权益的海洋立法、制定海洋综合战略三个方面剖析日本关于海洋问题的最新动向，并提出了对我国的几点启示或借鉴，以期维护我国海洋权益、完善法制，并推进制订和实施国家海洋开发战略及其规划。

* 金永明，上海社会科学院法学研究所副研究员，广岛大学大学院客座研究员。

二、日本在海洋问题上值得关注的动向

（一）东海争议引发日本制定相关对策

东海问题自 2004 年 5 月凸显后，尽管中日间针对东海问题争议已举行了 7 次磋商，但双方在东海划界的原则和争议海域的划定，尤其是在共同开发海域的界定方面，还存在严重分歧。[1] 为此，日本针对海洋问题，尤其是在东海问题显现后出台了相关的海洋对策，以完善海洋组织机构和相关法制，应对引发的海洋争议。主要对策为：

1. 2004 年日本执政党关于海洋问题的建议与措施。自民党（执政党）政务调查会于 2004 年 6 月 15 日提出了“维护海洋权益的 9 个建议”。其内容主要包括两个方面：

(1) 关于计划与实施综合海洋战略的建议。具体建议为：第一，设置与海洋权益有关的阁僚会议，制定与实施海洋战略政策；第二，在“中间线”的日本侧，由政府主导实施资源调查及授予企业或组织海底资源试采权；第三，尽早解决东海划界问题；第四，加速 2009 年向大陆架界限委员会申请外大陆架的调查工作。

(2) 关于确保海洋秩序的建议。具体建议为：第一，为应对包括“平时”向“有事”发展的事态，建议应完善政府“危机管理体制”；第二，加强海上保安厅对钓鱼诸岛周边警备的预警与监视体制；第三，强硬处理中国海洋调查船；第四，强化对冲之鸟礁、钓鱼诸岛的行政实施与控制权；第五，通过强化自卫队的能力和活用日美安保框架，确立应对各种事态的体制。[2]

应指出的是，上述建议中的有些内容是确保日本在东海权益上的具体措施，而有些内容则属于危机应对方案，应对中日发生海洋利益冲突的制度安排，以及制定海洋战略的计划。

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1 迄今，中日间关于东海问题 7 次磋商的具体时间和地点分别为：第 1 次磋商于 2004 年 10 月 25 日在北京举行；第 2 次磋商于 2005 年 5 月 30 日至 31 日在北京举行；第 3 次磋商于 2005 年 9 月 30 日至 10 月 1 日在东京举行；第 4 次磋商于 2006 年 3 月 6 日至 7 日在北京举行；第 5 次磋商于 2006 年 5 月 18 日在东京举行；第 6 次磋商于 2006 年 7 月 8 日至 9 日在北京举行；第 7 次磋商于 2007 年 3 月 29 日在东京举行。值得肯定的是，尽管磋商并未获得实质性的进展，但对缓和双方争议有一定的积极作用，尤其是在第 6 次磋商中，双方就建立旨在应对东海不测事态的海上热线联络机制达成了原则共识，它无疑延缓了东海争议的进一步升级，特别是阻止了双方在靠近“中间线”附近海域实施勘探与开发的活动，也为双方进一步展开对话提供了合作保障。当然，今后对于东海不测事态的认定与界定等方面，可能会存在争议，为此，有必要进一步细化关于应对东海不测事态的海上热线联络机制方面的原则，以期切实实施与执行。

2 [日] 海洋船舶财团海洋政策研究所编：《海洋白皮书（2005 年）：日本的动向，世界的动向》，第 186~187 页。

据此建议，日本政府于 2004 年 6 月设立了“与海洋权益有关的阁僚会议”，并鼓励日本企业在东海（尤其是在中日“中间线”以东）开采海底油气资源；2004 年 7 月，日本政府开始在所谓的“中间线”以东有争议的区域租用挪威调查船进行海底油气勘探，以调查春晓油气田附近的海底地质结构。

2. 2005 年日本执政党关于海洋问题的建议和措施。自民党于 2005 年 3 月 29 日制定了“维护东海海洋权益的紧急建议”。其内容主要包括以下 3 个方面：

(1) 关于试勘探的实施问题。它指出，根据《矿业法》，在“中间线”的日本一侧设定试勘探权并进行试采，在法律上没有问题。这显然是保卫国家资源的当然措施，但对民间企业来说，在未界定的海底区域开发资源必然伴随风险，为此，建议应由政府委托民间企业实施试采为妥。

(2) 关于进行试采的具体措施。主要为：设定试采权；创造有利于进行试采的环境；设置海洋权益相关阁僚会议。

(3) 与中国进行交涉。例如，要求中国提供开发春晓油气田的资料，并要求停止开发活动，对中国采取强硬的措施。[3]

据此建议，日本政府于 2005 年 7 月授予帝国石油公司东海油气试采权；2005 年 8 月，宣布帝国石油公司办妥试采东海油气的一切手续，但限制条件为该公司在正式开采东海油气资源时必须再同政府协商，在征得政府同意后，该公司才能正式实施开采活动。

实际上，在中日间关于东海问题的磋商进程中，日本政府的态度及措施，多是根据上述关于海洋问题的对策或建议而作出的。例如，在东海问题磋商中，日方向中方索要开发东海油气田的数据和资料、向帝国石油公司颁发东海油气试采权文书。当然，上述内容不全是针对东海问题的，其内容涉及海洋问题的全部，是关于海洋问题的综合性策略的一部分。

（二）日本为维护海洋权益加紧立法

一直以来，日本为开发利用海洋，高度重视海洋政策及其立法，并构建了海洋法律体系。东海争议突显后，日本加快了海洋立法步伐。其主要目的为维护日本的海洋权益，为各种活动提供法律依据。日本草拟或修改的法案，主要为：

1. 民主党关于制定海洋相关法制的建议。民主党于 2005 年 10 月 21 日草拟了“关于在专属经济区等海域实施自然资源的勘探和进行海洋科学调查有关的主权权利及其他权利的法案”、“海底资源开发促进法案”等法案。

(1) “关于在专属经济区等实施自然资源的勘探和进行海洋科学调查有关的主权权利及其他权利的法案”的结构。该法案由 5 章（共 24 条）和附则（共 6 条）组成。

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3 下载于 http://www.jimin.jp/seisaku/2005/seisaka-003.html，2007 年 3 月 12 日。

第一章名称为总则(第 1~2 条),第二章名称为禁止外国人勘探天然资源(第 3~4 条),第三章名称为外国人的海洋科学调查(第 5~15 条),第四章名称为补充规则(第 16~20 条),第五章名称为罚则(第 21~24 条)。

(2) "海底资源开发促进法案"的结构。该法案由三章(共 18 条)和附则组成。第一章为总则(第 1~2 条),第二章为开发海底资源的基本方针等(第 3~8 条),第三章为海底资源开发促进本部(第 9~18 条),即为综合及有计划地推进海洋资源开发,规定设置海底资源开发促进本部,并规定了其职责、组成等方面的内容。

上述 2 部法案的目的是维护日本专属经济区等海域的权益、合理管理外国人员进行的海洋科学调查活动,以确保《联合国海洋法公约》(以下简称"《公约》")规定的沿海国的权利。可见,上述关于维护海洋权益的立法草案旨在对包括东海问题在内的争议采取行动,以维护自身的"中间线"划界原则与主张,确保对大陆架资源的管辖权。同时,日本的相关措施也确实是按照其建议推进实施的。即日方试图完善《公约》大陆架制度规定的沿海国对管辖大陆架资源的配套法规,包括对东海大陆架资源的管辖权。

2. 日本政府修改的相关法律。为维护日本对其管辖海域,尤其是对专属经济区和大陆架的权利,日本政府于 2005 年 7 月将原来的《国土综合开发法》改名为《国土形成计划法》。在新法中,增加了关于海域(包括专属经济区和大陆架)的利用和保护方面的事项,即将专属经济区和大陆架海域的利用和保全也纳入国土形成与规划的对象。[4] 换言之,通过修订该法扩大了日本"国土"的范围,并加强了对其的管辖。

3. 日本制定海洋政策与海洋基本法的最新成就。日本海洋政策研究财团于 2006 年 12 月 7 日发表了关于海洋政策与法制方面的最新文件,12 月 20 日向有关单位及人员推介了关于制订海洋基本法的最新动向。最新文件主要为《海洋政策大纲——寻求新的海洋立国》(以下简称"《海洋政策大纲》")、《海洋基本法草案概要》。实际上,上述政策与法案是根据 2005 年 11 月该财团向政府提交的《海洋与日本:21 世纪海洋政策建议书》的建议,由海洋基本法研究会历时 8 个月(2006 年 4–12 月)经过十次讨论审议而完成的。应该说,上述文件为中期研究成果。此后,日本相关机构会出台细化上述文件原则的具体法规,由议员提交国会审议,即所谓"议员立法"。如果审议获得通过,海洋基本法将成为日本规范海洋问题的综合性基本法律。

上述文件是由海洋基本法研究会出具的。海洋基本法研究会成立于 2006 年 4 月,其由多党(自民党、公明党和民主党)的参议员和众议员(10 名)、海洋方面的专家学者(15 名)和作为观察员的有关省厅的官员(10 名)共 35 名组成。观察

4 [日] 海洋政策研究财团编:《海洋白皮书(2006):日本的动向,世界的动向》,第 193~194 页。

员所涉部门为：内阁官房、内阁官房大陆架调查对策室、防卫厅（省）防卫局，外务省经济局、文部科学省研究开发局、水产厅、资源能源厅、国土交通省综合政策局、海上保安厅、环境省地球环境局。从该研究会的观察员组成可以看出，这是一个综合了防卫、外交、历史、水产、资源、交通、海上执法、环境多方面人士组成的立法委员会，它反映了日本的海洋立法所考虑内容的综合性。该研究会的事务局设在海洋政策研究财团。

海洋基本法研究会的任务为，通过调研和审议，为日本提出综合性的海洋政策与法案。其宗旨是，改变日本一直以来管辖海洋事务的纵向行政分割制度，让政府与民间成为一体，综合性地制订和推进国家海洋政策，使海洋与人类共生，确保国家利益。

（三）日本海洋综合战略、大纲及法案初具规模

更值得注意的是日本在制订海洋战略与大纲上的动向。迄今，日本关于开发利用海洋方面的综合性建议，主要为以下 4 个：

1. 日本经济团体联合会关于海洋开发的建议。该联合会于 2005 年 11 月 15 日提出了“关于推进海洋开发为重要课题的建议”，该建议主要包括以下四个方面的内容：(1) 实质性地推进外大陆架调查活动；(2) 确保对自然灾害等的安全与安心感，包括开发利用海洋观测监测系统、开发防灾减灾体系、为保护地球环境实施相关研究开发活动；(3) 开发海洋资源，包括开发海洋各种能源、开发海洋生物资源等；(4) 完备海洋开发体制。[5] 可见，这是以开发海洋为目标的战略性建议。

2. 日本海洋政策研究财团提出的海洋政策建议书，即海洋综合战略。日本海洋政策研究财团于 2005 年 11 月 18 日向政府提交了《海洋与日本：21 世纪海洋政策建议书》（以下简称“《2005 年建议书》”）。[6]《2005 年建议书》由 12 名与海洋有关的专家学者组成的“海洋与沿岸海域研究委员会”经过 2 年多的审议和讨论完成。实际上，在此之前，其前身日本财团海洋船舶部已于 2002 年 5 月出具了《海洋与日本：21 世纪日本海洋政策建议书》（以下简称“《2002 年建议书》”），

5 参见日本经济团体联合会网站，下载于 http://www.keidanren.or.jp/japanese/policy/2005/085.html，2007 年 4 月 25 日。

6 自 2005 年 4 月起，日本的“海洋船舶财团”改称“海洋政策研究财团”。“海洋船舶财团”成立于 1990 年 9 月 10 日，并于 2000 年 4 月起开展海洋咨询活动。“海洋政策研究财团”是综合处理海洋问题的咨询机构，研究领域包括海洋政策、海上交通、安全保障、近海岸管理、海洋环境、海洋教育等，内容既涉及自然科学，又涉及社会科学。

并提出了具体建议。[7]

(1)《2005 年建议书》与《2002 年建议书》的内容与关系。两建议书均要求政府制定海洋开发综合政策或海洋政策大纲，例如，《2002 年建议书》建议政府应设置海洋政策制定与实施的行政机构，而《2005 年建议书》建议政府以制定海洋基本法为契机推进海洋体制，包括设置海洋权益相关阁僚会议、任命海洋大臣等。可见，尽管两建议书建议的路径不一，但目的一致，均是为完善海洋相关机构和制度。

同时，应指出的是，《2005 年建议书》是《2002 年建议书》的补充和完善，前者提出了具体的方针和措施。例如，《2005 年建议书》在制定海洋政策大纲方面，具体指出了五项原则或宗旨（内容见下文）；《2005 年建议书》建议政府以制定出台海洋基本法为契机完善海洋行政机构；《2005 年建议书》扩大了“国土”的范围，将专属经济区、大陆架、远离大陆的海岛及周边海域也列入“国土”范围，并要求强化对它们的管理。

(2) 日本《2005 年建议书》主要内容。《2005 年建议书》主要包括以下 3 个方面的内容：

第一，建议立项制定海洋政策大纲。其建议制定的国家海洋政策大纲主要包括以下内容（原则或宗旨）：明确基本观点；完善推进海洋政策的框架；强化解决问题的措施；加强合作；促进与海洋有关问题的理解、研究和教育活动。

第二，建议完善海洋基本法的推进体制。由于日本一向对海洋问题采取以个别实体法处理，为综合管理海洋问题，该建议书指出有必要尽早完善海洋政策框架及法律根据。主要包括：(a) 为推进综合海洋政策，有必要制定海洋基本法。内容包括基本理念、政策方针、海洋基本计划等；(b) 完善行政机构。即为推进以海洋基本法为轴心的综合海洋政策，从下述方面完善行政机构：设置与海洋有关的阁僚会议、任命海洋主管大臣等、整合规划和实行海洋政策的机构。

第三，建议国家管辖范围扩大到海洋“国土”和加强国际合作。具体建议主要为：(a) 强化对专属经济区、大陆架、远离陆地的海岛及其周边海域等的管理，(b) 确立对扩大为海洋“国土”的海域、海上运输等的安全保障；(c) 构建环境影响评价体系、保护海洋生态系统（保护生物多样性）等；(d) 合理管制鱼类捕获量、保存渔业资源、开发矿物资源和海洋微生物资源等；(e) 构建地方主体、市民参与型

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7 日本 2002 年 5 月的《海洋与日本：21 世纪日本海洋政策建议书》（即《2002 年建议书》）提出了以下 6 个建议：第一，制定综合的海洋政策；第二，完备制定与实施海洋政策的行政机构；第三，完善综合管理海域海岸的法制；第四，合理管理水产资源，调整渔业与其他海洋利用的关系；第五，细化对专属经济区与大陆架进行综合管理的内容；第六，充实青少年海洋教育以及学科间的教育研究活动。该建设书是由 12 名专家学者组成的“海洋管理研究会”经过调研后作成的。该委员会为日本财团资助下海洋船舶部的咨询机构。参见 [日] 日本财团海洋船舶部编：《海洋与日本：21 世纪日本海洋政策建议书》，2002 年 5 月。

的管理体制，与他们联合管理海域等；(f) 尽早策划制定区域防灾计划，针对防灾、减灾问题向市民进行系统而彻底的教育和训练；(g) 规划收集与海洋情报有关的国家战略、强化海洋情报管理机能等；(h) 扩大海洋教育，研究海洋管理，促进海洋科学技术研究等。其目的是管理国家管辖海域，综合治理海洋，包括处理和应对海洋突发事件。

如上所述，《2005 年建议书》为日本的海洋战略提拱了框架，可以预期日本政府今后会持续而实质性地推进海洋战略，并出台相关政策与法案。下文述及的《海洋政策大纲》与《海洋基本法草案》即为具体的步骤或成果之一，其目的是完善海洋政策法制及战略，维护海洋权益，继续发挥日本在海洋方面的技术和资金优势，包括向发展中国家，尤其是向发展中小国提供对外援助、培训人员、实施联合海上执法，以实现海洋强国之愿望。

3.《海洋政策大纲》。考虑到人类的生存和繁荣极大地依赖于占地球表面积约 70% 的海洋资源，今后随世界人口的增加对海洋的依赖将不断增加。而现实是，围绕海域的国家间竞争和对立、滥用海洋资源以及海洋环境污染等均日益严重和深化，为此，《海洋政策大纲》指出日本对海洋问题必须重视。

同时，认识到海洋问题的重要性和复杂性，单一国家已无法处理海洋问题，为此，《海洋政策大纲》指出，国际社会应以各国对沿岸海域的管辖为前提，以国际合意为原则，为全人类的利益而协调行动，对海洋进行整体而和平的管理。

相反，目前日本综合管理海洋问题的政策与体制并没有改进，仍采用纵向垂直功能分割的方法处理海洋问题。不要说综合性的海洋政策，连管理海洋问题的主管大臣和机构也没有。这种现状的弊端之一为，日本无法向国会提交相关海洋法案。为此，《海洋政策大纲》指出，为适应上述情况，有必要尽早构筑应对海洋问题的新体制。同时要求把作为新的海洋立国的理念提升为国家的重要政策，即把海洋政策作为国家的政策，同时也有必要对资源丰富的海域实施综合性的管理及国际合作与协调。《海洋政策大纲》最后指出，推进综合性海洋政策的关键是尽早制订海洋基本法。

4. 海洋基本法草案概要。《海洋基本法草案》内容主要为：

(1) 海洋基本法的目的。即为保全海洋环境、开发利用海洋、确保海洋安全等而开展海洋管理活动。

(2) 海洋政策的基本理念。即保全海洋环境理念；确保海洋安全理念；可持续开发利用理念；充实海洋科学知识理念；综合管理海洋理念；国际合作理念。

(3) 各主体的职权与义务，制订、推行政策与措施的方针。即应规定与海洋有关的单位和个人的职权和义务，并规定制订和实施海洋管理措施的方针。

(4) 海洋基本计划。政府为综合而有计划地推进海洋管理方面的措施，应制订海洋基本计划。其内容应明确国家、地方公共团体、企业、国民的职责和涉及制订海洋基本计划等有关海洋综合管理的基本政策，并对综合推进海洋管理的行政组

织等方面的内容作出规定。实际上，海洋基本计划是综合和体制化海洋政策、具体规定海洋基本政策的计划。

(5) 设置海洋政策大臣。即内阁总理大臣应任命海洋政策大臣，以有效地统制专业性和连续性强的海洋政策、展开综合管理活动，同时，以基本理念为基础，体制化先前由各部门实施的纵向分割海洋事务的职责，推进综合管理海洋的国策。

(6) 设置综合海洋政策会议机构。为调查和审议制订海洋基本计划及综合管理海洋所需资源分配方针等方面的重要事项，应设置以内阁总理大臣为议长，海洋政策大臣为副议长，由内阁官房长官、内阁总理大臣指定的国务大臣及有识之士和经验丰富者为其他组员组成的综合海洋政策会议机构。

(7) 其他相关规定。即为推进海洋综合管理政策与措施，应完善其他相关的必要规定。

应该指出的是，日本《海洋政策大纲》与《海洋基本法草案》是根据《2005 年建议书》的具体要求而制订的，旨在完善日本的海洋政策与制度，以从体制层面上综合处理海洋问题。从上述文件内容可以看出日本对待海洋问题的综合考虑和全面重视。为此，我国必须认真研究邻国日本的海洋政策与法制（法案），以资参考。

三、日本在海洋问题上的动向对我国的启示

海洋利益事关中国的国家安全、统一与发展，然而，中国不仅是一个海洋地理相对不利的国家，而且是一个海洋意识不强、海洋法规与战略滞后的国家。日本在海洋问题上的最新动向，对于加快我国推进海洋开发战略，制订和完善海洋相关法制，应对和处理东海争议无疑具有启示和意义。

（一）日本海洋综合战略对推进实施我国海洋开发战略的启示

党中央已在十六大报告（2002 年）中提出了“实施海洋开发”任务，国务院在 2004 年《政府工作报告》中提出了“应重视海洋资源开发与保护”的政策。近几年，我国一直在不断完善相关的海洋政策和措施，并修订完善了海洋相关法制，取得了明显成效。但迄今我国仍未形成国家海洋开发战略规划或国家海洋事业发展规划，这不利于我国综合海洋开发战略的实施。而海洋开发战略的推进实施，对于确保社会经济发展所需资源供应，改变我国长期以来“重视陆地开发、轻视海洋开发”的意识，维护我国海洋权益，具有重大意义。

另一方面，中国在改革开放以来在经济基础、海洋科技、海洋管理、海洋合作等方面取得的成就，使我国具备了实施海洋开发的条件。同时，我国与他国间关于海洋问题的多边条约、双边条约或相关文件的缔结和有效实施，保障了我国实

施海洋开发战略的外部环境。[8]

另外，综合性海洋政策或规划的制订，对于解决我国与他国存在的岛屿主权以及海域划界争议，实现国家统一和维护海上安全、维护海洋利益，都具有保障作用。

总之，鉴于海洋问题的综合性和复杂性，我国海洋开发战略规划的主要内容应包括：设置由各涉海部门参与的综合协商管理海洋问题的机构，合理开发和利用我国管辖海域的海洋资源，加强深海资源勘探活动，保护海洋环境，积极参与国际、区域及双边海洋活动，和平合理地解决海洋争端等，以综合协调与管理海洋问题，合理管理海洋活动，确保国家海洋权益。[9] 当然，海洋开发战略规划的制订与实施，应由多部门参与，多学科组织推进并加强协调，以形成综合合力。

（二）日本修订海洋法制对我国的启示

海洋开发战略及其规划的推进实施，需要健全的海洋法律法规作保障。尽管我国已制定了一系列关于海洋开发利用的法律规定并正在积极推进实施，但存在的问题也不少。结合日本海洋立法经验，笔者认为，今后我国在切实履行《公约》和区域及双边条约的同时，应在完善国内海洋政策与法律制度方面，主要完善以下几个问题：

第一，确立海洋在《宪法》中的地位。建议在《宪法》第 9 条中增加“海洋”为

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8 我国与相关国家间存在的海洋条约或相关重要文件主要为：第一，《东南亚友好合作条约》及其两个修改议定书，我国于 2003 年 6 月 28 日加入。我国加入该条约，表明中国与东盟间的政治互信加深，合作水平进一步提高，有利于共同维护本地区的和平与稳定。第二，我国于 2002 年 11 月 4 日签署了《南海各方行为宣言》（多边文件），它为和平与永久解决有关国家间的分歧和争议创造了有利条件。第三，《中越北部湾划界协定》和《渔业协定》已于 2004 年 6 月 30 日生效。这表明中国有诚意和能力解决两国之间的分歧和争议，同时，《北部湾划界协定》为中国今后与其他邻国划分海上边界积累了经验，并提供了借鉴。第四，中国、菲律宾和越南于 2005 年 3 月 14 日签署了《在南中国海协议区三方联合海洋地震工作协议》，其为落实“搁置争议、共同开发”原则迈出了实质性的一步，值得肯定。同时，它对维护该地区的和平与稳定具有重大意义。当然，它也是实施《南海各方行为宣言》的重大举措，并为解决其他国家之间的海洋争端树立了典范。

9 应指出的是，2006 年 3 月 14 日第十届全国人民代表大会第四次会议批准的《中华人民共和国国民经济和社会发展第十一个五年规划纲要》已对我国海洋事业的发展提出了明确的方向，必须切实贯彻实施。该《规划纲要》在保护和开发海洋资源部分指出，我国应强化海洋意识，维护海洋权益，保护海洋生态，开发海洋资源，实施海洋综合管理，促进海洋经济发展；综合治理重点海域环境，遏制渤海、长江口和珠江口等近岸海域生态恶化趋势；恢复近海海洋生态功能，保护红树林、海滨湿地和珊瑚礁等海洋、海岸带生态系统，加强海岛保护和海洋自然保护区管理；完善海洋功能区划，规范海域使用秩序，严格限制开采海砂，有重点地勘探开发专属经济区、大陆架和国际海底资源。参见《中华人民共和国国民经济和社会发展第十一个五年规划纲要》，北京：人民出版社 2006 年版，第 49 页。

自然资源的组成部分，以确立“海”在《宪法》中的地位，加强对“海洋”的保护。[10]

第二，制定海洋开发基本法。[11] 主要应明确该法的目的、原则、具体的计划和措施。例如，海洋资源的可持续开发和利用原则、海洋环境污染预防和治理原则、海洋的全面综合管理原则、海洋国际合作、区域合作及双边合作原则，等等。

第三，制定《专属经济区和大陆架法》配套法规等。我国《专属经济区和大陆架法》自 1998 年公布施行以来，迄今未制定相应的配套法规与实施细则，例如，大陆架油气资源开发规则，建筑物设施与结构物安全区域管理办法，应对外国企业、船舶侵害我国大陆架和专属经济区资源开发活动的措施，应对外国船舶测量我国管辖海域活动的措施等。为应对海洋冲突，包括划界争议，必须尽快制定和完善相关配套法规，以细化上述法律的基本原则与规则。

第四，进一步宣布我国的领海基线及明确我国管辖海域界限。我国于 1996 年 5 月宣布了大陆领海的部分基线和西沙群岛领海基线后，迄今未宣布其他岛屿的领海基线，为切实维护我国的海洋权益，应进一步宣布其他所属岛屿的领海基线，以明确确定我国有权管辖的海域界限。[12] 而应注意的是，日本的专属经济区面积是以钓鱼岛、冲之鸟礁等为领海基点而划定的，日本自称的专属经济区海域面积达约 405 万平方千米；如果再加上领海海域约 43 万平方公里，则合计为约 447 万平方公里，位居世界第六。[13] 相比之下，我国一直主张我国周边海域的争议面积达约 150 万平方千米，也没有具体界定我国管辖海域的范围。可见，我国对此采取了消极的态度，在海洋维权竞争激烈的时代，可能会处于不利的地位。

第五，进一步加强对海洋科技的投入和人才培养。海洋开发不仅需要资金，更需要科技支撑。为此，我国应继续在海洋科技的研发方面增加投入，并不断扩大合作活动。应该说，国务院于 2006 年 2 月 9 日公布的《国家中长期科学和技术发展规划纲要（2006—2020 年）》、科技部于 2006 年 10 月 27 日发表的《国家

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10 我国《宪法》第 9 条第 1 款规定，矿床、水流、森林、山岭、草原、荒地、滩涂等自然资源，都属于国家所有，即全民所有；第 2 款规定，国家保障自然资源的合理利用，保护珍贵的动植物，禁止任何组织或者个人用任何手段侵占或者破坏自然资源。

11 其实，关于海洋基本法的称谓与制订问题，《中国海洋 21 世纪议程》（1996 年）已有涉及。其指出，我国应制定和实施《海洋开发管理法》。参见国家海洋局编：《中国海洋 21 世纪议程》，北京：海洋出版社 1996 年版，第 39 页。在本文中，笔者将开发海洋的基本法命名为《海洋基本法》。

12 我国进一步宣布其他所属岛屿的领海基线的法律依据为：《中华人民共和国政府关于中华人民共和国领海基线的声明》（1996 年 5 月 15 日），其规定：“中华人民共和国将再行宣布中华人民共和国其余领海基线。”

13 [日] 海洋船舶财团海洋政策研究所编：《海洋白皮书（2005 年）：日本的动向，世界的动向》，第 9~10 页。

“十一五”科学技术发展规划》等文件保障了我国海洋科技的发展进程。[14] 最近，国家海洋局、科技部、国防科工委、国家自然科学基金委根据《国家中长期科学和技术发展规划纲要》联合制订了《国家“十一五”海洋科学和技术发展规划纲要》。[15] 该规划纲要的实施，无疑对加快海洋科技发展，推进我国海洋科技创新体系建设，提升我国海洋科技水平和能力，支撑和引领海洋经济快速发展，保障海洋安全均具有重大意义。另外，我国也不应放松对海洋科技人才和执法人员的培养和指导。[16] 近期，经劳动和社会保障部批准，国家海洋局职业技能鉴定指导中心的成立，对于改善我国海洋行业人才结构、扩充技能型人才等将起积极作用，值得肯定和推进实施。[17]

第六，应进一步加强海上执法。海洋开发战略及其规划的实施，需要强有力的维权执法队伍作保证。鉴于我国管辖海洋事务存在的多部门性、条块分割性及缺乏统一性导致无法形成综合合力，我国应进一步整合涉海部门的海上维权执法力量，包括配置相应的设施、增强对执法人员的培训，以加强海上执法力量，维护我国海洋利益。

（三）日本应对东海争议相关对策对我国的启示

由于中日间关于东海问题的争议主要集中在东海划界的原则与方法，及争议海域（包括共同开发海域）的界定等方面，为此，我国在以后的东海问题磋商中，应强调以下几个问题。主要为：

1. 关于专属经济区与大陆架的关系问题。日本认为，200 海里以内的大陆架制度已归入专属经济区制度，可用专属经济区制度阐释 200 海里内的大陆架制度。诚然，在 200 海里内专属经济区与大陆架存在重叠现象，且专属经济区制度远丰富于大陆架制度，但不可否认的是，从法律依据、内容和效果等规定的不同可以看出，上述两制度为平行而独立的制度，不存在主次之分。而且在第三次联合国海

14 例如，国务院发布的《国家中长期科学和技术发展规划纲要（2006—2020 年）》将“海洋资源高效开发利用”作为我国科技发展的重点领域及其优先主题。该《规划纲要》指出：我国要重点开发浅海隐蔽油气藏勘探技术和稠油油田提高采收率综合技术，开发海洋生物资源保护和高效利用技术，发展海水直接利用技术和海水化学资源综合利用技术。参见《新华月报记录》2006 年 3 月号（下半月），第 48~49 页。

15 张一玲：《我国“十一五”海洋科技发展规划蓝图绘就》，载于《中国海洋报》2006 年 11 月 24 日第 1 版。

16 近期，制约我国海洋科技和人才方面的因素主要表现为：海洋重点学科带头人不多，在某些学科存在“断层”态势；海洋科技经费投入不多；海洋技术设备陈旧、落后；对国际海洋热点和学科前沿跟踪不够，缺乏整体协同作战的安排与措施，且上述弊端近期无法取得明显改善。参见宋增华：《略论我国海洋开发战略的实施步骤》，《中国海洋报》2004 年 7 月 16 日第 3 版。

17 《培养高技能海洋人才的重要举措》，载于《中国海洋报》2006 年 11 月 21 日第 1 版。

洋法会议（1973—1982 年）上有国家提出将 200 海里内大陆架纳入专属经济区制度的提案，但遭到了否定。实际上，在海岸相邻或相向国家间存在专属经济区和大陆架划界争议时，根据《公约》的规定，相关国家没有统一划分界限的义务，可根据不同的制度划分不同的界线。同时，在划分界限时，大陆架划界与专属经济区划界需考量的要素与作用也不相同。考虑到中日间关于东海问题的争议主要集中在海底资源的归属和开发上，因此，双方应适用大陆架制度划分并确定大陆架界限。主要理由为：

(1)《公约》的法律依据。例如，《公约》第 56 条第 3 款规定，关于沿海国对专属经济区内海床和底土的权利，应按照大陆架制度的规定行使。可见，对于海床和底土的权利，大陆架制度优先于专属经济区制度。

(2) 中日间存在关于渔业资源的协定（1997 年），划分专属经济区现已没有充分的现实必要性。该协定对各方所属的海域与共同海域均规定了权利与义务，包括合作的义务，故在东海划分专属经济区，确定其界限，已没有现实的必要性。

中日间确定大陆架界限的法律应为《公约》。因为双方迄今未缔结有关协定，而双方均为《公约》的缔约国，对于有关《公约》涉及的问题与纠纷应该适用《公约》，由《公约》公平解决。[18]

2. 关于划分大陆架界限的原则问题。实际上，关于大陆架划界的原则问题，国际社会一直存在两种对立的观点。一种观点认为，大陆架划界应适用中间线或等距离原则；另一种观点认为，大陆架划界应适用公平原则。同时，上述两种观点也是第三次联合国海洋法会议上争议的焦点。争论的结果，各方均未占优势。最终，《公约》对专属经济区和大陆架的划界作了折中的规定，且其内容完全一致。关于划界的原则性内容，具体规定在《公约》的第 74 条和第 83 条中。[19]

由于《公约》关于专属经济区和大陆架划界方面的规定为国际政治妥协和折中的产物，对划界的原则性规定的阐释只能由国际司法判例及国家实践加以丰富和确认。从国际司法实践来看，自 1945 年美国《大陆架公告》发布以来，按照公

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18 关于依照《公约》规定“公平解决”引出的“公平原则”问题，按照学者傅崐成 2006 年 4 月 7 日在上海社科院演讲时提出的意见，应正确地被翻译为“衡平原则”。因为“公平原则”无法体现划界的过程公平，看重的仅是结果的公平。而“衡平原则”则不一样，它既重视过程公平，又重视结果公平。但因我国已使用了“公平原则”，实很难再使用“衡平原则”。

19 例如，《公约》第 83 条第 1 款规定，海岸相向或相邻国家间大陆架的界限应在《国际法院规约》第 38 条所指国际法的基础上以协议划定，以便得到公平解决；第 3 款规定，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的精神，尽一切努力作出实际性的临时安排，并在此过渡期间内，不危害或阻碍最后协议的达成。这种安排应不妨碍最后界限的划定；第 4 款规定，如果有关国家间存在现行有效协定，关于划定大陆架界限的问题应按照该协定决定。据此条规定，笔者认为，在东海问题产生争议后，中日双方主要存在以下义务：第一，避免事态进一步升级义务，即要求双方保持克制；第二，通过磋商，为推进协议的达成而努力的义务，即互谅互让；第三，忠实履行达成最终协议前的共识或合意的义务，即加强合作。

平原则划定大陆架界限已经形成为习惯国际法。这已为1969年北海大陆架案与1977年英法大陆架仲裁案所确认。此后的一系列划界案例，如1982年突尼斯／利比亚案、1985年利比亚／马耳他案、几内亚／几内亚比绍案、1992年法国／加拿大划界案、1993年格陵兰／杨马延划界案等，无一例外地均适用公平原则。这些司法判例和仲裁裁决在肯定公平原则是习惯法规则的同时，也明确指出等距离中间线只是一种便利的，有时是必要的划界方法，但并不是当事国必须执行的法律规则。为此，我国不仅应继续研究《公约》的理论和国际司法实践以寻找法律依据，同时还应继续坚持以自然延伸原则作为大陆架划界基础，采用大陆架与专属经济区分开划界的态度，以获得有利于我国的划界结果。

3. 关于东海大陆架划界的自然分界线问题。基于大陆架是陆地领土的自然延伸的这一事实，即大陆架的法律基础，我国主张中国东海大陆架界限位于冲绳海槽，该海槽应为中日大陆架的自然分界线；而日本主张，冲绳海槽只是偶然的凹陷，且海槽周边包括凹陷处的隆起和凹陷部分的成分相同，其不应成为中日东海大陆架的自然分界线，中日为共大陆架。故今后我国的主要任务应从地理地质结构等方面，论证和说明该海槽的成分和结构与附近的大陆架不同，中日在东海属非共大陆架，确立冲绳海槽在划界中的作用，以支撑我国的大陆架延伸至冲绳海槽的主张。

4. 关于钓鱼岛的地位与作用问题。中日双方均对钓鱼岛主张权利，同时由于钓鱼岛的战略重要性和附近资源（油气资源和渔业资源）的可观性，近期要解决钓鱼岛的主权问题难度很大。为此，一个行之有效的办法是，中日双方搁置钓鱼岛的主权争议，为尽早开采东海大陆架资源作出临时安排。而如何确立钓鱼岛在东海大陆架划界中的作用则是应解决的一个紧迫问题。从国际司法实践来看，关于主权或领土争议问题提交国际法院裁决的案例较多，无疑这是一个可行的方法，但即使双方达成共识提交国际法院裁决，双方还应互相妥协，尤其是我国未对国际法院的管辖权作出选择。显然，钓鱼岛的归属直接影响东海划界问题，包括领海基线的确定问题，严重影响双方所属海域的大小和范围。有学者认为，鉴于钓鱼岛地处日本主张的“中间线”附近，且面积很小，主权正处于争议中，结合国际上关于岛屿在划界中的司法实践，在中日东海专属经济区大陆架划界中应赋予其零效力为宜。[20] 应该说，这是一个值得考虑的建议。

简言之，在中日关于东海问题的磋商中，我国尤应强调专属经济区制度与大陆架制度的不同，且二者分别是独立的、平行的制度，在确定它们的界线时，所考

20 王可菊：《钓鱼岛及其在东海划界中的地位》，载于《中国海洋法学评论》2006年第1期。

虑的因素也是各有侧重的。[21] 中日间在东海争议海域的划界应以《公约》为根据，力求按公平原则进行。

四、展望与结语

21 世纪被称为海洋世纪，世界各国均已在海洋问题上公布了相关战略与法规，以推进实施海洋开发活动。为确保社会经济协调与可持续发展，保障能源与资源供应，我国实施海洋开发战略是一种可行且必要的路径选择。为此，我国应以东海问题为契机，积极推进国家海洋战略规划的制定与实施，修改与完善国家海洋开发法制，并加强国际、区域与双边海洋问题的合作，确保构建和谐社会发展进程中所需的能源与资源供应，维护我国海洋权益。

目前，中日两国在东海问题上找到有效的对策，显然是改善双方关系、推进中日“战略互惠”关系的重要途径之一，而实施共同开发无疑为一种合理选择。它既可延缓双方的冲突，又可通过合作开发获得实际的资源利益；不仅有利于维护国际、地区的和平稳定与发展，而且还有利于增进两国在经贸、科技、知识产权、能源和环保等方面的合作与交流。可以预见，双方在东海问题上的争议将是中长期的。因此，我国必须从长计议、认真对待、合理处理，使争议之东海变成合作之海、和谐之海，为他国解决海洋划界争议提供典范。

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21 尽管国际社会在划分大陆架和专属经济区的界线方面有转向一条线的趋势，但它不能抹杀在确定大陆架界线和专属经济区界线时，应考虑的因素各有不同。在国际实践中，为实现公平解决，在确定大陆架界线时，应考量的因素主要为：地理因素，包括自然延伸、海岸形状、海岸线的长度、岛屿的位置与性质等；地质和地形上的因素，包括重大海床形体的改变；矿床的统一性、第三国的利益等因素。参见傅崐成：《东海专属经济区和大陆架界线应为一条》，载于《社会科学报》2006 年 4 月 27 日第 4 版。而在确定专属经济区界线时，应考量的因素主要为：鱼种的分布与存量状况，过去的捕鱼业绩，沿岸的地理、经济和社会状况等。参见 [日] 小田滋著：《注解联合国海洋法公约》（上卷），东京：有斐阁 2002 年版，第 243 页。可见，专属经济区界线的划定主要依据经济因素，而大陆架界线的划定主要依据地质、地理和地形、自然资源尤其是非生物资源的结构和构造等自然因素。显然，上述因素符合设立专属经济区和大陆架制度的初衷。

中国大陆私人游艇的现状分析及其发展构想

魏荣辉* 傅崐成**

内容摘要: 当前，中国大陆地区私人游艇的拥有无论从数量上还是观念上都尚未普及。而从发展前景上看，游艇必将成为“后汽车时代”的主角。本文通过分析当前中国大陆私人游艇发展的障碍，提出了对中国大陆私人游艇发展的设想，并给出建立统一游艇管理规范的制度构想。

关键词: 私人游艇 现状分析 发展构想

游艇，顾名思义，是人们用于游览、享乐的一种工具。在社会阶层日益分化的今天，游艇是一种身份、地位的象征，而对游艇的拥有量同时也反映了一个国家或地区的富有程度。[1] 从国际社会其他先进国家的发展轨迹来看，当一个社会的人均收入提高到多数家庭都可以拥有第二辆汽车的时候，游艇的使用和相关水上活动的开展就会成为一件很自然的事情。

中国东南沿海一带岛屿罗列、海岸曲折、气候温和、自然景观丰富，且有东南汽车等汽车生产基地，非常适合发展游艇产业。尤其海峡两岸一衣带水，海峡两岸同胞的往来出现愈来愈多的海上休闲活动交流，利用游艇是最自然和谐的手段。随着这一地区海上游艇活动的增加，相信两岸人民的交流也会愈加频繁，这对于两岸和平统一的发展大势也是有一定助益的。

一、私人游艇在中国大陆、中国台湾和美国的现状

（一）中国大陆私人游艇现状

随着中国大陆旅游业的快速发展及人民生活水平的日益提高，人们已不再满足于陆上旅游，水上旅游成为旅游热点。海滨、湖泊和城市水系都成为人们游玩

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* 魏荣辉，法律硕士。
** 傅崐成，美国弗吉尼亚大学法学博士，厦门大学法学院教授、博士生导师。

1 安飞：《游艇业梦始何方》，载于《中国船检》2003 年第 12 期。

观光的好去处，如上海外滩的黄浦江，桂林的漓江，杭州的西湖，昆明的滇池等等。然而，我们不难发现，行驶在这些水面上的游艇品种主要是机动游船、画舫型游船、电瓶游船和垂钓型小游船等各种小型动力和人力游览船，家用型私人游艇难觅芳踪。[2]

据不完全统计，目前中国大陆拥有私人游艇的人数不超过 2000 人，并且分布不平均，主要集中在北京、上海、大连、浙江、广东、福建等主要城市和沿海省份，中西部广大地区几乎没有。大连拥有私人游艇 40 多艘，在中国北方地区位居第一，长江三角洲地区拥有私人游艇的人数大约在 500~600 人，[3] 珠江三角洲约有 60 艘私人游艇。阻碍私人游艇普及的主要原因是游艇价格相对高昂及后续费用庞大等。据中国船舶工业行业协会船艇分会秘书长黄振纲介绍，游艇有快艇、高速赛艇、豪华游艇、摩托艇等种类。目前进入大陆市场的游艇，主要是以 10 米左右的中小型游艇为主，价格一般在 200、300 万元左右，而拥有私人游艇的国内少数成功人士主要是靠加入游艇俱乐部的方式实现消费的。目前，中国大陆约有 20 家的游艇俱乐部，主要集中在长江三角洲地区和东南沿海地区。以落户在江苏太湖湖畔的美国水星游艇俱乐部为例，该游艇俱乐部是目前国内唯一按国际标准建设的，由世界最大的娱乐设备制造公司美国宾士城集团（世界 500 强）所属美国水星海事投资 1500 万美元打造的私家会员制游艇俱乐部，现有会员 200 多人，游艇近百艘，私家游艇 12 艘。[4] 据其销售主管顾忆明介绍说：水星俱乐部主要实行会员制。会员卡分 2 种：1.6 万美元的普通会员卡和 3.3 万美元的贵宾卡。入会方式有 2 种：一是租用俱乐部的游艇，二是个人买艇加入。个人买艇加入俱乐部的，每年还需付 1500 美元用于泊位、维修、保养等。[5]

（二）我国台湾的私人游艇现状

因为以往的海防严禁，台湾虽是海岛，却未发展出深厚的海洋休闲文化。台湾初期的游艇公司，由于游艇价格过高、法令限制太多、观念尚未普及等原因相继夭折，到现在，相关推动游艇休闲的公司已屈指可数了。不过，在 2000 年台湾当局修订了《游艇管理办法》后，情况出现了改观。以往，由于一艘游艇动辄上百万元或数百万元（指新台币，以下同），因此尽管台湾有约 2 万多人持有游艇驾照，但真正拥有游艇且登记为“游艇”的不超过 10 艘，大部分人不是把驾照摆着供奉，

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2 姚树镇：《中国大陆游艇业现状及发展构想》，下载于 http://chineseboating.com.cn/ytgy/2-2.asp，2006 年 7 月 11 日。

3 参见《大连晚报》2004 年 7 月 13 日，下载于 http://www.dlwb.com.cn/dlwb/news/jsp/shownews.jsp?id=45898，2006 年 7 月 13 日。

4 卢一平：《浦江再现中外游艇：打造“水上休闲”新天地》，载于《上海商业》2002 年第 5 期。

5 《长三角烹制 3000 亿游艇大餐：后汽车时代消费主角》，下载于 http://www.chineseboating.com.cn/qytd/detail2.asp?q_id=79&qy_id=1，2006 年 10 月 10 日。

就是将游船登记为“渔船”以逃避繁琐的法规限制。随着政府积极推动游艇港并逐渐放宽出海限制与游艇进口，现在购买一艘船大约只要 80 万元起，比进口汽车贵不了多少，而且还不用交燃料税和牌照税。过去游艇出海，每次最多 48 小时，从哪个港出也要从哪个港进，船只是停放还必须取得当地水域机关的证明。现在游艇出海，只要提前一天预约，由游艇港代为报关，等出海时查验身份证明之后就可以放行，对出海时间不作限定，也可以从一个港出从另一港进，只要事先向预计停靠的港口提出申请即可。所以，现在人们只要有游艇，就能驾着游艇出游，自己到海上赏鲸、潜水、海上 BBQ（烧烤）或者到兰屿、绿岛捕鱼，假日出游也不用再烦恼塞车与订房了。[6] 随着游艇港的兴建，现在游艇也有了停放的地方，停船费有些比停车费还便宜。台湾游艇业者于 1985 年就开始规划在台湾岛唯一邻海的垦丁公园修建专业游艇港——后壁湖游艇港。目前这一游艇港已经建成，可提供海上浮栈码头泊位 120 个，路上置位 130 个，未来还计划根据市场发展再投资兴建一个可容纳 300 多艘艇的立体艇库。[7] 停船费根据船只尺寸而有所不同，以一般大小的 26 到 35 尺游艇为例：停放一年须月付 5500 元或年付 49500 元。如果停放在游艇港的陆地上则更便宜，一年只需付 27000 元。以目前汽车停车费每月 3000 元计算，一年需 36000 元，游艇的停放费并不比汽车停车费贵。另外，台湾各地将陆续开放 12 个休闲渔港供游艇停放。因此，停船问题的解决将极大促进台湾私人游艇的普及。[8]

（三）美国私人游艇发展现状

在美国，海洋休闲文化发展相当多样，有游泳、潜水、游艇、垂钓、风帆与冲浪等，甚至有人就只有一艘船，以船为家，所有家当都在船上。据估计，美国游艇业在世界市场上的占有率为 55%，美国每 16 人就拥有一艘游艇，私人拥有游艇的比例更是位居世界首位，1998 年在美国注册的游艇就达 1300 万之多。[9] 这主要归功于美国拥有漫长的海岸线，众多的港口、湖泊、河流等自然条件，及其经济发达、观念普及等社会经济条件。在美国，游艇花样繁多，从 60、70 米长的超级游艇到能在最小湖泊上垂钓的小船，形形色色，应有尽有。它们的共同点是都能使你尽情享受水上乐趣，而精良的装备更是使一切尽善尽美。另外，美国还有大约 12000 个水上活动中心，其中仅佛罗里达就有 2000 多个，[10] 这些众多的水上活动

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6 下载于 http://gb.ettoday.com. w:6060/2004/05/24/930-1634352.htm，2006 年 11 月 18 日。
7 曹惠芬：《台湾游艇工业再度名扬四海》，载于《水路运输文摘》2003 年第 6 期。
8 下载于 http://gb.ettoday.com.tw:6060/2004/05/24/930-1634352.htm，2006 年 11 月 18 日。
9 Jerry Martin:《中国的游艇业面临巨大的商机》，下载于 http://chineseboating.com.cn/ytgy/1-1.asp，2006 年 7 月 11 日。
10 Ron Stone:《游艇业正向我们走来》，下载于 http://chineseboating.com.cn/ytgy/1-2.asp，2006 年 7 月 11 日。

中心不仅是船只的停泊地，更是一个功能齐全的娱乐中心和目的地。它们不仅能提供游艇所需的配套服务，如维修、加油、保养等，还能满足人们的基本需要，如饮用水、清洁的卫生间、废物处理设施等，甚至还包括自动售货机、餐馆、游泳池等等。配套设施的齐全、配套服务的完善，解除了私人游艇拥有者的后顾之忧，促进了私人游艇在美国的普及。

表 1　世界主要发达国家游艇数量统计 [11]

国家	游艇数量	人均拥有游艇比例
美国	1.7 亿	1/16
英国	50 万	1/100
瑞士	10.3 万	1/69
瑞典	120 万	1/7
西班牙	13 万	1/300
葡萄牙	6 万	1/170
挪威	62 万	1/6
新西兰	30 万	1/12
荷兰	50 万	1/30
意大利	80 万	1/71
爱尔兰	1 万	1/366
希腊	10 万	1/103
德国	42 万	1/231
法国	100 万	1/64
芬兰	69 万	1/7
丹麦	36.9 万	1/14
加拿大	550 万	1/5
比利时	1.5 万	1/680
奥地利	2.8 万	1/200
澳大利亚	55 万	1/33

11　华承昌：《国内外游艇产业发展简况》，载于《船舶工业技术经济信息》2004 年第 10 期。

二、中国大陆私人游艇的发展前景

休闲游艇和钓艇的流行与发展在国外被称为“后汽车时代”，可以肯定，游艇必将成为中国“后汽车时代”的主角，以下 5 个方面将体现这种发展前景：

1. 中国大陆的地理条件优越。目前，我国拥有 473 万平方公里的海域，1.8 万公里的海岸线，其中岛屿海岸线 1.4 万公里。陆上更是星罗棋布地分布着 9 万多个湖泊、河流，共有 1700 万公顷的内陆水域面积，并且我国有 13 亿的消费人口。中国大陆天然水路是美国的 2.5 倍，人口则是美国的 4 倍，丰富的人文自然条件和巨大的消费人群对于游艇业发展来说是得天独厚的。

2. 改革开放以来，中国大陆经济高速增长，人们收入水平提高，一个富有阶层日渐崛起。这批富有阶层蕴涵着巨大的消费欲望和消费潜力，带动了度假、休闲运动的消费。目前，这批成功人士普遍的时髦休闲方式莫过于打高尔夫，然而随着兴趣的转移和消费、休闲观念的转变，这部分人开始寻求新的休闲品种。休闲游艇运动完全有可能成为这一富有阶层，尤其是私营业主、高级白领等人士追求时尚生活的新潮流。另外，来华工作的外籍人士的增多也会为中国游艇业的发展增添新的动力。

3. 闲暇时代即将到来，工作之余的休闲将成为时代的重要特征之一。目前，中国大陆一年中有 114 天的法定休息日，这意味着一年有 1/3 的时间在休假。然而，当前我国的陆地旅游资源日渐稀缺，其开发利用已近饱和状态，难以满足人们休闲活动的需要，人们休闲活动的热点将会向水上活动转移，景观水系资源的开发必将成为中国旅游开发的一个新亮点。因此，游艇市场必会加大，游艇业必将会成为中国极具潜力的新兴产业。

4. 游艇配套设施和服务的完善将促进中国大陆游艇业的发展。我们可以借鉴美国水上活动中心的模式大力发展游艇会（俱乐部），为游艇业主提供良好的配套服务。深圳目前在这方面做了很好的尝试，深圳浪骑游艇会的成功经营率先填补了中国游艇经济的空白。建于 1998 年耗资 3.17 亿元的浪骑游艇会位于深圳市南澳镇东山村的桔钓沙海畔，占地、占海面积 14 万平方米，拥有 275 个游艇泊位和 400 个干船舱。这间全封闭式的会员制私人游艇会所目前已拥有会员 300 多人。[12] 我们有理由相信，随着各种俱乐部运营模式的成熟，中国将会出现越来越多的游艇会（俱乐部）。

根据当今世界各地游艇俱乐部的经营状况，其运作模式大概有以下几种：

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12 《经济观察报》2005 年 3 月 21 日第 45 版。

表 2 各类游艇俱乐部特征 [13]

俱乐部种类 / 俱乐部特征	运动娱乐型	休闲型	商务型
服务对象	青年群体、白领、其他	家庭、朋友、情人	公司、企业等高层商务
游艇要求	速度性能优良、中小型化、中低档、配备有大功率的发动机、内部设施相对较为简单	中档、内部设施侧重家庭设施特色、家用电器	游艇大、造价高昂，其内部设施齐备且极其豪华、装潢考究，注重在通讯设备、会议设备、办公设备上的配套安装，充分体现出现代企业办公需要
游艇租用 / 购买意图	运动、娱乐、休闲	休闲、度假	接待客户、商务谈判、公司高层会议、高层娱乐休闲度假等
收费标准	一般	一般	高昂
会员制	需要时临时包租多见或会员制	吸收固定会员或包租	固定会员或包租
服务内容	保险、安排节目行程、组织专题活动等	保险、日常代替护理、加油、游艇翻新和修理	提供专业船长、高档餐饮、酒吧、娱乐场所，安排全程服务或自行确定航程、活动
俱乐部硬件设施	较少外部配套	停车场、修理船坞	休闲、度假等设施综合性强，一应俱全

5. 随着市场培育逐渐成熟、基础设施的完善、配套设施的多样化，游艇产品将向两极发展。届时某些进口游艇的进口价可能只有 20 万元左右，而一些国产游艇的价格可能是 5~10 万元，身价跟时下的一些私家车差不多。而我国经过多年的经济高速增长，人们的购买力已明显提高，在一些大、中城市，万元级、10 万元级的消费已十分普及。可以预见，在不远的将来，北京、上海、浙江、广东和福建等主要城市及沿海城市的富有阶层完全有能力将自己的休闲方式向国际化迈进，成为私人游艇的拥有者，从而率先进入游艇私人消费时代。[14] 另外，对于不太富有的阶

13 程爵浩：《游艇俱乐部经营运作模式初探》，载于《船舶工业技术经济信息》2004 年第 5 期。

14 《长三角烹制 3000 亿游艇大餐：后汽车时代消费主角》，下载于 http://www.chineseboating.com.cn/qytd/detail2.asp?gy_id=1 &q-id=79, 2006 年 10 月 10 日。

层来说，集体租用游艇是个很好的办法。据业内人士介绍，人均月收入超过 2 万元的家庭都有能力租用游艇。

三、中国大陆私人游艇发展的障碍

中国大陆的游艇消费具有发展中国家的普遍特征，即从水上旅游景点的公众消费逐步发展到大公司、大集团的公务性消费。游艇的私人消费并未成为游艇消费的主流，究其原因，主要有以下几点：

1. 游艇作为一种高档、奢侈的耐用消费品，对其的消费是建立在经济高度发展的基础上的。普通游艇的价格从几十万元到上百万元不等，大型豪华游艇更是高达上千万元，而且“养”一艘游艇远比“养”一辆汽车费事，一年的码头停靠费就需要花 7000~12000 元，再加上燃料费、维修费、保养费等等，一年总计不下 5 万元。这些费用对于富有阶层来说不成问题，但对于大多数普通家庭来说，私人游艇的拥有还是一个可望不可及的梦。[15]

2. 驾照问题。目前，只有考取由国家交通部门颁发的“游艇 A 级驾照”才能亲自驾驶游艇。由于水域交通不同于地面交通，培训项目多而复杂并且考试要求严格，能开展驾驶培训的俱乐部并不多。目前，只有苏州的美国水星游艇俱乐部与苏州海事局达成协议，由俱乐部负责培训，苏州海事局进行考核、发证。[16] 所以，我国拥有私人游艇驾照者寥寥无几。另外，由于各地水域航道情况不同，游艇驾照只限本地使用。因此，对私人游艇拥有者来说，想要亲自驾驶爱艇自由驰骋各地海域，实现驾照互认，仍需进一步努力。

3. 码头问题。制约中国大陆私人游艇发展的另一重要因素是“下水难”，专用的游艇码头在大陆范围内仍是空白。即使是美国水星游艇俱乐部这样的大公司，他们的游艇也只能租用客运码头，而小型私家游艇能否长期租用这类客运码头更是一个未知数。

4. 出航手续繁琐。私人游艇的使用首先需要办理船舶登记，明确行驶的水域范围、航行时间和速度限制，而目前政府并未制定相关专门规定，只能适用客运船舶的规定。所以，即使是上海的私家游艇拥有者也只能远去太湖的美国水星游艇俱乐部，由俱乐部出面请江苏海事局为其会员进行驾驶培训，由俱乐部提供码头和水域，只有经过如此繁杂的手续，他们才能实现出航的目的。[17]

5. 游艇会（俱乐部）的不足也制约了私人游艇的发展。游艇会（俱乐部）始于

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15 曹新华：《游艇——悄然露出的消费新亮点》，载于《水路运输文摘》2003 年第 6 期。
16 曹新华：《游艇——悄然露出的消费新亮点》，载于《水路运输文摘》2003 年第 6 期。
17 《长三角烹制 3000 亿游艇大餐：后汽车时代消费主角》，下载于 http://www.chineseboating.com.cn/qytd/detail2.asp?qy_id=1 &q_id= 79，2006 年 10 月 10 日。

18 世纪的英国，最初只是供游艇停靠的小船坞，随着游艇的发展其功能也越来越大。游艇会（俱乐部）的功能大概包括：会所功能、餐饮—会议—健身功能、娱乐功能、水上运动培训功能、游艇停泊维护保养功能、休闲度假功能、商务功能、星级酒店功能，甚至团体（或个人）旅游活动策划功能、水上生活功能、口岸联检功能等。[18]可以毫不夸张地说，游艇会（俱乐部）已成为私人游艇拥有者不可缺少的“管家”。目前，全国约有 20 多家游艇会（俱乐部），对于一个新兴的、正在迅速发展的行业来说，这个数量是远远不够的。如目前浙江、厦门就没有游艇会（俱乐部），这显然不能满足浙江、厦门私人游艇拥有者的需求。

四、对中国大陆私人游艇发展的设想

（一）社会认识的提高及政府的可为之处

中国游艇业刚刚起步，最关键的是利用各种途径让人们了解游艇，认识到游艇是非常值得推广的娱乐工具，尤其是要让政府认识到发展游艇业的意义，强调游艇业对经济发展的推动作用。游艇业是一个新的产业，一个新的税收来源，一个新的经济增长点。在发达国家每 171 人就拥有一条游艇，全球游艇年消费额高达 400 亿美元，加上相关的维修、管理、娱乐等费用，全球每年的游艇经济收入超过 500 亿美元。[19] 目前，我国的游艇出口仅有 1700 万美元，劳动力价格的比较优势及制造业的成本优势使中国在国际游艇市场上可能拥有上百亿的创汇商机。由于游艇业是兼具劳动密集、技术密集、知识密集和资金密集的长链产业，它的生产将带动新型材料、涂料、电子仪器、仪表、动力、推进系统等几十个配套工业的发展，它的消费也将带动游艇码头、游艇运输、游艇维修、燃料加注、水上娱乐、餐饮服务等一批相关行业的迅速发展。另外，发展游艇业还能使一些废弃不用的岸边设施重新得到利用。[20] 现阶段，政府可以在以下几个方面有所作为：

1. 尽快建造游艇专用码头，解决游艇“下水难”问题。由于目前没有游艇专用码头，租用客运码头又比较繁琐，不少私人游艇拥有者只能望“洋”兴叹。值得欣慰的是，在 2004 年 3 月 24 日开幕的第九届中国国际船艇及技术设备展览会传出佳音：根据有关规划，未来将在上海建设 10 座以上的游艇专用码头。另据报载，浙江舟山正在规划全天候的游艇码头，南京开始建设长江上第一座国际游艇码头，而大连地区已建和在建的有 6 个游艇港，其中已经建成的有星海湾、小平岛游

18 程爵浩：《游艇俱乐部经营运作模式初探》，载于《船舶工业技术经济信息》2004 年第 5 期。

19 参见《经济观察报》2005 年 3 月 21 日第 45 版。

20 胡小刚、叶家伟：《珠三角游艇产业及发展前景》，载于《广东造船》2004 年第 1 期。

艇港。[21] 另外，拥有良好水景条件的私人游艇拥有者还可以在自家别墅前建造自己的私家码头，位于北京东四环的东山墅的部分别墅在湖畔就建造了私家码头，体现了市场的超前需求。[22] 同时，还要加快水上基础设施及游艇配套设施的建设。

2. 做好游艇驾照的培训、考核、颁发及管理工作。

3. 参考马来西亚的做法，对进口游艇及设备免税。10 年前，马来西亚政府对进口游艇和设备免税，使马来西亚的游艇业迅速发展起来，而由于进口游艇数量不多，并未对马来西亚本国的造船业造成损害，税收损失也不大。[23] 如果我们对进口游艇和设备免税，将对中国进口游艇有很大帮助，使中国的中产阶级能较容易地购买和拥有私家游艇。

（二）充分发挥市场的作用开发游艇市场

1. 建立更多的游艇会（俱乐部）以满足市场的需求。由于游艇业是一个新兴产业，不存在国有企业的经营、体制等问题，所以政府在做好总体规划和数量控制外，应尽量避免干预游艇经营企业的内部事务，让游艇经营企业得到一个宽松的外部市场环境。另外，由于长期以来我国政府对海洋开发实行控制立法，各地边防局的任务也是反内潜、反外逃、反走私，所以在沿海成立游艇会（俱乐部）的政策风险较高。因此，政府应该适度放宽，为游艇经营企业营造良好的外部政策环境。[24] 事实上，中国大陆目前已正式注册成立了 20 多家游艇俱乐部，游艇会（俱乐部）正以“新宠”的姿态成为沿海各地政府的工作重点。用百度搜索游艇会（俱乐部）的相关新闻，可以看到有 17100 个网页链接，其中一篇新闻称：天津汉沽区将投资 53 亿元人民币兴建一个全球最大的游艇会组织——东方国际游艇会。另据了解，一个由泰国南顺投资，投资额达 1.2 亿美元的国际游艇俱乐部已签约厦门。可见，游艇会（俱乐部）的发展已是生机勃勃。

2. 随着游艇市场的充分培育，法律法规的健全完善，我们还可以考虑与银行合作，推出游艇的分期付款方式。采用分期付款方式可以降低拥有私人游艇的门槛，使普通家庭拥有私人游艇变得更现实。由于有房地产市场、汽车市场的充分实践，该方式在技术层面上不存在困难。

3. 积极发展游艇二手交易市场及租赁市场。据《厦门晚报》报道，厦门惟一一艘私人游艇“闽厦门交 0017”于 2004 年 12 月 15 日由福建承信拍卖行有限公司

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21 参见《经济观察报》2005 年 3 月 21 日第 45 版。
22 参见《经济观察报》2004 年 10 月 25 日第 44 版。
23 Jerry Martin：《中国的游艇业面临巨大的商机》，下载于 http://chineseboating.com.cn/ytgy/1-1.asp，2006 年 7 月 11 日。
24 参见《经济观察报》2005 年 3 月 21 日第 45 版。

进行了首次拍卖，最后以 25 万元的价格拍出。[25] 随着游艇业的进一步发展，游艇二手市场及租赁市场将大有前途。

五、建立统一的游艇管理规范的制度构想

在游艇管理的法律规范方面，中国大陆目前只有杭州市港航管理局出台过《杭州市游艇管理暂行办法》，该《暂行办法》从法律层级上看只是市政府下的一个职能部门制定的规范性文件，远不能适应整个游艇市场发展的需要。因此，有必要将造船法规、航行法规、航行执照等从船舶业管理中独立出来，制定一个全国统一的游艇管理法规（笔者拟将其定名为《中华人民共和国游艇管理条例》），笔者认为该《条例》应包含以下内容：

第一部分　总则部分

该部分主要是确定一些概念。游艇是指长度大于 5 米，用于游乐活动的船舶。参照台湾地区的《游艇管理办法》，我们将游艇分为营业性游艇和自用游艇 2 种并对二者在管理上予以区别。

第一条　为规范游艇管理，维护水上交通秩序，保障航行安全，促进水上休闲、娱乐等旅游业的发展，制定本条例。

第二条　使用游艇在水面、水中从事航行、停泊、船钓、游览观光、休闲娱乐等相关活动，适用本条例。

第三条　本条例所称游艇是指长度大于 5 米，用于游乐活动的船艇。

游艇分为营业性游艇和自用游艇：

（一）营业性游艇，是指以营利为目的，以直接或间接方式结算费用的游艇；

（二）自用游艇，是指供自己使用或无偿借给他人使用，不以营利为目的，不发生各种方式费用结算的游艇。

第四条　游艇会（俱乐部），是指游艇经营管理人，根据约定，为游艇业主提供各种游艇服务或自营各种游艇服务的组织。

第五条　游艇管理遵循安全第一，有序、适度发展的原则。

第六条　国家海事管理机构负责全国的游艇及游艇会（俱乐部）的监督管理工作。

全国各地海事管理机构负责对本行政区域内的游艇及游艇会（俱乐部）的监督管理工作。

第二部分　游艇管理部分

25　下载于 http://search.csnn.com.cn/scripts/pws.dll/pkuir_tnodels/wb2001/dispdoc.irm?%23didoc=1&%23start_disp=0&%23distep=10，2006 年 4 月 10 日。

该部分主要是根据《中华人民共和国船舶登记管理条例》对游艇进行技术检验和所有权登记，游艇应分别取得《游艇技术检验合格证》和《游艇所有权登记证书》（笔者暂定名），营业性游艇还需取得工商执照和营运许可证。

第七条 游艇应具备下列条件方可航行：

（一）经海事管理机构认可的船舶检验机构依法检验，并取得有效的《游艇技术检验合格证》；

（二）经海事管理机构依法登记，并取得有效的《游艇所有权登记证书》及《游艇国籍证书》；

（三）配备有符合海事管理机构规定的船员；

（四）配备有必要的航行资料，通讯和救助设施；

（五）营业性游艇应当向当地海事管理机构申请，并取得《游艇营业运输许可证》。

第八条 游艇应当符合使用水域特殊的安全、环保要求。

第九条 营业性游艇应当按国家有关规定缴纳相关税费。

第十条 营业性游艇应当按照国家有关规定办理相关责任保险，自用游艇自愿办理相关责任保险。

第三部分 证照管理部分

游艇驾驶者应参加相应的培训，取得相应的驾驶执照才能“下水”。参照汽车执照的管理模式，根据游艇的种类，可将游艇驾照分为不同种类，考核标准也各不相同，考核时应特别注重实际操作训练，同时还可以规定一定时间的见习期。游艇驾照每年应参加年检。

第十一条 游艇驾驶员及其他船员应当经过水上交通安全专业培训，并经当地海事管理机构考试合格，取得相应等级的适任证书或者其他适任证件，严禁未取得适任证书或者其他适任证件的驾驶员及其他船员上岗。

游艇驾驶员及其他船员应当遵守职业道德，提高业务素质，严格依法履行职责。

第十二条 申请游艇驾驶员及其他船员证书的人员应当符合下列条件：

（一）年满 18 周岁且不超过 65 周岁；

（二）经体检合格；

（三）具有高中以上文化程度；

（四）具备本条例第十三条规定的水上服务资历。

第十三条 申请报考游艇驾驶员的资历要求：

（一）参加不少于 15 小时的实际操作训练；

（二）经确认在游艇上见习不少于 30 小时；

（三）达到上述（一）、（二）条件的，还需参加不少于 5 天的专业基础知识培训。

第十四条 持有内河五等及以上船员职务适任证书者，应当参加不少于 15

个小时的实际操作训练，经海事管理机构考试合格，方可在游艇上任职。

第十五条 游艇驾驶员及其他船员统一使用《中华人民共和国游艇船员职务适任证书》。

第十六条 游艇驾驶员及其他船员每年应当参加由当地海事管理机构组织的年度培训、审核。

第十七条 游艇驾驶员及其他船员的职务设置，证书的考核、颁发、审验、更换及管理等事项，由海事管理机构参照《中华人民共和国内河船员考试发证规则》等规定执行。

第四部分 航行管理部分

该部分应参照《中华人民共和国内河交通安全管理条例》、《中华人民共和国海上交通安全法》、《中华人民共和国港口法》和《港口经营管理条例》中有关游艇停靠的码头、泊位及航行的区域、航速等事项的规定。

第十八条 游艇应当在当地海事管理机构核定的水域内以安全航速航行。

第十九条 游艇进出港航行，应当按规定向当地海事管理机构办理船舶进出港签证，严禁在恶劣天气及危及航行安全的情况下出港航行。

第二十条 游艇各项活动不得污染水质、破坏生态环境。

第二十一条 游艇各项活动不得在饮用水水源的水库进行，但经该水库管理机关同意的除外。

第二十二条 游艇不得从事走私或其他不法行为。

第二十三条 游艇不得提供或容许妨碍公共秩序、善良风俗的活动。

第二十四条 游艇应当遵守海事管理机构制定的其他规定。

第二十五条 艇应当在当地海事管理机构核准的游艇码头、泊位、停泊区域内集中停泊。

第二十六条 游艇码头应当符合安全、环保的要求，并具备保证人员安全、快捷、便利地上下船的环境。

第二十七条 游艇码头管理按照《中华人民共和国港口法》、《港口经营管理规定》实施。

第五部分 游艇经营管理部分

如前所述，游艇经营管理实行游艇会（俱乐部）模式，故有必要对游艇会（俱乐部）的职能进行定位，对其经营资质及经营行为进行规范。由于海上交通事故容易造成巨大损失，因此应强制游艇所有人或经营人参加保险。[26] 对此笔者认为，应强制营运性游艇经营人参加保险，对于自用游艇所有人则实行自愿原则。

第二十八条 游艇会（俱乐部）是游艇经营管理或委托管理的组织，游艇会（俱乐部）可以实行会员制管理。

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26 彭小军：《由台湾游艇管理引出的思考》，载于《珠江水运》2001 年第 8 期。

第二十九条 游艇会（俱乐部）可以提供以下服务：

（一）游艇机务、海务管理服务；

（二）游艇检修、保养服务；

（三）船员配给、管理服务；

（四）游艇停泊、供给服务；

（五）游艇租赁、营运服务；

（六）其他游艇管理服务；

（七）为会员提供休闲、用餐、健身、住宿等固定活动场所。

第三十条 游艇会（俱乐部）应当依法进行工商登记，取得相应的经营资质，并在核定的经营范围内从事游艇经营管理活动。

（一）为自用游艇提供服务的游艇会（俱乐部），其经营资质条件和要求，应当符合《国内船舶管理业规定》的有关规定，并取得《水路运输服务许可证》；

（二）将自有的营业性游艇租赁给会员或他人使用的游艇会（俱乐部），其经营资质条件和要求，应当符合《国内船舶运输经营资质管理规定》的有关规定，并取得《水路运输许可证》；

（三）兼有上述（一）、（二）两项经营内容及范围的游艇会（俱乐部），其经营资质条件和要求，必须同时符合《国内船舶管理业规定》和《国内船舶运输经营资质管理规定》的有关规定，并取得相应的《水路运输服务许可证》、《水路运输许可证》。

第三十一条 游艇会（俱乐部）应当加强对游艇的安全管理，建立、健全相应的交通安全管理制度，并落实游艇安全管理责任。

第三十二条 游艇会（俱乐部）合并、分立或者要求变更经营范围、企业名称、地址和法定代表人等事项的，应当依法办理相关手续。

第六部分 法律责任部分

该部分主要规定违反以上各条的处罚，明确游艇管理机构。在现有条件下，游艇管理机关宜为各地海事部门和港航部门。

第三十三条 海事管理机构必须建立、健全对游艇和游艇会（俱乐部）的监督检查制度，并组织落实。

海事管理机构的工作人员依照本条例实施监督检查时，应当出示执法证件，表明身份。

第三十四条 游艇所有人和游艇会（俱乐部）应当接受海事管理机构的监督检查，如实提供相关资料，并为其提供方便，任何单位和个人不得拒绝或者阻挠。

第三十五条 海事管理机构应当加强对自用游艇从事营业性活动、擅自超越核定水域航行等违法行为的监督管理，规范对游艇会（俱乐部）经营行为的管理。

第三十六条 违反本条例规定，应当报废的游艇继续航行或者活动的，由海事管理机构责令停止航行或者活动，并对游艇予以没收。

第三十七条 违反本条例规定，游艇未持有合格的检验证书、登记证书或者游艇未持有必要的航行资料，擅自航行或者活动的，由海事管理机构责令停止航行或者活动；拒不停止的，暂扣游艇；情节严重的，予以没收。

第三十八条 违反本条例规定，游艇未按照国家海事管理机构的规定配备船员，擅自航行或者活动的，由海事管理机构责令限期改正，对游艇所有人或经营人处 1 万元以上 10 万元以下罚款；逾期不改正的，责令停止航行或者活动。

第三十九条 违反本条例规定，未经考试合格并取得适任证书或者其他适任证件的人员，擅自从事游艇航行或者活动的，由海事管理机构责令其立即离岗，对直接责任人员处 2000 元以上 2 万元以下罚款，并对聘用个人或单位处 1 万元以上 10 万元以下罚款。

第四十条 违反本条例规定，游艇在航行或活动时有下列情形之一的，由海事管理机构责令改正，处 5000 元以上 5 万元以下罚款；情节严重的，责令停止航行或者活动，并可对责任船员给予暂扣适任证书或者其他适任证件 3 个月至 6 个月的处罚：

（一）未向海事管理机构办理游艇进出港签证手续的；

（二）未按照规定申请引航的；

（三）擅自进出港口，强行通过交通管制区、通航密集区、航行条件受限制区域或者禁航区的；

（四）未申请或者未按照核定的航线、时间航行的。

第四十一条 违反本条例规定，游艇未在核准的游艇码头、泊位、停泊区域停泊的，由海事管理机构责令改正；拒不改正的，予以强行拖离，因拖离发生的费用由游艇所有人或者经营人承担。

第四十二条 违反本条例规定的其他行为，有关法律、法规已规定处罚条款的，按有关法律、法规的规定处罚。

第四十三条 当事人对海事管理机构的行政处罚、行政强制措施决定不服的，可以依法申请行政复议或提起行政诉讼。

第七部分 附则部分

该部分主要是明确该《条例》的解释机关及生效时间。

第四十四条 本条例由中华人民共和国海事局负责解释。

第四十五条 本条例自公布之日起实施。

论海难救助制度与水下文化遗产的保护

——兼评《保护水下文化遗产公约》的相关规定

赵亚娟 *

内容摘要: 海难救助制度是海上运输中一项古老的法律制度，旨在鼓励海上面临丧失危险的货物或船舶得到救助。不过，随着大量古老沉船沉物被发现，一些公司开始以“海难救助”的名义对这些沉船沉物进行打捞，并主张对打捞物享有请求权乃至所有权。考虑到这些沉没上百年的船舶和物品已经成为具有历史意义和考古价值的水下文化遗产，对其适用以经济价值为导向的海难救助制度是否妥当也成了考古学家和打捞者们一个争论不休的话题。2001 年《保护水下文化遗产公约》明确拒绝对水下文化遗产进行商业性打捞和开发，但也规定例外情形。《公约》的这些规定对中国的水下文化遗产保护和管理具有积极的借鉴意义。

关键词: 海难救助　水下文化遗产　就地保护原则

一、传统海难救助制度的有关理论

海难救助制度是海上运输中一项古老的法律制度。设立救助制度是出于现实的经济考虑，目的在于通过法律形式赋予海难救助人救助报酬请求权，从而鼓励在海上面临丧失危险的货物或船舶得到救助，阻止掠夺，进而保全货物或船舶所有人的利益。[1] 法国路易十四的《海事条例》中就设有对遇难物的救助给予奖励的规定。[2] 救助者如果在海上或其他可航行水域成功地使船舶、货物等脱离危险，使船舶或货物所有人的损失降至最低，即有权为自己的救助行为请求报酬。救助者

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*　赵亚娟，法学博士，华南理工大学法学院讲师。

1　张湘兰等主编：《海商法论》，武汉：武汉大学出版社 2001 年版，第 59 页；黄隆丰著：《海难救助之法律问题》，台北：联经出版事业公司 1986 年版，第 12~14 页；司玉琢主编：《海商法》，北京：法律出版社 2003 年版，第 260 页。

2　司玉琢主编：《海商法》，北京：法律出版社 2003 年版，第 271 页。

可以在报酬债权额范围内，对被救助船舶所有人的海产（包括船舶、属具、运费及其他海事债权）享有优先权，并在拍卖海产之后依法定顺序优先受偿。各国海事法规都广泛承认这种优先权。除了这种优先权之外，救助者在被救助者给付报酬之前，有权留置被救财产。[3] 在英美法系国家，因为船舶已经是拟制的法律主体，可以享受权利并承担义务，救助者可以因此向海事法院提起对物诉讼，主张救助报酬。[4]

（一）请求救助报酬的构成要件[5]

请求救助报酬的构成要件包括：被救物必须是法律所承认的；被救物处于真实的或不可避免的危险中；救助行为是自愿的行为；救助行为必须要有效果。[6]

1. 被救物必须是法律所承认的。即救助的标的是物，不包括对人的救助，且该救助标的是法律承认的物。[7]

2. 被救物处于真实的或不可避免的危险中。请求救助报酬的前提条件是，被救助的船舶或其他财产处于真实的不能自救的海上危险中。至于哪些危险构成海难救助上的危险，国际公约并没有统一规定，各国海商法一般也没有明确列出。

3. 救助行为是自愿的行为。自愿救助要件要求救助方或被救助方在发生救助法律关系时，其作为或不作为完全出于自愿，是双方的一种合意行为，不是基于履行职责或法律义务或其他合同义务。[8] 救助成功则有权获得报酬，不予救助也不承

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3 黄隆丰著：《海难救助之法律问题》，台北：联经出版事业公司 1986 年版，第 60~61 页。

4 黄隆丰著：《海难救助之法律问题》，台北：联经出版事业公司 1986 年版，第 80~81 页；See also John Reeder ed., *Brice on Maritime Law of Salvage*, London: Sweet and Maxwell, 2003, p. 319.

5 海难救助的构成要件和请求救助报酬的构成要件并不完全一致。比如，“救助要有效果”是构成救助报酬的要件之一，但没有效果仍然可以成立救助法律关系。参见司玉琢主编：《海商法》，北京：法律出版社 2003 年版，第 267 页。但也有学者没有对此加以区分。参见黄隆丰著：《海难救助之法律问题》，台北：联经出版事业公司 1986 年版，第 30~37 页。仅就水下文化遗产保护而言，分析请求救助报酬的条件更具有现实意义。

6 Nigel Messon, *Admiralty Jurisdiction and Practice*, 3rd ed., Bodmin: MPG Books, 2003, p. 45；司玉琢主编：《海商法》，北京：法律出版社 2003 年版，第 263~267 页。

7 对人命救助，英国法律承认有报酬请求权，但国际公约、中国《海商法》、日本法、德国商法等原则上不承认有报酬请求权，除非救财产的同时又救了人命。司玉琢主编：《海商法》，北京：法律出版社 2003 年版，第 263 页。

8 比如，发生碰撞时船舶之间的互相救助义务；救助人的过失行为引起的必要救助；正常履行拖航合同或其他海上服务合同而引起的救助；引水员、救生员、消防员等在职责范围内的救助。张湘兰等主编：《海商法论》，武汉：武汉大学出版社 2001 年，第 276 页。

担法律责任。救助方施救时，未被明确合理地拒绝，才能产生救助报酬请求权。[9] 如果被救助方没有做出明确而合理的禁止救助意思表示，可以推定为默示自愿，尽管没有签订救助合同，如果救助人救助成功亦同样有权请求报酬，此时构成了纯救助法律关系。[10] 救助活动通常根据各种格式合同进行，最常见的救助是以“无效果，无报酬”为原则进行的合同救助。

4. 救助行为必须要有效果。“无效果，无报酬”是国际公约和各国海商法普遍接受的一项原则。有救助效果要求救助者使遇险的船舶或其他财产全部或部分获救。

（二）确定救助报酬时应当考虑的因素

确定救助报酬可谓是海难救助制度中最复杂的问题，因为救助报酬并非仅限于救助者劳务的实际价值，除了救助者所付出的劳务、支出的费用外，还需考虑多种因素。[11] 如果当事人已经对救助报酬作了约定，自然可以减少或免除很多争议；反之，则势必会引发诸多问题。美国法院在 1869 年布莱克沃尔轮案中，曾就当事人未约定救助报酬时如何估算救助报酬提出了如下斟酌要素：（1）救助人在施救时所耗费的努力；（2）救助人在提供劳务及保全财物时所呈现的敏捷、技术及努力；（3）救助人在施救时所使用之财物的价值及其所遭遇的危险；（4）救助人在急迫海难中保全财物时面临的危险；（5）被救财物的价值；和（6）被救财物的危险程度。[12] 该案所确立的这些法则成为此后法院审理救助案件时经常引用的依据。

英国法院估算救助报酬的考量因素实际上与美国相去不远。根据英国 19 世纪判例，也可以列出下列要素：(1) 救助人冒着自己生命的危险，在恶劣气候下拯救遇难财物的英勇程度；(2) 遇难财物被救时的危难程度；(3）救助人在施救时耗费的努力、技术及时间的多寡；和（4）被救助财物的价值。[13]

很多国家的海商法和国际社会就救助问题达成的国际公约，基本上都采纳了这些从英美判例中所累积下来的确定救助报酬的种种考量因素。[14] 例如，1989 年《国际救助公约》列出的评定报酬标准包括：（a）获救的船舶和其他财产的价值；(b) 救助人在防止或减轻对环境损害方面的技能和努力；（c）救助人获得成功的程度；（d）危险的性质和程度；（e）救助人在救助船舶、其他财产及人命方面的技能和努力；（f）救助人所花的时间、费用及遭受的损失；（g）救助人或其设备的责任

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9 司玉琢主编：《海商法》，北京：法律出版社 2003 年版，第 265 页。
10 司玉琢主编：《海商法》，北京：法律出版社 2003 年版，第 260~266 页。
11 黄隆丰著：《海难救助之法律问题》，台北：联经出版事业公司 1986 年版．第 89 页。
12 黄隆丰著：《海难救助之法律问题》，台北：联经出版事业公司 1986 年版，第 90 页。
13 黄隆丰著：《海难救助之法律问题》，台北：联经出版事业公司 1986 年版，第 92 页。
14 黄隆丰著：《海难救助之法律问题》，台北：联经出版事业公司 1986 年版，第 91 页。

风险及其他风险；（h）提供服务的及时性；（i）用于救助作业的船舶及其他设备的可用性及使用情况；（j）救助设备的备用状况、效能和设备的价值。[15]

由此，根据传统的海难救助制度，非政府船舶和船上的财产不论其沉没年代是否久远，理论上当然是法律承认的救助对象。救助者如果能成功地将其打捞出水，即可向法院主张一笔救助报酬。

二、海难救助制度的新变化

随着科学技术的日新月异和人们对海洋勘探力度的加强，越来越多沉没上百年的沉船沉物被发现。由于国内和国际层面上相关法律制度的空缺，在部分国家和地区，特别是英美国家，一些救助公司开始以“海难救助”的名义打捞这些古旧沉船沉物，并请求法庭按照与所有人或者保险人之间的救助合同给予救助报酬或分配打捞出水的物品；救助法的适用对象也相应地扩大到这类古旧沉船沉物。不过，这时的救助法已经出现了某些新变化，救助法理论和发现物法理论悄然融合起来，这在美国的判例中表现得更为明显。

发现物法是一个普通法系概念，它反映了一个古老的法律理念：“谁发现，谁占有。”[16] 传统上，发现物法适用于从未被任何人所有的财产；不过，近来一些法院（特别是美国法院）的判例开始将这个概念扩大用于被原所有人抛弃所有权的沉船和沉物。

抛弃是一个来自于罗马法的古老概念，即权利人自愿放弃对某一财产的权利。[17] 判断是否构成抛弃应当依据财产的性质和有关各方的行为而定。就沉船沉物而言，构成抛弃可能是基于所有者（包括原所有人和支付了赔偿金的保险人）明确表示抛弃所有权，也可能基于默示表示。因此，是否构成抛弃关键在于确定所

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15 1989 年《国际救助公约》第 13 条第 1 款。

16 Eke Boesten, *Archaeological and /or Historic Valuable Shipwrecks in International Waters*, The Hague: T. M. C. Asser Press, 2002, p. 108.

17 桑德罗 • 斯契巴尼著，范怀俊译：《物与物权》，北京：中国政法大学出版社 1999 年版，第 59~61 页。较早对沉船沉物采用抛弃理论的是 1987 年美国《抛弃沉船法》，该法旨在保护位于美国领海海床上和掩埋在海床中、且被认定为具有历史价值的被抛弃的沉船。依照该法，美国国会重申对这些沉船享有所有权，并同时将这些沉船的所有权自动转移给各州。对这类沉船不得适用救助法和发现物法，这就阻止了打捞公司以“海难救助”为名打捞美国领海中的历史性沉船。有关该法的立法宗旨和效果可见：Anne G. Giesecks, The Abandoned Shipwreck Act Through the Eyes of Its Drafter, *Journal of Maritime Law and Commerce*, Vol. 30, 1999, p. 167; Ole Varmer and Caroline M. Blanco, United States of America, in Sarah Dromgoole ed., *Legal Protection of the Underwater Cultural Heritage: National and International Perspectives*, The Hague: Kluwer Law International, 1999, p. 207.

有人的意图，在默示情形下则应当根据案件具体情况加以推断。[18]

如果认定构成了抛弃，沉船的发现人应当向法院证明他实际占有、控制财产——他知道沉船位置所在；他有能力打捞；且他目前正在进行打捞。[19] 通常，捞救沉船沉物者在发现并能将部分物品打捞出水后，会向法院提起对物诉讼，证明财产已经被原所有人抛弃，并要求法院根据救助法发布禁令，保护他作为第一个救助者的权利。由此，如果救助者表明有意获得其打捞出的财产并已经实际占有该财产，且能够证明或合理推定原所有人已经放弃了其所有权时，法院即可依据发现物法授予救助者所有权，而不是判决给予救助者一笔救助报酬。[20] 既然适用发现物法要求救助者实际占有打捞出的财产，救助者显然会秘密进行捞救作业，一来可以避免潜在的所有权主张，二来也可以防止包括其他救助者在内的第三人的干预。[21] 另外，因为在确定救助报酬时要考虑获救财产的价值，但要准确确定打捞出水的人工制品的价值还存在相当难度，而一旦取得捞救物的所有权，既可以对抗其他人的所有权主张，又可以绕开确定捞救物的价值这个问题，所以，救助者都积

18 比如在 Zych v. The Lady Elgin 一案中，法院指出："……抛弃是某人自愿放弃其财产的所有权……既可以明示行为做出抛弃，也可以默示行为做出：将财产留在或扔在某处而不希望寻回且不打算让其回归……抛弃必须是有放弃所有权之积极意图的自愿行为，不是出于被迫或外在压力……为了表明抛弃，一方必须证明（1）有意图抛弃；和（2）有将该意图付诸实践的外在行为……可以从一切相关因素和情形推断出抛弃……抛弃之认定必须有强大而令人信服的证据的支持……但可以，且常常必须，根据案件情形加以判定。"有关该案的评价可见：Paul N. Keller, Salvor- Sovereign Relations: How the State of Illinois Destroyed the Lady Elgin, *Journal of Maritime Law and Commerce*, Vol. 30, 1999, p. 245. 在 Columbus-America Discovery Group v. Atlantic Mutual Insurance Company 一案中，法院指出："……（所有人对其财产的）抛弃必须经由明确而令人信服的证据（比如所有人明确宣布抛弃其所有权）予以证明。如果财产包括丧失已久的古旧沉船，法院可以推断已被抛弃。但是，如果前所有人出现并主张其所有人权益，则此一推断不妥，此时，必须有强大而又令人信服的证据证明已被抛弃。" See Columbus- America Discovery Group v. Atlantic Mutual Insurance Company, (1992) 974 F. 2d. 450 (US Court of Appeals, 4th Circuit). 但实践中各方对何为"抛弃"的理解并不统一，有关案例之间的差异也颇大。

19 Eke Boesten, *Archaeological and/or Historic Valuable Shipwrecks in International Waters*, The Hague: T. M. C. Asser Press, 2002, p. 112.

20 John Reeder ed., Brice on Maritime Law of Salvage, London: Sweet and Maxwell, 2003, pp. 314~317.

21 Eke Boesten, *Archaeological and/or Historic Valuable Shipwrecks in International Waters*, The Hague: T. M. C. Asser Press, 2002, p. 109.

极主张适用发现物法。[22]

三、对水下文化遗产是否适用海难救助制度之争

虽然一些国家和地区的法院对已沉没几百年的沉船沉物适用了海难救助制度，但问题在于，沉没在水下几百年的船舶和货物是否有别于普通的沉船沉物？对二者是否应当适用同样的法律制度？沉没在水下几百年的船舶和货物也像新沉没的船舶和货物那样“处于海上危险之中”、是法律承认的当然的救助对象吗？“无效果，无报酬”原则有利于这类沉船沉物的管理和保护吗？

（一）沉没几百年的沉船沉物是否有别于普通的沉船沉物，对二者是否应当适用同样的法律制度？

在历史学家和考古学家看来，沉没百年以上的船舶和物品已经不再是普通的沉船沉物，而属于“水下文化遗产”。顾名思义，“水下文化遗产”就是位于水下的文化遗产。由于各国对“文化遗产”的理解并不完全相同，对“水下文化遗产”的界定也并不一致。[23] 据 2001 年《保护水下文化遗产公约》对“水下文化遗产”的定义，水下文化遗产是指至少 100 年来，周期性地或连续地，部分或全部位于水下的具有文化、历史或考古价值的所有人类生存的遗迹。公约列举的水下文化遗产包括遗址、建筑、房屋、人工制品、人类遗骸、船舶、飞行器、其他运输工具或其任何部分、所载货物或其他物品，及其有考古价值的环境和自然环境以及具有史前意义的物品等。[24]

不言而喻，和普通的沉船沉物相比，水下文化遗产具有重要的考古、历史和文化价值。当然也应当指出，一些属于水下文化遗产的物品按照经济学的眼光看来可以被认为是商品，具有一定的经济价值，如果不把遗产打捞出水显然无法实现这种经济价值。由此产生的问题就是：如何看待水下文化遗产的考古、历史、文化价值和经济价值？如何保护遗产？

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22 Eke Boesten, *Archaeological and/or Historic Valuable Shipwrecks in International Waters*, The Hague: T. M. C. Asser Press, 2002, p. 109．但法院可能态度相反。在 Columbus-America Discovery Group v. Atlantic Mutual Insurance Company 一案中，法院指出：“……如果沉船或其货物由原所有人以外的第三人从海底打捞出水，法院更喜欢适用救助法而不是发现物法。但是，如果认定前所有人已经抛弃了他的财产，则应当适用发现物法……” See Columbus-America Discovery Group v. Atlantic Mutual Insurance Company, (1992) 974 F. 2d. 450 (US Court of Appeals, 4th Circuit).

23 Craig J. S, Forrest, Defining “Underwater Cultural Heritage”, *The International Journal of Nautical Archaeology*, Vol. 31, 2002, p. 1.

24 2001 年《保护水下文化遗产公约》第 1 条。

即使是考古学家之间也有分歧。最纯粹的考古学家们认为，水下文化遗产的考古价值和经济价值是不兼容的，保护遗产的目的就是为了实现遗产的考古价值。[25] 就地保护水下文化遗产也因此成为他们最为推崇的保护方式。[26] 很多考古团体的政策都反对对历史性沉船进行商业开发，并阻止其成员参与商业打捞作业。[27] 比如，台湾内部曾为是否有必要打捞澎湖水域中的“将军一号”沉船，发生了激烈辩论，许多考古学者甚至拒绝协助中国台湾历史博物馆打捞这艘沉船。[28]《水下和海洋考古百科全书》在 Nuestra Senora de Atocha 词条的“编者按”中指出：“本书之所以收录这一遗址是因为它家喻户晓，大众传媒和报界都作了广泛报道。但是，像这种遗址历来都是商业导向性活动的关注焦点，而商业导向活动导致向私人销售打捞出水的人工制品、向私人投资者转让人工制品，或者在政府和私人救助者之间分享人工制品。虽然发掘该遗址时有一位考古学家在场，虽然打捞出了一些考古材料，但却人为分散了本应作为一个整体予以收藏的人工制品，而这些人工制品是提供遗址信息的主要材料。这就损害了遗址长期提供有价值信息的潜力。另外，销售从沉船上获得的人工制品还支持一个业已被证明不利于历史保护和研究的想法：考古历史和古物是可以在公开市场上买卖的商品。将这个遗址列入本百科全书并不意味着认可或原谅这种商业性导向活动。”[29]

另外一些学者则认为，虽然水下文化遗产所具有的这些价值彼此并不完全协调一致，但也不应当为了保全某种价值而完全忽视其他价值，比如为了就地保护水下文化遗产的考古等价值而否认商业打捞、拒绝考虑其经济价值，而是应当彼

25 Carig J. Forrest, Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?, *Journal of Maritime Law and Commerce*, Vol. 34, 2003, p. 317.

26 有关就地保护原则的讨论可见：赵亚娟、张亮：《从“南海一号”事件看我国水下文化遗产保护制度的完善》，载于《法学》2007 年第 1 期。

27 See Ricardo J. Elia, The Ethics of Collaboration: Archaeologists and the Wydah Project, *Historical Archaeology*, Vol. 26, No. 4, 1992, p. 105. 转引自 Carig J. Forrest, Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?, Journal of Maritime Law and Commerce, Vol. 34, 2003, p. 317.

28 不论是中国大陆还是中国台湾有关水下文物保护的立法，都没有引入就地保护原则，这不能不说是遗憾。傅崐成：《联合国教科文组织 2001 年〈保护水下文化遗产公约〉评析》，载于傅崐成著：《海洋法专题研究》，厦门：厦门大学出版社 2004 年版，第 20 页。

29 James P. Delgado, *Encyclopaedia of Underwater and Maritime Archaeology*, London: The British Museum Press, 1997, p. 299. Nuestra Senora de Atocha 号是一艘西班牙船舶，1622 年因飓风沉没于佛罗里达浅滩，1985 年被宝藏打捞者有限公司发现，随后被打捞出水。

此尽量协调。[30] 虽然水下文化遗产具有公共物品的属性，但试图将其提升到超越商品的高度，就会导致对该资源有兴趣的私人使用者和谋求进行公共利用者之间的冲突。目前，国际艺术品和古物贸易十分兴旺，交易记录不时会因为独特艺术品或古物的出现而被刷新；而不管是公共机构还是私人所持有的单件文化遗产，都难免受到经济估价。由此，一些学者从经济学视角出发，呼吁将文化遗产的私人用途和公共用途相结合。比如波特•霍格兰就认为，政府可以和私人打捞公司合作，可以约定分成比例，并认为销售重复品具有诸多好处。[31]

笔者认为，应当承认，水下文化遗产具有的考古价值、文化价值、历史价值和经济价值之间并不完全协调一致，但理论上具有协调的可能性。如果单纯通过将遗产的法律地位提升到超越商品的高度来消除市场，从而消除其经济价值、达到保护遗产目的，并不必然能完全消除商业性打捞活动，反而很可能会导致黑市的形成和壮大。另外，很多保护文化遗产（财产）的国际文件显然必须协调种种相互竞争的利益，既要为文化财产提供一些保护措施，同时也要尊重其他利益考量，比如保护商业（国际艺术品贸易）、尊重军事利益、维持经济发展等。比如，1968 年教科文组织《关于保护受到公共或私人工程危害的文化财产的建议》的主题就是，协调经济发展和文化财产保护之间的冲突。虽然该建议寻求在这些互相竞争的利益之间找到一个平衡点，但建议的规定表明，只在例外情况下优先考虑文化遗产利益。[32] 同样，1954 年《关于发生武装冲突时保护文化财产的公约》也承认军事必要高于一切。[33] 所以，有时候文化遗产保护得让位于对其他利益或价值的考量，现有的国际文件并没有强调文化遗产的考古、文化、科学或教育价值是高于一切的考量因素，也没有明确禁止对文化遗产的经济利用。虽然如此，但要在保全水下文化遗产的考古、历史和文化价值，与实现水下文化遗产潜在的经济价值之间，找出一个平衡点，并不容易。实践中，为了单纯实现水下文化遗产的经济价值而破坏其考古、历史和文化价值的事例，不胜枚举。在具有丰富文化资源的发展中国家，因为面临经济发展的需要，文化遗产受到的破坏可能更加严重。如何抉择也是各国，特别是发展中国家，所面临的一个难题。在尊重水下文化遗产的考古价值、文化价值和历史价值的原则之下，个别例外情形下允许考虑实现其经济价值，似乎更为合理。

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30 Carig J. Forrest, Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?, *Journal of Maritime Law and Commerce*, Vol. 34, 2003, p. 317.

31 Porter Hoagland, China, in Sarah Dromgoole ed., *Legal Protection of the Underwater Cultural Heritage: National and International Perspectives*, The Hague: Kluwer Law International, 1999, pp. 32~34.

32 比如 1968 年《关于保护受到公共或私人工程危害的文化财产的建议》第 3~12 条。

33 1954 年《关于发生武装冲突时保护文化财产的公约》第 4 条。

（二）如果要打捞水下文化遗产，是否应适用海难救助制度？

就地保护水下文化遗产固然是很多考古学家和历史学家追求的理想，但也得承认：很多情况下会需要将水下文化遗产打捞出水，此时是否应当适用救助制度？考古和历史学界以及打捞界处于不同的考虑作出了迥然不同的回答，一方强烈反对适用救助法，另一方则热烈支持适用适用救助法。

1. 考虑到救助法的目的、救助者的手段和实现救助费用的方式，更多考古学家和历史学家反对适用救助法，他们认为：

首先，救助法的宗旨和水下文化遗产保护的目标背道而驰。很多考古学家认为，设立救助制度是出于经济上的考虑，目的是鼓励救助者尽快使处于危险状态的船舶和货物等脱离危险状态、返回商业流，为此，不论采用何种手段，只要救助者使商业利益最大化（比如保全了最高价值的商品），即使船舶或货物在所有可以救助的物品得到救助之前就完全损失了，船舶或货物所有人的损失也已经减为最小，救助人仍然可以请求报酬。[34] 而水下文化遗产发掘是一种令人遗憾的科学——发掘的同时也就是对遗址的破坏，为此，必须进行细致耐心的测量、拍照、绘图、记录等等繁琐的工作，以便最大程度地从遗址中获取考古信息。救助法的目的和水下文化遗产保护完全是背道而驰。如果对水下文化遗产适用救助法，将会导致救助者采用不符合考古发掘的方法首先打捞具有最高经济价值的人工制品，极有可能破坏了其他具有文化价值的物品、丢失了考古信息：有关这方面的例子不胜枚举。[35] 而且，很多考古发掘物品都不可能具有经济价值，更何况绝大多数情况下，按照考古标准进行发掘本身就意味着即使卖光发掘物品也不会盈利。[36] 显然，健康的救助产业能确保尽可能多地救助漂流或搁浅的船舶和面临沉没危险的船舶，有利于国际社会。救助法应当继续适用于这些情形，但不应适用于沉没百年以上的水下文化遗产。

其次，即使假定能够适用传统救助法，对水下文化遗产的打捞作业也不能完全套用救助的构成要件。在他们看来：(1) 这些沉没在海床上的水下文化遗产不是“处于危险之中”。反对适用救助法者倾向于对“处于危险之中”作狭义解释，认为沉没在海床上几百年的沉船并不是“处于危险之中”。事实上，考古学家们指出，船舶和货物在沉没一段时间之后，就会达到和周围环境的一种平衡状态。在移出水下环境之前，这些物品进一步受侵蚀、坏变的速度相对缓慢；而一旦打捞

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34 Carig J. Forrest, Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?, *Journal of Maritime Law and Commerce*, Vol. 34, 2003, p. 317.

35 石丁：《文物大盗在我国海域活动，有人在捞我海底宝藏》，载于《环球时报》2004 年 3 月 1 日第 16 版。

36 Patrick J. O’keefe, Protecting the Underwater Cultural Heritage: The International Law Association Draft Convention, *Marine Policy*, Vol. 20, 1996, p. 303.

出水，新一轮的侵蚀过程很快就开始了，物品很容易遭受坏变乃至彻底灭失。因此，除非一出水就由专业保护人员进行相对复杂的技术处理，否则，将这些遗存打捞出水不仅没有保全它们，反倒几乎肯定要失去它们。[37] 所以，适用救助法会鼓励救助者出于商业目的将这些宝贵的水下遗存移出海床，将加大对它们的破坏和损害。[38]

(2) 不能对水下文化遗产进行自愿救助。为最大程度地避免损失，救助法鼓励救助者在紧急危险情况下可以不经所有者的事先同意即进行救助。[39] 但对于沉没在海底百年以上的船舶或货物，很难说它们仍然处于紧急危险状态。如果适用救助法，则可能鼓励救助者不经所有者的事先同意即进行救助，可能违背了所有者希望其留在原地或只进行非侵入性调查的意愿，干预了物主的所有权。

(3) 传统救助制度的某些理念和计算救助报酬的方式，也不利于水下文化遗产的保护和保全。比如，救助法会鼓励救助者迅速行动打捞水下文化遗产，因为救助者为了得到法院的禁令以便有效阻止他人进入遗址，必须证明他已经占有了该遗址，而证明占有遗址的最简便方法是提供一件已经从遗址中打捞出水的物品。[40] 由此可见，救助法并不鼓励在对遗址造成物理扰乱之前进行调查，而这正是获取有价值的考古信息的方法。救助者可能在没有完全实现遗址的考古价值之前就进行发掘，可能会导致某些重要考古信息永久性丢失。但事实上有必要鼓励发现者在进行发掘之前先向主管机构报告其发现。这样一来，专业的考古学家就可以判

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37 Preliminary Study on the Advisability of Preparing An International Instrument for the Protection of the Underwater Cultural Heritage, UNESCO General Conference, Twenty-eighth Session, 4 October 1995, para. 31. 当然，田野考古也存在同样问题。参见周双林：《谈谈考古发掘中文物的现场保护》，载于《文物世界》1999 年第 4 期。

38 但各国有关水下文化遗产的实践不完全一致。美国法院的做法似乎更倾向于做出广义的解释，认为海洋危险包括但不限于船舶航行中遭受的暴风雨、火灾或海盗威胁，即使船舶在沉没以后，仍然受环境影响面临丧失或遭受劫掠的危险，相关的判例很多。See Platoro Ltd., Inc. v. The Unidentified Remains of a Vessel, 614 F. 2d 1051, 1055-56, 1981 AMC 1087, 1102-03 (5th Cir. 1980); Cobb Coin Co. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 549 F. Supp. 540 (S. D. Fla. 1982). 但也有判例认为几百年都没有被侵扰的沉船不是处在危险之中。See Archaeology Ltd. v. Subacqueous Exploration & the Unidentified, Wrecked and Abandoned Vessels, 577 F. Supp. 597,611, 1983 AMC 913, 932 (D. Md. 1983). 这也表明，在救助法没有做出明确规定的情况下，是否对水下文化遗产适用救助法很大程度上取决于法院的态度和一国的政策取向。

39 也即“纯救助”，指船舶遇难后，未曾请求外来援助，救助方自行救助，并在救助成功时有权请求报酬。如果遇险船舶不同意救助，必须明确表示拒绝。司玉琢主编：《海商法》，北京：法律出版社 2003 年版，第 261 页。

40 Eke Boesten, *Archaeological and/or Historic Valuable Shipwrecks in International Waters*, The Hague: T. M. C. Asser Press, 2002, p. 113.

断遗址的考古重要性。给予报告者物质奖励或其他奖励（比如给予嘉奖、允许有兴趣者参加遗址的调查和发掘工作等）都可以很好地实现这个目的。支持美国和英国海事法院给予救助者慷慨报酬的原理之一就是，要鼓励向主管部门报告重要的考古发现。[41] 虽然救助法一般对报告其发现和打捞出的人工制品的个人给与财政奖励，但如果没有打捞出人工制品则不会给予奖励。换言之，因为救助法要求发现者有实际占有行为，如果某人想要成为救助法上的救助者并要求适用救助法或发现物法，仅仅主张发现一处沉船遗址并有意打捞该遗址还不够，还必须打捞出一些人工制品来支持他的主张。[42]

另外，在救助报酬的计算上，传统救助法主张的“无效果，无报酬”原则会鼓励救助者不择手段地首先打捞具有最高商业价值的物品，而不会考虑遗址的其他方面，往往会严重破坏遗址的考古价值，这方面的例子比比皆是。[43] 而且，法律也没有明确指出保全遗址的考古价值是计算救助报酬的考量因素之一；即使将 1989 年《国际救助公约》第 13 条 1 款所列出的考量因素中的（e）项（“救助人在救助船舶、其他财产及人命方面的技能和努力”）和（f）项（“救助人所花的时间、费用及遭受的损失”）解释为应当考虑救助者在保全遗址考古价值方面的努力，保全遗址的考古价值充其量算是计算救助报酬时的考量因素之一，不可能激励救助者尊重水下遗址的考古价值并为保全该价值而倍加努力。

此外，在实现救助报酬时，很可能得出售打捞出水的物品，几乎必然会导致发掘品无可挽回地失散，阻碍进一步的考古研究。而且，在某些情况下，救助者会取得其打捞出水的物品的所有权而后出售谋取利润，而不是获得一笔救助报酬，这也必然会导致出水物品不可挽回地失散、阻碍今后的研究。[44] 这些因素都不利于水下文化遗产的保护和保全。

质言之，传统救助制度鼓励救助者在对水下文化遗产开展预先考古调查之前，就进行不成熟的救助作业；鼓励救助者采用迅速却不科学的发掘方法将它们打捞出水；还鼓励救助者出售打捞出的物品，而不是将发掘品作为一个整体保存在公共机构之中，以方便后来的研究：这种法律规则如果适用于具有历史和考古价值的

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41 从历史性沉船上打捞出人工制品的救助报酬显得极其丰厚：在英国是该物品的净销售所得，在美国也常常是该物品价值的 75％以上。See Carig J. Forrest, Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?, *Journal of Maritime Law and Commerce*, Vol. 34, 2003, p. 332.

42 Norman Palmer and Ewan Mckendrick, *Interests in Goods*, 2nd Edition, London: Lloyd’s of London Press, 1998, pp. 189~194.

43 石丁：《文物大盗在我国海域活动，有人在捞我海底宝藏》，载于《环球时报》2004 年 3 月 1 日第 16 版。

44 Guido Carducci, The Crucial Compromise on Salvage Law and the Law of Finds, in Roberta Garabello and Tuillo Scovazzi eds., *The Protection of the Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention*, Leiden: Brill Academic Publishers, 2003, pp. 198~200.

文化遗产，只会导致对遗产的破坏，与保护、保全遗产的目标背道而驰。

再次，可能在一些国家出现了将传统救助法和尊重水下文化遗产考古价值相结合的新趋势，但这并不意味着就能充分保护和保全这些宝贵遗产。虽然美国海事法院的某些判例表明，法院已经开始意识到水下文化遗产的考古价值，但这种意识仅仅是法官在决定救助报酬时的考量因素。[45] 更何况在大多数情况下，法院得根据救助者提供的证据来确定报酬，逻辑上而言，救助者不大可能提供对自己不利的证据。[46] 即使认为一些国家（比如美国）的法官可以根据情况拒绝其认为不成熟的救助申请，或要求救助者遵守有关的考古规则，也并不是说法官判断的依据或者救助者遵守的标准就符合海洋考古标准。[47] 这样一来，仍然会导致对考古信息的破坏，只是破坏程度的轻重而已。所以，对水下文化遗产适用改良的救助法仍然会鼓励救助者的打捞行为。如果救助法不把保全考古价值纳入救助成功的标准之一，就无法保全水下文化遗产的历史和考古价值。

最后，具体到实践中，包括加拿大、塞浦路斯、丹麦、伊朗、墨西哥、摩洛哥、挪威、葡萄牙、突尼斯等在内的很多国家的国内立法，都排除对水下文化遗产适用救助法。[48] 虽然某些国家仍然允许对水下文化遗产适用救助法，但几乎所有国家都排除对其军舰残骸进行救助作业。[49]

2. 很多商业性打捞公司则主张应当对水下文化遗产适用救助制度。它们认也提出了很多理由。

首先，有关海难救助的国际公约并不排斥对水下文化遗产适用救助法。1989 年《国际救助公约》规定的救助对象是“可航水域或其他任何水域中处于危险中的船舶或任何其他财产”，既然公约对“船舶”和“财产”作的定义没有限定它们的

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45 Carig J. Forrest, Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?, *Journal of Maritime Law and Commerce*, Vol. 34, 2003, p. 334.

46 Patrick J. O’keefe, Protecting the Underwater Cultural Heritage: The International Law Association Draft Convention, *Marine Policy*, Vol. 20, 1996, p. 304.

47 David J. Bederman, The UNESCO Draft Convention on Underwater Cultural Heritage: A Critique and Counter-Proposal, *Journal of Maritime Law and Commerce*, Vol. 30, 1999, No. 345.

48 James A. R. Nafziger, Historic Salvage Law Revisited, *Ocean Development and International Law*, Vol. 31, 2000, p. 83. 比如美国 1987 年《抛弃沉船法》的立法理由就是，在沉没几百年后，船舶的价值已经从交通工具变成了“时空密封舱”，能使我们知道自己的过去，它们已经不再是决定设立联邦海事法院的那些人们当初所设想的那种船舶。See Anne G. Giesecks, The Abandoned Shipwreck Act Through the Eyes of ItsDrafter, *Journal of Maritime Law and Commerce*, Vol. 30, 1999, p. 171.

49 Preliminary Study on the Advisability of Preparing an International Instrument for the Protection of the Underwater Cultural Heritage, UNESCO General Conference, Twenty-eighth Session, 4 October 1995，para. 33.

年岁，[50] 就应当包括沉没的船舶和货物而不论其年岁如何、历史或考古价值如何。[51] 而且，依照《国际救助公约》第 30 条（d）项的规定，如果“有关财产为位于海床上的具有史前的、考古的或历史价值的海上文化财产”，任何国家都可以在签字、批准、接受、核准或加入时做出保留。因此，该《公约》原则上对水下文化遗产适用救助法，除非有关国家做出保留。同时，在该《公约》列出的有关评估救助报酬时应考虑的各项标准中，也没有特别强调救助者在保护水下文化遗产方面的努力。[52]

其次，1982 年《联合国海洋法公约》也明确规定不影响救助法的适用。[53] 依照《联合国海洋法公约》第 303 条，缔约国有义务保护在海洋发现的考古或历史文物，并应当为这一目的进行合作，但该条第 3 款又规定：“本条的任何规定不影响……打捞法或其他海事法规则……”[54] 因此，《海洋法公约》试图对“在海洋发现的考古或历史文物”保留适用救助法。

再次，实践中，一些海洋大国，比如英国和美国，仍然对水下文化遗产适用救助法。赞成对水下文化遗产适用救助制度者倾向于认为水下文化遗产仍然“处于危险之中”。比如在英国法上，在海底发现的船舶（包括远古时代的沉船）或货物仍然被认为是处于被固定状态，这是救助法上久已确立的一类危险：除非被发现并

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50 1989 年《国际救助公约》第 1 条。“船舶”系指任何船只、艇筏或任何能够航行的构造物；“财产”系指非永久性和非有意地依附于岸线的任何财产，包括有风险的运费。

51 Brice Q. C. Geoffrey, Salvage and the Underwater Cultural Heritage, *Marine Policy*, Vol. 20, 1996, p. 339.

52 1989 年《国际救助公约》第 13 条列出的评定报酬标准包括：(a) 获救的船舶和其他财产的价值；(b) 救助人在防止或减轻对环境损害方面的技能和努力；（c）救助人获得成功的程度；(d) 危险的性质和程度；(e) 救助人在救助船舶、其他财产及人命方面的技能和努力；(f) 救助人所花的时间、费用及遭受的损失；(g) 救助人或其设备的责任风险及其他风险；（h）提供服务的及时性；（i）用于救助作业的船舶及其他设备的可用性及使用情况；(j) 救助设备的备用状况、效能和设备的价值。

53 显然，从 1982 年《联合国海洋法公约》到 1989 年《国际救助公约》，再到 2001 年《保护水下文化遗产公约》，国际社会对水下文化遗产的保护日渐加强。关于 3 个公约之间的关系，详见 When the Salvaged Property Is an UCH – Relationship of Three Conventions, in Kuen-chen FU, *Essays on International Law of the Sea*, Xiamen: Xiamen University Press, 2004, pp. 47~56．傅崐成：《海上救助法与水下文化遗产打捞的法律架构——谈三个公约之间的关系》，载于《法令月刊》2005 年第 56 卷第 1 期。

54 1982 年《联合国海洋法公约》第 303 条第 1 款和第 3 款。第 3 款的英文原文为：Nothing in this article affects ... the law of salvage or other rules of admiralty... 中文版翻译为“打捞法”，似乎“救助法”更为稳妥。

打捞出水，这些沉船沉不具有任何商业价值。[55] 美国法上类似判例也很多。[56]

最后，即使认为适用传统的救助法不能很好地保护水下文化遗产，但救助法也出现了一些有利于遗产保护的新发展动态。赞成对水下文化遗产适用救助制度者认为，救助法在性质上属于私法，不像公法那么严格，应当可以根据时代的发展适应新形势、解决新问题，比如考虑到保全水下文化遗产的考古价值。论者指出，不管历史起源如何，救助法已经在逐渐发展以便满足当今时代的要求——保护沉船的历史和考古价值，至少在美国海事法院已经出现了将水下文化遗产的考古价值和传统的救助法相结合的趋势：法院在授予商业打捞团体对某一历史性沉船享有排他救助权之前，会要求其遵守有关沉船遗址的考古规则，以便于今后对沉船和所载物的研究，这已经成了美国法院一致的做法；一些地区法院就曾以救助公司没有试图保全遗址的考古完整性为理由，拒绝它们的打捞申请。[57] 另外，美国法院已经明确表示，救助者是否忠实于考古价值是授予救助报酬时的考量因素之一。如果救助者没有采取适当预防措施，保护和保全具有历史或考古价值的人工制品，法院至少可以限制或拒绝给予救助报酬。[58] 简言之，无论是最初救助者的选择和指定，还是最后救助报酬的给予，美国法院的法官都有广泛的自由裁量权。美国的联邦法院已经行使了这个自由裁量权，以便确保救助者在救助过程中保全

55 Brice Q. C. Geoffrey, Salvage and the Underwater Cultural Heritage, *Marine Policy*, Vol. 20, 1996, p. 339; John Reeder ed., *Brice on Maritime Law of Salvage*, London: Sweet and Maxwell, 2003, p. 268; Nigel Messon, *Admiralty Jurisdiction and Practice*, 3rd Edition, Bodmin: MPG Books, 2003, p. 45.

56 美国联邦海事法院的判例并不完全一致。法官在个别案件中尊重了有关专家的建议和证据，认定沉船没有处在海洋危险之中，并判决就地保护沉船；但大多数案件中法官认为沉船仍然处于危险之中，有关考古和科学的专家意见与救助法的目的并无关系，仍应适用救助法。See Ole Varmer, The Case Against the “Salvage” of the Cultural Heritage, *Journal of Maritime Law and Commerce*, Vol. 30, 1999, p. 286.

57 David J. Bederman, The UNESCO Draft Convention on Underwater Cultural Heritage: A Critique and Counter-Proposal, *Journal of Maritime Law and Commerce*, Vol. 30, 1999, p. 344．比如 MDM Salvage Inc. v. Unidendified, Wrecked and Abandoned Sailing Vessel 一案，参见傅崐成：《联合国教科文组织 2001 年〈保护水下文化遗产公约〉评析》，载傅崐成著：《海洋法专题研究》，厦门：厦门大学出版社 2004 年版，第 16 页；傅崐成：《海上救助法与水下文化遗产打捞的法律架构——谈三个公约之间的关系》，载于《法令月刊》2005 年第 1 期。

58 James A. R. Nafziger, The Titanic Revisited, *Journal of Maritime Law and Commerce*, Vol. 30, 1999, p. 324.

了古旧沉船的历史价值。[59]

对于支持就水下文化遗产打捞适用救助法者提出的这些理由，笔者不能完全同意。其一，国际社会虽然已经有了 1989 年《国际救助公约》这一基本上属于私法领域内的公约，但并不排斥另外缔结一项公法性质的《保护水下文化遗产公约》、并排除适用救助法。[60] 其二，1982 年《联合国海洋法公约》第 303 条第 3 款虽然规定不影响救助法，但该条第 4 款同时还规定，“不妨害关于保护考古和历史性文物的其他国际协定和国际法规则”。这也表明，未来有关水下文化遗产保护的公约（比如 2001 年《保护水下文化遗产公约》）完全可以排除适用救助法。第三，即使救助制度出现了某些可能有利于水下文化遗产的新变化，但这种救助不可能像考古发掘那样进行细致的勘察、绘图、测量等工作，很可能导致打捞出水的物品被人为分散等，仍然不能完全满足保护水下文化遗产的目的。

四、2001 年《保护水下文化遗产公约》的相关规定与评价

由于国内层面和国际层面上相关法律的缺失，许多沉船被非法发掘、遗址被破坏，越来越多的水下文化遗址面临着非法打捞的威胁。比如，早在 1974 年一份为土耳其当局提供的研究报告就表明，在所检查的土耳其近岸海域已经没有尚未受到干预的典型沉船了。[61] 有学者悲观地认为，如果找不到解决问题的办法，几十年之后就不会再有值得保护的沉船。[62] 为加强水下文化遗产保护，联合国教科文组织经过多年协商终于在 2001 年正式通过了《保护水下文化遗产公约》（以下简称“《2001 年公约》”）。《2001 年公约》明确界定了保护的对象、保护的内容和方式，树立了若干重要原则，并根据遗产所在水域性质的不同规定了不同的保护模式，还为了确保规定的执行而规定了若干控制措施。此外，《2001 年公约》还在附件《关于开发水下文化遗产活动的规章》（以下简称“《规章》”）中为开发活动确立了一

59 David J. Bederman, The UNESCO Draft Convention on Underwater Cultural Heritage: A Critique and Counter-Proposal, *Journal of Maritime Law and Commerce*, Vol. 30, 1999, p. 344.

60 傅崐成：《联合国教科文组织 2001 年〈保护水下文化遗产公约〉评析》，载于傅崐成著：《海洋法专题研究》，厦门：厦门大学出版社 2004 年版，第 17 页。

61 Preliminary Study on the Advisability of Preparing an International Instrument for the Protection of the Underwater Cultural Heritage, UNESCO General Conference, Twenty-eighth Session, 4 October 1995, para. 4.

62 Gillian Hutchinson, Threats to Underwater Cultural Heritage: The Problems of Unprotected Archaeological and Historic Sites, Wrecks and Objects Found at Sea, *Marine Policy*, Vol. 20, 1996, p. 287.

套技术标准，这已经为全球各种水域内的文化遗产撑起了一张保护网。[63]

《2001 年公约》的唯一目的就是保护水下文化遗产。[64] 但问题是何谓保护？最宽泛地讲，“保护”是保卫被保护对象的安全不受损坏或破坏，不论损坏或破坏是蓄意的还是偶然的、是自然造成的还是人为的。考虑到水下文化遗产通常已经达到了和周围环境的平衡状态，任何介入都会造成扰乱，即使物品还留在原处，它仍然得再调整平衡，这样就会造成额外的坏变，[65]《2001 年公约》第 2 条第 5 款明确规定：“在允许或进行任何开发水下文化遗产的活动之前，就地保护应作为首选。”由此，既然该《公约》规定就地保护水下文化遗产是一项基本原则，至少在理论上将捞救水下文化遗产的可能性降到了最低点。

即使在例外情况下需要对水下文化遗产进行发掘、打捞出水，“救助法和发现物法不适用于和本公约所指的和水下文化遗产有关的任何活动，除非该活动：（a）得到主管当局的批准，同时（b）完全符合本公约的规定；且（c）确保对水下文化遗产的任何打捞都做到了最大保护。”[66] 也就是说，原则上不得对水下文化遗产适用救助法和发现物法，除非同时满足公约所列的 3 个条件。条件（a）确保了一切发掘、打捞作业都满足了主管文化遗产保护工作的机关规定的发掘和打捞条件，取得了主管机关的授权；条件（b）确保了这些发掘和打捞作业的目的是为了保护水下文化遗产或者有助于认识或改善水下文化遗产；条件（c）则指在主管当局发布的批准书中包含了确保对水下文化遗产的打捞做到最大保护的各种条件。[67] 如前所述，依照现有的救助法和发现物法理论，即使沉船所有人明确拒绝救助，救助者仍然

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63 公约生效需要 20 份国家的批准或加入文书。截止到 2007 年 3 月 1 日，已经有 14 个国家，即巴拿马、保加利亚、克罗地亚、西班牙、大阿拉伯利比亚人民社会主义民众国、尼日利亚、立陶宛、墨西哥、巴拉圭、葡萄牙、厄瓜多尔、乌克兰、黎巴嫩和圣卢西亚岛等批准或加入了公约。下载于 http://portal.unesco.org/la/conven-tion.asp?KO=13520&language=E，2007 年 3 月 1 日。对公约的评价可见 Patrick J. O’keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage*, Leicester: Institute of Art and Law, 2002; Guido Carducci, New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage, *The American Journal of International Law*, Vol. 96, 2002. 傅崐成：《联合国教科文组织 2001 年〈保护水下文化遗产公约〉评析》，载于傅崐成著：《海洋法专题研究》，厦门：厦门大学出版社 2004 年版；郭玉军、徐锦堂：《国际水下文化遗产若干法律问题研究》，载于《中国法学》2004 年第 3 期；张湘兰、朱强：《〈保护水下文化遗产公约〉评析》，载于《中国海洋法学评论》2006 年第 1 期。

64 2001 年《保护水下文化遗产公约》第 2 条第 1 款，以及附件《关于开发水下文化遗产活动的规章》第 1 条。

65 Patrick J. O’keefe, Protecting the Underwater Cultural Heritage: The International Law Association Draft Convention, *Marine Policy*, Vol. 20, 1996, p. 49.

66 2001 年《保护水下文化遗产公约》第 4 条。

67 Patrick J. O’keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage*, Leicester: Institute of Art and Law, 2002, p. 63.

可以进行救助，除非该拒绝合情合理；除了美国一些法院要求救助者遵循考古原则之外，救助者和发现者可以自由地按照他们认为合适的方式进行作业；发现者可以随意处置其发掘出的物品。一旦按照这三项条件进行打捞作业，即使能够适用救助法和发现物法，也显然会使其效果大打折扣。

有关评论指出，《2001 年公约》排除适用救助法的原因在于：救助法的宗旨从来就不是保全历史性沉船的结构、内容物以及它们所蕴含的信息；救助法的整个理念都建立在根据其所捞救物品的价值而给予救助者救助报酬之上，捞救不具有商业价值的物品，比如沉船的船板，毫无意义；计算救助报酬是在工作完成之后，此时如果因为捞救工作没有符合考古标准而再进行保护为时已晚。《2001 年公约》排除发现物法的主要原因是，发现物法特别是美国法院发展形成的发现物法理论，将发现者视为对其发现的物具有完全支配能力的所有者，这和保护水下遗址的文化和考古价值的目的不相容。[68] 另外，因为有的国家不允许对水下文化遗产适用救助法或发现物法，而有的国家允许适用，可能会出现这样一种情形：救助者试图将在本国适用的救助法和发现物法同样适用于他国领域内的水下文化遗产。比如，美国法院就曾企图授予救助者救助位于爱尔兰领海内的卢西塔尼亚号沉船的权利。[69] 而《2001 年公约》第 4 条规定各项条件的目的就是要结束这种状况，排除适用救助法和发现物法，对有关水下文化遗产的活动采取许可制。但另一方面，因为《2001 年公约》不涉及所有权问题，如果绝对排除适用发现物法，则意味着可能无法确定所有权人。比如，在深海床上发现并被打捞到岸上的古代沉船将没有所有者，除非该沿岸国的法律做出相关规定。《2001 年公约》也保留了适用救助法和发现物法的余地，但彼时这些法律概念原有的含义也几乎消失殆尽了。[70]

笔者认为，《2001 年公约》为尊重并实现水下文化遗产的考古价值而设计了两道门槛：其一是《公约》第 2 条第 5 款，其二就是《公约》第 4 条。《2001 年公约》将就地保护水下文化遗产规定为一项基本原则，至少在理论上将捞救水下文化遗产的可能性降到了最低点。对于属于例外情形的捞救活动，第 4 条又明确排除适用救助法和发现物法，除非同时满足该公约规定的三项条件；而正如有关评论所指出的，即使能够适用救助法和发现物法，这些法律概念原有的含义也几乎消失殆

68 Patrick J. O'keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage*, Leicester: Institute of Art and Law, 2002, p. 62.

69 Patrick J. O'keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage*, Leicester: Institute of Art and Law, 2002, pp. 60~61; Lusitania 是一艘英国客轮，一战时沉于爱尔兰领海内。美国维吉尼亚州诺福克地区法院在 1995 年 3 月判决新墨西哥州一商人享有沉船的所有权和一定的救助权利，但爱尔兰政府没有承认该判决。See James P. Delgado, *Encyclopaedia of Underwater and Maritime Archaeology*, London: The British Museum Press, 1997, pp. 248~249.

70 Patrick J. O'keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage*, Leicester: Institute of Art and Law, 2002, p. 64.

尽了。虽然一些学者呼吁，应当结合文化遗产的私人用途和公共用途，尽量平衡各方面的利益考量，但在水下文化遗产所具有的相互冲突的价值之间，《2001 年公约》选择了考古价值，基本上尊重了最纯粹的考古学家的主张。不过，正如前文所言，似乎不能就此认为，消除水下文化遗产的经济价值则将确保保全其考古价值：虽然考古界在反对私人拥有水下文化遗产、反对销售发掘品方面，可能拥有道义上的优势，但利用水下文化遗产开展私人事业、获取经济利润，也会得到社会某些方面的支持。考虑到海上执法的难度，再加上陆上文化遗产黑市的教训，更可取的作法似乎是建立一种能够平衡各种价值和利益考量的保护体制。

五、结　语

传统的海难救助制度旨在鼓励在海上面临丧失危险的货物或船舶得到救助，健康的救助产业能够确保尽可能多地救助漂流或搁浅的船舶和面临沉没危险的船舶，有利于国际社会。但对于已经沉没上百年的沉船沉物，不能简单套用这一制度。因为此时的沉船沉物已经成为了具有考古和历史价值的水下文化遗产，是宝贵而有限的文化资源，由专业人士对之进行考古研究以便推动人类对自身文明的了解才是国际社会的真正利益所在。尽管有些属于水下文化遗产的物品本身具有相当的经济价值，但必须承认，水下文化遗产的考古价值和经济价值似乎是不可兼得的鱼和熊掌，关键是找到一个平衡点。《保护水下文化遗产公约》的相关规定确立了就地保护原则，并原则上禁止在打捞水下文化遗产时适用救助法或发现物法，这就奠定了保护水下文化遗产的基调，同时也为非常情形留下了一些余地。

作为一个拥有悠久历史文化的国家，中国拥有丰富的水下文化遗产资源。中国的相关法律不允许私人所有水下文化遗产，不得对水下文化遗产适用海难救助制度。[71] 这和《2001 年公约》的精神相一致，也表明中国有关水下文化遗产的立法是比较先进的。不过，尽管修订后的《文物保护法》确立了“保护为主、抢救第一、合理利用、加强管理”的十六字方针，但相关法律并没有规定对水下文化遗产实行就地保护原则，这不能不说是一件憾事。[72] 未来在修订《水下文物保护管理条例》时应当予以考虑。

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71 《文物保护法》第 2、3、13 条；《水水下文物保护管理条例》第 2、3 条；《关于外商参与打捞中国沿海水域沉船沉物管理办法》第 3、8 条。

72 《文物保护法》第 4 条。对中国有关立法的评价可见：傅崐成：《保护水下文化遗产公约——两岸相关法律亟待增修》，载于傅崐成著：《海洋法专题研究》，厦门：厦门大学出版社 2004 年版。

风险预防原则发展历程的研究

褚晓琳 *

内容摘要: 风险预防原则最早起源于德国和瑞士国内立法，被用于处理环境危险事宜。随着风险预防原则的发展，其他国家，如荷兰和美国，也逐渐将其纳入本国环境与资源保护法规中，并作为其中的一项重要原则。在国际层面上，风险预防原则经历了从“能力许可方式“到“预防性方式”的转变，并得到了很多国际公约的认可，而且成为国际司法机构裁断案件的重要依据。从各国国内环境立法，以及众多的国际条约和国际司法判例来看，风险预防原则事实上已经成为环境法和海洋法的一项基本原则。

关键词: 风险预防原则　《联合国海洋公约》　国际法院

20 世纪，技术革新对人类社会和自然界造成了深刻的影响，人类社会在享受丰富的物质文明的同时，也正遭受着工业化进程所带来的负面后果。如森林、矿藏等自然资源正以惊人的速度被损耗；化学物质的广泛使用对环境和人类健康所带来的影响远比人类所预想的要严重的多；城市的扩张侵蚀了富饶的土地，并制造出大量的废物；空气和水等维系人类生命的资源也正受到无法挽救的污染和损害。[1] 因而，资源的可持续利用与环境保护成为各国所共同关注的区域性或国际性重要议题之一。

风险预防原则是近 20 年环境法中最具创新性、最具影响力，且最重要的新兴概念。风险预防原则的理念是基于科学不确定性，需要更好地、更谨慎地管理有关健康与环境的危险。由于人类不可能获得有关任何危险的充足科学信息，也不可能获得完全的科学确定性，因而在危险管理中采用风险预防原则是必要的。[2]

正如国际法院某法官在 1997 年“匈牙利共和国诉斯洛伐克联邦共和国”一

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* 褚晓琳，厦门大学法学院国际法专业博士研究生，主要研究方向为国际海洋法。

1 Wybe Theodorus Douma, *The Precautionary Principle – Its Application in International European and Dutch Law*, Groningen: University of Groningen, 2003, p. 59.

2 Gary E. Marchant and Kenneth L. Mossman, *Arbitrary and Capricious – The Precautionary Principle in the European Courts*, Washington D.C.: The AEI Press Publisher for the American Enterprise Institute, 2004, p. 1.

案中所指出的：这些年来，人们出于经济或是其他原因，频繁的打扰自然界，而根本没有考虑自身活动对环境的影响。随着人类不断获得新的科学知识，对危险也有了逐步清晰的认识。在近 20 年间，许多有关环境的新形式和标准得以发展，并且在大量的公约中得以确定。对此，国家在计划进行新的活动，或是继续进行已经开始的活动时应当考虑这些新的形式，并对新的标准予以重视。[3] 风险预防原则是环境法的一项新兴原则，对环境危险能起到有效的预防作用，值得深入研究。

一、风险预防原则的产生

（一）预防性理念的确立

风险预防原则是国际环境法中一项重要原则。风险预防原则的本质是强调当有环境议题发生或发生之虞时，不应以欠缺科学明确性作为限制必要措施实行、防治环境灾害的理由。[4]

在环境法中引入风险预防原则源于对环境危险的不确定性，以及科学对人类活动影响评估能力的欠缺性的认定。也就是说，虽然目前人类拥有较为先进的科技，并对环境危险有一定的认识，但是自然界是纷繁复杂的，人类不可能对其完全认知。因而，在面对诸多不确定时应采取谨慎的态度，从而更好的保护环境，预防危险的发生。早在 1966 年，便有学者指出，“一项管理性的原则应是：通过研究合理明确改变了的自然现象的性质和作用之前，人类不应受制于危险，消极等待危险的发生。如违反这项原则将导致灾难性的后果。”[5]

风险预防原则不同于环境决策中的“传统模式”。[6]“传统模式”是假定科学能够充分预知人类活动对环境所造成的影响，并认为只有当结论性的证据表明此种活动将导致实质损害时，环境保护行动才被认为是正当的。然而在危险具有不确定性的条件下，“传统模式”便不能有效地实施环境保护，而只能等到危害结果确定时才能采取进一步的行动，但是这些危害后果往往是严重的且无法恢复的。风险预防原则克服了“传统模式”的缺陷，在面对环境危险时，结论性的科学证据不再是采取环境保护措施的必要条件，不确定性也不再是环境保护的障碍。

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3 Arie Teouwborst, *Evolution and Status of the Precautionary Principle in International Law*, The Hague/London/Boston: Kluwer Law International, 2002, p. 1.

4 牛惠之：《预防原则之研究——国际环境法处理欠缺科学证据之环境风险议题之努力与争议》，载于《台湾大学法学论丛》2005 年第 3 期。

5 Arie Teouwborst, *Evolution and Status of the Precautionary Principle in International Law*, The Hague/London/Boston: Kluwer Law International, 2002, pp. 10~11.

6 Arie Teouwborst, *Evolution and Status of the Precautionary Principle in International Law*, The Hague/London/Boston: Kluwer Law International, 2002, p. 11.

人类社会和自然界充满了不确定。当人类面对这样一个不确定的未来时，需要谨慎和预见。因而风险预防原则的出现和适用并不是偶然的，而是环境法发展的必然趋势，应普遍加以适用。一位澳大利亚法官曾指出，“风险预防原则是一种常识性的表述，一些决策者已经在某些情况下适用了风险预防原则。风险预防原则是在科学不确定条件下预防环境损害的发生。其前提是有关环境损害的性质或范围是不确定的或是未知的，决策者应当谨慎处之。”[7]

（二）风险预防原则的产生过程

技术的日新月异对自然界和人类社会产生了较大冲击。而人类面对繁多的变革却疲于作出反应，或是对这种变化重新进行调整；某些现行的发展政策不能有效的保护，甚至有可能破坏未来世代的福祉，从而使得长期规划和管理也变得不那么可靠；国家主权和全球层面的国际安全、生态保护及其经济管理之间也存在一定的冲突；此外，某些事关人类生活质量乃至生死存亡的威胁日甚一日，对此继续依靠被动的反应机制是无济于事的。

由于现代国际法律秩序面临着越加复杂和更具危险性的挑战，国际法需要一套新的富有创造性的思维来重新定位。不同于以往的结果分析方式，风险预防原则是事先为决策者提供参考意见，从而避免事情陷于险境或是以灾难告终。

风险预防原则最早起源于 20 世纪 70、80 年代的德国和瑞士国内环境法中。虽然在 20 世纪 70 年代预防性思想已经在德国环境政策中有所体现，[8] 但是其作为一项原则第一次纳入法律是在 1976 年德国某一行政法规中，其规定：“环境政策并不能通过避免将要发生以及已经发生的危害而得以充分实现。预防性的环境政策要求以更谨慎的态度保护自然资源以及实现对它们的要求。”[9] 不久，风险预防原则便成为德国环境法的一项基本原则，并为德国政府用以加强应对酸雨、温室效应与海洋污染等环境问题的政策。

在国际层面上，风险预防原则在国际环境法中的出现主要经历了以下 2 种方式。第一种方式，环境规则中所谓的“能力许可方式”，也称之为“容纳方式”。[10] 这种方式可以预防已经预见到的环境危害的发生，但是当缺乏充足的科学确定性时，便可能无法采取或是推迟采取保护性措施。在某些情况下，“能力许可方式”

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7 Arie Teouwborst, *Evolution and Status of the Precautionary Principle in International Law*, The Hague/London/Boston: Kluwer Law International, 2002, p. 8.

8 德国科学家和政策制订者最早利用风险预防思想处理“森林死亡”及其相应后果，还有空气污染问题。

9 Arie Teouwborst, *Evolution and Status of the Precautionary Principle in International Law*, The Hague/London/Boston: Kluwer Law International, 2002, p. 17.

10 Arie Teouwborst, *Evolution and Status of the Precautionary Principle in International Law*, The Hague/London/Boston: Kluwer Law International, 2002, p. 18.

可能成为一些国家拒绝采取环境保护措施的借口，例如一些渔业国家延迟采取减少捕捞配额措施直到结论性证据表明已经出现过度捕捞的后果。

“能力许可方式”可以说是环境法中“传统模式”的一种变形。换言之，“能力许可方式”认为科学可以准确评估环境危害。一旦危害得到准确估计，那么科学可以提供解决这些危害的方法。然而“能力许可方式”最终失败了，其原因是，科学不可能准确评估人类活动对环境的影响，而且有关环境危害的科学证据总是出现的太迟。“能力许可方式”的失败促成了从预测到预防的转变。1991 年《禁止向非洲输入有害物质以及控制有害物质在非洲境内的跨国流动公约》规定，“成员方应相互合作采取适当的措施执行风险预防原则，以清洁生产的方式防止污染的发生，而非遵循基于纳污能力假设的‘能力许可方式’。”

第二种方式是“预防性方式”。“预防性方式”的内涵与风险预防原则的精神基本一致，即基于不可能获得完整、精确的科学数据，人类应以谨慎的态度管理环境危险，以防止对环境造成无法挽回的灾难。

第一个明确提到“预防”一词的公约是 1985 年《维也纳保护臭氧层公约》（以下简称“《维也纳公约》”）。在这一公约中，预防思想是以“预防性方法”一词体现的。成员方对“预防性方法”达成一致意见，认为应在国内和国际层面上对其加以实施。1990 年联合国欧洲经济委员会发布的《卑尔根可持续发展宣言》也采用了“风险预防原则”的概念，其规定“基于可持续发展的目标，政策应根据风险预防原则加以制定。环境措施应预见、防止并能控制环境损害。当发生了严重的或是不可回复的危险时，缺乏充分的科学确定性不能成为延迟采取相关措施防止环境损害发生的理由。”

二、风险预防原则的发展

（一）风险预防原则的发展背景

在一定程度上，全球化促进了风险预防原则的发展。随着人类活动的全球化，环境问题并非仅是一国国内事务，跨国环境和资源的损害成为影响到各国共同利益、需要各国共同合作解决的问题。

在国际法上，国家对于其境内活动所造成的跨国环境损害应承担相应的责任，即任何一国不得以其境内任何形式的活动，造成其他国家人民或财产的损失。1982 年的《联合国海洋法公约》（以下简称“《公约》”）第 194 条第 2 款规定：“各国应采取一切必要措施，确保在其管辖或控制下的活动的进行不致使其他国家及其环境遭受污染的损害，并确保在其管辖或控制范围内的事件或活动所造成的污染不致扩大到其按照本公约行使主权权利的区域之外。”

此外，常设仲裁法庭1941年“炼矿厂污染仲裁”，[11] 以及国际法院1949年的“科孚海峡案” [12] 都对国家的跨境环境损害责任作了规定，即任何国家都需要对其境内活动所造成的跨国环境危害，以及可以预见的环境风险负起防治或预防的责任。

然而，一国的跨境损害责任存在一定限制，即只有当充分的证据证明灾害存在时，加害国才有义务规范其活动，并对受害国进行赔偿。在著名的“炼矿厂污染仲裁”中，仲裁庭将跨境损害的责任限制于某些情况，即存在相关损害的明确证据。因此，当造成环境风险的原因欠缺明确的科学证据，或在合理情况下仍无法察觉或预见危害时，国际法便不能基于国家的跨境损害责任要求一国规范其具有潜在环境风险的行为，或承担预防的义务。[13]

由于生态环境和资源本身的复杂性，以及人类现有科学知识的局限性，在很多情况下，人类可以预见某种危害，但对危害产生的原因可能一无所知，或是存有合理怀疑但缺乏足够的科学证据。如臭氧层破洞早在1930年便被观测到了，但其中原因到20世纪80、90年代才得以澄清。如果根据国家跨境损害责任的传统模式，只有当危害发生或存在明确的因果关系时，才可追究国家相应的责任，那么根本无法预防环境危害的发生。

因而，随着人类无法预知的环境危害日益增多，继续依据原有的国家跨境损害责任原则已经无法有效实现环境保护的目标，也无法保障人类的切身利益和长远利益。风险预防原则的发展解决了国家跨境损害责任原则在处理危害方面的不足，作到防患于未然。所以风险预防原则的产生是国际法发展的必然趋势，是环境保护促使下的人类良性选择。

（二）风险预防原则的发展历程

1. 风险预防原则在国内层面的发展

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11 在本案中，位于美国和加拿大边境的加拿大锌矿厂所释放的二氧化硫气体飘到美国境内，并对美国的环境构成危害。该案仲裁判断认定加拿大有责任限制其境内的二氧化硫对美国所造成的损害。Judicial Decisions Involving Questions of International Law – Trail Smelter Arbital Tribunal, *American Journal of International Law*, Vol. 33, 1939, p. 182; Judicial Decisions Involving Questions of International Law – Trail Smelter Arbitral Tribunal, *American Journal of International Law*, Vol. 35, 1941, p. 684. 参见牛惠之：《预防原则之研究——国际环境法处理欠缺科学证据之环境风险议题之努力与争议》，载于《台湾大学法学论丛》2005年第3期。

12 在本案中，由于阿尔巴尼亚在其领海的科孚海峡中设置鱼雷，但未尽告知义务，因而造成英国军舰损害与人员伤亡。国际法院认定阿尔巴尼亚有义务将此种可以预见的危险通知途经船舶。*ICJ Reports*, 1949, p. 22. 参见牛惠之：《预防原则之研究——国际环境法处理欠缺科学证据之环境风险议题之努力与争议》，载于《台湾大学法学论丛》2005年第3期。

13 牛惠之：《预防原则之研究——国际环境法处理欠缺科学证据之环境风险议题之努力与争议》，载于《台湾大学法学论丛》2005年第3期。

在国内层面上，风险预防原则最早发端于德国与瑞士的环境法。德国的某些环境法规，如 1970 年《德国空气清洁法》，与 1976 年德国政府法令都对风险预防原则作了规定，均要求小心慎重的处理环境危险，作到预见、预防和缓减相应的损害。此后，风险预防原则逐步发展成为德国环境法中的一项基本原则。除了德国最早对风险预防原则有相应规定外，其他国家也逐渐采纳了风险预防原则，并将其作为本国环境保护的一项重要原则。

在荷兰，虽然风险预防原则的地位并不像德国一样根深蒂固，但是在荷兰的一些环境法规中，都有风险预防原则理念的体现。例如，荷兰 1998 年《保护自然法案》中虽未明确提到“预防”一词，但是第 6 条第 3 款表达了风险预防原则的理念，其规定基于环境保护的目的，如果一项计划可能会对周边环境造成重要影响，那么在付诸实施之前应对该项计划作出适当的评估。[14]

在美国，风险预防原则也逐渐引起重视，究其原因，一是全球化背景二是一些涉及荷尔蒙牛肉、食品安全、气候变化等问题的贸易争端频繁发生。在风险预防原则受到欧洲各国关注的几年后，美国也开始就风险预防原则在环境政策中的地位问题展开讨论。而风险预防原则在理论上明确成为美国环境政策的一部分是自 1992 年联合国环境与发展会议的召开。在这次会议上，美国签署了《里约宣言》，而且美国环境保护局承认美国受《里约宣言》的约束，同时确认了一些执行风险预防原则的方法。然而，目前美国还没有制定相应的策略真正将风险预防原则纳入国内环境政策中。可以说，美国联邦政府对风险预防原则持中立态度，虽然很多风险预防原则的支持者期望通过风险预防原则缓减污染和其他环境问题，并对抗美国环境政策中的低糜倾向。[15]

不同于美国联邦政府，美国各州政府对风险预防原则持积极态度。在过去 30 年里，美国州政府通过环境政策改革加强了风险预防原则的执行。目前，已有 20 多个州确立了自愿性或强制性的环境污染预防程序。其中，加利福尼亚是强硬环境政策的代表。例如，加利福尼亚第 5 号决议规定，那些可能释放导致生殖性疾病和癌症物质的工厂有义务证明这些物质不至于导致有关法规所规定的危险。[16]

2. 风险预防原则在国际层面的发展

（1）国际条约中的风险预防原则

最早涉及风险预防原则的公约是 1958 年《公海公约》。该公约主要是关于预防公海污染，要求各缔约方采取预防性措施以防止海洋石油污染，以及放射性物

14 Tim O’Riordan and James Cameron, *Reinterpreting the Precautionary Principle*, London: Cameron May International Law & Policy, 2001, p. 163.

15 Tim O’Riordan and James Cameron, *Reinterpreting the Precautionary Principle*, London: Cameron May International Law & Policy, 2001, p. 183.

16 Tim O’Riordan and James Cameron, *Reinterpreting the Precautionary Principle*, London: Cameron May International Law & Policy, 2001, p. 190.

质倾倒所造成的海洋污染等。1958 年《公海公约》虽然未对风险预防原则做出明确规定，但其中却体现了风险预防原则的理念。

政府间海事协议组织创制了《防止倾倒废物和其他物质污染海洋的公约》，也就是所谓的《伦敦公约》。[17] 该公约将风险预防原则适用于废物和危险物质的管理中，认为在海底对高标准放射性物质处理时，应具有合理的技术方法，以便能够安全且有效地使放射性物质与海洋隔离。

在《伦敦公约》的筹备会议上，公约是否应规定风险预防原则的问题成为争论的焦点之一。在政府间海事协议组织第 13 次会议准备过程中，专家小组就已经对是否应将风险预防原则纳入《伦敦公约》进行了讨论。专家组认为《伦敦公约》实际上已经将风险预防原则适用于海洋污染的预防和控制活动中，并指出有必要对风险预防原则进行合理界定，并将其纳入公约中。专家组还一致认为在放射性物质倾倒中引入风险预防原则有助于减少损害，即使对这些损害的认定仅是基于怀疑，或是有关因果关系的证据并不存在。

在政府间海事协议组织第 14 次会议上成立了一个工作小组，负责对风险预防原则加以详细研究和精确界定。在此次会议上，缔约方还通过了在《伦敦公约》框架内，将风险预防原则适用于海洋保护的决议，即“当有合理根据认为向海洋倾倒的物质可能对海洋环境造成损害时，各缔约方应在预防性方法的指导下，采取适当的预防性措施，即使不存在有关倾倒和损害之间因果关系的结论性证据。”

《公约》是第一个有关预防、减少、控制各种海洋污染，以及海洋生物资源养护和管理的全球性公约。它虽没有明确提到风险预防原则，但是却对该原则作出了相关阐释。例如，《公约》第 116 条规定了“公海捕鱼的权利”，各国均有权在公海上捕鱼，但应受到条约相关义务以及沿海国的相关权利义务的限制；第 119 条规定了“公海生物资源的养护”，要求各国基于所能获得的最佳科学依据采取措施，使捕捞鱼种的数量维持在或恢复到能够生产最高持续产量的水平。

虽然根据《公约》第 116 条和第 119 条的规定，如果所能获得的最佳科学证据对于复杂的决策并不充分或足够时，结果如何未知，但是这 2 条规定已经体现了风险预防原则的理念。而且《公约》第 206 条对风险预防原则的重要因素也作了明确阐述：“各国如有合理根据认为在其管辖或控制下的计划中的活动可能对海洋环境造成重大污染或重大和有害的变化，应在实际可行范围内，就这种活动对海洋环境的可能影响作出评价。”

《公约》对风险预防原则所规定的实施标准不同于 1992 年《里约宣言》原则 15 的规定，即各国应广泛适用预防措施，遇有严重或不可回复的损害威胁时，不得以缺乏科学充分确实证据为理由，延迟采取符合成本效益的措施防止环境恶化。首先，《公约》规定了在进行相关活动之前，应存在合理的根据。其次，不同于《里

17　1972 年 12 月 29 日在伦敦缔结了《伦敦倾倒协定》。

约宣言》中所规定的“严重的或是不可回复的损害”，《公约》使用了对海洋环境造成“严重污染”或是“严重的且有害的变化”用语。最后，值得注意的一个重要区别是，《里约宣言中》要求各国应采取措施以预防损害的发生，而《公约》仅要求各国对可能的损害或变化进行评估，并且规定了这种评估应以切实可行的方式进行，但这可能为缔约方违约提供了便利。可以看出，相对于《里约宣言》，《公约》中的风险预防原则力度较弱。

1982 年国际捕鲸委员会对《国际捕鲸管理公约》第 5 条中的商业捕鲸进度安排作了修订，禁止基于商业目的捕杀鲸。此规定是根据捕鲸所可能导致的诸多不确定的海洋生物影响作出的，在一定意义上是风险预防原则适用的结果。

1985 年《维也纳公约》[18] 是第一个明确提到“预防性措施”的公约。公约序言指出，基于臭氧层变化对人类健康和环境所造成的深远有害的影响，因而无论在国内层面还是在国际层面都有必要采取预防性措施。

《维也纳公约》的序言和实体部分都指出，预防性措施应建立在相关科学和技术考量基础之上。公约除了对有害影响 [19] 加以解释外，还规定了成员方应采取适当措施以保护人类健康和环境免受人类活动对臭氧层所造成的负面影响的危害。《维也纳公约》虽然没有明确提到“风险预防原则”，但是其序言中出现了“预防性措施”的概念，并且实体部分对成员方相关义务，以及人类活动有害影响作了规定，表明其实际上已经认可风险预防原则，并在探寻实现风险预防原则的方式。而且该公约对人类活动有害影响的界定，即严重有害的后果，基本上与《里约宣言》中的规定一致。

《维也纳公约》构建了一个条约体系，为有关保护臭氧层的特殊协定奠定了基础。而 1987 年的《管制耗竭臭氧层物质的蒙特利尔议定书》（以下简称“《蒙特利尔议定书》”）便是其中之一。[20]《蒙特利尔议定书》的主要目的是解决自 20 世纪 30 年代初期发现的且日益严重的臭氧层漏洞问题。

《蒙特利尔议定书》虽然也没有提到“风险预防原则”的概念，但是与《维也纳公约》一样，《蒙特利尔议定书》中有关缔约方义务的规定体现了风险预防原则的思想，并对风险预防原则的具体实施作了规定。第一，《蒙特利尔议定书》序言强调了《维也纳公约》各缔约方应采取适当措施以保护人类健康和环境免受人类活动对臭氧层破坏所造成的负面影响。第二，《蒙特利尔议定书》明确规定了基于科学的发展，以及相关技术和经济因素的考量，应采取预防性措施控制破坏臭氧层物质的全球释放总量。最后，与《维也纳公约》相一致，《蒙特利尔议定书》序言也规定了在国家和国际层面上都应该采取预防性措施以控制破坏臭氧层物质的

18 《维也纳保护臭氧层公约》于 1985 年 3 月 22 日通过，于 1988 年 9 月 22 日生效。
19 《维也纳保护臭氧层公约》指出“有害影响”是指环境变化所导致的严重的有害后果。
20 《蒙特利尔协定》主要是关于处理氯氟碳化合物等破坏臭氧层的各种物质。

释放。

《蒙特利尔议定书》的重要性在于：在科学证据并不十分明确的 20 世纪 80 年代，《蒙特利尔议定书》依据风险预防原则的理念，并通过国际合作方式，试图达到管制可能会继续耗竭臭氧层物质的生产、制造和使用。而且还具体要求缔约国逐步采取限制、禁止制造和使用可能会释放破坏臭氧层的氟氯碳化合物的产品，以控制其释放总量。因而《蒙特利尔议定书》可以被视为国际间运用风险预防原则的理念处理具有科学不确定性臭氧层问题的先驱。联合国环境规划署执行长官伊丽莎白女士曾指出，《蒙特利尔协定》是建立在风险预防原则基础上的保护臭氧层的特殊工具。[21]

1992 年《保护波罗的海海洋环境公约》（以下简称“《波罗的海公约》”）是一个以风险预防原则为根据保护海洋环境的区域性公约的典范。

虽然在 1990 年欧共体和欧洲一些国家共同制定了包含风险预防原则的《波罗的海宣言》，但是随着对海洋污染的深入认识，波罗的海沿海国家认为有必要制定一个新的旨在保护波罗的海海洋环境的具有拘束力的条约。另外，1992 年《波罗的海公约》的前身，即《1974 年波罗的海公约》未能阻止波罗的海大面积污染，在波罗的海中仍有 10 万平方公里的海域是“完全的死海”。

相对于《1974 年波罗的海公约》，1992 年《波罗的海公约》不仅规定了防止原则，而且采纳了风险预防原则。首先，《波罗的海公约》规定了公约缔约国有义务预防并消除污染，以促进波罗的海生态修复，保护其生态平衡。其次，《波罗的海公约》规定应在海洋环境保护中适用风险预防原则，其第 3 条规定：“当有合理根据认为直接或间接引入海洋环境的物质或能量可能对人类健康带来灾难，危害生物资源和海洋生态系统，损害舒适性，或者干扰海洋的其他用途时，即使没有结论性证据证明引入和后果之间的因果关系，缔约方也应适用风险预防原则采取预防性措施。”

相对于 1990 年《波罗的海宣言》，1992 年《波罗的海公约》不仅涵盖了排泄到海洋中的物质，而且还包括能量。另外 1990 年《波罗的海宣言》仅提到基于保护海洋生态系统的目的，而 1992 年《波罗的海公约》还涉及了对人类健康、生物资源的保护，以及其他对海洋合理使用的保护。

1992 年在里约召开的联合国环境与发展会议上通过了 5 个环境公约，其中 2 个具有拘束力，即《联合国气候变化框架公约》和《生物多样性公约》。[22] 此次会议是风险预防原则得到国际社会普遍认可的重要标志，因为在此之后很多国际公约或国际组织决议都采纳并明确规定了风险预防原则。

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21 Wybe Theodorus Douma, *The Precautionary Principle – Its Application in International European and Dutch Law*, Groningen: University of Groningen, 2003, p. 109.

22 在第 2 章第 2 节“风险预防原则的发展历程”中对 1992 年联合国环境与发展会议上产生的另外 3 个不具拘束力的国际宣言已作阐述。

在《联合国气候变化框架公约》制定之前，已有一些国家组织开始关注气候变化，及其对人类生存和全球环境所造成的严重威胁。1988 年联合国环境规划署和世界卫生组织成立了政府间气候变化专门委员会，以便为针对释放二氧化碳和其他温室效应气体造成的气候变化所采取的抵制活动提供科学指导。例如，在 1992 年 8 月，政府间气候变化专门委员会发布了第一份报告，其报告结果在 1992 年得以确认。根据这份报告，在 2025 年之前全球气温将升高 2°C，到 2030 年之前将升高 4℃;并且气温的升高将导致全球海平面上升，到 2030 年之前将升高 20 厘米。

《联合国气候变化纲要公约》是针对气候变化的危害而要求缔约国采取相应措施以减少温室效应，保护环境。该公约将预防性措施纳入其中，第 3 条第 3 款规定，缔约各方应采取预防措施，以预测、防止或尽量减少引起气候变化的原因，并缓和其不利影响。该规定还重申了《里约宣言》第 15 项原则，强调当存在造成严重或不可逆转的损害的威胁时，不应当以科学上没有完全的确定性为理由推迟采取这类措施，同时考虑到应付气候变化的政策和措施应当讲求成本效益，确保以尽可能最低的费用获得全球效益。

在《生物多样性公约》中虽然没有明确出现“风险预防原则”一词，但是其序言规定了风险预防原则的理念，“当生物多样性遭到严重减少或损失的威胁时，缺乏充足的科学确定性不应成为推迟采取旨在避免或减少此种威胁的措施的理由。”

1992 年签署的《保护与使用跨国水道和国际湖泊公约》（以下简称“《跨界水道公约》”）是国际间第一个，并可能是唯一一个直接将风险预防原则法典化的已经生效的国际性公约。此公约的目的是通过国际合作，防止或控制跨国水道和国际湖泊可能遭受的污染，以及人类活动，如废水、地下水的排放，对跨国水道所产生的负面影响。

《跨界水道公约》第 2 条第 5(a) 项规定：“基于风险预防原则而采取的具有能够避免有害物质排放对跨国水道造成潜在影响的措施，不应该因为这些被排放物质与潜在影响间因果关系还未经科学研究的充分证实而搁置。”此外，在“匈牙利共和国诉斯洛伐克联邦共和国”一案中，匈牙利曾向国际法院主张了该公约中的风险预防原则。国际法院虽然对国际环境法新发展予以一定程度的肯定，但是并没有明示风险预防原则是否属于国际环境法的新发展，也没有明确风险预防原则的国际法地位。

《〈防止倾倒废物及其他物质污染海洋的公约〉1996年议定书》(以下简称"《议定书》")第3条第1款规定："各缔约方应采用预防性方法使海洋环境免受倾倒物质或是其他物质的污染。当有合理根据认为向海洋倾倒的物质可能对海洋环境造成损害时，即使不存在有关倾倒和损害之间因果关系的结论性证据，缔约方也应采取适当的预防措施。"

政府间海事协议组织一位高级技术官员指出，1996年《议定书》与1972年《伦敦公约》的不同之处在于，1996年《议定书》规定"应采用预防性方法"，而1972年《伦敦公约》规定"应在预防性方法指导之下"。因而，1996年《议定书》中风险预防方法的规定更直接、更明确。

随着风险预防原则的发展，其适用范围不再局限于环境保护领域，还扩展至海洋生物资源养护和管理领域。例如，1995年签署通过的《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和高度洄游鱼类种群规定的协定》（以下简称"《鱼类种群协定》"）。该协定的主要目的是处理《公约》中关于跨界鱼类和高度洄游鱼类种群的养护和管理尚存争议的问题，通过一些重要机制确保在可持续发展和风险预防原则指导下进行渔业养护、管理活动。这些机制包括促进相关数据的分享和汇集，维持或评估相关活动对于生态的影响，以及预防性方法。[23]

1995年《鱼类种群协定》第6条规定，会员国应通过预防性方法养护、管理并开发跨界鱼类和高度洄游鱼类种群。并强调各国在资料不明确、不可靠或不充足时应更为慎重。不得以科学资料不足为由推迟或不采取养护和管理措施。而且为强化对于不确定性风险的处理能力和技术，会员国应强化其处理资料和研究的能力。该协定通过对会员国义务的规定使得风险预防原则得以具体实施，从而为风险预防原则的未来发展提供了方向性指导。

最后，世界贸易组织相关协定与风险预防原则也存在紧密联系。贸易与环境问题一直是世界贸易组织内引发争端、争论最多的议题之一。世界贸易组织作为全球最大的贸易组织，其目标是削除各国关税壁垒，促进贸易自由化。此外，世界贸易组织还对环境问题予以关注，并将环境保护也列为其发展目标之一。在世界贸易组织协定序言中也提到了可持续发展目标，要求对自然资源进行合理利用。

风险预防原则对于实现可持续发展目标具有重要意义。风险预防原则要求各国谨慎采取有关涉及环境和自然资源的行动，因为科学发展的阶段性和不确定性使得人们不可能完全预知自身活动对自然界和人类健康所产生的影响。如果盲目武断地进行活动，可能对人类或自然界造成无法挽回的灾难。因而风险预防原则是基于人类和自然界的长远利益，要求人类小心谨慎的进行相关活动，从而更好

23 牛惠之：《预防原则之研究——国际环境法处理欠缺科学证据之环境风险议题之努力与争议》，载于《台湾大学法学论丛》2005年第3期。

的保护环境和人类健康。

虽然世界贸易组织相关协定规定成员方可以采取环境保护措施，即使这些措施可能对自由贸易产生一定的阻碍，但是这些环境保护措施必需是必要的且符合比例原则。例如，《关税暨贸易总协定》第 20 条“一般例外”规定，各国环境保护措施本不得构成武断的或不合理的差别待遇，或构成对国际贸易的变相限制。然而，这些限制性条件实质上阻碍了风险预防原则的实施。其中第（g）款中“有关”保护可用竭自然资源的措施，“有关”一词是指“存在紧密的且真实的因果关系”。[24] 这一规定实质上阻碍了风险预防原则的适用，因为采取预防性措施的前提条件是行为与损害之间因果关系不甚明确，即在科学不确定条件下，计划采取的行为可能会产生一定的损害结果。如果只能当存在“紧密且真实的因果关系”时才可以采取环境保护措施，那么风险预防原则便不能得以适用。

而根据《关税暨贸易总协定》第 20 条（b）款的规定，适用风险预防原则将更加困难。第（b）款规定对保护人类、动植物的生命或健康所“必要的”。对于“必要”一词的解释存在很大的灵活性和任意性，对于何为“必要的”不存在任何确定的标准，主要依赖世界贸易组织争端解决机构在具体案件中发挥自由裁量权。

从以上国际条约中可以看出，在 20 世纪 80 年代之前，国际条约还未对风险预防原则予以关注。20 世纪 80 年代初，风险预防原则开始萌芽。此时，一些国际条约虽然没有明确提到风险预防原则，但是却对其理念作了规定，这实际上是关于风险预防原则的执行方法。例如，《公约》要求缔约方对人类活动对海洋环境所造成的潜在影响做出评估。《国际捕鲸管理公约》及《维也纳公约》的序言中都出现了“预防性措施”的概念。1987 年的《蒙特利尔议定书》序言也规定了在国家和国际层面上都应该采取预防性措施以控制破坏臭氧层物质的释放。

此后，自 1992 年联合国环境与发展会议通过《里约宣言》开始，越来越多的国际条约明确规定了风险预防原则。例如，相对于 1972 年的《伦教公约》，1996 年《议定书》更直接地规定了预防性方法，从而更加明确的表达了风险预防原则的思想。因而，1996 年《议定书》是 1972 年《伦敦公约》的进一步发展，是应国际环境保护潮流，而对风险预防原则的进一步接纳。此外，1995 年《鱼类种群协定》也对风险预防原则作了明确规定。可以说自《里约宣言》后的 20 年间，风险预防原则已深深扎根于国际环境法和海洋法中。

另外，随着风险预防原则的发展，其适用范围已经突破了国际环境领域的局限，而逐步扩张至自然资源的养护和管理领域。如 1995 年的《鱼类种群协定》规定应采用风险预防原则养护、管理和开发跨界鱼类和高度洄游鱼类，从而更好的保护海洋生物资源。

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24 Wybe Theodorus Douma, *The Precautionary Principle – Its Application in International European and Dutch Law*, Groningen: University of Groningen, 2003, p. 131.

（2）国际组织决议中的风险预防原则

1972 年《斯德歌尔摩宣言》是在瑞典斯德歌尔摩召开的联合国人类环境会议上通过的。《斯德歌尔摩宣言》通过了 26 条有关环境保护的原则，并在其序言中确定了鼓励和指导全人类维护和改善人类环境的目标。其中原则 6 指出，为了防止造成对生态系统严重的或是无法回复的损害，应阻止发生超出环境所能承受的污染。这一原则在某种程度上表达了预防性理念，即应采取相关措施防止危害的发生。因而，《斯德歌尔摩宣言》表达了预防环境损害的思想，而且某些原则为风险预防原则的出现提供了条件。

1982 年《世界自然宪章》（以下简称“《宪章》”）是联合国大会 37/7 号决议的附带文件。《宪章》虽没有明确使用“风险预防原则”这一表述，但是却提到了风险预防原则的一些重要组成因素。《宪章》第 11 条规定：“（a）应避免发生可能对自然界造成无法回复损害的活动；（b）应对那些可能会对自然界造成严重危险的活动进行全面检查；这些活动的提倡者应证明所预期的利益应超过对自然界造成的内在损害，如果不能完全了解有关影响，则这些活动将不能进行。”

可以看出，《宪章》认为应对那些可能对自然界造成影响的活动加以控制，并将对自然界的危害和影响减少到最低限度。此外，《宪章》还极富创造性的规定了风险预防原则的执行方式，指出“应通过国内立法和各国实践，以及在国际层面上”加以执行。

1984 年在德国不来梅召开的第一次北海会议上采纳的《不来梅宣言》，第一次明确使用了“风险预防原则”一词，而且还规定了风险预防原则的构成要素，即相关环境损害，以及证据条件等。序言规定，“应通过及时的预防性措施保护环境”，以及“考虑到海洋环境的损害可能是无法回复的……因而沿海国和欧洲经济共同体不应等到损害证据的出现才开始行动”。

1987 年在伦敦召开的第二次北海会议也明确提到了风险预防原则。此次会议通过的《伦敦宣言》第 7 段规定：“为了保护北海免遭危险物质所可能导致的损害，在有足够的科学证据表明这一因果关系之前，有必要采取预防性方法以控制这些物质的输出。”应注意的是，《伦敦宣言》中的风险预防原则仅适用于北海海洋环境维护，而且其范围仅限于那些最危险的物质和那些持续有毒的，并能在生物体内积聚的物质。

1990 年在海牙召开的第三次北海会议所通过的《海牙宣言》序言中指出：“应继续适用风险预防原则，以避免那些持续有害的、在生物体内积聚的物质损害，甚至当损害和物质释放之间的因果关系缺乏科学证据的时候。”第三次北海会议基本上继承了第二次北海会议有关风险预防原则的规定，并在其基础上进一步强调了应坚持不懈地适用风险预防原则。

联合国环境规划署管理委员会于 1989 年发布了《海洋污染决议》。这份决议基于海洋环境无法回复的损害，以及由于等待有关海洋倾倒物的科学证据而未能及时控制海洋污染所导致的对人类的危害，建议“各国政府应采纳风险预防原则，并将其作为预防和消除海洋污染政策的基础。”如果说 1984 年和 1987 年的 2 次北海会议是风险预防原则在区域层面上的出现，那么 1989 年联合国环境规划署《海洋污染决议》便是在全球范围内引入了风险预防原则。

1990 年联合国欧洲经济委员会在挪威卑尔根举办了名为“为了共同未来行动”的会议，并通过了《卑尔根可持续发展宣言》（以下简称“《卑尔根宣言》”）。《卑尔根宣言》将风险预防原则解释为当环境损害是严重的或是无法挽救时才实施的措施。而且相对于其他法律文件，如《里约宣言》，《卑尔根宣言》并未要求预防性措施应符合成本效益原则。

在 1990 年《波罗的海宣言》中，[25] 欧共体和欧洲一些国家决意适用风险预防原则。这份宣言还对风险预防原则的适用范围作了规定，其基本与第二次北海会议上通过的《伦敦宣言》一致。此外，在《波罗的海宣言》中采用了“有效执行”的表述，替代了“成本效益标准”。

1992 年在里约召开的联合国环境与发展会议“地球峰会”上产生了 5 个环境公约，其中 3 个是不具有拘束力的宣言，即《21 世纪日程》、《里约环境和发展宣言》和《林业原则宣言》。经过与会各国和大会主席的共同努力，[26]《里约宣言》对风险预防原则作了普遍性界定，并成为其他国际文件和协定所经常借鉴的定义。《里约宣言》原则 15 规定：“当严重或不可回复的威胁出现时，欠缺完整的科学证据不能被用作拖延采取符合成本效益的措施以防止环境破坏的理由。”该项规定中的风险预防原则与以往国际文件不同，其适用范围不再局限于环境保护中的一个或几个方面，而是针对总体环境恶化的预防。

《里约宣言》之后的一些国际性文件也相继对风险预防原则作了规定，如 1993 年在奥德萨通过的《保护黑海部长宣言》（以下简称“《黑海宣言》”）。这份文件要求各国应立即采取行动以防治黑海污染，而且在此次会议上，各国环境部长也决议将基于风险预防原则建构它们的环境政策。[27]

1995 年在华盛顿召开了政府间保护海洋环境会议，并通过了《华盛顿保护海洋环境宣言》，其中有关风险预防原则的规定基本与《里约宣言》一致，区别之处在于两者的适用范围不同，前者仅限于海洋环境，而后者则是针对世界环境而言。

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25 《波罗的海宣言》的目标是保持波罗的海的生态平衡。瑞典于 1990 年 9 月采纳了这份宣言。

26 在 1992 年联合国环境与发展大会上，加拿大、哥伦比亚、美国等国家都先后就风险预防原则的概念提出了自己的意见。

27 在《黑海宣言》中，保加利亚、格鲁吉亚、罗马尼亚，以及俄罗斯等国家的环境部长都表示了风险预防原则在各自环境政策中的重要地位。

随着风险预防原则适用范围的扩展，其不但适用于海洋环境保护，而且延伸至海洋生物资源养护领域。例如，联合国大会于 1989 年通过了第 44/225 号有关流网捕鱼的决议。[28] 该决议认为任何有关海洋生物资源养护的管理性措施都应考虑到可以获得的科学数据和分析；在缺乏有关损害的科学证据情况下，联大要求禁止远洋大规模流网捕鱼。联大的这项决议对海洋生物的可持续利用具有重要意义，但却遭到了一些渔业生产者和一些渔业大国的反对。[29]

1995 年联合国粮食与农业组织制定了《负责任渔业行为守则》（以下简称“《行为守则》”），其中风险预防原则被列为其“一般原则”。《行为守则》第 6.5 款规定，“各国、分区域和区域渔业管理组织，应当利用目前最佳的科学依据，普遍采取保护、管理和利用水生生物资源的预防性方法。不应当把缺乏足够的科研资料作为推迟采取或不采取措施来保护目标物种、与之相联系的物种或对其依赖的物种以及非目标物种及其环境的理由。”

从以上国际组织决议中，我们可以看出：第一，风险预防原则的适用范围在不断扩大，从第二次北海会议的《伦敦宣言》到联合国环境与发展会议的《里约宣言》，风险预防原则从局限于环境损害的一种或几种情况发展至适用于针对各种环境损害的总体保护；第二，风险预防原则的采纳范围也逐步由区域性发展至全球范围内，从第一、二次北海会议，以及《波罗的海宣言》，到 1992 年的地球峰会，风险预防原则不再限于个别区域范围内的环境保护，而是作为全球各国应加以重视的环境保护策略。此外，风险预防原则不仅在环境保护领域得到了各国的认同和适用，而且在海洋生物资源养护和管理方面，也逐渐确立了自己不可忽视的地位。

（3）国际判例中的风险预防原则

目前国际间涉及风险预防原则的案例主要有 6 个，分别为国际法院 1995 年的“核试验Ⅱ案”，[30] 1997 年的“匈牙利共和国诉斯洛伐克联邦共和国”；[31] 国际

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28 1989 年 12 月 22 日联大一致通过了有关远洋大规模流网捕鱼和其对世界海洋生物资源影响的第 44/225 号决议。在 1990 年 12 月 21 日通过的联大第 45/197 号决议再次确认了风险预防原则的必要性，并指出根据联大第 44/225 号决议，一些国家审查了有关流网捕鱼可以获得的科学数据，但未能得出流网捕鱼对海洋生物资源的维护和持续性管理不具危害的结论。

29 有学者认为，如果联大禁止流网捕鱼的这一观点得到了普遍接受，那么很少有渔业能够在公海上合法地开展，除非已经进行了昂贵的且复杂的前期调查。

30 全称为“依据 1974 年 12 月 20 日核试验案判决第 63 段检验情况的请求案”。Request for Examination of the Situation in Accordance with Paragragh 63 of the Judgement of 20 December 1974 in Nuclear Tests (New Zealand v. France), Order of 22 September 1995, *ICJ Reports*, 1995, pp. 288~426.

31 Case Concerning the the Gabčíkovo-Nagymaros Project (Hungary-Slovakia), *ICJ Reports*, 1997, pp. 1~241.

海洋法法庭 1999 年的“南方黑鲔案”，[32] 2001 年的“MOX 核废料加工厂案”[33] 等。

在这些案件中，有些是涉及对风险预防原则国际法地位或是法律效力的确认，有些是探讨风险预防原则与某特定公约或协定的关联性，有些是关于将风险预防原则作为判案依据。这些国际案件对于风险预防原则法律地位的确定，相关法律效力的解释，以及对各国环境保护都具有参考价值和指导性作用。

国际法院的“核试验Ⅱ案”。本案可追溯到 1974 年“核试验Ⅰ案”[34]。1973 年，法国在南太平洋进行了一系列的核试验，引起澳洲和新西兰的不满。澳洲主张其主权受到侵犯，而新西兰则主张其海洋生态，甚至大气层都受到放射性物质的污染。对此，国际法院认定法国在南太平洋所进行的核试验，造成辐射性灰尘堆积在澳洲、新西兰领土上，这是违反国际法的行为。国际法院还于 1973 年 6 月 22 日根据《国际法院规约》第 41 条制定了临时性措施，要求法国应避免核试验对澳洲和新西兰所造成的放射性物质污染。

1995 年法国总理宣布将进行最后一系列的地下核试验。新西兰认为法国的行为违反了其 1974 年不再进行任何大气核试验的承诺，并且主张法国在未依据公认的国际标准进行环境影响评估以确定试验的安全性之前，法国的核试验将造成或可能造成放射性物质进入海洋环境的危害后果，因而根据风险预防原则的规定，法国的行为违反国际法。而法国则主张风险预防原则的国际法地位尚不明确，所以其没有遵守的义务。

在本案中，国际法院认为 1974 年“核试验Ⅰ案”决定的范围只涉及大气核试验，而无权处理本案中的地下核试验，因而驳回了新西兰的诉讼。国际法院虽然未对本案中风险预防原则的国际法地位等争议点作出规定，但是在国际法院法官意见书中，却对风险预防原则提出了一些重要见解。其中韦拉曼特里法官指出，风险预防原则在国际环境法中逐渐获得广泛支持。另外，就举证责任转换而言，新西

32 Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), Order on Provisional Measures (ITLOS Cases Nos. 3 and 4). International Tribunal for the Law of the Sea, at http://www.itlos.org, 27 August 1999.

33 MOX Plant Case, Request for Provisional Measures (Ireland v. United Kingdom) (ITLOS Cases No. 10). International Tribunal for the Law of the Sea, at http://www.itlos.org, 3 December 2001.

34 Nuclear Test case (Australia and New Zealand v. France), *ICJ Reports*, 1974, p. 253.

兰已经就本案中放射性物质流入海洋的争议提供了适当的初步证据，所以法国负有提供相关证据的义务。[35] 柯洛马法官也持有相同意见，认为法国负有举证责任；此外，在此种风险可以被合理避免的情况下，法国应负有不让此种严重灾害发生的义务。[36] 法官帕尔默也指出，当一项活动对环境有重大影响时，不仅应采用风险预防原则，而且应适用环境影响评估，以避免或降低环境灾害的发生。而且他还进一步指出，这种做法应是环境议题中的习惯法。[37]

国际法院 1997 年“匈牙利共和国诉斯洛伐克联邦共和国”。1958 年，捷克斯洛伐克与匈牙利协商决定在共同水道多瑙河上建造一水力发电厂。1977 年两国签署了一份有关共同建设并运营此水力发电厂的条约。随着两国计划的执行，匈牙利对该计划的相关环境影响产生了疑虑。其认为，水坝的建造可能使得多瑙河南岸唯一湿地地区因表层水位下降而易于遭受污染；水坝可能使得布达佩斯南边的地下水遭受污染；而且在水坝的上游修建地下蓄水库，可能造成沉淀物的渗透，从而致使多瑙河水源遭受污染。

由于匈牙利对水坝建造环境影响的诸多疑虑，匈牙利科学院于 1981 年指派一个特别小组对两国水坝计划的环境安全性进行调查。该特别小组认为应延迟或是取消两国水坝计划。在强大的国内压力下，匈牙利于 1989 年中止两国水坝建造的部分计划，并宣布对两国水坝计划环境影响评估之后，才可以执行水坝的其他工程部分。对于匈牙利延迟水坝建设的做法，捷克斯洛伐克于 1991 年提出一项临时性解决方案，其中包括要继续进行其本国境内的蓄水库建设。匈牙利对于捷克斯洛伐克的解决方案提出抗议，并宣布如果捷克斯洛伐克继续进行水坝建设，将终止 1977 年条约。最终，在两国协商未果的情况下，匈牙利和捷克斯洛伐克于 1993 年将争端提交国际法院解决。

匈牙利主张，根据国际法中的风险预防原则，国家有义务防止危害的发生，并以此作为其延迟两国水坝计划的根据。匈牙利重申了《里约宣言》第 15 项原则的规定，强调了当有严重或是无法恢复的损害发生时，缺乏充分的科学确定性，不应成为延迟采取符合成本效益措施的理由。此外，匈牙利还引用 1992 年《跨界水道公约》中的风险预防原则规定，说明其行为的合法性。

最后，国际法院裁决认为，如果国际环境法中的一些新发展与本案中条约的执行相关，本案的争端双方可以基于共识，将这些新发展并入条约中。换言之，国际法院承认了国际环境法中的新发展可以作为履行有争议条约的依据，但是前提是争端双方应对此达成共识。但是，国际法院并未对国家是否可以根据风险预防原则采取保护跨国资源的措施直接作出处理，并巧妙的回避了风险预防原则是否

35 Dissenting Opinion of Judge Weeramantry, *ICJ Reports*, 1995, pp. 288, 345.
36 Dissenting Opinion of Judge Koroma, *ICJ Reports*, 1995, pp. 288, 378.
37 Dissenting Opinion of Judge ad hoc Sir Geoffery Palmer, *ICJ Reports*, 1995, pp. 288, 412.

已经构成国际习惯法的问题。

国际海洋法法庭 1999 年“南方黑鲔案”。1993 年澳大利亚、新西兰和日本签署了《南方黑鲔保护公约》，以共同养护、管理南方黑鲔，并控制其捕捞数量。南方黑鲔是一种具有高度经济价值的洄游鱼类，并深受日本市场欢迎。由于日本进行了一项实验性捕鱼计划，其所捕获的南方黑鲔数量超出了《南方黑鲔保护公约》所规定的捕捞限额，因而澳大利亚和新西兰认为日本的实验性捕鱼计划对南方黑鲔的养护可能造成损害。

在三方协商失败后，澳大利亚和新西兰根据《公约》附件 7 的规定启动了仲裁程序。对于澳大利亚和新西兰依据《公约》第 290 条第 5 项规定实施临时性措施的要求，国际海洋法法庭于 1999 年 8 月裁定实施临时性措施。有学者认为国际海洋法法庭的此项裁定是“确定风险预防原则在国际法上地位的极好例子”。显然，国际海洋法法庭临时性措施裁定是根据风险预防原则作出的，但是该项裁定却不足以确定风险预防原则国际习惯法的地位。

在本案中，澳大利亚和新西兰主张，根据《公约》和《南方黑鲔保护公约》，缔约方在采取任何可能对环境造成严重或是无法回复损害的活动时，应根据风险预防原则作出相应决定。当面对行为和后果之间的科学不确定性时，应谨慎的作出决定，或采取相关行动;还要求日本在最终裁决作出之前，应根据风险预防原则进行南方黑鲔的捕捞活动。而日本则对风险预防原则是否已经构成国际习惯法提出了质疑。

国际海洋法法庭认为，缔约方应谨慎的采取行动，以确保有效地实施养护措施，从而防止对南方黑鲔种群造成损害。并应采取紧急措施以维护缔约方的权益以及防止南方黑鲔种群数量的削减。日本单方面采取实验性捕捞南方黑鲔的计划[38] 显然违反了《公约》中有关对风险预防原则解释的条款，如第 64、116 和 119 条的规定，即有关“公海捕鱼的权利”和“公海生物资源养护义务”的规定，并违反了 1993 年《南方黑鲔鱼保护公约》的相关规定。因而，国际海洋法法庭裁决日本应停止继续进行实验性南方黑鲔捕捞活动。此外，国际海洋法法庭还建议澳大利亚、新西兰和日本与其他国家或渔业团体达成协议，以更好的养护和管理南方黑鲔。

虽然在本案中国际海洋法法庭并没有解决风险预防原则的国际法地位问题，但是一些法官在个别意见书中表达了对预防性方法的支持，从而推动了风险预防原则的发展。例如，法官李恩指出，本案中所实行的临时性措施，体现了预防性方法。他还指出预防性方法比风险预防原则更具灵活性。法官希尔也认为如果使用

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38 学者詹姆斯•卡梅隆将国际海洋法法庭在南方黑鲔案中作出的临时性裁定视为“很好的说明国际法中风险预防原则地位的例子”。参见 Tim O’Riordan and James Cameron, *Reinterpreting the Precautionary Principle*, London: Cameron May International Law & Policy, 2001, pp. 113~142.

预防性方法，而非风险预防原则，不但在处理相关议题上更具弹性，而且能够与1995 年《鱼类种群协定》第 6 条第 1 款的规定相一致，即会员国应通过预防性方法养护、管理并勘探跨界鱼类和高度洄游鱼类种群。法官特雷维斯则认为，可以将风险预防原则是否构成国际习惯法的问题暂时搁置，而直接引用预防性方法来处理本案争议。

国际海洋法法庭 2001 年“MOX 核废料加工厂案”。爱尔兰政府担心位于英国境内的 MOX 核废料加工厂中的核废料与放射性物质在通过两国间水道运输过程中会造成环境污染，因而根据《公约》第 290 条的规定，向国际海洋法法庭请求实施临时性措施，即要求英国立即关闭该 MOX 核废料加工厂，并禁止核废料与放射性物质经由两国间水道运输。

本案中，爱尔兰政府主张英国政府没有采取任何必要措施以防止、减少或控制 MOX 核废料加工厂的核废料或放射性物质蓄意或意外流出，以及在两国间水道运输过程中的流出，因而该核废料加工厂可能造成爱尔兰海域海洋环境污染。此外，英国政府有义务证明 MOX 核废料加工厂将不会对周围环境造成威胁。

由于事实上英国已经对 MOX 核废料加工厂周围环境安全作了周密的防护措施，并且也计划停止该厂核废料或放射性物质的跨境运输活动。因此国际海洋法法庭只是建议两国应以合作的态度，相互交换关于 MOX 核废料加工厂的相关情况，并共同监控该厂的安全问题。而对于爱尔兰政府的临时性措施则未予批准。

在本案中，法官沃尔夫鲁姆指出，虽然目前国际间对于风险预防原则的很多问题未达成共识，但是就风险预防原则的举证责任而言，应由进行可能污染环境行为的国家承担证明其行为无害的义务，并认为，相对于英国所提供的证据，爱尔兰所提供的证据并不足以证明该风险的严重性。法官特雷维斯也认为，爱尔兰所提供的证据不足以证明采取临时性措施的急迫性。特派法官翟凯利也持有相同的看法，认为爱尔兰未能提出足够的证据以说服国际海洋法法庭采用风险预防原则，并赞成国际海洋法法庭根据风险预防原则所作出的两国进行合作的建议。

本案中，国际海洋法法庭虽然没有应爱尔兰政府的要求裁定采取临时性措施，但是国际海洋法法庭根据风险预防原则的理念，指出有关环境风险的举证责任应由行为国承担，即其应证明所采取的行动对环境无害，否则将被施加以风险预防原则。该案的裁定表明不能滥用风险预防原则，其实施应具备一定的条件，即受害国应提供足够的证据表明行为国所采取的行为可能对环境造成一定的风险。

在这些涉及风险预防原则的国际案例中，国际司法机构虽然对风险预防原则的国际法地位及法律效力等问题避而不谈，但是相关裁定对该原则内涵的发展，以及法律地位的确立具有推动作用。在相关案件中对有关不具科学确定性的环境风险举证责任和实施风险预防原则条件的讨论等有关风险预防原则的引用和阐释对风险预防原则的发展不无裨益。

此外，在世界贸易组织争端解决机制中，也有一些涉及风险预防原则的案例。如 1996 年“美国汽油案”，上诉机构对《关税暨贸易总协定》第 20 条（g）款中“有关保护可用竭自然资源的措施”中“有关”与“基本上针对”解释时，指出只有当一项特殊措施在任何情况下对环境或资源保护没有任何积极意义时，才可以说这项措施不是基于环境或资源保护的目标。上诉机构还指出国家政府在环境或资源保护方面具有一定的自由裁量权。在此案中，上诉机构虽然没有明确提到风险预防原则，但是其所作出的解释是与风险预防原则的基本理念相一致的，即较大限度的肯定了旨在保护环境和资源的措施，并包括那些针对可能产生一定环境和资源损害后果行为的措施，力求达到环境保护与贸易发展之间的平衡。在 1998 年“荷尔蒙牛肉案”中，虽然上诉机构对于风险预防原则的国际法地位没有作相关评论，但是上诉机构在其裁定中明确提到了风险预防原则。上诉机构认为对世界贸易组织有关贸易法规可以根据风险预防原则作出解释。例如，上诉机构指出《实施动植物卫生检疫措施的协议》第 5.1 条规定的危险评估中的危险不仅是指科学实验室中可以确定的风险，而且是指客观存在的风险，换句话说，是指在现实世界中可能对人类健康造成损害的危险。

上述案例虽然没有说明风险预防原则已经成为具有约束力的国际习惯法或是一般国际法原则，但是专家组和上诉机构报告对风险预防原则给予了较高的重视，认为可以依据可持续发展原则和风险预防原则对世界贸易组织贸易法规作出解释。

三、结　论

由于目前科学的不确定性和局限性，为了保护现有的环境和资源，防止发生无法挽回的灾难和损失，并为了人类子孙后代的利益，在环境保护和资源利用方面，人类应采取一种谨慎的态度。风险预防原则便是基础此种思想应运而生的。风险预防原则首先发端于德国和瑞士国内环境法。之后，其他国家也逐渐采纳了风险预防原则，并将其作为本国环境与资源保护中的重要原则之一，如荷兰和美国。在国际层面上，无论是国际公约，或是国际组织决议，大多都对风险预防原则作了规定或阐释，并将其作为国际环境保护的重要依据。另外，风险预防原则还成为国际司法机构裁判的重要根据。因而，可以说风险预防原则已成为各国以及国际社会评估人类活动对环境与资源的影响，以及采取环境与资源保护措施的一项重要理论依据。

公共运输领域中回归契约自由的尝试

——评联合国贸法会《运输法公约》(草案)对于海运服务协议的调整思路

韦经建* 姚 莹**

内容摘要: 公共运输领域中的海运服务协议具有彰显契约自由的特性,并且在当前的国际班轮贸易中发挥着重要作用。现行的海运统一法以限制公共承运人的契约自由为主要的秩序价值,故而不能对海运服务协议加以有效的规制。正在拟定的《运输法公约》创设了适用于具有海运服务协议性质的批量合同的规则框架,它突破了海运统一法限制公共承运人契约自由的传统,是在新一轮海上货运法统一化运动的秩序价值的诉求上进行的,是在公共运输领域中对回归契约自由的尝试。

关键词: 公共运输 契约自由 《运输法公约》 海运服务协议

在当今的国际班轮运输中,海运服务协议的数量呈飞快上升趋势。在一些行业中,80%~90% 的班轮运输是根据这类合同进行的。关于如何处理这类合同的任何决定都可能因而影响到对赔偿责任实体法规定的审议。[1] 在 2003 年和 2004 年举行的联合国国际贸易法委员会运输法工作组制定《运输法公约》(草案)(以下简称"《公约草案》") 的会议上,将海运服务协议纳入《公约草案》的议题被正式提上日程。将要拟定的运输法公约是否应当沿袭"海牙—维斯比规则体系"的传统,即排除适用任何能够相对体现契约自由精神的海运合同,如租船合同或海运服务协议?如果调整海运服务协议,是调整所有类型的海运服务协议,还是仅调整具有其某些特性的批量合同,如班轮运输下的批量合同?如果仅调整班轮运输下的批量合同,关于公共承运人责任制度的强制性规范是否可完全或部分适用?这些问题一直是运输法工作组会议上各国代表争论的焦点,本文亦据此展开讨论。

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* 韦经建,吉林大学法学院教授。
** 姚莹,吉林大学生法学院讲师,民商法学博士研究生。

1 Comments from the UNCTAD Secretariat on freedom of contract, at http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport/, 18 April 2005.

一、线索：在公共运输领域中的契约自由限制下挣扎而出的海运服务协议

班轮运输方式是随着世界经济和国际贸易的发展而发展起来的。19 世纪初，国际贸易已经发展到了相当的规模，工业制成品、半制成品、食品和其他高价值商品所构成的件杂货运输量迅速增加。只有提供快速的、规则的和不间断的海上货物运输服务，方能适应分布广泛的世界消费市场的需要，班轮运输市场便应运而生，而这也成为班轮运输方式的首要特点。班轮运输方式的另一个特点，就是其运输的货物价值较高。“近年来，虽然班轮运量在世界海运总量中仅占 20% 左右，但它所承运的货物价值却相当于世界海运货值的 80%。由于世界上经济发达国家的工业品贸易占世界工业品贸易的 80% 以上，班轮运输也相应地在发达国家之间广泛进行。”[2]

关于班轮运输的性质、契约自由在班轮合同关系中的地位、班轮公会在班轮运输市场中的作用、海运服务协议产生的背景及其对于契约自由限制的突破等问题，本文将遵循以下线索展开讨论：

1. 根据普通法的传统，班轮运输属于公共运输领域，并具备以下基本特征，即：（1）公共承运人将公众的货物按照指定时间，从指定地点运至指定目的地；（2）托运人为此支付运费作为合同的对价；（3）公共承运人明示或以行动表明运送货物之目的是赚取运费；（4）公共承运人须接受任何人交付托运的货物，通常无拒运权；（5）运输并非是偶发性的或不定期的或附属于承运人主业的。[3] 这表明，公共运输领域中的契约自由尽管受到一定的限制，但是，尚未涉及最为主要的赔偿责任领域。于是，从英国源起的公共承运人就开始通过在班轮提单中列入免除其赔偿责任条款的方式来规避对契约自由的限制。从 19 世纪中期开始，班轮承运人“滥用契约自由”的做法十分盛行，在代表班轮运输合同的提单中充斥着大量的、免除承运人对货物灭失和损坏的赔偿责任的条款，以至于“收货人或提单持有人的权益无从保障，严重阻碍了提单的流通作用，银行不肯汇兑，保险公司不肯承保货物运输风险”。[4]

2. 自 1924 年《海牙规则》始奠定的、以公共承运人责任制度为核心的、统一的强制性规范体系，其制度创设的本意，一方面是要通过规定标准提单条款来限制公共承运人对于契约自由的滥用；另一方面则是通过设立赔偿责任限额或责任免除的制度使承运人享有一定的特权，从而大体上实现船货双方的利益平衡，以

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2 李勤昌主编：《国际货物运输》，大连：东北财经大学出版社 2005 年版，第 11 页。
3 威廉 • 台特雷著，张永坚等译：《国际海商法》，北京：法律出版社 2005 年版，第 35 页。
4 司玉琢主编：《海商法》，北京：法律出版社 2003 年版，第 149 页。

促进国际班轮业的有序发展。无论是 1968 年的《海牙—维斯比规则》，还是 1978 年的《汉堡规则》，尽管对于班轮运输中船货双方的权利义务均重新加以调整，尤其是后者的调整相当彻底，但总体上看，也都没有改变国际海运统一法的前述立法意旨。因此，在一定程度上限制公共承运人的契约自由，以维护班轮运输中船货双方的利益平衡关系，这仍然是目前有效运行的国际班轮运输统一法的既定原则。

3. 在 20 世纪的大部分时期，北美及欧洲的各班轮航线多由班轮公会依据其制定的统一运费率加以控制。一方面，这种垄断性的联盟使得公会以外的船东很难与作为公会成员的船东在这些航线上进行公平竞争；另一方面，也使得船东（承运人）与货主（托运人）之间的关系总体上处于一种相安无事的稳定状态。而在过去的 20 年里，由于生产全球化、贸易自由化和投资便利化的深入发展，再加上集装箱运输方式和相应航运技术的日趋成熟，以及跨国公司对于全球采购和物流服务的广泛依赖，导致美国的承运人与托运人，以及与班轮公会之间的关系发生了戏剧性的变化，尤其表现在，“美国各港口间航线上的这种商业关系已从严格管制模式转换为灵活宽松模式，托运人与承运人可通过签订协议达成最适合他们的商业合作关系”。[5] 近 20 年来，随着欧盟和美国的航运政策向自由化方向转向，班轮公会的垄断空间被越来越严格地加以限制，从而使其会员的海运市场份额被逐渐蚕食。

4. 出于继续发挥班轮公会的垄断性调控作用和夺回海运市场份额的考虑，美国的一些大船东开始与一些大货主（通常是跨国公司）签订长期的包运合同或批量合同等，而这些合同的总称，即所谓“远洋班轮服务协议”。根据美国法，运输协议通常被视为一种服务合同，因此，“远洋班轮服务协议”在美国航运业和贸易界又被称为“海运服务协议”。这些协议可以使各方清楚地明了在各时间段和运输量中承担的义务以及因违约所必须给付的赔偿数额等条件；同时，托运人根据协议通常可以获得船东所承诺并呈报联邦海事委员会备案的、稳定的优惠运费率，这也使得其他货主由于不能在公会航线上获得此种优惠而在贸易的边际成本方面上处于劣势。于是，自 1984 年和 1998 年美国改革远洋班轮业的管理制度，允许以竞争方式谈判订立海运服务协议以来，在多种国际贸易中，海运服务协议的使用有了较大的发展。[6] 但是，海运服务协议适用的主体在其后的发展进程中有逐渐

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5 Donald F. Wood, Anthony Barone, Paul Murphy and Daniel L. Wardlow, *International Logistics*, 2nd Edition, New York: AMACOM, 2002, p. 141.

6 Transport Law: Preparation of a draft instrument on the carriage of goods [by sea], Proposal by the United States of America (A/CN.9/WG.III/WP.34), UNCITRAL Working Group III 12th session, Vienna, 6–17 October 2003, at http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html, 14 May 2006.

扩大的迹象，如一些无船承运人[7]或独立船东（非班轮公会成员），随着班轮航运业日趋集中以及全球货运代理业各种结盟的出现，也开始提供以这类协议为基础的海运服务。海运服务协议的使用变得更为普遍。

5. 作为班轮运输合同当事方的承运人，由于其具有公共承运人的法律地位，在调整此种合同关系的强制性规范的约束下受制于不能以契约自由相对抗的、法定的最低责任，其拥有的契约自由的范围有限。而海运服务协议下的承运人尽管也属于公共承运人，但由于国内法的豁免，使得承运人在满足豁免条件的场合可以排除强制性规范的适用，即在一定程度上能够以缔约自由来规避强制性规范的制约，从而比较充分地享有契约自由的利益。或许这就是海运服务协议得以在班轮运输条件下产生和发展的最为主要的原因。

二、分析：公共运输领域中的海运服务协议的特点

公共运输领域中海运服务协议属于服务合同范畴，而服务合同这一概念首先是在美国《1984 年航运法》中规定的，因而仅适用于班轮运输。该法案第 3 条第 19 款规定："服务合同是指一个或多个托运人与一远洋公共承运人之间，或两个或多个远洋公共承运人与其签订的除提单或货物收据以外的书面协议。一个或多个托运人承诺在一固定期限内提供一定的批量或最低限量的货物，或保证一定的运费收人；远洋公共承运人承诺按照一定的费率或费率表收取运费，并就确定的服务水平，如舱位保证、运输期间、挂港顺序或类似的服务内容等作出承诺。"[8]美国《1999 年海上货物运输法》（草案）第 2 条第 10 款确认了《1984 年航运法》关于服务合同的定义，规定："服务合同"与《1984 年航运法》第 3 条第 19 款所界定的该术语的含义相同。[9]

由于公共运输领域中的海运服务协议可以由托运人或托运人协会与公共承运人或班轮公会签订，各方所应承担的义务以及违约责任和赔偿方式都会在其中很清晰地列明。法律要求此类合同必须是真实意思表示的合同，合同中必须有陈述清楚的航程持续时间、货物最小装载量、运费率、所运商品清单、始发港和目的港、限定的服务预期等等；对于货物损坏也有条款规定，以防止托运人没能履行义务，

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7 美国《1984 年航运法》将无船承运人定义为，不经营提供海上运输所要求的船舶的公共承运人，在其与海运公共承运人的关系上，相当于托运人的人。可以说，"《1984 年航运法》的最大成就之一就是对于无船承运人制度的变革"。转引自陈宪民著：《海商法理论与司法实践》，北京：北京大学出版社 2006 年版，第 48 页。

8 Shipping Act of 1984, Article 3(19).

9 韩立新等编译：《各国（地区）海商法汇编》（上卷），大连：大连海事大学出版社 2003 年版，第 388 页。

比如海外销售的损失（这是经济萧条时期常见的问题）。[10] 综上，可以认为，公共运输领域中的海运服务协议具有以下特点：

1. 从适用的主体范围来看，海运服务协议适用的主体可以是班轮公会成员，也可以是成员以外的一个或多个远洋公共承运人之间的协议组织，而且还可以适用于相互之间无关联的多个独立托运人，即他们可以在不必成为货主协会成员的情况下参与海运服务协议。

2. 从适用的运输方式来看，海运服务协议仅适用于班轮运输，而不适用于非班轮运输，[11] 如航次租船运输、包箱运输、拖带运输等，尽管在这些运输方式下也会签发提单或类似的货运单证，乃至在航运业务中，合同约定的向出租人缴付的报酬也称之为“运费”，而我国《海商法》更是将前者直接规定为国际海上货物运输的一种类型。总体而言，班轮运输以外的海运方式均属于私人运输领域，国家干预和法定限制较少，各方当事人均享有比较广泛的契约自由。

3. 从承运人的责任期间来看，海运服务协议下的承运人的责任期间通常是从接到货物时起至交付货物时止，责任期间的开始和终止并不必然受制于《海牙规则》，或者根据美国《哈特法案》，以及参照《海牙规则》制定的《1936 年海上货物运输法》规定的装卸货港的地点，故而属于“门到门”运输模式。从这种意义上说，海运服务协议下定期的批量货物运输方式更能满足跨国公司组织全球化生产和资源配置的要求。

4. 从合同的形式来看，由于海运服务协议通常规定船货双方可以根据需要签订书面或电子形式的合同来运送批量货物，并可以用提及的方式将价格表、提单或货物收据等单证作为合同的内容纳入其中，因此，它是介于传统的件杂货运输合同与现代物流合同之间的一种特殊合同形式。

5. 从使用的运输单证来看，由于海运服务协议以运送批量货物为目的，故于实践中使用海运单或电子提单等运输单证为多，而这类单证作为合同的一部分尽管能够作为合同存在的证明，亦并成为承运人收到单证上记载货物的凭证，但毕竟不具有可转让单证的效力，故不可作为物权凭证而流通。

6. 从管辖权条款来看，海运服务协议的当事人可以书面形式就仲裁或法院管辖权达成约定，包括因协议而发生的争议是由仲裁管辖或是由法院管辖的约定，也包括由任何指定的仲裁机构或法院管辖的约定。但是，按照美国《1999 年海上货物运输法》（草案）的规定，与美国有关的海上货物运输合同（包括服务合同）中的外国管辖权条款并非完全排除美国法院的管辖，如果争议一方在美国提起请

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10 Donald F. Wood, Anthony Barone, Paul Murphy and Daniel L. Wardlow, *International Logistics*, 2nd Edition, New York: AMACOM, 2002, p. 163.

11 根据公约草案第 1 条 (c) 款的规定，“非班轮运输”系指非班轮运输的任何运输。在本款中，“班轮运输”系指一种运输业务，即：(1) 通过公示或类似手段向公众提供的，并（2) 包括由根据公布的航期时刻表在指定港口之间定期运营的船舶进行的运输。

求，并且货物的装卸地或交接地，或者被告的主营业地或居所地，或者合同缔结地等其中一项连接因素或若干项连接因素涉及美国，美国对此类纠纷仍然具有管辖权。[12]

7. 从报备制度来看，根据美国《1984 年航运法》的规定，除散装货、林业产品、回收旧金属、废纸的服务合同外，其他的服务合同都应向美国联邦海事委员会报备，同时附随报送此项合同的核心条款，并登录到运价本上接受公众查询。上述核心条款包括：始发港、目的港、品名、最低箱量、运价、合同持续时间、服务承诺、损害赔偿等。而改革后的《1998 年航运法》对此进行了部分修改：服务协议仍需向联邦海事委员会报备。但不同的是，上述核心条款中被要求登录到运价本上接受公众查询的，只有始发港、目的港、品名、最低箱量、合同持续时间等，对其他各项条款不再要求公开。由于运费率等核心条款不再接受公众查询，服务合同对公众而言就成为“秘密合同”，而原有的报备制度则成了“秘密报备制度”。[13]

三、比较：海运服务协议与其他海上货物运输合同的关系

海运服务协议与提单以及其他类型的运输合同如件杂货运输合同、批量合同，以及忠诚契约等既有联系，亦有区别。本文以下部分将基于比较的方法来梳理其相互关系。

（一）海运服务协议与件杂货运输合同的关系

件杂货运输合同是承运人负责将件杂货由一港运至另一港，而由托运人或者收货人支付运费的合同。由于件杂货运输合同通常在班轮运输（又称定期船运输）方式下所采用，故习惯上亦称之为班轮运输合同，其主要特点为“承运人接受众多托运人的托运，将属于不同托运人的多批货物装于同一船舶，按规定的船期，在一定的航线上，以规定的港口顺序运输货物”。[14] 件杂货运输合同一般没有合同书的通常格式，它往往是由一套相互关联的法律文件组合而成，比如订舱单、提单等。各国司法实践通常确认，当承托双方办理完成订舱手续时运输合同即告成立，一般不必以是否存在着可明确划分的要约和承诺，是否存在一份双方当事人签字、加盖公章的书面合同书，或者其他附加条件是否成就等因素来判断合同的成立与

12 Carriage of Goods by Sea Act of 1999, Article 7(9).
13 Donald F. Wood, Anthony Barone, Paul Murphy and Daniel L. Wardlow, *International Logistics*, 2nd Edition, New York: AMACOM, 2002, p. 162.
14 司玉琢主编：《海商法》，法律出版社 2003 年版，第 101 页。

否。尽管件杂货运输合同与海运服务协议都是采用班轮运输方式的定期运输合同，但是，二者之间还有以下不同：

首先，海运服务协议是承托双方签订的除提单或收货单以外的书面合同，其中有明确的用以规定承托双方权利义务的条款，而件杂货运输合同由包括提单、海运单在内的一套相关的法律文件组合而成，没有合同书的通常格式。

其次，海运服务协议下的货物为批量货物时，缔约承运人（契约承运人）可以为多个，并由其中的一个实际履行特定批量货物运送的责任，从而成为该批量货物运送的履约承运人（实际承运人）；而件杂货运输合同中尽管可以有多个托运人，但通常只有一个契约承运人，并由其承担所有托运人货物的运送责任，而且，除非另有转船的约定，契约承运人也是惟一的履约承运人。

再次，海运服务协议下承运人的责任期间比传统的件杂货运输合同下的责任期间更加宽泛，它将承运人的管货责任从《海牙规则》或美国《1936 年海上货物运输法》的“装至卸”扩大到了“接到交”，从而使得管货责任适用于“门到门”运输的全部期间。以我国《海商法》为例，其第 46 条将包括件杂货运输在内的国际海上货物运输承运人的责任期间规定为，在集装货物的场合，是从装货港接货至卸货港交货的承运人掌管下的全部期间，与《汉堡规则》相同；而在非集装货物的场合，则是从货物装上船至货物卸下船的全部期间，与《海牙规则》一致。因此，在件杂货运输合同项下，无论采用哪一种装货方式，承运人责任期间的开始和终止均与装卸货港的地点相联系，故而属于“港至港”运输。

最后，海运服务协议的运费可以由合同各方约定；而件杂货运输合同的运费则是依据承运人事先单方面确定的固定的费率表计算。

（二）海运服务协议与批量合同的关系

批量合同是指在约定期间内分批装运约定总量货物的运输合同。货物总量可以是最低数量、最高数量或一定范围的数量。[15] 批量合同既可以出现在班轮运输的场合，也可能在非班轮运输方式下履行。规定在商定时期内分批运送指定数量货物的批量合同概念在散装干货和石油贸易中早已确立，在这两个领域，批量合同经常被描述为包运合同或吨位合同。例如，希望能保证满足其吨位要求并对运费

15 Transport Law: Draft convention on the carriage of goods [wholly or partly] [by sea] (A/CN.9/WG.III/WP81), UNCITRAL Working Group III 19th session, New York, 16–27 April 2007, at http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html, 14 May 2007.

风险加以管理的船上交货买方经常在长期销售合同下共同使用批量合同。[16] 1982 年，波罗的海国际海事理事会为散装干货运输发布了代号为 VOLCOA 的《标准包运批量合同》（2004 年修订并作为代号为 GENCOA 的《散装干货标准包运合同》重新发布），该合同反映了国际贸易中经常使用的术语。这种格式规定了合同的商定时期、运送总量和每批装运数量。它还规定，该合同下的每一次航行都要按所附标准格式，符合航次租船合同的条件和条款。国际独立油轮船东协会于 1980 年发布了代号为 INTERCOA80 的《标准格式油轮包运合同》（为波罗的海国际海事理事会所采用），其中规定了商定的合同期限、每年运送的数量和每批装运数量。每一次航行都要遵照 INTERTANKVOY 76 格式中的租船合同条款实施。[17]

关于批量合同的具体概念、其与海运服务协议的关系、各国法律对其调整的方式等，各大法系之间存在着较大的差异。《海牙规则》不直接调整分批运输货物的海运服务协议关系，故不适用于批量合同；而根据《汉堡规则》第 2 条第 4 款之规定，如货物将在一个约定期间内分批运输，则本规则的规定应适用于每一批货载。因此，《汉堡规则》对于批量合同实际上是“间接”强制适用的。其结果是，如果批量合同中约定了承运人义务与赔偿责任低于《汉堡规则》的标准，则该条款无效。一些国家的代表在运输法工作组会议上指出：“海运服务协议可以广义地定义为通过班轮运输分批运送的方式在未来一段时期内运送一定数量的货物的批量合同，这是行业里众所周知的一个特点。”[18] 故而，批量合同具有海运服务协议的性质和特点，是海运服务协议的一种主要类型，亦是勿庸质疑的。

（三）海运服务协议与忠诚契约的关系

忠诚契约是在托运人（货主）与承运人或班轮公会之间签订的包运协议。“根据约定，货主通过将其全部或固定部分货载交由该承运人或班轮公会承运，而获得较低的运价，或获得延期回扣。货主若违反忠诚义务，将被罚款或课以罚金。”[19] 忠诚契约主要采用合同费率制和延期回扣制两种形式。由于忠诚契约限制了货主

16 UNCITRAL, Volume Contracts: Document presented for the information of the Working Group by the Comité Maritime International, Working Group III (Transport Law) 17th session New York, 3–13 April 2006, at http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html, 25 June 2006.

17 UNCITRAL, Volume Contracts: Document presented for the information of the Working Group by the Comité Maritime International, Working Group III (Transport Law) 17th session New York, 3–13 April 2006, at http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html, 25 June 2006.

18 Report of Working Group III (Transport Law) (A/CN.9/572), UNCITRAL Working Group III 14th session, Vienna, 29 November–10 December 2004, at http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html, 25 June 2006.

19 司玉琢主编：《国际海事立法趋势及对策研究》，北京：法律出版社 2002 年版，第 110 页。

选择其他承运人的缔约自由，属于交易限制性协议。有的忠诚契约约定，托运人将其 100% 的货载量均交付特定承运人或班轮公会运输，而获得该项忠诚承诺的承运人实际上具有了独家服务提供商的地位。一方面，此种忠诚契约具有排除其他承运人获得竞争机会的效果；而且，由于小货主能够提供的货载有限，他们很难获得与班轮公会签署忠诚契约的交易机会，从而造成了对于小货主的竞争歧视。另一方面，忠诚契约的广泛适用对于促进国际海运业的发展亦有其正面作用，如有助于加强承运人的揽货力度，以满足全球化生产方式下的大宗货物运输的需求，通过合理运用弹性运价能够降低边际成本，从而有利于提高大型航运公司的综合竞争力。正是基于这些考量，《联合国班轮公会行动守则公约》确认了忠诚契约的合法性，一些国家的航运法，如美国《1998 年航运法》，则是通过规定忠诚契约适用的豁免条件的方式确认忠诚契约的效力的。

海运服务协议与忠诚契约作用与目标是相同的，都采用合同费率制约定优惠运价，而且在竞争法上的豁免条件也基本一致。两者的区别主要体现在：忠诚契约通常以班轮合同为基础，但在合同中列入优惠运价或延期回扣的相应条款，对于忠诚履行交付货载义务的托运人给予优惠运价或延期回扣的优惠待遇，并没有增加承运人在传统的班轮运输方式下的责任；而海运服务协议是通常的件杂货运输合同以外的独立合同，合同中除了列入给予托运人以一定的运费优惠的条款外，还列入较高标准的服务承诺条款，从而增加了承运人的责任负担，并且也不采用任何回扣方式。所以，忠诚契约还是以班轮合同为基础的，即使从广义上也很难将其看成是海运服务协议的一种类型，只是其比较注重优惠运价或运费回扣，而不是像批量合同一类的服务协议那样突出强调服务承诺和服务质量。

四、反思：《公约草案》调整海运服务协议的必要性与合理性

随着全球经济的发展，目前已经由一些新的货物运输方式代替了传统的方式，并且，现行海上货物运输领域已经存在很多海上货物运输公约，如《海牙规则》、《海牙—维斯比规则》、《汉堡规则》等等，但是迈向制定国际统一运输法的步伐似乎并没有多少前进的迹象。[20] 不同法律适用之间的冲突造成了海运货物自由流动的障碍并增加了国际贸易的交易成本，这就需要统一法规范来整合现有国际海上货物运输秩序，并使其在国际海运贸易的任何所及之处都能够最大限度地

20 Robert H. Ballantyne, The Ultimate Cargo Regime?, in *The Shipper Advocate*, Ottawa: Canadian Industrial Transportation Association, Spring 2005, p. 11.

得以统一适用。[21] 贸法会在 1996 年开始重新审查国际海上货物运输法律制度，并吸取《汉堡规则》失败的教训，注意广泛听取国际航运界和贸易界的意见，并委托国际海事委员会起草《公约草案》。国际海事委员会于 2001 年向贸法会提交了《公约草案》，至 2006 年 11 月已经召开了 18 届会议。《公约草案》的审议吸引了美国国内包括美国海商法协会、美国工业运输联合会（代表美国托运人利益）以及世界航运协会在内的众多机构的关注，他们已经举行多次磋商来讨论公约草案中的各项条文以便其能更好地在美国得以适用。[22] 可以说，美国的上述特殊利益集团对于《公约草案》是否调整海运服务协议有着比任何其他国家更多的关切，因为控制着较大货载量的跨国公司和拥有强大的班轮运力的海运公司相对集中于美国，而采用海运服务协议的形式一直是其相互之间达成交易的主要合同方式。据美国联邦海事委员会的调查，在 2001 年大约有 8% 的托运人签订的服务协议是全球性的，但是到了 2004 年底已经达到 45%。因此，作为以统一海上货物运输法律秩序为首要目标的运输法公约，有必要将这种在国际班轮运输中占据重要地位的合同类型纳入其调整范围。

此外，除了上文提及的海运服务协议的积极作用之外，其负面作用也不容忽视。例如，实践中大部分海运服务协议都是根据承运人制订的标准合同，或者按照合同中预设的标准条款签订的。因此，承运人在控制运价和附加费，以及调整服务标准等方面均拥有更大的主动权，这就使得托运人经常会面临不确定的商业风险。进一步看，来自于发展中国家的货主在与发达国家的船东签订海运服务协议时往往也处于不利的地位。据美国联邦海事委员会的调查，除了美国国内贸易和北美—欧洲贸易航线外，在美国—亚太、美国—中东、美国—加勒比和南美洲的许多国际贸易航线上，有着相当多数量的海运服务协议在使用。在这些南北贸易航线上运营的发达国家的承运人和大型海运公司有机会利用其强势的商业影响力，依赖其国内法的豁免、外国法的排除适用和国内法院的“长臂管辖”等立法和司法政策，借助“约定”海运服务协议中的首要条款、赔偿责任条款和管辖权条款等缔约自由之便利，规避其本身的商业和法律风险。可以说，如果没有相关的国际海运统一法进行管制，掌控雄厚班轮运力和航线资源的公共承运人借助以上的利己因素，以契约自由掩护下的合法手段培育和巩固其海运市场上的主导地位，这必然会形成南北海运服务贸易的扭曲，不但会阻碍服务贸易统一化的进程，甚至会侵蚀货物贸易的统一秩序。因此，将海运服务协议纳入《公约草案》有其必要性与合理性。

美国代表团在运输法工作组第 14 届会议上首先提出了“海运服务协议”的定

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21 Patrick J. S. Griggs, Obstacles to Uniformity of Maritime Law, *Journal of Maritime Law & Commerce*, Vol. 34, 2003, p. 192.

22 Constantine G. Papavizas and Lawrence I. Kiern, 2001-2002 U.S. Maritime Legislative Developments, *Journal of Maritime Law & Commerce*, Vol. 34, 2003, p. 477.

义提案，提议将海运服务协议纳入公约管辖范围之内。美国提出的定义是在《1984年航运法》关于服务合同定义的基础上加以修改后出台的，其内容包括：海运服务协议系指一个或多个承运人与一个或多个托运人之间以书面或电子方式谈判并商定的，使用班轮在约定期限内经由海路运送批量货物的合同。承运人承诺提供海上货物运输（也可包括内陆运输及相关业务）服务，并承诺使用远洋班轮运输业务通常使用的船舶分批运送最低限量的货物，还可按托运人的要求包括以其他运输方式提供货物运送以及仓储或物流服务；托运人承诺交付最低限量的托运货物和支付约定的运费。[23] 根据美国的提案，海运服务协议应该成为适合于“门到门”运输的一种合同形式。在商业需求的驱动下，各当事方应该依他们看来合适的方式自由安排运输，这其中也包括海运服务协议的当事人拥有订立全部或部分偏离《公约草案》的合同条款的权利。美国提案建议，在《公约草案》中应设立一项单独的条款专门调整海运服务协议，但此种调整应当是非强制性的。也就是说，《公约草案》不应完全排除对于海运服务协议的适用，而是应当排除对其强制性适用。这即意味着，当根据海运服务协议运输货物时，《公约草案》的责任制度自动适用，但其中的一些赔偿责任限制可以经由合同豁免或更改。可见，美国提案的主要观点就是要给予海运服务协议当事人较为充分的契约自由，这是对以《海牙规则》为代表的公共承运人责任制度的一个突破，从而使得《海牙规则》以来对公共承运人契约自由的严格限制，被打开了一个缺口。与此相反的观点是，设立一项单独的条款使得公约的责任制度对于海运服务协议非强制性适用，就如同打开了“潘多拉盒子”，公共承运人会再次获得《海牙规则》制定前的优势地位，“滥用”契约自由的现象将重新出现，进而将给整个国际贸易带来不利的后果。在前述观点中比较有代表性的体现于运输法工作组第17届会议上欧洲托运人理事会的评述意见，其强调在任何情况下都不得允准减损运输合同的重大内容，尤其是使用导致承运人所负赔偿责任得以减轻甚或免除的条文。[24] 该理事会要求对减损的范围加以明确界定，将其局限于《公约草案》本身所规定的情形。《公约草案》所界定的“批量合同”和“服务合同”一样，远未达到这些标准。而且，用于界定这些合同的标准几乎涵盖托运人和承运人之间的所有商业关系，因此不具备减损公约所必需的特殊性。

运输法工作组认为，由于批量合同系货物运输合同，如果此类合同在班轮运输方式下履行，则应为公约所调整；而在非班轮运输方式下履行的任何批量合同均被排除在公约草案的适用范围之外。因此，运输法工作组达成如下结论性意见：

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23 Transport Law: Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea], Proposal by the United States of America (A/CN.9/WG.III/WP.42),UNCITRAL Working Group III 14th session, Vienna, 29 November–10 December 2004, at http://www.uncitral.org/unci-tral/en/commission/working_groups/3Transport.html, 14 May 2006.

24 第 14 条第 2 款和第 95 条。

第一，海运服务协议应当作为批量合同列入《公约草案》的适用范围，但列入哪些批量合同须视批量合同之下具体货运的性质而定；第二，班轮运输下的批量合同须符合某些条件方可偏离强制性规定，偏离的办法可构成今后讨论的基础，但是要考虑到在确定性、充分区别和不加滥用方面的具体要求；第三，班轮运输下的批量合同不得偏离适航义务和由不适航而造成的赔偿责任……[25]

本文认为，这种调整思路虽不能使《公约草案》对海运服务协议的规范更加具体化、逻辑化，但毕竟对海运服务协议各方当事人的利益在公约框架内进行了平衡，也照顾到了各法系和各国代表团的不同立场，具有较大的灵活性与合理性。

五、总结：《公约草案》有关批量合同的规则框架

从运输法工作组第 13 届到 18 届会议，各方就《公约草案》调整批量合同的规则框架初步形成了如下共识：

1. 公约不完全调整所谓的海运服务协议（会议上通常采用“远洋班轮服务协议”的用语），而是调整具有此种协议的性质和某些特点并在班轮运输下的批量合同。为此，批量合同的定义被界定为：在约定期间内分批装运约定总量货物的运输合同。货物总量可以是最低数量、最高数量或一定范围的数量。[26]

2. 公约适用的批量合同，其条款应当符合《公约草案》第 6 条的规定。《公约草案》第 6 条是关于《公约》适用范围的除外情形的规定，其第 1 款规定：“本公约不适用于：(1) 租船合同；（2）使用船舶或船舶中任何舱位的合同，而不论其是否系租船合同。”因此，可以说批量合同是被《公约》所涵盖的，其具体内容应当依据第 89 条加以解释。

3.《公约草案》第 89 条规定了适用于批量合同的特别规则，其内容主要包括：(1) 虽有第 88 条的规定，[27] 在承运人和托运人之间，本公约所适用的批量合同可以规定增加或减少本公约中列明的权利、义务和赔偿责任，条件是批量合同中载有减损本公约的明确声明，并且该批量合同：(a) 是个别谈判订立的，或（b）明确指

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25 Transport Law: Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea], Proposal by Finland on scope of application, freedom of contract and related provisions (A/CN. 9/WG.III/WP. 61), UNCITRAL Working Group III 17th session, New York, 3–13 April 2006, at http://www. uncitral. org/uncitral/en/commission/working_ groups/3Transport. html, 25 June 2007.

26 Transport Law: Draft convention on the carriage of goods [wholly or partly] [by sea](A/CN.9/WG.III/WP81)，UNCITRAL Working Group III 19th session, New York, 16–27 April 2007, at http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport. html, 25 June 2007.

27 根据《公约草案》第 88 条的规定，运输合同中直接或间接排除或限制承运人或海上履约方负有的公约下的义务或因违反公约义务而承担赔偿责任的条款无效。

明批量合同中载有减损内容的章节；(2) 根据本条第 1 款所作的减损应当在批量合同中载明，并且不得以参见另一文件的方式并入；（3）承运人的公开运价表和服务表、运输单证、电子运输记录或类似单证不是本条第 1 款所规定的批量合同，但批量合同可通过提及方式并入此类单证的内容后将其作为合同条款；（4）本条第 1 款不适用于第 16 条第 1 款（a）项和（b）项、[28] 第 29 条 [29] 和第 32 条 [30] 中规定的权利和义务或因违反上述规定而产生的赔偿责任，本条第 1 款也不适用于因第 64 条 [31] 述及的作为或不作为而产生的任何赔偿责任；（5）批量合同满足本条第 1 款要求的，批量合同中减损本公约的条款在承运人和非托运人的其他任何人之间适用，条件是：(a) 该人所收到的信息明确声明该批量合同减损本公约，并且明确同意受减损内容的约束；并且（b）此种同意不单独体现在承运人的公开运价表和服务表、运输单证或电子运输记录上；（6）主张从减损公约中获得利益的一方，负有证明减损公约的各项条件已经得到满足的举证责任。

综上，《公约草案》对于海运服务协议的调整思路采纳了折衷调整的思路，既不完全排除调整，又不完全纳入调整，并且在总体上沿袭了《海牙规则》、《海牙—维斯比规则》和《汉堡规则》以来确定的传统——以规制海运提单和其他货运单证为线索，进而直接调整公共运输领域中的班轮运输合同关系和间接调整私人运输领域中的租船合同关系。所不同的是，《公约草案》在现行的统一规则的基础上，因应国际贸易和海运服务的发展变化的要求，除了依然直接调整班轮运输合同关系和间接调整租船合同关系外，还意图直接调整公共运输领域中的某些海运服务协议关系——批量合同关系。

然而，批量合同是通过近 20 多年的航运实践中业已经形成的一种习惯模式，其主要依赖于个别贸易和海运大国（如美国）的国内法对于公共承运人在竞争法下义务的豁免，以及在运输法下对契约自由限制的豁免，而证明其在国内法上的合法性与海运习惯上的合理性，得以在充满着残酷竞争的国际海运市场中立足并发展起来的。可以说，《公约草案》将具有海运服务协议特性的批量合同纳入其调整范围乃是大势所趋。因为，经济全球化的进程不但建构了统一的国际贸易秩序，也必然推动海上货物运输法的统一化运动，而不冲破并行有效但相互冲突的“海牙—维斯比规则体系”和“汉堡规则体系”的束缚，就不可能实现统一化运动的目标诉求。包括批量合同在内的海运服务协议是具有广泛实践基础的运输契约关系，如果仅仅依赖国内法和海运习惯作为其合法性与合理性的法源，依然使其

28 《公约草案》第 16 条是有关海上航程的具体义务的规定，其内容涉及《海牙规则》以来即确定下来的适用于公共承运人的、法定的最低适航义务，是公共承运人责任制度的最基本组成部分。但是，该条规定的适航义务的期间，比之《海牙规则》已经大大加重了。

29 《公约草案》第 29 条是关于托运人提供信息、指示和单证的义务。

30 《公约草案》第 32 条是关于危险货物的特别规则。

31 《公约草案》第 64 条是关于承运人赔偿责任限制权的丧失的内容。

游离在统一的《运输法公约》的框架体系之外，这不但会背离统一公共运输领域中的海上货运法的宗旨，甚至会进而影响到正常的国际贸易秩序。所以，在《公约草案》的制度架构中纳入批量合同，乃是应有之义。

不可否认的是，包括批量合同在内的海运服务协议，即使在公共运输领域中也表现出了彰显契约自由的特性，并且在当前的国际班轮贸易中发挥着重要作用。以限制契约自由为目标之一的现行海运统一法不能对其加以有效的规制，而正在拟定的《运输法公约》创设的、适用于具有海运服务协议性质的批量合同的规则框架，则完全突破了公共运输领域中的海上货运统一法限制公共承运人契约自由的传统。于是，在客观地观察了《公约草案》关于批量合同的规则框架后，本文得出以下结论：《公约草案》对于海运服务协议的调整思路，可以说，是在新一轮海上货运法的统一化运动的秩序价值的诉求上作出的，在公共运输领域中对回归契约自由的尝试。

试析沿海国防止船舶污染管辖权

徐伟力 *

内容摘要: 对于船舶造成海洋污染的管辖权问题，《联合国海洋法公约》确立了沿海国、船旗国和港口国的相对平行管辖原则。本文通过分析《联合国海洋法公约》的相关规定，阐述了沿海国对船舶污染海洋环境所享有的管辖权。

关键词: 沿海国防污管辖权　《联合国海洋法公约》　船舶污染

海洋防污管辖权一直是国际社会争论最激烈的问题。传统船旗国管辖权与沿海国管辖权是否并存是争论的核心。在公海自由原则下，国家的海洋管辖权只及于领海。公海中的船只除遵守国际法外，只服从船旗国的法律，此之谓“船旗国管辖权”。[1] 沿海国管辖权在渐进式的发展中，正逐步被国际社会所承认。

一、沿海国防污管辖权概述

船舶作为一个独特的法律客体，曾长期被视为船旗国的“浮动领土”或一个“浮动岛屿”，而当其处于他国海域内时，则是一块法律上的“飞地”。由于沿海国在其管辖范围海域内对外国船舶享有一定的属地管辖权，因此，此种说法有一定的局限性。在毗连区、专属经济区和大陆架上行使的是“准属地权威”。但对处于公海上的船舶，大部分学者认为其具有相对独立性，船旗国此时对本国船舶行使的是属人管辖权。因此，海上管辖权因船舶这个“流动物”所处海域的不同而由不同的国家行使。

防止船舶污染管辖权问题比较复杂，它涉及到来自船舶的不同污染源或发生在不同海域的船舶污染行为是由船旗国、沿海国还是港口国享有管辖权。本文所说的防止船舶污染管辖权，主要是指沿海国、船旗国和港口国为防止、减少和控制船舶污染海洋而对处于不同海域的船舶所享有的制定和执行法律、规章的权利，包括 2 个问题：一是管辖范围，现有国际法规规定的国家管辖海域污染的区域包括

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* 徐伟力，中国海洋大学法政学院国际法专业 2004 级硕士研究生。

1 欧阳鑫、窦玉珍著：《国际海洋环境保护法》，北京：海洋出版社 1994 年版，第 50 页。

内水、领海、专属经济区和公海；二是由谁来管、管到什么程度的问题。[2] 本文主要研究沿海国的防止船舶污染管辖权，因此下文将主要阐述沿海国对不同海域的外国籍船舶所享有的不同管辖权。

二、《联合国海洋法公约》对沿海国防止船舶污染管辖权的规定

（一）沿海国在不同海域所享有的管辖权

在国际海洋法中，管辖问题内容比较广泛，既有处于沿海国或群岛国主权控制下的内水、领海和群岛水域，也有不属于任何国家管辖和控制的公海。除此之外，还有虽属国家管辖范围但并不构成国家领土组成部分的毗连区、专属经济区和大陆架。沿海国在这类海域不享有完全的、排他的主权，仅行使有限制的主权权利和特定事项的管辖权。

1. 内水海域的管辖

内水包括一国的河流、湖泊、运河和内海、内海湾、内海峡、河口、港口等。一个国家的内水是其领土不可分割的一部分，国家有权行使完全的、排他的主权，本国的船舶只要不违反本国的有关法律法规当然可以在上述水域通航无阻，但除遇难外，所有外国船舶非经许可不得在一国的内水航行，一国有权禁止一切外籍船舶的进入。被允许进入一国内水的外籍船舶应绝对遵守该沿海国的一切规章、制度，不得从事贸易、捕鱼以及任何违反沿海国利益的行为。[3]

2. 领海海域的管辖

沿海国对领海主权的行使要受到习惯国际法规则的限制，即外籍船舶享有无害通过一国领海的自由。外国船舶在一国领海享有“无害通过权”的条件是：通过领海必须是无害的；在通过一国领海时，应当遵守沿岸国的有关法令，如关于海关、卫生、航行安全、环境保护等事项的法律规章；除例外情况外，通过领海必须是继续不停的迅速进行，中途不得停泊。沿海国对进入其领海的外国籍船舶享有管辖权，但不能妨害该船的无害通过。

3. 专属经济区海域的管辖

专属经济区不是公海，它不像公海那样对一切国家开放；也不是领海，它不属于领海的组成部分。它是自成一类的具有特殊法律地位的水域，沿海国在这个区

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2 段爱斌：《关于防止船舶污染海洋管辖权的法律研究》（硕士学位论文），大连：大连海事大学 2005 年版。

3 周洪钧主编：《国际法》，北京：中国政法大学出版社 1999 年版，第 153 页。

域只行使一定的管辖权。沿海国对该区域的自然资源有勘探和开发、养护和管理等主权权利;对该区域内的人工岛屿、海洋科学研究和海洋环境保护有管辖权或专属的管辖权。根据《联合国海洋公约》(以下简称“《公约》”)的规定,过境船舶在这个区域内享有航行自由的权利,但应遵守沿岸国关于专属经济区的法律、规章,还应遵守普遍接受的关于海上安全和防止、减少、控制船舶造成污染的国际规章、程序和惯例。

4. 毗连区海域的管辖

毗连区既不同于领海,也不同于专属经济区。毗连区毗连领海,由沿海国对在其领土或领海内违反其海关、财政、移民或卫生的法律规章等事项行使必要的管制,并对违反上述法律和规章的行为进行惩治。根据有关国际公约和国际规则,沿海国主管当局有充分理由认为外国船舶违反该国法律和规章时,可以从毗连区开始对违反其法律规章的船舶行使紧追权,而无论该船舶是向内还是向外航行。这一规定同时说明,沿海国有关海关、财政、移民和卫生的法律和规章是适用于毗连区的。因此,沿海国对在毗连区内违反其有关法律规章的外国船舶应当有权采取包括逮捕在内的各种必要的管制措施。

5. 对发生在公海内的船舶污染管辖

公海是全人类的共同财富,对一切国家自由开放,平等使用。它不属于任何国家领土的组成部分,因而不处于任何国家的主权之下。任何国家不得将公海的任何部分据为己有,不得对公海本身行使管辖权。公海自由被看作是公海法律制度的基础。

鉴于公海自由原则,沿海国原则上对发生在公海上的污染行为没有管辖权。但另一方面,由于海上航行事故多发生在接近沿岸的海域,因此可能导致石油或其他有害物质大量流入海洋从而造成沿海国局部海域的灾难性污染。托利峡谷号事件发生后,国际社会终于承认沿海国可以在公海上对外国商船采取必要措施,以防止、减少或控制由于该船发生事故所产生的油污或油污威胁对其海岸或有关利益的严重和紧迫的威胁。但沿海国干预的能力要受到限制。同时,如果采取的措施超出了合理需要的范围,有关沿海国还应当负赔偿责任。

沿海国对发生在领海和专属经济区内的船舶污染行为所享有的管辖权最为复杂,后文将围绕《公约》的具体规定对这 2 个海域的船舶污染管辖问题作出进一步的阐述。

(二)《公约》对沿海国在领海海域防污管辖权的具体规定

在国际法上,邻接一国陆地领土及其内水,并处于该国主权下的一定宽度的海水带,称之为领海。根据公认的国际法原则,领海是沿岸国领土的一部分,沿岸国对领海享有主权。各国对在本国领海内发生的一切犯罪,包括发生在外国船舶

上的犯罪，都有权行使司法管辖权。但是沿海国对领海主权的行使要受到习惯国际法规则的限制，即外国籍船舶享有无害通过一国领海的自由。本节文章将首先从无害通过和非无害通过入手，阐述沿海国在领海内的管辖权问题。

1. 无害通过与非无害通过

无害通过是指只为穿过领海的目的通过领海而不进入内水的航行，或者停靠在内水以外的泊船处或港口设施；或者驶往或驶出内水或停靠这种驳船处或港口设施。[4]《公约》正式确立了所有船舶无害通过领海的权利。沿海国家按照普遍接受的国际海洋法规则可以对无害通过制定相应的规则，阻止非无害船舶的通过。要求无害通过权的船舶可以被沿海国认为是对海洋环境或普遍利益造成威胁，这样就可能构成非无害通过。

沿海国有权采取必要措施来防止船舶的非无害通过。采取的必要措施包括要求船舶提供相关信息、实际检查、扣留或驱逐。沿海国的难点不在于采取何种适当的措施，而在于如何准确地确定船舶是非无害通过。如果没有准确的证据判定某船舶是非无害通过，就可能导致沿海国负担相关责任，如赔偿因对船舶采取措施而造成的损害。因此，对于沿海国来说，在决定对被确定为非无害通过的船舶采取措施时，其行动同时受到法律的限制。

2. 沿海国对领海内行使无害通过权的船舶所享有的权利

(1) 有关无害通过的立法权

在管制外国船舶的无害通过时，沿海国必须遵守《公约》第 21、22、23、24 条的规定。为了航行的安全和援助保护、海洋生物资源的保护以及沿海国环境的保护和污染的减少和控制，沿海国可以自由的设置比《防止船舶污染国际公约》规定的国际标准更为严格的排放标准。但对建造、设计、人员配备或装备标准没有自行设定的权利，只能实行国际规则和标准。也就是说，沿海国可以要求外国船舶遵守该国国内的建造、设计、人员配备或装备标准，但这些标准必须是普遍接受的国际规则和标准。外国船舶应遵守沿海国的相关法律和防止海上碰撞的一般接受的国际规章。国际海事组织建议沿海国制定海道和分道通航制来控制在其领海内外国船舶的航行。最后，关于核动力船舶和携带核物质的船舶，沿海国有权要求他们提供公文并有权要求他们遵守相关国际规则所规定的特殊预防措施。同时，沿海国制定的法律和规章，不能妨碍外国船舶的无害通过权，除非船舶故意或造成严重损害的污染。

(2) 在领海内的执行措施

《公约》第 27 条是关于沿海国对行使无害通过船舶的执行权的一般规则，《公约》第 220 条补充了第 27 条的规定。第 220 条是对在领海和专属经济区内的船舶污染海洋环境实施保护措施的特殊规定。当同一部法律中有 2 项内容相近的规

4 《联合国海洋法公约》第 18 条。

定时，特殊规定应优先于一般规定而适用。第 220(2) 条清楚地规定了沿海国在领海内对外国船舶无害通过的执行权。外国船舶在通过一国领海时若有违反一般接受的国际规则和标准或该国相关法律规章的行为，该沿海国在不妨碍无害通过的情况下，可以对该船进行实际检查，当证据充分时，可按本国法律提起司法程序。当外国船舶的污染是“故意和严重”的时候，该船的通过就不再是无害的了。对此，沿海国享有无限制的执行权。如果船舶已属“非无害通过”者，那么沿海国就可以实施一切的执法管辖权，包括将之排除在领海之外。换句话说，第 220 条针对行使无害通过的船舶的危险情况要比第 27 条规定的可能造成非无害通过的“严重和故意污染”要轻，但是危险仍要达到足够能使沿海国行使执行权的程度。[5]

第 220(2) 条针对的情况是穿过一国领海的船舶违反了该国管制航行污染的法规。虽然此时船舶仍可以行使无害通过权，但要受到沿海国执行特殊措施的制约。如果条件满足的话，这些措施包括实际检查船舶、提起司法程序、扣留船舶。难点在于这些条件的确定。船舶必须被假定为无害，直到有确定证据证明有违法行为。对于此问题，第 220(2) 条规定：①沿海国要有确定的证据证明有违法行为；②使用的规则要么是《公约》，要么是关于防止、减少、控制船舶污染的国际规则和标准；③沿海国对外国船舶采取的任何措施都不能违反《公约》第二部分第 3 节的规定；④另外，提起诉讼包括扣留船舶都必须遵守《公约》第十二部分第 7 节保护性措施的规定。简单的说，如果行使无害通过权的船舶被怀疑在领海违反关于航行、污染控制或建造、设计、人员配备或装备的规则，在经过合理的检验后，沿海国就有权合法干预该船的无害通过。也就是说，沿海国只在有足够的证据证明发生了足够严重的违法行为时，才可对船舶实行合法干预。同时在干预时必须尊重程序上的诸多保护性措施。《公约》第 220(2) 条的 4 个条件构成了证据检验标准的 4 种因素。这 4 个因素将决定沿海国在领海行动的合法性。[6]

(3) 采取的措施不能违反《公约》第二部分第 3 节的规定

就像前面提到的，外国船舶在领海执行法规是由第 27 条规定的。这个规定区分了 2 种情况：①如果在领海有违法行为，并且船舶航行于领海，则沿海国在 4 种情况下享有管辖权：a. 罪行的后果及于沿海国；b. 罪行属于扰乱当地安宁或领海的良好秩序的性质；c. 经船长或船旗国外交代表或领事官员请求地方当局予以协助；或 d. 这些措施是取缔违法贩运麻醉药品或精神调理物质所必要的。如果一艘正在行使无害通过权的外国船舶违反了沿海国国内法的相关规定，只要该行为不属于上述 4 种例外情况，沿海国就不享有管辖权。②如果违法行为发生在沿海国内水，并且船舶正航行于领海，则沿海国的管辖权没有任何限制。另外，第

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5 傅崐成著：《海洋法专题研究》，厦门：厦门大学出版社 2004 年版，第 64 页。

6 Benedicte Sage, Precautionary Coastal States' Jurisdiction, *Ocean Development and International Law*, Vol. 37, Issues 3~4, 2006, p. 35.

27(4) 条要求沿海国采取执行措施时必须要考虑航行的利益。沿海国有权管制无害通过，但其实施的措施必须是合理的，以便达到不能过分干预无害通过权的行使。

（三）《公约》对沿海国在专属经济区海域防污管辖权的具体规定

如果海洋污染事故或海洋污染行为被合理地认为会造成重要损害后果时，沿海国有权对这种实际损害或实际损害的威胁采取合理措施，以保护沿海一带或相关利益免受污染，包括对自然资源的损害。《公约》第 221 条适用范围是“在领海范围外”，因此，该条款把领海与公海之间的专属经济区也包括在内。1969 年《国际干预公海油污事件公约》（以下简称“《干预公约》”）已经确立了沿海国的这项权利，但其管辖范围仅仅局限于公海。《公约》第 221 条的规定比 1969 年《干预公约》的规定更宽。沿海国的管辖权不仅从其领海扩大到专属经济区，而且对该区内的自然资源享有主权权利。

1. 沿海国在专属经济区内的一般立法权

《公约》最大的创新点在于从领海延伸到 200 海里的专属经济区。在专属经济区，沿海国享有防治海洋污染的管辖权。在利比亚诉马耳他大陆架划界案中，国际法院认为“各国的实践证明由于距离标准在专属经济区关于权利的制度和规则已经成为国际习惯法的一部分”。[7] 因此，在领海之外已经延伸的沿海国权利规则现在是国际法的一部分，尽管各国在这一海域要求的权利不同。《公约》赋予了沿海国在专属经济区对污染进行立法的管辖权。沿海国为执行的目的，可对其专属经济区制定法律和规章，以防止、减少和控制来自船舶的污染。但沿海国制定的法律必须遵守一般接受的国际规则和标准。

此外，当一些国际规则和标准不足以适应特殊情况，又如果沿海国有合理根据认为其专属经济区某一明确划定的特定区域，因与其海洋学和生态条件有关的公认技术理由，以及该区域的利用或其资源的保护及其在航运上的特殊性质，要求采取防止来自船舶的污染的特殊强制性措施，该沿海国通过主管国际组织与任何其他有关国家进行适当协商后，可就该区域向该组织送发通知，提出所依据的科学和技术证据，以及关于必要的回收设施的信息。[8]《公约》的这项规定仅仅是《防止船舶污染国际公约》关于特殊区域的再次重现，它没有授予沿海国在专属经济区对禁止污染采取单边行动的其他自由。

《公约》第 234 条是一个例外。该条是加拿大和苏联在保护北冰洋利益方面相互妥协的产物。它适用与专属经济区范围内的冰封区域。当沿海国适当的尊重

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7 刘家琛著：《国际法案例》，北京：法律出版社 1998 年版，第 156 页。
8 《联合国海洋法公约》第 211 条第 6 款。

航行并且无歧视时，该条赋予沿海国一个宽泛的处理权，即在沿海国适当的尊重航行并且无歧视的条件下，沿海国可以自由的采取一般接受的国际规则和标准以及自行制定的控制污染的国内标准。沿海国将规范污染的《公约》条款作为执行《防止船舶污染国际公约》和其他国际标准的一个基础是非常重要的，同时，这些条款没有认可在公海的“延伸管辖权”。[9]

2. 沿海国在专属经济区内的执行权

按照第 220 条的规定，沿海国对航行于专属经济区内的外国船舶的执行权包括要求该船提供相关信息、实际检查或提起司法程序（包括扣留船舶）。但是这些措施的合法性要依专属经济区或领海内船舶的违法行为的严重程度以及对沿海国和海洋环境造成的后果而定。

当被指控的违法行为发生在专属经济区时，如果沿海国有确凿的证据证明船舶违反“一般接受的国际规则和标准”或实行“一般接受国际规则和标准”的国内规则，沿海国就可以要求在领海或专属经济区内的违章船舶提供关于它的识别标志、登记港口、上次停泊和下次停泊港口的信息和需要确定是否已发生违法行为的其他信息；当沿海国有确凿证据证明在专属经济区被指控的违法行为导致了大量排放，对海洋环境造成严重污染或有严重污染的威胁时，并且该船拒绝提供信息或提供的信息与实际情况不符时，该国可以对在领海或专属经济区的船舶实行实际检查；当沿海国有确凿证据证明被指控的违法行为导致的排放造成重大损害或对沿海国相关利益有重大损害的威胁，或对其领海或专属经济区内的任何资源有重大损害的威胁时，沿海国可以对该船提起司法程序，包括逮捕该船。从以上的规定可以看出，沿海国对外国船舶的执行行动，可以在其领海内发动，也可以在其专属经济区内发动。事实上，此规定给予沿海国的执法权利，也使得沿海国可针对其内水及领海内的违反事件，在其专属经济区内发动管辖。[10]

三、对我国现行防止船舶污染法律、法规的立法建议

我国现行的防止海洋污染法律体系主要是由《海洋环境保护法》这一有关海洋环境保护的基本法律和其他大量有关海洋环境保护的行政法规和部委规章所构成的。其中有关防止船舶污染的主要法律、法规有：1961 年《进出口船舶联合检查通则》、1964 年《外国籍非军用船舶通过琼州海峡管理规则》、1974 年《防止沿海水域污染暂行规定》、1979 年《中华人民共和国对外国籍船舶管理规则》、经

9 Fakistan Zia-Mansoor, International Regime and the EU Developments for Prevention and Controlling Vessel-Source Oil Pollution, at http://web.ebscohost.com/ehost/results?vid=2&hid=3&sid=896bf533-3328-408c-a69e-f6a854c60fff%40sessionmgr7, 12 March 2007.

10 傅崐成著：《海洋法专题研究》，厦门：厦门大学出版社 2004 年版，第 75 页。

1999 年 12 月 25 日修订的《中华人民共和国海洋环境保护法》、1983 年《外国籍船舶航行长江水域管理规定》、1983 年《中华人民共和国海上交通安全法》、1983 年《防止船舶污染海域管理条例》、1991 年《内河避碰规则》、1992 年《中华人民共和国领海及毗连区法》、1992 年《海上航行警告和航行通告管理规定》、1993 年《船舶和海上设施检验条例》、1995 年《国际航行船舶进出中华人民共和国口岸检查办法》、1997 年《船舶安全检查条例》、1998 年《中华人民共和国专属经济区和大陆架法》、2001 年《中华人民共和国海域使用管理法》、2003 年《中华人民共和国船舶载运危险货物安全监督管理规定》、2005 年《防止船舶污染内河水域环境管理规定》、2006 年《内河交通事故调查处理规定》等。

虽然我国已经形成了防止船舶污染的基本法律框架，但现有的法律规定仍然存在一些不足，比如，在某些规定上还没有与国际公约接轨，没有将国际公约的内容国内化；缺少有关船舶污染的专门性法律规范；内河海域船舶污染防治立法欠缺等。为了强化海洋环境管理，进一步保护和改善海洋环境，保护生态平衡，我国在防止船舶污染立法方面要重点加强以下几项立法工作：

1. 我国应尽力与国际接轨，将国际公约具体化、国内化；完善海上船舶污染防治立法的同时制定全国性的内陆水域船舶污染防治法规以及地方综合性法律法规

我国现行船舶污染防治法规参差不齐，各部分发展不平衡。已参加的有关的国际公约发展得最为完善，已经基本覆盖了船舶污染防治的各个方面，并仍在不断发展完善中；我国现行的法律体系中，对船舶污染问题的规定只是散见于各种法律和法规中，还没有单独制定专门性法律规范。

虽然我国的《海洋环境保护法》已经进行了修订，从很多方面进一步完善了有关规定，但在防止船舶污染方面仍然存在一些漏洞。如《海洋环境保护法》缺少我国船舶在公海或在国外管辖海域排污处罚的规定，致使国家海事行政主管部门对于此类案件的处理还存在很大的难度。

目前还有很多法规是在我国加入《公约》之前制定的，没有考虑到与国际海洋法律制度接轨等问题，如《海上交通安全法》、《防止船舶污染海域管理条例》等，这些法律和法规的规定有些已经明显不符合时代发展的要求，不利于加强防治外国籍船舶对我国海洋的污染。

同时，还应该健全地方综合性法律法规。目前，地方综合性海洋法规几乎处于空白，现有的法规有些条款已滞后，且没有配套的方法和实施细则。海洋综合法规不健全、不完善，严重制约了海洋综合管理工作的开展，也直接影响地方实际执法部门的执法效果。

2. 应当制定全面的多方位的船舶污染防治法规，并考虑加入相应的国际公约

我国在油污等方面的立法相对较多，但对于有毒物质、船舶废水、垃圾等方面的立法虽然在《防止船舶污染内河水域环境管理规定》中作出了相关规定，但仍显

薄弱，相应的国际公约也未参加，如《国际海上运输有毒有害物质的损害责任及赔偿公约》；《海商法》中也没有关于有毒有害物质损害赔偿的相关规定。[11]

3. 建立和完善船舶污染事故应急反应体系，确保船舶污染应急计划的有效实施

与船舶操作性排放相比，船舶事故性排放对海洋环境造成的污染更为严重，特别是油船、化学品船因碰撞、触礁、搁浅、爆炸、火灾或船体损坏等事故导致的污染将给海洋环境带来灾难性的损害。对于事故性排放，重点在于最大限度地控制和减少污染对海洋环境的损害。建立和完善船舶污染事故应急反应体系，确保船舶污染应急计划的有效实施，是防治船舶污染事故造成海域污染的有效措施和重要保障。

《海洋环境保护法》第 18 条、第 69 条以及《防止船舶污染国际公约》附则 I 第 26 条、《1990 年油污防备公约》都规定，为有效控制和减少船舶滋油污染损害，船舶、码头、港口、地区、区域、国家都应制定相应的应急计划。这些多层次的应急计划，加上国际间的协作，就形成了一个完备的应急系统，必将为海域环境保护提供有效的保障。

以上有关规定，明确了我国海事行政主管部门在船舶污染事故的防备、反应工作中的组织、指挥、协调地位，为海事部门加强这方面的管理提供了法律依据。虽然上述规定只是针对油类污染而言，但我们应充分借鉴在防治油类污染方面的成功经验，建立针对散装液体化学品船舶污染事故的应急体系，从而更好地全面做好近岸海域环境保护工作。

4. 加强内河海域船舶污染防治的立法工作

我国在内河海域船舶污染防治工作方面虽然有诸多法律和法规加以规制，但仍不健全，特别是对于外国籍船舶污染防治方面的法律体制仍有不足。

德国是一个内河交通安全管理先进的国家。在这一方面，我国可以借鉴德国的相关先进经验。首先，德国的内河航运安全管理法制健全。在德国，管理内河航运和海洋运输是 2 个完全不同的法律部门。100 多年来，德国在内河航运方面已逐步建立起一套专门的法律体系。调整内河航运的法律是联邦政府的《内河航运法》，除此之外，还对每条河流制定了专门的法律。当然，莱茵河作为欧洲跨国河流，其遵循的法律是 1865 年有关国家共同参加的《曼海姆公约》。其次，由于水上交通安全与防污染的各项工作都有法可依，因此，职责明确，分工负责，执法效率很高。德国政府从水资源和航道资源的综合利用出发，高度重视内河航运的基础设施建设，而并没有使内河航运急剧萎缩。航运发展提高了水上安全管理，水上安全管理促进了航运的发展。

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11 蒋平：《我国船舶污染防治立法现状及建议》，下载于 http://www.7265.cn，2007 年 3 月 15 日。

四、我国防止船舶污染管理体制的建设方向

我国现行的防止船舶污染管理体制是在海洋事业发展过程中逐步形成的。70年代以来，我国的管辖海域从领海扩大到大陆架和其他管辖海域，海洋环境污染损害日益严重，不同部门、行业之间的矛盾也日渐增多。为了适应这种新的形势，有些部门也把管理职能向海洋延伸，陆续开展了一系列与海洋环境保护有关的管理工作。这固然是好事，但也带来了一些有待解决的问题。

我国现行防止船舶污染管理体制存在的主要问题有：第一，各部门建立的与防止船舶污染管理有关的机构和队伍各成体系，协调工作很难做；第二，涉及的执法部门较多，彼此之间的职责和权限不够分明；第三，执法机构彼此之间不能协调合作；第四，执法队伍技术装备落后，海洋权益难以得到有效地维护；第五，地方管理部门的执法力度不够等。

针对以上问题，在借鉴外国先进经验的基础上，我国关于防止船舶污染管理体制方面主要应做好以下工作：

1. 将海洋环境保护工作纳入海洋综合管理之中，在统筹协调海洋资源与空间开发利用的同时，要充分注意海洋环境的保护

根据国内外的经验，两者之间既要有明确分工，又要有密切配合，具体工作可以做以下设想：海洋综合管理在海洋环境保护上，应负责统一监督管理，但要贯彻整体的环境工作政策、规划和不同时期的目标，要服从全局性的下调与指导，在陆源污染物的控制上要与环境管理部门密切配合，搞好入海污染物的管理。环境管理部门在海洋环境保护上，应立足于全局性整体环境保护的政策、目标，对海洋环境保护工作进行指导、检查，但要注意到海洋的特殊性，确认海洋环境是海洋管理的一个组成部分。环境部门对海洋环境的管理主要是宏观调控与指导，具体的管理活动，包括对各行业部门开发中环境影响的监督管理等，应通过海洋主管部门来实现。如能以这样的原则处理海洋环境管理中的海洋与环境部门之间的关系，会有助于减少工作中的矛盾，提高保护工作的成效。[12]

2. 建立多职能的海上执法队伍

国外的经验告诉我们，建立一支多职能的海上执法队伍，可以有效地维护海洋权益、保护海洋资源和海洋环境。[13] 多职能的警备队伍有很多好处，首先是其船舶、飞机担任多种任务，可以充分利用，节省人力、财力和物力。其次是作为战争的后备力量，平时少养兵，战时又有后备力量。另外，这种执法力量在处理行政性

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12 鹿守本著：《海洋管理通论》，北京：海洋出版社 1997 年版，第 379 页。

13 李耀臻、徐祥民主编：《海洋世纪与中国海洋发展战略研究》，青岛：中国海洋大学出版社 2006 年版，第 90 页。

执法问题时比军队方便。一般来说，处理国内行政违法事件以及国外船只的一般违法行为，都不宜由军队负责。[14]

3. 进一步加强防止船舶污染管理的装备建设

现代防止船舶污染管理工作，很大程度上是处理涉外问题，管理工作必须要采用国际通用的方法和先进的技术手段。例如，监视检查外国船舶排放含油污水，就是采用抽样鉴别方法，采用遥感技术进行监视、拍照等。同时，现代化的海洋管理及执法工作、搜寻救助工作，都必须有先进的信息保障系统，以雷达、计算机为主要技术手段的安全管制系统等。没有现代化的技术手段和方法防止船舶污染管理，就无法实现对海洋环境保护。[15]

我国政府对防止船舶污染的装备建设一直以来都很重视。比如，建设了船舶交通管制工程（VTS 工程）；更新、添置了大批先进的执法车辆，建设了一批千吨级的高速执法船只。这些设施都对实现海事工作的现代化起到了极大的促进作用。但是，随着我国航运经济的迅速发展以及国内公众对于保护海洋环境的呼声日益高涨，为了适应新的形势，我国防止船舶污染的装备建设也亟需再上一个新的台阶。[16]

4. 加强地方管理部门的执法力度

应该高度重视地方执法人员技术素质的提高，使执法人员不仅真正理解海洋，还要懂海洋、精通海洋；应该完善地方行政管理系统，提高装备技术和管理手段；不断完善和健全地方综合性海洋法规体系，让地方执法人员在行使职权时有法可依；明确地方执法机构的管理职能，使地方与中央形成一个上下呼应、协调配合的组织体系。

5. 加强与有关单位和国家的合作

仅靠海事管理机构一家单独采取措施防治船舶污染海洋环境是不够的，首先海事管理机构要加强与国家海洋管理部门、地方环境保护部门、渔政管理机构等部门的相互合作，互通有无，及时发现和清除船舶污染，共同防治船舶对我国海洋环境的污染；其次是根据《公约》要求，加强与邻国的合作，互通即将发生的污染损害或实际损害，共同发展和促进各种应急计划，以应付包括由船舶引起海洋环境污染的事故，共同保护好我国周围的海洋环境。

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14 段爱斌：《关于防止船舶污染海洋管辖权的法律研究》（硕士学位论文），大连：大连海事大学 2005 年版。

15 段爱斌：《关于防止船舶污染海洋管辖权的法律研究》（硕士学位论文），大连：大连海事大学 2005 年版。

16 段爱斌：《关于防止船舶污染海洋管辖权的法律研究》（硕士学位论文），大连：大连海事大学 2005 年版。

五、结　语

目前，世界范围内的海洋污染形势极其严峻，而船舶污染是造成此种现象的重要因素。防止船舶污染、保护海洋环境，对于各个国家尤其是各沿海国家而言，都有着极其重要的战略意义。

作为沿海国，我国在船舶污染管辖权方面的立法实践和执法实践已经进入初步发展阶段，但仍需不断完善。从维护我国沿海权益方面，不论是立法还是执法方面，我国都应与国际接轨，在不断完善我国立法和执法体制的同时，还应积极争取更多的海洋权利，以维护我国的沿海利益。

论国际海洋法法庭的临时措施管辖权

关 晶 *

内容摘要: 国际海洋法法庭是依据《联合国海洋法公约》设立的常设性国际司法机构。自 1996 年成立至今，其不少案件涉及临时措施，这与法庭在这方面具有独特的剩余强制管辖权是分不开的。鉴于临时措施在法庭管辖权中的重要性，《联合国海洋法公约》等有关法庭临时措施管辖权规定的模糊性，以及法庭在临时措施实践中所引发的诸多学理探讨，本文试图就法庭临时措施管辖权进行深入分析，并呼吁我国更加关注和研究其规定和实践，适宜时诉诸法庭以解决我国与周边国家的海洋争端。

关键词: 《联合国海洋法公约》 国际海洋法法庭 临时措施 国际法院

国际海洋法法庭（以下简称“法庭”）是依据 1982 年通过、1994 年生效的《联合国海洋法公约》（以下简称“《公约》”）设立的常设性国际司法机构。于 1996 年 10 月正式成立，总部设在德国汉堡自由汉萨城。目前《公约》签署方已达 157 个，缔约方已达 152 个。中国于 1996 年 6 月 7 日正式成为《公约》的缔约方。法庭自 1996 年 8 月 1 日成立至今，登记处理的案件只有 12 个，其中 4 个涉及临时措施，[1] 7 个涉及迅速释放。这与法庭在这两方面具有独特的剩余强制管辖权是分不开的，[2] 也说明法庭目前在此类案件中具有重要作用。

法庭的临时措施管辖权来源于《公约》第 290 条以及《国际海洋法法庭规约》（以下简称“《法庭规约》”）第 25 条。其中，《公约》第 290 条第 5 款更是赋予法庭在特定情形下的临时措施强制管辖权。鉴于临时措施在海洋法争端，尤其是突发事件或紧急情况中的重要性，《公约》、《法庭规约》及《国际海洋法法庭规则》（以

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* 关晶，厦门大学法学院国际法专业硕士研究生。

1 分别为：1998 年 M/V “SAIGA” 第 2 号案（圣文森特和格林纳丁斯诉几内亚），1999 年南方金枪鱼案（新西兰诉日本；澳大利亚诉日本），2001 年混氧燃料工厂案（爱尔兰诉联合王国）以及 2003 年关于新加坡在柔佛海峡内和周围开垦土地的案件（马来西亚诉新加坡）。所有案件的判决均可参见国际海洋法法庭的官方网站。

2 法庭的海底争端分庭对有关海底争端的案件也具有强制管辖权，但目前尚未有有关实践。

下简称“《法庭规则》”）有关法庭临时措施管辖权规定的模糊性，以及法庭在临时措施实践中所引发的诸多学理探讨，本文试图就法庭临时措施管辖权进行深入分析，包括临时措施的约束力、目的和简易程序，以及法庭超越请求的临时措施规定权等问题。由于《法庭规约》和《法庭规则》均以《国际法院规约》及《国际法院规则》为蓝本，[3] 本文在考察法庭的临时措施管辖权时，穿插比较了国际法院的相关规定。

一、临时措施的约束力问题

临时措施的约束力问题曾一度为学界热烈探讨，但国际法院于 2001 年拉格朗德案中确认了其临时措施的约束力，结束了该问题多年来的不确定性。[4] 相比较《国际法院规约》第 41 条第 1 款 [5] 所采用的模糊措辞“指示”，早在 1982 年通过的《公约》在其第 290 条第 1 款采用的措辞为“规定”，明确赋予法庭临时措施以约束力。这种约束力由《公约》第 290 条第 6 款“争端各方应迅速遵从根据本条所规定的任何临时措施”的规定所佐证，并进而反映在《法庭规则》第 95 条有关临时措施执行的规定中。该条要求争端各方迅速报告其遵循法庭规定的临时措施已采取或建议采取的步骤，[6] 超越了《国际法院规则》第 78 条所赋予国际法院的要求争端各方提供信息的简单权利。[7] 在法庭审理的第一个有关临时措施的 M/V “SAIGA”第 2 号案中，法庭不仅“规定”了临时措施，还“建议”争端各方在实体判决前达成安排，以避免争端的恶化或扩大。[8] 这个判决在法庭诸法官中引发了以下争议：法庭采取效力低于“规定”之临时措施的建议或其他措施的可能性，是否为《公约》第 290 条赋予法庭的权利所包含？法庭前任法官 Vukas（克罗地亚籍）

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3 Shabtai Rosenne, International Tribunal for the Law of the Sea: 1996~1997 Survey, *The International Journal of Marine and Coastal Law*, Vol. 13, No. 4, 1998, p. 487.

4 LaGrand (Germany v. U.S.A.), Judgment, *ICJ Reports*, 2001, p. 466, para. 128(5).

5 《国际法院规约》第 41 条第 1 款：法院如认为情形有必要时，有权指示当事国应行遵守以保全彼此权利之临时办法。

6 《法庭规则》第 95 条第 1 款：每一当事方都应尽可能快地通知法庭关于其遵守法庭规定的临时措施的情况。特殊情况下，每一当事方都应就为了确保立即遵守规定的临时措施已采取或建议采取的步骤提交一份初步的报告。

7 《国际法院规则》第 78 条：法院可以要求当事国提供与其指示之任何临时措施的执行相关的任何问题的信息。

8 M/V “Saiga” No. 2 Case (Saint Vincent and the Grenadines v. Guinea), Provisional Measures, ITLOS Case No. 2, 11 March 1998, para. 52(2).

在其声明中指出法庭的临时措施只能是“规定”的观点。他认为，无论是《公约》、《法庭规约》还是《法庭规则》，均没有赋予法庭做出其他诸如建议、推荐，甚至表达任何愿望等决定的权力。法庭的唯一任务和权限即“规定”其根据争端情况认为适当的临时措施。[9] 有趣的是，在法庭继而审理的“南方金枪鱼案”中，诸法官没有一人对法庭的建议性临时措施发表任何意见。[10] 事实上，如果法庭在其临时措施决定中附有建议性措辞，这本身就说明该措施的性质仅为建议性的，对争端各方没有绝对的约束力。而如果法庭认为某项措施是必要的，那么自然会采取“规定”的方式。换个角度看，既然法庭有权“规定”临时措施，使其具有《公约》赋予的约束力，那么似乎并没有合理理由否认法庭的“建议”权——一个小于“规定”权的权利。

二、临时措施的目的

在临时措施的目的上，法庭不仅可以“保全争端各方的各自权利”为目的，还可以“防止对海洋环境的严重损害”为目的（《公约》第 290 条第 1 款）规定临时措施（与国际法院相同）。这似乎表明争端一方可以环保卫士的身份请求临时措施，尽管其对争端并没有直接利益。[11] 更重要的是，它反映了国际法这一机制的功能从调整国家间行为向认可和维系全球社会共同价值的转变。[12]

与此相关的一个问题是学者有关南方金枪鱼案中“不可弥补损害”和“预谨性原则”的探讨。该案中，在规定临时措施的判断标准上，法庭偏离了国际法院早已确立的惯例，即如不采取临时措施将造成“不可弥补损害”的证明要求，[13] 转而考虑“预谨性原则”。虽然法庭在最终判决中有意避开了对“预谨性原则”之法律地位的探讨，然而其将海洋生物资源的养护列为海洋环境保护和维护之要素的判决很显然支持了该原则背后的法理。另外，法庭已故法官 Laing（伯利兹籍）在其独立意见中提出：“‘不可弥补’标准不适宜用于法庭所可能面临的广阔的、类型多

9 M/V “Saiga” No. 2 Case (Saint Vincent and the Grenadines v. Guinea), Provisional Measures, ITLOS Case No. 2, 11 March 1998, Declaration of Judge Vukas, para. 3.

10 Barbara Kwiatkowska, The Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan) Cases, *The International Journal of Marine and Coastal Law*, Vol. 15, No. 1, 2000, pp. 1~36.

11 Tullio Treves, The Procedure before the International Tribunal for the Law of the Sea: The Rules of the Tribunal and Related Documents, *Leiden Journal of International Law*, Vol. 11, No. 3, 1995, p. 565~594.

12 P. Chandrasekhara Rao and Rahmatullah Khan eds., *The International Tribunal for the Law of the Sea: Law and Practice*, The Hague: Kluwer Law International, 2001, p. 176.

13 转引自 Moritaka Hayashi, The Southern Bluefin Tuna Cases: Prescription of Provisional Measures by the International Tribunal for the Law of the Sea, *Tulane Environmental Law Journal*, Vol. 13, 2000, p. 361.

样的诸案件，它不是唯一的标准。这与许多国内法律制度就相似救济手段的实践相一致。”[14] 日本学者 Hayashi 因此认为，虽然 Laing 法官的独立意见并不代表法庭的整体意见，但如果这个观点在今后的海洋法案件中得以盛行，那么法庭的法理发展将可能独立于国际法院法理的发展方向，因为各国很可能并不会停止将海洋法案件诉诸于国际法院。[15]

然而，该学者忽略了海洋环境案件的“预谨性”要求并非国际法院现有“不可弥补损害”之一般性标准所能涵盖的事实以及国际法院法理本身的发展性。一方面，虽然“预谨性原则”是否已获得国际习惯法地位的争议仍在继续，不少学者也批判该原则过于抽象且缺乏可行性，[16] 但该原则近年来在国际环境和自然资源保护法方面的迅速发展不容忽视。另一方面，国际法院有关“不可弥补损害”的法理也不是一成不变的。实际上，早在 1996 年陆地和海洋分界案中国际法院就已对“不可弥补损害”概念进行扩展，使其包含对人类生命的保护。[17] 因此，可以设想国际法院现有的“不可弥补损害”概念还会随海洋环境案件“预谨性原则”的演变而演变。基于国际法院在其 1997 年加布奇科沃—大毛罗斯工程案中对国际环境法的编撰和逐步发展的突出贡献，荷兰学者 Kwiatkowska 也认为国际法院将来在适用《公约》第 290 条时进一步将“不可弥补损害”概念扩展适用于环境事宜未必是不太可能的。[18] 甚至有关注 WTO 争端解决机制的学者也大力赞赏法庭在南方金枪鱼案中适用“预谨性原则”的先例做法，[19] 认为该原则最终也将为 WTO 临时措施所采用。[20] 因此，国际法院与法庭就海洋环境案件的有关法理朝同一方向良性发展的可能性就不能被武断地排除。而且这种可能性也是法庭和国际法院，甚至是 WTO 等其他国际争端解决机制所应该追求的，以更好地促成国际海洋法的统一发展，避免“法院挑选”和国际海洋法的碎片化。

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14 Southern Bluefin Tuna Case (Australia and New Zealand v. Japan, Provisional Measures, ITLOS Case Nos. 3 & 4, 27 August 1999, Separate Opinion of Judge Liang, para. 3.

15 Moritaka Hayashi, The Southern Bluefin Tuna Cases: Prescription of Provisional Measures by the International Tribunal for the Law of the Sea, *Tulane Environmental Law Journal*, Vol. 13, 2000, p. 361.

16 Alan Boyle and David Freestone eds., *International Law and Sustainable Development: Past Achievements and Future Challenges*, Oxford: Oxford University Press, 1999, pp. 135~136.

17 Land and Maritime Boundary Dispute (Cameroon v. Nigeria), Provisional Measures, *ICJ Reports*, 1996, pp. 22~23.

18 Barbara Kwiatkowska, The Saint Vincent and the Grenadines v. Guinea M/V Saiga Cases, *Leiden Journal of International Law*, Vol. 11, No. 3, 1998, p. 564.

19 Brian K. Myers, Trade Measures and the Environment: Can the WTO and UNCLOS Be Reconciled?, *UCLA Journal of Environmental Law and Policy*, Vol. 23, No. 1, 2005, p. 37.

20 Raj Bhala and David A. Gantz, WTO Case Review 2001, *Arizona Journal of International and Comparative Law*, Vol. 19, No. 1, 2002, p. 516.

三、简易程序

根据《法庭规约》第 25 条第 2 款，如果法庭不开庭，或没有足够数目的法官构成法定人数，在争端任何一方请求下，临时措施应由根据《法庭规约》第 15 条第 3 款设立的简易程序分庭加以规定。该款是对《法庭规约》第 15 条第 4 款规定的例外，后者要求分庭审讯和裁判必须应当事各方的请求而启动。不过，简易程序分庭规定的临时措施应由法庭加以审查和修订。另外，根据《法庭规则》第 91 条第 2 款，争端一方应于临时措施规定后 15 日内提出要求审查和修订的书面请求，法庭亦可于任何时候主动审查。这种由简易程序分庭规定临时措施并由法庭审查修订的做法是对国际法院临时措施程序的一大创新，也是对建立一个更快、更有效率，且更便利于回应争端各方请求程序的贡献。[21]

值得注意的是，这种应争端一方请求而直接启动的简易程序并不同样适用于迅速释放案件。后者只能严格遵循《法庭规约》第 15 条第 4 款的规定，即分庭的审讯和裁判必须应当事各方的请求而启动。《法庭规则》第 112 条第 2 款也规定只有在请求国请求就迅速释放问题适用简易程序，且扣留国在收到该请求的 5 日内也表示同意时，简易庭方能审理该迅速释放案件。在“塞加”号第 2 号案中，请求国就曾请求适用简易程序，然而扣留国并没有在规定时间内予以同意。[22]

在临时措施和迅速释放两者之间的关系上，还有一点值得留意。根据《法庭规则》第 90 条第 1 款，临时措施的程序优先于法庭其他程序，除了有关迅速释放的程序（当然，根据《公约》第 294 条的规定，初步程序如果被启动则优先于法庭所有程序）。因此，如果法庭同时收到临时措施请求和迅速释放申请，法庭必须保证两者均得以毫不迟延地处理（《法庭规则》第 112 条第 1 款）。这保证了法庭处理此类案件的效率，也实现了法官们在制定《法庭规则》时坚持的目标：能够以“众所关注的高效率和最小的耽搁和花费”处理递交给其的案件。[23]

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21 P. Chandrasekhara Rao and Rahmatullah Khan eds., *The International Tribunal for the Law of the Sea: Law and Practice*, The Hague: Kluwer Law International, 2001, p. 186.

22 M/V “Saiga” No. 2 Case (Saint Vincent and the Grenadines v. Guinea), Provisional Measures, ITLOS Case No. 2, 11 March 1998.

23 转引自吴慧：《从“蒙特·卡夫卡”号案析国际海洋法法庭的地位和作用》，载于《国际关系学院学报》2002 年第 1 期。

四、法庭超越请求的临时措施规定权

法庭是否有权规定不同于当事人请求的临时措施这个问题引发于法庭 2001 年的混氧燃料工厂案。该案中，法庭基于《公约》第 290 条第 5 款中“情况紧急”条件的缺失拒绝了爱尔兰的临时措施请求，但却继而规定了自己的临时措施，尽管“情况紧急”的条件并未满足。[24] 这个判决的明显矛盾在多个法官的独立意见中受到质疑，[25] 也遭到了许多学者的批判。

法庭这种超越请求的，自由裁量的临时措施规定权来源于《公约》第 290 条第 1 款的规定：“法院或法庭可在最后裁判前，规定其根据情况认为适当的任何临时措施”，以及《法庭规则》第 89 条第 5 款的规定：“法庭可以规定部分或全部不同于请求的临时措施”（该款实为《国际法院规则》第 75 条第 2 款的重复）。尽管如此，法庭的临时措施规定权只能依争端一方的请求而启动（《公约》第 290 条第 3 款）。法庭并不享有国际法院依据《国际法院规则》第 75 条第 1 款所享有的任何时候的主动审查案件情况并指示临时措施的权利。法庭现任法官 Treves（意大利籍）因此认为，既然《法庭规则》的制定在参照《国际法院规则》时有意避开其第 75 条第 1 款而仅采纳其第 2 款，这似乎表明法庭虽然没有启动临时措施的主动权，但一旦获得临时措施的请求，则可以任意规定不同于请求的临时措施。[26] 法庭现任庭长 Wolfrum（德国籍）则认为，法庭这种偏离已确立的“不能超越请求”司法原则的变更权，如果运用得当，将可能成为保护海洋环境的一种重要手段。[27] 法庭现任法官 Yankov（保加利亚籍）也表示法庭在临时措施方面的权限是宽泛的。[28]

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24 虽然《国际法院规约》及《国际法院规则》均未明确指出只有在紧急情况下才可请求指示临时措施，但国际法院众多判例均明确肯定了该要件存在的必要性。例如 1996 年陆地和海洋分界案、1991 年大海峡通行权案以及 1976 年爱琴海大陆架案等。

25 MOX Plant Case (Ireland v. U.K.), Provisional Measures, ITLOS Case No. 10, 3 December 2001, Separate Opinions of Judge Mensah, Judge Treves, Judge *ad hoc* Szekely.

26 Tullio Treves, The Procedure before the International Tribunal for the Law of the Sea: The Rules of the Tribunal and Related Documents, *Leiden Journal of International Law*, Vol. 11, No. 3, 1995, p. 565~594.

27 P. Chandrasekhara Rao and Rahmatullah Khan eds., *The International Tribunal for the Law of the Sea: Law and Practice*, The Hague: Kluwer Law International, 2001, p. 181.

28 转引自 Donald L. Morgan, Focus: Emerging Fora for International Litigation (Part 1): Implications of the Proliferation of International Legal Fora: The Example of the Southern Bluefin Tuna Cases, *Harvard International Law Journal*, Vol. 43, 2002, p. 541.

然而，基于临时措施本身固有的例外性，[29] 这种变更权的行使应该是有限的。实际上，法庭前任法官 Warioba（坦桑尼亚籍）早在 M/ V“SAIGA”第 2 号案中就对这个问题有所探讨。他在其声明中认为，法庭可能因《法庭规则》第 89 条第 5 款获得了这种变更的自由裁量权，但是这种裁量权并非一个仅仅因为它存在就该被使用的权力。它不该因一时兴起而使用，而应在存有事实支撑的强势理由时方才行使。[30] 南方金枪鱼案中的特别法官 Shearer（澳大利亚籍）甚至认为法庭超越请求而规定临时措施的权利是无效的。《公约》第 290 条第 3 款规定：“临时措施仅在争端一方提出请求并使争端各方有陈述意见的机会后，才可根据本条予以规定、修改或撤销。”特别法官 Shearer 由此得出结论：在当事方未请求以及法庭未使当事方对其提议的临时措施有陈述意见的机会时，法庭无权规定临时措施。如果《法庭规则》第 89 条第 5 款真的声称赋予法庭超越请求范围的行事权，那么这个条款并未被《公约》所授权（即越权），因而是无效的。但是如果该条款仅仅是被适当地解释为：在选择完全认可或完全否定当事方请求的临时措施之外，法庭可以规定代表对原请求临时措施的部分认可或者修正版本的临时措施，那么，该条款就是在权限范围内的。[31] 对于混氧燃料工厂案而言，问题进一步转化为：法庭在行使临时措施规定权一般必须满足的管辖权条件并未满足的情况下（该案中“情况紧急”条件并未满足），法庭是否有权规定不同于请求的临时措施？根据《公约》第 290 条关于管辖权条件的明文列举，答案似乎是否定的。那么如何使法庭在混氧燃料工厂案中的临时措施具有正当性？一个可能的解释即，虽然爱尔兰请求的临时措施所需的紧急情况并不存在，但是该案的情况足够紧急以使法庭规定了其认为必要的临时措施。Treves 法官提出了另一种解释，即法庭区分了爱尔兰不受污染或其威胁的实体性权利和其有关合作和信息交流的程序性权利，并认定前者所需达到的“情况紧急”条件并未满足，反之却暗示了后者已满足。[32] 法庭现任庭长 Wolfrum 也在其独立意见中暗示了相似的观点。他一方面认为法庭应在最终判决中明确指出以保护爱尔兰提出的实体性权利或防止对海洋环境的严重损害为由规定临时措施将超越法庭的权限；另一方面指出合作义务乃国际环境法之最高原则，尤其当危及邻国利益时，并提出合作义务表明国际法律秩序一般方向的重大转移，它平衡了各国的主权原则，并因此确保相比于国家的个体利益，共同利益

29 转引自 Chester Brown, Provisional Measures before the ITLOS: The MOX Plant, *The International Journal of Marine and Coastal Law*, Vol. 17, No. 1, 2002, p. 267.

30 M/V “Saiga” No. 2 Case (Saint Vincent and the Grenadines v. Guinea), Provisional Measures, ITLOS Case No. 2, 11 March 1998, Declaration of Judge Warioba.

31 Southern Bluefin Tuna Cases (Australia and New Zealand v. Japan), Provisional Measures, ITLOS Nos. 3 & 4, 27 August 1999, Separate Opinion of Judge *ad hoc* Shearer.

32 MOX Plant Case (Ireland v. U.K.), Provisional Measures, ITLOS Case No. 10, 3 December 2001, Separate Opinion of Judge Treves, para. 7.

也都受到考虑。[33] 遗憾的是，法庭并没有在这一点上给予任何明确的解释。

五、对我国的影响

1996 年 5 月 15 日我国全国人大常务委员会批准了《公约》，并于 1996 年 8 月 1 日始在法庭拥有了本国国籍的法官。[34] 但迄今为止，我国在法庭尚无实践。

我国是世界上海洋大国之一，濒临渤海、黄海、东海和南海，海域总面积达 473 万多平方公里。我国海岸线漫长，除个别地方，大部分沿海海域存在与其他国家的划界问题。尤其在我国南海海域，一些国家抢占我岛屿，逮捕我渔船及渔民的事件时有发生。另外，随着我国海上航海贸易的明显增加，近海渔业和远洋捕捞渔业的迅速发展，近些年来我国渔船在外国专属经济区和其他水域被扣押的事情也时有发生。如何处理类似纠纷应当引起我国政府有关部门的关注。在适宜情况下，完全可以考虑将有关争端提交法庭处理。因此，关注法庭有关临时措施和迅速释放等问题的实践，研究其规约和规则，对我国无论是主动起诉还是被动应诉都具有重大意义。

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33 MOX Plant Case (Ireland v. U.K.), Provisional Measures, ITLOS Case No. 10, 3 December 2001, Separate Opinion of Judge Wolfrum.

34 我国著名海洋法专家赵理海于 1996 年 10 月 18 日宣誓就职，2001 年 10 月 10 日病逝；许光建于 2001 年 9 月 17 日继任海洋法法庭法官，任期至 2011 年 9 月 30 日。

《联合国海洋法公约》争端解决机制十年：成就、不足与发展

——以与常设仲裁法庭、国际法院的比较实证分析为视角

徐曾沧 * 卢建祥 **

内容摘要：国际海洋法法庭自1996开始履行审理海洋争端职责以来，迄今已10年。本文通过其与常设仲裁法庭、国际法院10年来处理海洋争端情况的比较实证分析，得出结论：国际海洋法法庭对“临时措施”、“船只和船员的迅速释放”2类程序性争端具有强制管辖权，其对此2类案件的处理成就斐然；《联合国海洋法公约》附件七规定的仲裁，具有“剩余备用”性质，它已成为联系《联合国海洋法公约》和常设仲裁法庭的桥梁；国际海洋法法庭对海洋争端的强制性管辖存在法定和约定的例外，对争端实体问题的处理已成为其最为薄弱的环节；由于“区域”海底资源开发仍处在勘探阶段，海底争端分庭未受理过任何案件，但海底争端分庭在处理海底争端方面具有“强制管辖权”、“当事方”、“可适用的法律”三方面优势，随着“区域”海底资源开发大规模、大批量的实质进行，海底争端分庭处理海底争端的潜力巨大。

关键词：《联合国海洋法公约》 争端解决机制 国际海洋法法庭 海底争端分庭

一、引 言

1994年生效的《联合国海洋法公约》（以下简称“《公约》”）是调整海洋关系最全面、最有影响力的国际公约，是建立海洋新秩序的里程碑。作为《公约》的核心组成部分，《公约》第十五部分（争端的解决）、正文其他相关条款、附件五（调解）、附件六（国际海洋法法庭规约）、附件七（仲裁）、附件八（特别仲裁）确立了争端

* 徐曾沧，广州海事法院法官，华东政法大学国际法专业博士研究生。
** 卢建祥，华东政法大学国际法专业博士研究生。

解决机制。依《公约》设立的国际海洋法法庭（以下简称“海洋法庭”），[1] 自 1996 年 8 月 1 日选出第一任法官以来，[2] 开始履行职责，《公约》争端解决机制正式运行，迄今已 10 年。本文通过比较实证的方法，分析海洋法庭运作以来，与常设仲裁法庭（以下简称“仲裁法庭”）、国际法院处理海洋争端的情况及特点，得出结论：海洋法庭处理临时措施、船只和船员的迅速释放 2 类程序性争端成就斐然；《公约》附件七（仲裁）已成为联系《公约》和仲裁法庭的桥梁；对海洋争端实体问题的处理，已成为海洋法庭的“阿基里斯腱”；[3] 海底争端分庭处理海底争端潜力巨大。

二、三大国际机构十年来审理的海洋纠纷案件比较分析

目前，审理国际海洋争端的常设国际机构主要有三，即海洋法庭、仲裁法庭和国际法院。自海洋法庭成立以来，三大机构审理海洋案件的情况如下：

（一）海洋法庭

迄今，海洋法庭已审理 13 起案件，具体情况见表 1：[4]

表 1 海洋法庭裁决的案件

序号	案件名称	案件当事人	案由
1	“塞加”号轮案	圣文森特及格林纳丁斯诉几内亚	迅速释放
2	“塞加”号轮案	圣文森特及格林纳丁斯诉几内亚	实体问题
3	南方金枪鱼案	新西兰诉日本	临时措施

1 本文所指国际海洋法法庭，也包括海底争端分庭。一方面，海底争端分庭具有较大独立性，在管辖权、当事方、可适用的法律方面与国际海洋法法庭有很大差异；另一方面，海底争端分庭和国际海洋法法庭都由《国际海洋法法庭规约》、《国际海洋法法庭规则》调整，海底争端分庭被并入国际海洋法法庭成为其一部分。

2 我国法学家赵理海教授当选为首届海洋法法庭法官。赵先生因病于 2000 年 10 月逝世，由外交部原条法司司长许光建大使接任，换届时，许大使被选举为连任法官。

3 阿基里斯腱，喻指弱点、薄弱环节。阿基里斯是希腊神话人物。当阿基里斯还是个婴儿的时候，他的母亲听到一种预言：儿子会在战争中死去，她大为震惊。为拯救儿子，他的母亲在冥河中为她的孩子施浸礼，河水可使人体免遭苦难和屠杀，但因阿基里斯被抓的脚后跟是干的，因此脚后跟就成了阿基里斯整个身体中最致命的一点。

4 表 1 系作者根据国际海洋法法庭官方网站提供的数据（截至 2006 年 12 月 31 日）整理编制。

（续表）

4	南方金枪鱼案[5]	澳大利亚诉日本	临时措施
5	“卡其科”号轮案	巴拿马诉法国	迅速释放
6	“蒙特卡夫号”轮案	塞舌耳诉法国	迅速释放
7	关于在东南太平洋养护和可持续捕捞箭鱼群案	智利诉欧盟	实体问题
8	“大王子”号轮案	伯利兹诉法国	迅速释放
9	“契斯雷雷夫 2 号”号轮案	巴拿马诉也门	迅速释放
10	混合氧化物案	爱尔兰诉英国	临时措施
11	“伏尔加”号轮案	俄罗斯诉澳大利亚	迅速释放
12	关于新加坡在柔佛峡填海造地案	马来西亚诉新加坡	临时措施
13	“朱诺商船”号案	圣文森特及格林纳丁斯诉几内亚比绍	迅速释放

从表 1 可以看出：海洋法庭裁决的 13 起案件中，7 件关于船只与船员的迅速释放，4 件关于临时措施，两种程序性案件共 11 件，占所有案件的 84.6%，而涉及实体问题的仅 2 件，即第 2 个“塞加”号轮案和关于在东南太平洋养护和可持续捕捞箭鱼群案，仅占所有案件的 15.4%

（二）仲裁法庭

根据 1899 年第一次海牙和会通过的《关于和平解决国际争端的公约》，仲裁法庭 1900 年设立。经过了较长时间的沉寂后，仲裁法庭通过一系列改革，实现了复兴，[6] 焕发了前所未有的强大生命力，受理的案件明显增多。自海洋法庭运作以来，仲裁法庭受理了 5 件海洋纠纷案件，具体情况见表 2：[7]

5 该案是对新西兰诉日本以及澳大利亚诉日本 2 案的合并审理，国际海洋法法庭将其视为 1 个案件。

6 常设仲裁法庭成立的前十几年，审理了一系列国家间争端。但随着国际法院及其前身国际常设法院的设立，常设仲裁法庭变得很少被国际社会所利用，以致于很多国际法学者认为“常设仲裁法庭仅是国际法著作中的历史脚注”。自 1990 年以来，常设仲裁法庭采取一系列措施，让国际社会意识到其提供的服务和便利，使其争端解决功能得以提高和现代化。

7 表 2 系作者根据仲裁法庭官方网站提供的数据（截至 2006 年 12 月 31 日）整理编制。

表 2 仲裁法庭受理的海洋纠纷案件

序号	受理时间	案件当事人	案由	仲裁依据
1	1999.11	厄立特里亚诉也门	岛屿主权归属及海洋划界案	两国政府达成的仲裁协议
2	2003.6	爱尔兰诉英国	海洋环境案	依《公约》第十五部分及附件七提起
3	2003.7	马来西亚诉新加坡	关于新加坡在柔佛海峡填海造地案	依《公约》第十五部分及附件七提起
4	2004.2	圭亚那诉苏里南	海洋划界案	依《公约》第十五部分及附件七提起
5	2004.8	巴巴多斯岛诉特立尼达岛	海洋划界案	依《公约》第十五部分及附件七提起

从表 2 可以看出：(1) 从案由分析，仲裁法庭受理的 5 件案件全部涉及案件实体问题，其中，海洋划界纠纷 4 件，海洋环境纠纷 1 件；(2) 从仲裁依据分析，除“厄立特里亚诉也门岛屿主权归属及海洋划界”案外，其他都是依据《公约》第十五部分及附件七提起。(3) 仲裁法庭受理“爱尔兰诉英国海洋环境”案、“马来西亚诉新加坡关于新加坡在柔佛海峡填海造地”案之前，海洋法庭采取了临时措施。

（三）国际法院

国际法院于 1946 年 4 月 3 日成立，作为联合国六大机构之一，它是联合国司法机关。依《联合国宪章》和《国际法院规约》, 国际法院职权分为诉讼管辖权和咨询管辖权 2 类。自海洋法庭运作以来，国际法院没有为海洋纠纷提供过咨询意见，其受理的海洋案件情况见表 3：[8]

表 3 国际法院受理的海洋纠纷案件

序号	受案时间	案由	案件当事人	审理时间
1	1999	加勒比海海洋划界纠纷	尼加拉瓜诉洪都拉	1999—
2	2001	岛屿归属及海洋划界纠纷	尼加拉瓜诉哥伦比亚	2001—
3	2002	请求修正 1992 年 9 月 11 日对陆地和海洋划界纠纷的判决（萨尔瓦多诉洪都拉斯，尼加拉瓜介入	萨尔瓦多诉洪都拉斯	2002—2003
4	2004	黑海海洋划界纠纷	罗马尼亚诉乌克兰	2004—

8 表 3 系作者根据国际法院官方网站提供的数据（截至 2006 年 12 月 31 日）整理编制。

从表 3 可以看出，国际法院受理的 4 件案件全部涉及争端实体问题，而且都是海洋划界纠纷，没有受理过临时措施、[9] 船只和船员迅速释放案件。

三、处理临时措施、船只和船员迅速释放程序性案件：海洋法庭成就斐然

从表 1 至表 3 分析可知，海洋法庭裁决的临时措施、船只和船员的迅速释放案件共 10 件，而仲裁法庭及国际法院没有处理过此 2 类案件，由此可知，海洋法庭处理此 2 类案件优势明显。原因在于，《公约》赋予海洋法庭对临时措施、船只和船员迅速释放案件的强制管辖权；仲裁法庭没有处理此 2 类案件的权力；国际法院对船只和船员的迅速释放案件管辖权没有明确规定，其在采取临时措施方面有更大的权力，但其态度审慎，自海洋法庭运作以来没有使用过。

（一）海洋法庭对临时措施、船只和船员的迅速释放案件具有强制管辖权

1. 临时措施

临时措施，也称临时保全，《国际法院规约》采用的标题是临时保全，《海洋法庭规约》采用的标题是临时措施，两者含义基本相同，均指争端当事人在提起诉讼或仲裁程序之后或之前，在当事人权利正受到损害或威胁、情况紧急时，当事人申请或法庭依职权采取保全财产或权利的行为。《公约》第 290 条关于临时措施的规定，赋予了海洋法庭采取临时措施的特殊权力。根据该条规定，在争议提交的仲裁庭组成以前，经争端各方协议的任何法院或法庭，如在请求采取临时措施 2 周内不能达成协议，则由海洋法庭（在涉及“区域”内活动时，由海底争端分庭）依《公约》规定采取临时措施。受理争端的法庭组成后，可对该临时措施予以确认、修改或撤销。

2. 船只和船员的迅速释放

一缔约国扣押另一缔约国船只和船员，会对被扣船舶的正常营运造成不利影响，对被扣船员人身造成伤害。为此，《公约》第 292 条赋予了海洋法庭在船员和船员迅速释放方面的特殊权力。根据该条规定，只要是《公约》缔约国，被扣押船舶国提供合理担保后，扣押船舶国和被扣押船舶国仍不能在十日内就船只和船员释放问题达成协议，被扣押船舶国可直接向海洋法庭提出请求释放的申请，不受

9 1991 年（国际海洋法法庭运作之前），国际法院在“芬兰诉丹麦大贝尔特海峡通行权”案中采取了临时措施。

争议方根据《公约》第 287 条所作选择的限制。

（二）仲裁法庭对临时措施、船只和船员的迅速释放案件没有管辖权

仲裁法庭，与一般仲裁机构一样，对于其仲裁案件，并无采取临时措施的权力，也无权处理船只和船员的迅速释放案件。如果案情需要，申请人只能向有管辖权的法院或法庭提出申请，请求法院采取临时措施，或请求法庭裁定船只和船员迅速释放。例如，在仲裁法庭受理的英国诉爱尔兰混合氧化物案过程中，爱尔兰请求海洋法庭采取临时措施，海洋法庭于 2001 年 12 月 3 日采取了临时措施。

（三）国际法院审慎使用临时措施且未明确对船只和船员的迅速释放的管辖权

根据《国际法院规则》，国际法院可随时主动地视情况需要对争端一方或各方规定临时措施，言下之意，国际法院不仅可以采取临时措施，还可以在诉讼前依职权采取临时措施，此与海洋法庭只能在诉讼或仲裁进程中依申请人申请采取临时措施相比，更进了一步。但国际法院对临时措施采取非常审慎的态度，在海洋法庭正式运作后，未对海洋纠纷案件采取过临时措施。此外，国际法院规则也未明确规定其对船只和船员迅速释放案件的管辖权，国际法院未处理过此类案件。

四、《公约》附件七：联系《公约》与仲裁法庭的桥梁

根据《公约》第 287 条的规定，附件七规定的仲裁可以起到备用作用。而争议方就海洋纠纷向仲裁法庭提起仲裁时，以《公约》附件七规定的仲裁为依据。《公约》附件七规定的仲裁，已成为联系《公约》与仲裁法庭的桥梁。

（一）《公约》附件七的“备用适用”

《公约》第 287 条（程序的选择）赋予了附件七的仲裁程序“备用适用”的效力。该条第 1 款规定：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) 按照附件六设立的海洋法庭；(b) 国际法院；(c) 按照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。第 3 款规定：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。第 4 款规定：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。第 5 款规定：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。据此，若成员间选择争议的解决方法不一致，或一方作出选择而另一方没作选择，或都没有就《公约》第 287 条第 1 款的 4 种争议解决方法作出选择，则《公约》附件七规定的仲裁自动适用。

（二）依据《公约》附件七向仲裁法庭提起仲裁

《公约》附件七设置了仲裁程序，但自《公约》生效以来尚无实践公布。但是从仲裁法庭受理海洋纠纷的仲裁案件来看，都以《公约》附件七为依据。以仲裁法庭受理的“英国诉爱尔兰混合氧化物”案为例，爱尔兰首先请求海洋法庭采取临时措施，海洋法庭于 2001 年 12 月 3 日采取了临时措施。然后，再依据《公约》附件七提交仲裁法庭。这样就把《公约》附件七的仲裁与仲裁法庭有机联系起来，《公约》附件七的仲裁已成为联系《公约》与仲裁法庭的桥梁。

笔者认为，之所以出现依《公约》附件七向仲裁法庭提起仲裁（而非向依附件七设立的仲裁庭提起仲裁）的情况，主要原因是有三。一是启动附件七仲裁程序的条件尚不具备。从海洋法庭已受理案件的情况看，11 件是关于临时措施和船只、船员的迅速释放，这些都是海洋法庭强制管辖的程序性事项；只有 2 件是实体纠纷，从当事人作出的对纠纷解决方式的选择看，不符合附件七仲裁程序提起条件。二是《公约》并不排除其他适格国际司法或仲裁机构处理强制管辖事项之外的纠纷。海洋法庭除对临时措施、船只和船员的迅速释放等程序性案件具有强制管辖权外，并不排除其他适格国际司法或仲裁机构处理海洋纠纷，这为仲裁法庭受理海洋划界、海洋环境等纠纷提供了空间。三是仲裁法庭在仲裁方面的声誉和特点。仲裁法庭在国际仲裁（特别是国家间的仲裁）方面享有很高声誉，一些主权国愿意向仲裁法庭提起仲裁；此外，仲裁法庭充分尊重当事人意思自治，允许当事人协议选择或确定仲裁程序，海洋纠纷当事人选择《公约》附件七作为仲裁法庭的仲裁程序，不足为奇。

五、处理海洋争端实体问题：海洋法庭的“阿基里斯腱”

从表 1 分析可知，海洋法庭裁决的 13 件案件中，只有 2 宗涉及对案件实体问题的处理，其余 11 件为涉及程序性问题的临时措施、船只和船员的迅速释放，对海洋纠纷案件实体问题的处理，已成为海洋法庭最薄弱的环节。造成这一现象的主要原因在于：《公约》规定的海洋法庭管辖权的法定例外和约定例外，削弱了管辖的强制性。反观仲裁法庭和国际法院受理的海洋案件，绝大部分关于海洋划界

纠纷，而这正是《公约》中可以约定排除的事项。

（一）海洋法庭强制管辖权的例外

1. 法定例外

法定例外是指《公约》明文规定不受强制管辖的事项，包括如下几项：

（1）海洋科学研究争端

根据《公约》第 297 条第 2 款（a）项规定，沿海国并无义务同意将以下争端提交争端解决：沿海国按照第 246 条（专属经济区和大陆架上的海洋科学研究）行使权利或斟酌决定权所引起的任何争端；或沿海国按照第 253 条（海洋研究活动的暂停或停止）决定命令暂停或停止一项研究计划所引起的任何争端。

（2）渔业争端

根据《公约》第 297 条第 3 款（a）项规定，沿海国并无义务同意将任何有关其对专属经济区内生物资源的主权权利或此项权利的行使的争端，包括关于其对决定可捕量、其捕捞能力、分配剩余量给其他国家、其关于养护和管理这种资源的法律和规章中所制订的条款和条件的斟酌决定权的争端，提交争端解决。

2. 任择性例外

任择性例外，是指缔约国可以书面声明的方式，将某些争端排除在管辖事项之外。根据《公约》第 298 条的规定，缔约国可声明如下 3 类争端不接受强制管辖：

（1）海洋边界争端

关于划定海洋边界的第 15 条（海岸相向或相领国家间领海界限的划定）、第 74（海岸相向或相邻国家间专属经济区界限的划定）和第 83 条（海岸相向或相邻国家间大陆架界限的划定）在解释或适用上的争端，或涉及历史性海湾或所有权的争端。

（2）军事活动

关于军事活动，包括从事非商业服务的政府船只和飞机的军事活动的争端，以及根据第 297 条第 2 和第 3 款不属法院或法庭管辖的关于行使主权权利或管辖权的法律执行活动的争端。

（3）联合国安理会活动

由联合国安全理事会执行《联合国宪章》所赋予的职务时所发生的争端。

（二）仲裁法庭和国际法院海洋争端管辖事项未受限制

从仲裁法庭仲裁程序规则、以及国际法院规约和规则看，仲裁法庭和国际法院并没有对海洋法庭规定的例外事项也加以排除，这表明仲裁法庭和国际法院有权受理海洋法庭规定的排除事项。“海洋法庭之所短，恰为仲裁法庭和国际法院之

所长”，事实上，仲裁法庭和国际法院受理的海洋纠纷案件，主要涉及海洋划界纠纷和海洋环境纠纷，而这正是《公约》规定可选择排除的争端。

六、处理海底争端：海底争端分庭潜力巨大

《公约》第十一部分规定了区域内资源勘探和开发活动。根据《公约》第1条（用语和范围）的规定，“区域”是指国家管辖范围以外的海床和洋底及其底土，“区域内活动”是指勘探和开发“区域”的资源的一切活动。由于区域内资源开发尚出于勘探阶段，实质开采活动尚未大规模进行，海底争端较少，海底争端分庭尚未受理案件。但随着区域内海底资源开发活动广度和深度的不断增加，海底争端随之增多，海底争端分庭具有的强制管辖权、当事方、可适用的法律三大优势就会发挥。

（一）海底争端分庭尚未受理案件的原因分析

从《公约》争端解决机制实际运行情况分析，海底争端分庭尚未受理一件区域内海底争端案件，此与区域内海底资源开发实践是紧密联系的。《公约》确立了海底资源全人类共同所有原则和海底资源平行开发制度，建立了管理局、企业部等机构，以保障区域内资源开发活动的正常有序进行。现在，管理局已经完成了深海多金属结核采矿法典的制定，与先驱投资者签定了为期15年的勘探合同，正在准备着手拟定多金属硫化物、富钴结壳等资源的勘探规则，推进新一轮深海资源勘探开发的竞争。据统计，到2004年底，管理局已向6个先驱投资者颁发在国际海底区域勘探多金属结核的合同，即将发出第七份合同。[10] 但区域内资源开发尚处于勘探阶段，大规模和大批量的资源开采尚未开始。相应产生的海底争端较少，海底争端分庭迄今未受理海底争端案件就不难理解。

（二）海底争端分庭受理海底争端案件潜力巨大

但是，无论如何，随着人类对海底资源日益增大的需求，人类开发利用海底资源的科技水平的不断提高，开发区域内海底资源能力不断增强，人类开发区域内海底资源规模和次数不断增多，由此引起的海底纠纷也会相应增多，海底争端分庭会逐渐发挥在在处理海底争端案件方面的潜力，受理的案件也会从无到有、从少到多，这种潜力主要体现在强制管辖权、当事方、可适用的法律三方面。

1. 强制管辖权

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10 《纪念〈联合国海洋法公约〉签署20周年研讨会专辑》，载于《中国海洋法学会会员通讯》2002年第2期。

《公约》赋予海底争端分庭对海底争端的强制管辖权。《公约》第 287 条第 2 款规定："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。"据此，海底争端分庭对区域海底争端具有强制管辖权。《公约》第 187 条对海底争端进行了列举，包括：

(1) 缔约国之间关于本部分及其有关附件的解释或适用的争端；

(2) 缔约国与管理局之间关于管理局或缔约国的作为或不作为据指控违反本部分或其有关附件或按其制定的规则、规章或程序的争端，或管理局的行为据指控逾越其管辖权或滥用权力的争端；

(3) 作为合同当事各方的缔约国、管理局或企业部、国营企业以及自然人或法人之间关于对有关合同或工作计划的解释或适用的争端，或合同当事一方在"区域"内活动方面针对另一方或直接影响其合法利益的作为或不作为的争端；

(4) 管理局同承包者之间关于订立合同的拒绝，或谈判合同时发生的法律问题的争端；

(5) 管理局同缔约国、国营企业或由缔约国担保的自然人或法人之间关于指控管理局应负担赔偿责任的争端；

(6) 本公约具体规定由分庭管辖的任何争端。

与海洋法庭相比：海洋法庭的强制管辖权存在法定例外和任择性例外，是柔性的，称之为"准强制管辖权"较为贴切，而海底争端分庭的强制管辖权不存在这 2 种例外，是刚性的，是"实在的强制管辖权"。

与国际法院相比：国际法院行使管辖权须经主权国家同意。早在 1923 年，常设国际法院就确定了这项重要的国际法原则。在"东卡雷利亚"案中，常设国际法院宣称："没有一个国家不经其同意，能被迫将它与其他国家间的争端提交调停、仲裁或任何其他和平解决方法。"国际法院行使管辖权的依据同样遵循了该原则。

2. 当事方

《海洋法庭规约》第 37 条（申诉机会）规定：分庭应对各缔约国、管理局和第十一部分第五节所指的实体开放。《海洋法庭规约》第 20 条（向法庭申诉的机会）规定：1. 法庭应对各缔约国开放；2. 对于第十一部分明文规定的任何案件，或按照案件当事所有各方接受的将管辖权授予法庭的任何其他协定提交的任何案件，法庭应对缔约国以外的实体开放。由此可知，海底争端分庭的当事人包括：

(1) 国家

《公约》缔约国当然成为法庭当事方。

(2) 自治联系国或自治领土

根据《公约》第 305 条第 1 款 (c)~(e) 项，自治联系国或自治领土可以成为国际海洋法庭当事方。

(3) 公约附件九所指的政府间国际组织

《公约》第 305 条规定，《公约》根据附件九向国际组织开放。根据附件九的规定，国家组成的政府间的组织，其成员国已将本公约所规定事项的权限，包括就该等事项缔结条约的权限转移给各该组织者。如果其过半数成员国为本公约签署国，即可签署本公约。该国际组织在签署时应作出声明，指明为本公约签署国的各成员国已将本公约所规定的何种事项的权限转移给该组织以及该项权限的性质和范围。目前，这类政府间国际组织有欧共体。2001 年，智利诉欧共体“关于在东南太平洋养护和可持续捕捞箭鱼”案中，已有司法实践。

(4) 管理局和企业部

管理局和企业部是依据公约成立的执行机构，其有资格成为当事方。

(5) 国营企业

国营企业因其所有权属国家，可以由其所属国行使国际法上的权利义务。

(6) 自然人或法人作为争端当事方的担保国

为了避免由于自然人或法人成为分庭当事方而引起的当事方在分庭上的不平等，《公约》第 190 条规定了“担保缔约国的参加程序和出庭”制度。该条规定：1. 如自然人或法人为争端的一方，应将此事通知其担保国，该国应有权以提出书面或口头陈述的方式参加司法程序。2. 如果一个缔约国担保的自然人或法人对另一缔约国提出诉讼，被告国可请担保该人的国家代表该人出庭。如果不能出庭，被告国可安排属其国籍的法人代表该国出庭。

相比之下，根据《国际法院规约》第 34 条第 1 款的规定，在国际法院进行诉讼的当事人，仅限于国家。

3. 可适用的法律

《海洋法庭规约》第 38 条（可适用的法律）规定：“除第 293 条的规定以外，分庭应：(a) 适用按照本公约制订的管理局的规则、规章和程序；和 (b) 对有关“区域”内活动的合同的事项，适用这种合同的条款。”《公约》第 293 条（适用的法律）规定：“1. 根据本节具有管辖权的法院或法庭应适用本公约和其他与本公约不相抵触的国际法规则。2. 如经当事各方同意，第 1 款并不妨害根据本节具有管辖权的法院或法庭按照公约和善良的原则对一项案件作出裁判的权力。”由此可知，海底争端分庭所适用的法律，包括：(1)《公约》；(2) 与《公约》不抵触的国际法规则；(3) 公允善良原则；(4) 按照《公约》制订的管理局的规则、规章和程序；(5) 合同条款。

与《海洋法庭规约》相比，《国际法院规约》第 38 条规定：“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 59 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。”其结果是，国际法院所适用的法律限于国际法。

“厦金海域管理问题”研讨会综述

阮贞艳 * 董 琳 **

2007 年 4 月 21 日，由厦门大学海洋政策与法律中心和厦门市海洋与渔业局共同主办的“厦金海域管理问题”研讨会在厦门大学召开。众所周知，海洋资源与环境既是沿海地区经济与社会发展的动力因素，又是其制约条件。厦门作为海滨城市，金门作为海岛县，两地人均拥有的陆域可生存空间十分有限，人均陆地自然资源拥有量远远低于世界平均水平，而海域则成为两地经济社会发展的重要资源。正是由于厦金海域以及周边海域海洋资源在厦门及金门的国民经济和社会发展中具有的重要战略地位，因此加强厦金海域的保护和管理，对于厦门建设海湾型城市，建立厦金共同发展区域，促进海洋经济的可持续发展具有重大意义。另一方面，虽然国内外关于海域或海岸带使用管理的论著颇丰，但厦金海域由于其特殊的地理位置和政治因素，使得国内外对其相关的系统研究几乎处于空白状态。有鉴于此，本次研讨会主要着眼于厦金海域的使用管理及相关问题的探讨。

此次研讨会与会代表包括了来自厦门市台办、金门县政府、金门港务局、金门县水试所、厦门市海洋专家组成员、厦门大学法学院、厦门大学海洋与海岸带发展研究院、厦漳泉三地海洋与渔业局、环保、海监、港务、海事等政府部门和学术机构的专家学者。研讨会在与会领导和学者专家的共同努力下，对厦金海域的管理问题提出了许多具有建设性的意见和建议。会议主要内容包括：

1. 厦金海域使用及管理情况；

2. 厦金海域管理问题；

3. 厦金海域管理建议及设想。

来自两岸的与会专家学者采用主题发言和专题讨论等方式，就上述问题进行了深入的探讨和交流。现将本次研讨会的主要观点综述如下。

一、厦金海域概况

金门县地处厦门湾，位于九龙江口。厦门与小金门仅隔一条宽 5.18 海里的水

* 阮贞艳，厦门大学海洋与环境学院环境科学专业硕士研究生。
** 董琳，厦门大学海洋与环境学院环境管理专业硕士研究生。

道，中间纵列着一条梭形的浅滩和众多小岛，水深不过 20 米，而大金门岛最近处距内地的角屿仅为 1.25 海里。金门与厦门遥遥相对，纬度相同，均属亚热带海洋性气候。全年降雨多集中于 4 月至 8 月，台风多生于 7 月和 8 月，全年风向东风占 8 个月，每年 5 月至 8 月为东南风及南风。

厦金海域是由厦门港湾、围头湾、金门湾（金门）、九龙江河口湾组成的海域，其面积约为 1088 平方千米。该海域内岛屿星罗棋布，其中厦门岛和金门岛是两个大的海岛。在地貌形态上，此海域是一个较大的海湾，两湾角间直线距离约为 51 千米。在海域行政管辖方面，厦门市和金门县所辖海域面积占绝大部分，其中厦门市管辖海域面积为 390 平方千米，有一部分水域分属泉州市和漳州市管辖。由于该海域未被定名为海湾，而厦门岛和金门岛的面积较大和知名度较高，以及厦门市和金门县所辖海域面积占绝大部分等情况，故称为厦金海域。

厦门海洋与渔业局郑茂是局长认为厦门和金门是联系中国台湾和中国大陆的“两扇门”，厦金海域是两岸合作交流最直接的桥梁，从海域管理的角度来看，厦金海域的管理互动性较强，从海域的使用功能来看，厦金海域的使用既是经济用海又是生态旅游和航运用海。厦门市台办的林晓副处长介绍了厦金航线开通 6 年多来在两地经济贸易、医疗合作、交通旅游等经贸文化交流方面的运行情况：截至 2007 年 3 月底，厦金通航已达 13864 航次，1937103 人次，成效斐然。她表示，“两门”对开的实现，在两岸关系史上是新的一页，对于加强厦金两地的交流与合作，增进中国台湾人民对祖国大陆的了解和感情，维持台海局势的稳定，推动两岸关系的发展及“三通”的早日实现，都具有十分重要的意义。但是由于历史和现实的种种原因，在厦金海域的管理和使用方等方面也留下许多有待解决的问题。

二、厦金海域使用及管理概况

（一）厦门海域管理

海洋是厦门最重要的资源和优势。厦门海域面积约 390 平方公里，海岸线 234 公里，无居民海岛 17 个，港口深水岸线 31.7 公里，并拥有国家一级保护动物中华白海豚、厦门文昌鱼等多种珍稀物种。厦门海洋资源总的特点是“质优量少”。

从 90 年代开始，厦门市便重视海洋资源的可持续利用，加强海洋综合管理，初步形成了“立法先行、集中协调、科学支撑、联合执法、公众参与”的海洋综合管理模式，即形成了国家法律体系下的地方性海洋法律框架，明确了海岸带和海洋可持续发展的行为规范，为综合管理体制提供了必要的法律保障；建立和发展了海洋综合管理体制和决策协调机制，将各种海洋用途之间可能的纠纷，化解在开发过程之前，并对已出现的纠纷，经过跨部门、跨行业磋商的途径，寻找有利于可

持续发展的解决方案；形成了海洋综合管理由科学体系支撑的机制，开通了科学为管理服务的渠道，保障决策的科学性和前瞻性，减少失误，提高工作效益和效率；探索出基于现行海洋行政执法体制下的联合执法模式，有效地聚合海洋行政执法力量；营造出全民爱海管海的良好舆论氛围，公众参与海洋事务的互动平台，建立海岸带培训机制。厦门市先后制定了《厦门市海域功能区划》、《厦门海域使用规划》、《无居民海岛保护与利用规划》等一系列涉海规划，形成较为完整的海洋规划体系，为海洋综合管理的科学化、规范化奠定了基础，适应了海湾型生态城市发展的需要。厦门市充分利用全国人大授予的制订地方性法规规章的权利，逐步建立了国家法律体系下的地方性海洋法律框架。1997 年，厦门出台了全国第一部海域管理地方性法规——《厦门市海域使用管理规定》，2003 年又进行了修订。2002 年，厦门市政府出台了《厦门市无居民海岛保护与利用管理办法》政府规章，2004 年 11 月，厦门市人大又将其上升为全国第一部无居民海岛管理地方性法规。同时，厦门市先后制定了十多件涉海法规规章和规范性文件，形成了地方性海洋管理法律框架，使厦门市海域管理走上了“管海有法、用海有规、依法治海”的法制化轨道。

厦门建立海域管理制度十年来，特别是《中华人民共和国海域使用管理法》实施以来，厦门建立健全海洋地方法规和配套制度，严格依法强化海域使用管理，开展海域综合整治，努力调整用海结构，积极摸索海域资源市场化配置路子，加强海域管理的能力建设，从 2002 年起连续 5 年被评为“海域使用管理全国先进单位”。

（二）金门海域管理

金门的限制性水域是依据中国台湾的《与大陆地区人民关系条例》而做出的，大陆船舶及其他运输工具，非经主管机关许可，不得进入台湾限制或禁止水域。

金门海域面临以下几个问题：排雷、垃圾问题（主要是由福建沿海漂到金门，在雷区里的垃圾无法清理）、水质监测数据共享、紧急事件的联络渠道（金门都靠火力发电和海上输油，厦门是国际港口，海上运输比较频繁，万一发生海上事故，双方应如何通报及处理）、海砂开采问题（由于福建省禁止开采海砂，所以有采砂船到中线附近开采，对金门的影响很大）。

后屿、草屿、北碇、东碇、大胆、二胆、猛虎屿、复兴屿、狮屿要塞管制区的管制及禁止、限制事项，依《要塞堡垒地带法》管制。这些地区在没有“国防部”[1]授权的情况下，禁止测绘、摄影和渔猎等活动。

金门海域管理常见的问题有：非法偷渡、走私，越区非法捕鱼、盗采海砂等破

1 本文中有关金门方面涉及的海域管理部门，各“部”“会”都是我国台湾地区的行政立法机构，在此一并指出，下文中不再一一注明。

坏海洋海岸资源行为，油污及固废漂流物等海洋环境保护问题，船只未经许可占用航道、影响航道安全等行为。金门县涉及海域管理的部门较多，有“国防部”及其下属的“交通部”金门县交通旅游局和金门县港务处、“经济部”金门县建设局、“财政部”、“内政部”，以及“行政院”大陆委员会、行政院海岸巡防署、“行政院”环境保护署金门县环境保护局、“行政院”农业委员会金门县政府建设局等。在海域管理的执法方面，由“行政院”海岸巡防署执行各项海洋执法任务，诸如海域警卫警戒、海域犯罪侦防、查缉偷渡、走私等，并协助环境保护、资源维护及渔业巡护、海难救助等工作，涵盖各部会主管的海域事务，但目前金门县海域管理仍未形成综合管理体制。

（三）漳州海域管理

漳州是福建省重要的沿海城市，全市毗邻海域 1.86 万平方公里，浅海滩涂面积 11.23 万公顷，海岸线长 680 公里。据 2002 年用海普查，全市用海面积 32.8 万亩，其中渔业用海面积 25.2 万亩，海上交通运输用海 1.13 万亩，保护区用海 3.65 万亩，围海造地用海 1.93 万亩，其它用海 0.89 万亩。到 2006 年 12 月 31 日，全市累计确权宗数 2417 宗，确权面积 1.66 万公顷，征收海域使用金 2065 万元。

漳州市海洋海域使用与海洋综合管理着重做了以下几个方面工作：1. 重视和加强基础工作，编制和实施市、县两级海洋功能区划，开展海域勘界和海河划界工作，着手进行海岸线修测工作；2. 构筑海洋管理网络，不断完善海域使用管理工作机制。成立了漳州海洋开发管理领导小组，成立中国海监漳州市支队，组建漳州市海洋与渔业执法支队，加强基层乡镇海洋与渔业管理工作网络建设；3. 强化组织领导，积极推进海域使用证和海域有偿使用两项制度的贯彻落实，组织开展项目用海清理和渔业用海全面清查；4. 加大督查力度，确保海洋综合管理工作全面深入贯彻实施，加强对管辖海域的巡航监视，加大海监执法力度；5. 加强海洋环境监视监测，重视海洋保护区建设工作，开展海洋环境综合整治，努力做好海洋环境保护工作。

（四）泉州海域管理

泉州市位于台湾海峡西岸中段，属南亚热带海洋性季风气候。全市拥有海域面积 11360 平方公里，海岸线蜿蜒曲折，大陆海岸线长 541 公里。沿海大小岛屿计 180 个，岛屿岸线 72 公里。沿岸有湄洲湾、大港湾、泉州湾、深沪湾、围头湾等港湾。拥有十分丰富的渔业资源、港口资源、滨海资源、盐业资源、砂矿资源和花岗岩资源、红树林资源等。

泉州是一座经济蓬勃发展的现代化新兴城市。按照建设海峡西岸经济区现代

化工贸港口城市的大泉州战略，经济全面飞速发展，海洋开发形成热潮，海洋产业日益成为新的经济增长点。2006 年全市海洋经济总产值 365 亿元，增加值 177 亿元，分别比增 14% 和 12%。

2002 年《中华人民共和国海域使用管理法》实施以来，泉州积极加强海洋综合管理，合理开发海洋资源，保护海洋生态环境，海洋经济进一步持续、稳定、协调发展，为建设海峡西岸经济区现代化工贸港口城市起到积极作用。2005 年，泉州成为了东亚海项目海岸带综合管理平行示范点。

泉州市海洋综合管理始终坚持速度与效益协调统一；坚持发展与保护并举；坚持有进有退，科学调整海洋经济结构；坚持统筹兼顾，维护海洋整体利益。泉州市海洋综合管理取得明显成效，主要表现在：1. 推进海洋法制建设，利用各种宣传形式，提高涉海管理部门、用海单位和个人对有关海洋法律法规的认识，转变传统的用海观念；2. 建立以海洋与渔业局为行政管理主体，发改委、国土、环保、规划、科技、交通、港务、海事、公安边防、水利林业等管理部门共同参与、分工负责的海洋综合管理体制；3. 成立海洋开发管理领导小组，建立村、镇海岸带基层管理机构，镇设立海管办，建立“泉州市重特大污染事故应急处理预案”制度，并组建海洋与渔业综合执法队伍；4. 制订海洋功能区划和海洋开发、保护等一系列规划，完善海洋管理基础工作，为海洋综合管理提供科学支撑体系；5. 贯彻实施《中华人民共和国海域使用管理法》基本制度，强化政府的管理和服务职能；6. 加强海洋科技研究与开发，加速海洋产业化和工业化进程，提高海洋综合效益。

三、厦金海域管理问题

因政治、法律差异等原因，厦门市各部门虽然就厦金海域管理问题与金门地区进行过广泛接触和交流，但大都停留在共识阶段，深层次问题仍有待进一步解决。本次会议来自两岸四地的专家学者及政府部门代表就厦金海域管理方面存在的问题展开了热烈讨论。会上探讨的厦金海域管理问题主要集中于以下五个方面：厦金海域管理协商机制、生态及资源共同养护、海洋环境保护、渔业合作、海洋科学研究等。

（一）厦金海域管理协商问题

厦金海域管理协商问题主要表现在海上执法联络互动及海洋安全合作方面。

厦门海洋与渔业局郑茂是局长认为厦金海域汇集厦门、金门、漳州、泉州和龙岩等九龙江流域各市，管理涉及众多行政部门，各部门的管理协商与互动具有重要意义。来自金门水产试验所的杨诚国所长认为虽然厦门与金门拥有共同的海

域，但双方海域管理的协商机制仍未建立。

海上执法方面的主要问题表现为：一是大陆方面船舶违法作业，违规船舶时常跨越“中线”[2]逃逸至“金门的限制性海域”以躲避大陆执法部门追捕和执法，更有甚者继续进行违法作业，而大陆执法部门无法越“中线”执法。二是取证难的问题，例如违法电鱼行为，一旦被执法人员发现，违法者将电缆和渔具沉入海里以销毁证据，造成执法取证难的问题。究其深层原因是厦金海域海洋管理体系各自为阵，管理缺乏协商机制，解决管理问题互动合作不足，导致对以上违法行为取证难、抓捕难，违法案件屡禁不止。

厦门海洋综合行政执法支队副支队长张煦荣表示厦金海域执法打击的重点应集中在大陆渔船及其作业方式上，在厦门与泉州两地发现较多违法行为，越线之后大陆方面执法就较困难，执法人员不能越线，在中线附近守候违规作业船舶返回又不可行，导致大多数情况下无法及时抓捕违法作业船舶。厦门海洋与渔业局法规处的钟向前先生表示由于厦门执法部门不能超中线执法，非法采砂船和电鱼船在执法人员查处时常跨越中线逃逸，或在金门控制海域进行非法采砂、电鱼炸鱼活动。

在海洋安全合作方面，钟向前先生认为，尽管当前厦金两地航贸交流发展迅猛，促进了海峡两岸关系的积极发展，但厦金海域存在的海洋安全问题一旦处理不当，不但会破坏两地的航贸交流，还可引发冲突，威胁发展海峡两岸关系所必需的和平环境。海洋安全问题主要表现在：经济安全方面的违规船舶威胁海上运输线安全，如渔船挤占航道威胁船舶安全、航道放置捕鱼网具以及两地配合不畅等影响和危及航运安全等；生态安全方面的环境污染损害海洋生态，如过度开发导致海砂和鱼类等海洋资源开始衰退，人口膨胀和工农业发展导致排海垃圾、污水和废料激增，游船、货船等排放含油压载水、洗舱水、舱底水等严重影响港口及海域的水质，海域的水工建筑、围海造地等造成淤积并影响生态等；社会安全方面的公共卫生、海难事故及冲突纠纷等公共安全事件影响两岸交流等。钟向前表示，前述海洋安全问题，究其原因在于两岸分治，两岸海洋管理以“中线”为界“各扫门前雪”，海洋管理体系各自为阵，海洋安全缺乏合作协商机制。

（二）生态及资源养护问题

会议对于生态及资源养护讨论集中于海砂开采、渔业资源及珍稀物种保护方面。

违法开采海砂行为包括无证采砂、越界采砂、超期采砂等，违法采砂将对厦金海域水质和底土产生严重影响，过度开发将导致海砂资源的衰退。金门县政顾问

2　厦金海域人为划分的中间线，中线两侧分别由厦门和金门县管辖。

张云羽表示由于福建省禁止违规开采海砂，导致采砂船倾向在中线附近开采，以便随时越线逃避执法。

福建省海洋研究所研究员王涵生在人工鱼礁石斑鱼资源修复与增殖研究基础上分析了渔业资源养护问题。他表示，近 20 年来，渔业资源的捕捞强度已成倍超过海区渔业资源的承受能力。加之近海环境污染日趋严重，导致渔业资源日渐衰竭，渔获物中的优质鱼类逐年下降。近海传统鱼种已经难以形成渔汛，其幼鱼和低值杂鱼渔获量达 80% 以上。石斑鱼类等高级鱼类的资源更是几近绝迹。他还分析不法之徒以石斑鱼为目标在岩礁、珊瑚礁和沉船之处炸鱼，不仅导致鱼类和其他海洋生物死亡，更严重破坏岩礁、珊瑚礁等自然风貌和生态系统，还可导致石斑鱼栖息地和产卵场的倾覆，有可能使石斑鱼自然资源永远也无法恢复。为了保护渔业资源，金门水试所和渔业署固定投放人工鱼礁。但金门县政府技士樊德正先生表示金门对人工鱼礁投放区未进行有效管理，来自大陆渔船的网具时常卡住鱼礁，使鱼礁失去原有作用。此外，在收获鳗苗季节，集体捕捉鳗苗现象严重，由于捕获鳗苗时间与许多经济性鱼类繁殖时间重叠，加之鳗鱼捕捞网较密集，易导致因混获而造成多种经济性鱼类死亡。

在珍稀保护物种方面，樊德正指出文昌鱼和鲎是大陆地区的重点保护动物，但在台湾地区却不属于受保护动物，因此大陆渔民时常越界到金门水域捕获文昌鱼和鲎，导致珍稀保护物种数量下降。由于珍稀保护动物不受人为空间划分保护区的局限，其活动范围为整个厦金海域，越界捕获给整个厦金海域珍稀物种资源的保护工作带来影响。

（三）海洋环境保护问题

厦金海域海洋环境保护问题主要表现为陆源污染物排放问题、围填海工程等海岸海洋工程污染海域环境等问题。

排海垃圾和排海污水是厦金海域海洋环境保护需要解决的主要陆源污染物排放问题。九龙江上游地区垃圾不合理堆放和九龙江流域所带的大量淤泥导致厦金海域和下游地区垃圾漂浮物增多，造成沙滩漂浮物的管理问题;此外排入厦金海域的污水量随着人口膨胀和工农业发展而增加，游船、货船等船舶排放含油压载水、洗舱水、舱底水等污染同时也严重影响港口及海域的水质。

福建海洋研究所郭允谋研究员在对厦门半封闭海湾海域面积总量控制研究基础上分析了围填海造成海域面积减少，纳潮量减少，航道淤积和环境恶化等海洋环境保护问题。钟向前先生也提出，海域的水工建筑、围海造地等工程会造成海域淤积并影响红树林等的海域生态环境。

关于海岸工程和海洋工程对海洋环境的影响，厦门大学朱晓勤副教授认为在我国海洋工程每年新增项目近 400 个的压力下，《防治海洋工程建设项目污染损

害海洋环境管理条例》（以下简称“《条例》”）的出台，完善了海洋工程建设前的环境影响评价制度，加强了对海洋工程建设、运行过程中污染损害的监管，明确了海洋工程运行后排污行为的监管，细化了海洋工程污染事故的预防和处理，设定了严格的法律责任。《条例》制定事先控制环境评价、事中监管、事后评价等一系列措施，有望极大地缓解因为海洋工程带来的海洋环境污染。该《条例》的生效标志着我国进一步加大了防治海洋工程建设对海洋损害管理的工作力度。但同时，朱晓勤副教授表示海洋工程和海岸工程法律界定不清，实践中很难严格区分涉海工程项目属于海岸工程或是海洋工程，两类工程在法律规定中分属环保部门和海洋部门管理，两部门处于分割式的管理状态，各自为政，但在管理涉海工程时权力争执，存在一定的职能交叉。关于海洋环境影响评价问题，海洋工程环境影响评价制度被认为是软制度，实施中环评还未审批但工程照样动工，违背法律法规却没有部门制裁，法律对环境影响评价中举行听证会的规定较简单，对于听证会上各方代表反映的意见如何考虑，各方意见对最终的审核结果具有的影响力等都不得而知，使听证会难免流于形式，不能真正发挥公众参与和监督的作用。最后，她认为生态损害作为一个法律问题，在我国立法上尚未明确，包括生态损害评估在内的海洋污染评估及其评估方法目前在我国还不成熟。

（四）渔业合作问题

当前的渔业合作问题主要表现在渔业贸易和养殖方面。由于厦金两地气候条件和生态环境相近，台湾地区的渔业产品通过“小三通”的渠道，在金门和厦门形成集散中心，加之厦门交通便利、区位优势明显，台湾地区渔业优势品种如石斑鱼等高经济价值鱼种在大陆地区市场广泛，且成本降低，市场竞争力提高。关于渔业合作交流问题，金门县水试所的杨诚国所长表示，“小三通”的成功在人流运输方面较显著，物流运输尤其是高经济价值鱼产品的贸易还是较少，台湾水产品以金门作为终极站，面临着高经济价值鱼种如石斑鱼等的高关税障碍。其次，金门方面做了蚕、台湾梭子蟹等种苗繁殖和放流工作。金门与厦门处同一海域，若双方之间继续缺乏协调合作，将使繁殖和放流工作徒劳无功。

（五）海洋科学研究问题

海洋科学研究是厦金海域管理的科技支撑。厦金海域两岸各地科研机构在海洋科学研究过程中分别积累了大量的科学数据和资料。各地专家学者对海洋规划、海域管理提供咨询、调研和论证，减少海洋开发和利用对环境和生态带来的负面影响，为海洋开发和利用提供科学依据，为政府和海洋管理部门决策提供科学建议和意见。但由于种种原因，厦金海域海洋科学研究还存在一些问题，主要有：

科学研究资金不充足导致金门方面海域水质监测点布设比厦门方面少，金门科学研究数据较少；在中线附近采集科学研究样品较为困难，两岸科学研究各设监测站点、分别研究；厦金海域各地科学研究合作不够，双方科研数据不能共享导致厦金海域海洋科学研究的不连续和不完整。

四、各方管理建议及设想

针对以上厦金海域管理的种种问题，来自厦金漳泉的各方面专家学者纷纷出谋划策，并提出以下几点意见、建议及设想，以进一步解决更深层次的问题。

（一）建立管理协商联动机制

钟向前先生从合作原则、合作机构、合作内容和合作规范四方面提出构建厦金海域海洋安全合作机制。合作机制应该建立在互信互利、务实平等、协调统一等原则的基础上。首先，各自确定具有较高协调能力的行政机构负责处理日常事务，既可综合协调本辖区各部门的行动，也可作为两地制度化的联系管道实现对等接触联系；其次，各自成立民间授权团体代表两地商洽不宜由政府出面的事宜。再次，成立共同智囊机构，由两地的法律、海洋、港口、渔业、旅游等方面专家学者共同研究。他提出，两地合作机构在开展工作时，一是要通过定期或不定期联系来商定议题，二是要加强信息交流，及时通报日常事务信息和紧急情况信息。他认为应重点明确的合作内容有以下几个方面：在航运安全领域，加强对双方直航船公司、海上旅游船以及船员的管理；加强通航环境的治理，防止通航水域管理出现真空地带；共同遏止违规及越线船舶，消除航道安全隐患。在生态安全领域，共同监测海域环境，保护珍稀海洋物种，清理海上垃圾；控制各自陆源污染，船舶污染，打击非法采砂船等。在社会安全领域，建立气象互助、船舶避风以及海难事故搜救等灾害预防和处理合作机制；在疾病卫生防治、水产品安全等公共安全方面进行信息沟通、技术交流、人才教育培训合作。

在海上联动打击非法采砂、打击非法捕捞海洋保护动物等越界查处的问题上，与会专家学者提出应先寻求一种突破，事先联系，采用“不期而遇”但实际上是“有期而遇”的方式，在同样时间同样水域，进行相关的打击非法活动，形成一定的默契，并以此为基础建立相互间的协调联络机制。

关于执法取证难的问题，厦门大学傅崐成教授建议通过修改法律，降低举证责任的限制，将预备犯当作正犯处罚，并建议加重对预备犯的处罚。其次，在两地海洋管理法律制度方面，大陆对电鱼等违法行为只有金钱处罚制度，而台湾方面还有自由刑和徒刑处罚，应修订法律使福建与台湾地区海洋管理法律制度一致化。

傅教授还建议违法行为在厦金两地只要证据明确、保留完整，就应严格按照法律程序执行，两地关于处罚的规定以及处罚的执行可以相互衔接。

（二）生态及资源共同养护

厦金海域生态及资源需要双方的共同养护。在渔业资源的养护方面，有专家提出人工鱼礁建设作为一项海洋生态环境的修复工程，能改善近海水域环境，使原本生产力较低、鱼种较少的砂泥底质环境，成为生产力较高、鱼种较多的岩礁环境。可提供稚鱼庇护，鱼类栖息、索饵和产卵场所，防止底拖网作业，增殖与保护渔业资源，补充附近渔场已不足的资源量，提高渔获质量。同时，开放型鱼礁还能把渔业同旅游业结合起来，以休闲渔业促进海上生态观光旅游的发展，有利于渔业产业结构的调整和解决就业问题。因此，专家建议在适当的海区建设人工鱼礁，放流鱼苗种对渔业资源进行资源修复和增殖，对防止海洋环境与资源进一步恶化，建设良性循环的海洋生态系统有重要意义。在人工渔礁的管理上，专家提出人工鱼礁的建设资金采取多元化投入机制，实行“谁投资，谁受益”的政策。投资者的经营管理问题和政府对区域的宏观管理必须兼容协调，制定相应法规和管理政策，使区域的生态系统得到有效保护，同时使投资经营者通过开发而有利可图。人工鱼礁区要制定规章制度加强管理，严惩电、炸、毒鱼行为，防止毁灭性掠捕，并在礁区周围设立昼夜可视的浮标标示物，以防止无意进入人工鱼礁区捕鱼和事故发生。

在珍稀物种的保护方面，专家提出在划定珍稀物种保护区之前，应事先做好保护物种的栖息地调查，重点考虑划定原有栖息地为保护区；同时，加强厦金海域两岸珍稀物种保护的科研合作，共享珍稀物种调查数据。在海砂资源的养护方面，厦金海域两岸各地应抓紧制定相关法律，加强海域巡航，加大执法打非力度，加强各地合作，建立协调机制。

（三）海洋环境保护

厦金海域管理方面采用简单的人为区分中线的做法已不能满足现阶段的管理要求。对于海域的环境保护，专家建议可参考所谓的“大海洋生态系统”的研究和实践。

厦门大学朱晓勤副教授建议应完善海洋环境保护的地方性法规和规划体系；借鉴厦门作为东亚海域海岸带综合管理示范点的经验，加强海洋污染评估技术方法的研究和实践；加强生态损害补偿机制和修复的技术支持；建议在立法中应考虑对红树林、海草场、珊瑚礁、盐沼地等重要的海洋生态系统的保护和建设。她还指出，有法必依、违法必究是让环评制度发挥真正作用的保证。

郭允谋研究员对厦门西海域和同安湾围填海研究分析后，建议确定海域面积总量控制的合理值和范围，以及海域面积控制的管理底线，可将环境及生态风险降至最小。他认为将海域面积控制到管理底线，即使存在一些环境及生态风险，也可将该等风险控制在可承受的范围内。

在排海垃圾和污水的管理方面，专家提出对九龙江流域进行综合整治，并对海漂垃圾进行分段拦截，加强海漂垃圾的治理；上游地区的陆上垃圾管理可采用“垃圾不露地”的定点定时集中收集和投放。对排海污水的处理可采用“人工湿地”为三级处理方法，可以借鉴厦门市建立人工湿地经验。关于污水深层排放问题，傅崐成教授建议将厦门的污水排放管延伸至厦金中线附近，之后由金门继续将其延伸至海水动力更强的海域深层排放。

（四）渔业合作

由于近年来生产成本的增加，台湾地区渔业资源的缺乏以及大陆对推动两岸渔业合作表现出的极大诚意，两岸渔业合作有着广阔的发展空间。两岸可在渔产品进出口、水产养殖、渔产品加工，发展休闲渔业，水产种苗合作研发与繁育等多方面进行合作。

在渔业贸易方面，专家建议针对高经济价值水产品的贸易，台湾地区可以金门作为储运中心，通过金门以合法的方式运输至厦门，并通过有关部门协商税金问题。厦门和金门可事先进行试运，以推动和扩大台湾地区同大陆的渔业贸易与合作。

在渔业捕捞养殖方面，专家建议可引进台湾水产名优品种、捕捞技术和养殖技术；由于厦门方面正进行环东海域综合整治养殖清退，金门代表建议可在靠近小金门的金门管辖海域范围从事计划的网箱养殖，借助大陆方面养殖经验，金门与大陆方面进行互助养殖。专家建议对渔业养殖和销售应采取严密的计划与协调。

（五）科研合作

加强两岸的科研合作，对厦金海域环境保护、生态资源及珍稀物种养护等方面有着重要的意义。专家建议应加强台湾地区与厦门地区学术研究机构的交流与合作，建立科学研究的联合；学术机构之间可对共同关注的问题联合展开专题研究，统一参与各方数据系统、分工合作、数据整合、资料共享，共同丰富并更新海洋基础数据，为管理厦金海域提供科学建议。科研合作对水质监测、水下技术研究、珍稀物种保护等海洋科研以及维护海洋生态和海洋的可持续利用起重要的作用。

（六）建立海洋文化

建立厦金海域海洋文化是参会专家学者的设想。杨诚国所长表示厦金海域是缔造山海文明的瑰宝，是厦金两岸人民永续生存的命脉。他表示，台湾方面海洋文化的建立以休闲渔业和海上娱乐为主，建议通过文学艺术影像和亲身体验来提升人们对海洋文化的认知。傅崐成教授认为让广大人民普遍参与海洋活动是海洋文化建立的良好基础。专家们还提议建立海洋文化节日或举办海上休闲娱乐比赛（例如帆船比赛、游艇节），这也是推广海洋文化，让民众接触海洋文化的良好途径。与会专家学者一致认为海洋文化的建立与发展要同提高海洋经济、开发海洋资源、保护海洋环境结合起来。

附图：厦金海域相关图表

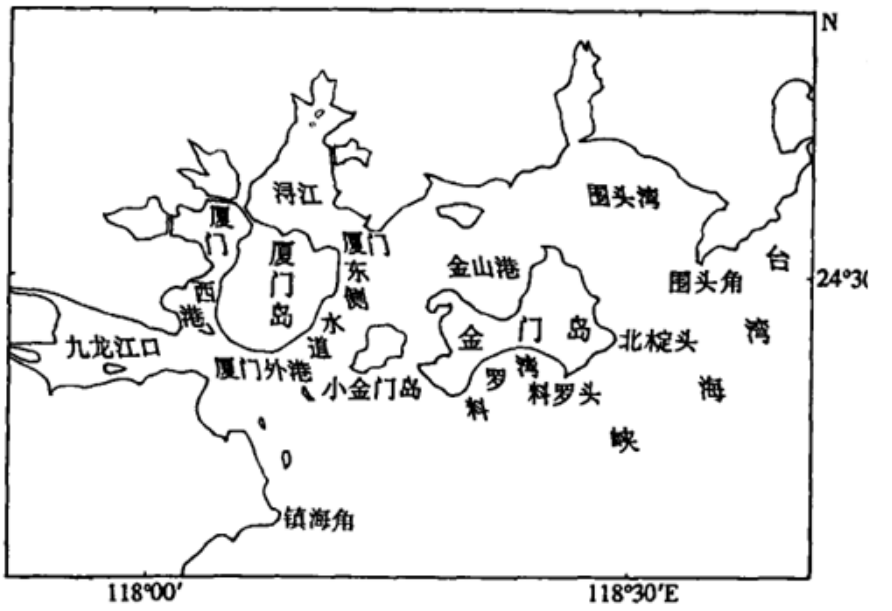

图 1　厦金海域图 [3]

3　张士三等：《金一厦海域环境综合管理机制探讨》，载于《台湾海峡》2003 年第 22 卷第 4 期。

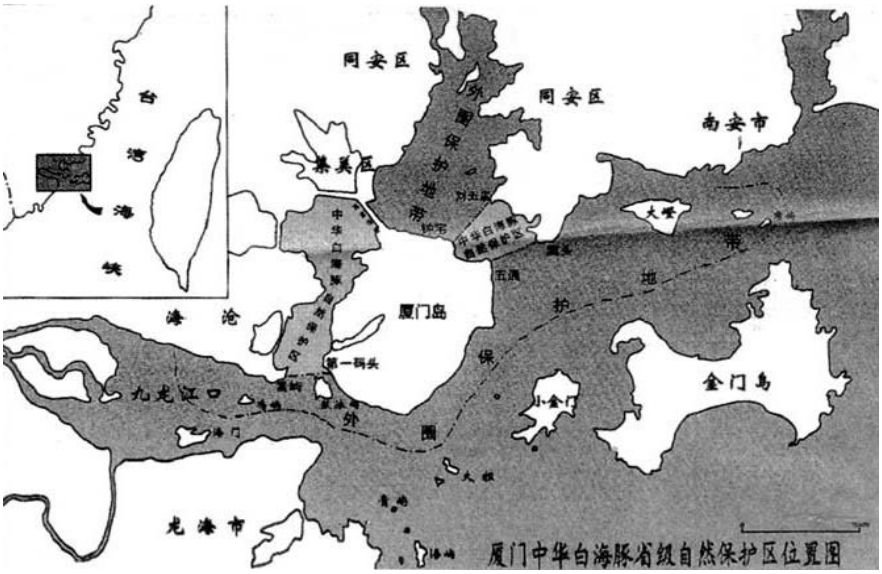

图 2　厦门中华白海图自保护区图 [4]

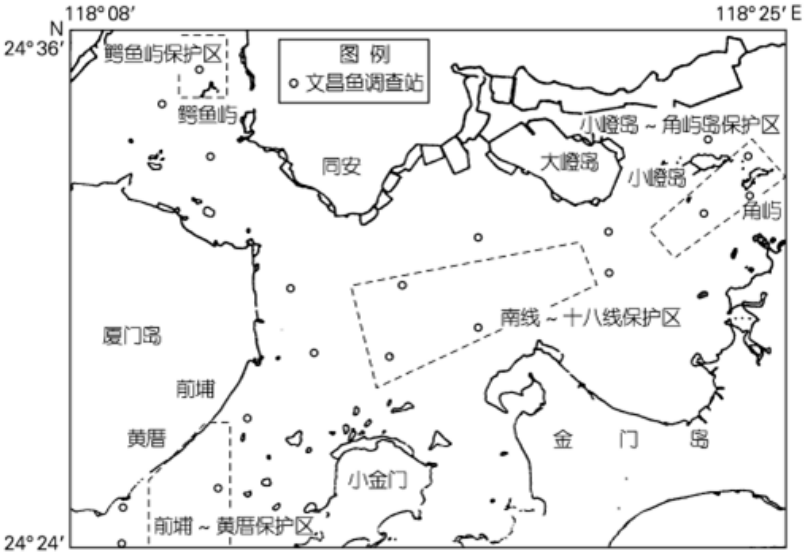

图 3　厦门文昌鱼自然保护区图 [5]

（图中虚线包围部分为厦门文昌鱼自然保护区）

4　《福建省志——海洋志》，下载于 http://www.fjsq.gov.cn/showtext.asp?ToBook =75&index=147，2007 年 5 月 11 日。

5　吕小梅等:《厦门文昌鱼自然保护区的生态环境特点》,载于《海洋科学》2005 年第 10 期。

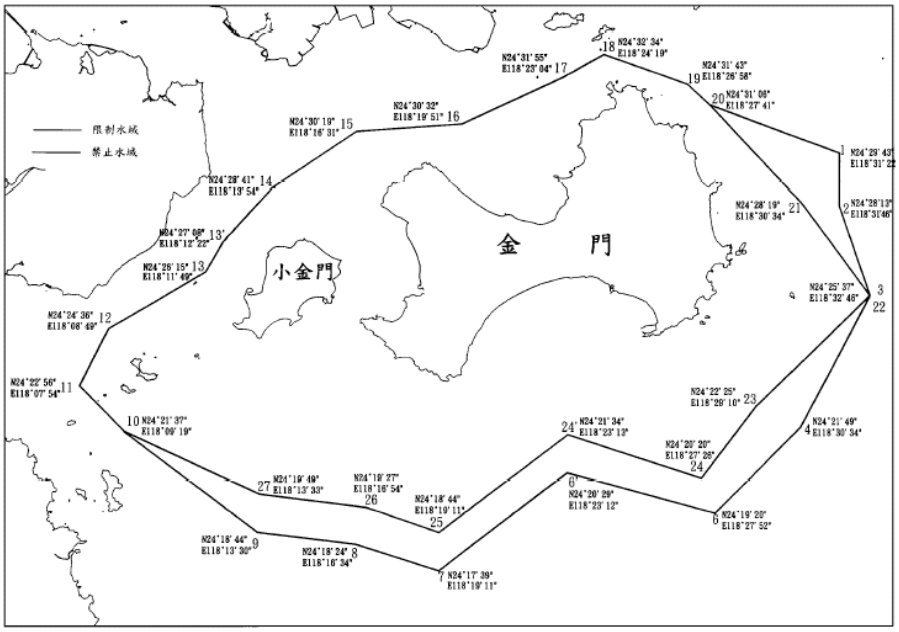

图 4　金门地区限制水域图 [6]

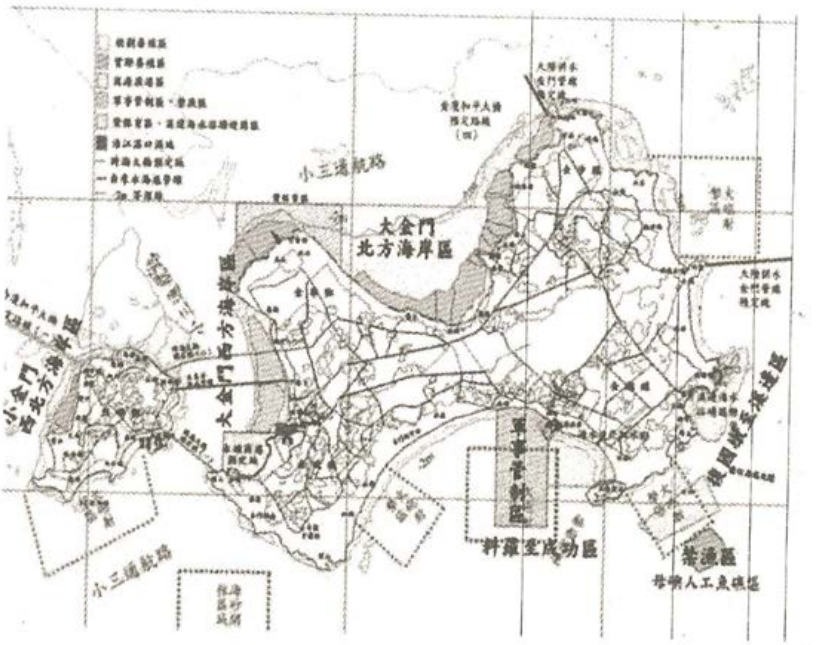

图 5　金门县水使用情况

6　图 4 和图 5 由金门县政府建设局提供，在此深表谢意。

日本《濑户内海环境保护特别措施法》的成功经验

——兼论对我国渤海治理的启示

徐祥民 * 孔晓明 **

内容摘要: 濑户内海由于其特殊地理环境导致难了于治理的严重污染。《濑户内海环境保护特别措施法对》因地制宜、对症下药，通过一系列特别举措实现了濑户内海的成功治理，其成功经验对我国渤海治理具有重要的借鉴意义。

关键词: 濑户内海 特别措施法 治理 渤海

一、引 言

濑户内海是日本国内的一个重要海域，既是优美的风景胜地，又有着丰裕的天然资源，[1] 同时还有着发达的工业，“濑户内海沿岸是日本最大的新兴工业地区，已经成为全国五大工业地带之一”。[2] 由于濑户内海自身的封闭性，存在海水交换时间长、自净能力差、环境容量低的特点。极低的环境污染承载力加上工业密布、污染源不断的周边状况，致使濑户内海环境严重恶化，水质、底质严重污染，水产资源衰退，赤潮频繁发生，填海造地失控，海上油污损害不断，濑户内海一度被称为“濒死之海”。[3]

濑户内海的治理备受日本各界关注。然而，其治理实践却表明，一般性海洋环境立法对于濑户内海的环境治理收效甚微。日本在海洋环境保护方面的传统法律，如 1921 年《公有水面填埋法》、1956 年《海岸法》、1970 年《水质污染防止法》和《海洋污染及海上灾害防止法》等均无力解决濑户内海的环境问题，甚至阻止不

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* 徐祥民，中国海洋大学法政学院院长，教授，博士生导师。
** 孔晓明，中国海洋大学法政学院 2005 级博士研究生。

1 “不仅在日本，而且在世界上也是以其壮丽而著名的绝无仅有的风景胜地，并且作为一个重要的渔业资源宝库，国民也无一例外地享受其天然惠泽，是子孙后代应该继承的天然财富。”《濑户内海环境保护特别措施法》第 3 条。
2 张舒:《日本濑户内海工业区的工业布局与产业结构》，载于《日本研究》2004 年第 2 期。
3 震惊世界的日本水俣病事件，正是由于熊本县水俣湾的百姓吃了从濑户内海中捕捞的含有高毒性的汞污染海产品，导致痴呆麻痺、精神失常。

了其每况愈下的恶化趋势。[4] 然而，日本 1973 年《濑户内海环境保护临时措施法》的颁布实施却对濑户内海的环境治理起到了明显效果，成功地将濑户内海从“濒死”的边缘挽救回来。由于治理效果显著，日本于 1978 年将该法更改为《濑户内海环境保护特别措施法》（以下简称“《特别措施法》”），使其成为保护濑户内海环境的永久性法律。究竟这部具有起死回生之效的法律有什么特别之处？其对我国海域治理具有什么样的借鉴意义？本文试析之。

二、特殊情况特别立法

《特别措施法》是专门针对濑户内海环境问题治理的区域性法律，从性质上来说是一部特别法。[5] 与一般法相比，特别法针对性强、因地制宜，可以做到有的放矢。之所以进行特别立法，乃是因为濑户内海治理的特殊需要。

日本海洋环境保护一般法在濑户内海治理上的乏力，其根本原因在于一般法律内容与濑户内海地理环境特点的不相容。如前所述，濑户内海由于其自身封闭性而具有环境污染承载力极低的特点，这就使得主要针对通常具有相当的自净能力和环境承载力的普通海域的一般海洋环境法律的内容难以适应濑户内海治理的特殊需要。正是由于一般立法在濑户内海环境治理上的无能为力，促使日本不得不制定了专门针对濑户内海环境保护问题的《特别措施法》。

实践证明，在这种特殊的海域制定特殊的法律是卓有成效的。[6] 自《特别措施法》颁布实施以来，濑户内海的环境有了极大的改善：填海造地活动得到扼制，填海造地的面积大大减少，从 1973 年前的 2000~3700 公顷下降到 2000 年的 100 多公顷；赤潮发生数目前减少到 70 年代出现次数的约 1/3，这是被世界海洋环保界公认的濑户内海治理的直接成效；濑户内海的海洋油污染逐年减轻，滋油发生次数已从 1972 年的 874 次，下降到 1995 年的 115 次，有了大幅度的减少；恢复了原来受到破坏的海水浴场，到 1995 年主要海水浴场已经达到 51 个，每年接待人数可达 773 万人次以上；自然保护区增多，到 2000 年，鸟兽保护区已由 1985 年的 729 处，面积 47.1 万公顷增加至 834 个，面积 52.8 万公顷。

在封闭性海域的环境问题上，不仅仅只有日本通过专门的立法来治理。在 6

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4 例如，濑户内海赤潮的发生仍旧频繁。1955 年只有 5 次，1965 年增加到 44 次，1971 年骤升为 136 次。赤潮造成了严重的灾害，仅 1972 年的一次赤潮灾害就造成了 70 亿日元的损失。

5 徐可鹿先生认为，特别法是非普遍的法律，即适用于特定时期、特定地区、特定人或特定事项的法律。下载于 http://freelaw,diy.myrice.com/lunwen/029.htm，2007 年 4 月 30 日。

6 笔者强调《濑户内海环境保护特别措施法》的功效并不是否定那些治理水域污染与公害的一般法，只不过其功效甚微。

处属于单一主权国家管辖的封闭性海域中，除加拿大的哈德逊湾因面积大、污染少没有进行专门的立法外，美国的切萨比克湾和旧金山湾分别制定了《切萨比克湾协议》、《法案》等专门法律文件，加利福尼亚湾虽然没有进行专门的立法，但要求建立加利福尼亚湾环境保护特别法的呼声也已十分强烈。

因此，通过专门立法来治理具有特殊性的特定环境，是《特别措施法》成功的基本经验。与濑户内海有着相同地理属性的我国渤海，污染已相当严重，社会各界呼吁对渤海进行整治的呼声也很高，然而到今天为止也没有通过立法制定一部专门的法律文件的形式来对渤海进行综合治理，这不能不说是渤海治理的一大缺憾。虽然我国制定了专门针对海洋环境的《中华人民共和国海洋环境保护法》，但其作为一般法只有防止海洋环境污染的一般原则性规定，根本无法覆盖海洋污染的所有方面和来源，无法有效应对渤海自净能力差、更新周期长、环境容量低等自然属性所带来的治理困难。

三、正确处理与一般法的关系

特殊情况需要适用特殊法律，但在任何问题的治理上，都不可能只靠特别法。针对特定区域单有一般法没有特别法行不通，仅有特别法没有一般法，特别法也就失去了其存在的依据和意义。如何正确处理特别法与一般法的关系，使二者相得益彰、互相配合、共同治理是特别法能否成功实施的重要因素，《特别措施法》在此方面处理十分得当。

在濑户内海环境问题治理上，不仅有《特别措施法》，还有《水质污染防治法》和《海洋污染及海上灾害防止法》等一般法。日本政府并没有因为制定了一部专门针对濑户内海的特别法就对先前颁布的水污染治理的一般性立法不闻不问，而是根据“特别法优于一般法”的法律原则，对二者进行综合运用，采用特别法为主、一般法为辅的方式对濑户内海进行治理。

一方面，在《特别措施法》的立法内容上，十分注重其与一般法的衔接。例如，《特别措施法》中规定的“公共水域”系指《水污染防治法》（1970 年第 138 号法律）第 2 条第 1 款[7] 规定的公共水域。“特定设施”系指同条第 2 款[8] 规定的特定设

7 《水污染防治法》第 2 条第 1 款规定：本法所称“公共水域”是指河流、湖泊、港湾、沿海海域及其他供公共使用的水域和与此相连接的公共沟渠、灌概水渠及其他供公共使用的水渠。

8 《水污染防治法》第 2 条第 2 款规定：本法所称“特定设施”是指以政令规定排放属于下列各项情况之一的废水或废液的设施：1、排放含有政令规定的镉及其他对人体健康产生危害的物质的设施；2、排放以政令规定的化学需氧量及其他水质污染的项目（包括热污染，但前项规定除外）而对生活环境产生危害程度的设施。

施。[9]通观整部《特别措施法》，尤其是第三章“有关濑户内海环境保护的特别措施”这一核心内容，几乎每一条的规定都涉及到了《特别措施法》与一般法的法律关系适用问题，甚至专门用了大量的篇幅详细规定了其同《水污染防治法》等的适用关系。[10]

另一方面，在适用上，日本政府对濑户内海治理的一切措施，首先都是基于《特别措施法》实施的，在《特别措施法》没有特别规定的时候参照一般法。这样既遵循了一般环境立法的主要规定，又有专门的针对性很强的特别法的规定，在严格按照国家的一般性法令治理濑户内海的同时，充分发挥针对性强的《特别措施法》的整治功效，对治理濑户内海起到了至关重要的作用。

四、特殊问题与特殊措施

该法之所以称为《特别措施法》，是因为其重点规定了 3 项有针对性的有关濑户内海环境保护的特别措施，分别是控制特定设施的设置、防止营养富化引起危害的发生和自然海滨的保护。[11] 这 3 项专门针对濑户内海特殊环境问题所提出的特别措施构成了该法的主要内容：(1) 控制特定设施的设置是从陆源方面控制和削减污染物的排放总量，例如对特定设施设置的批准标准、有关特定设施的过渡措施、特定设施构造的变更与继承以及与《水质污染防治法》的使用关系等进行了规定，同时为了防止有关化学需氧量的水质污染，规定由内阁总理大臣制定有关削减以化学需氧量表示的污染负荷总量的基本方针。[12] (2) 防止营养富化引起危害的发生是要求削减磷以及其它指定物质，[13] 制定削减的总目标、年度计划、指导方针和对策。[14] (3) 自然海滨的保护针对的是濑户内海自然资源和旅游资源的保护，要求在海滨沙滩、岩礁、海水浴场、赶海区域等设置自然海滨保护区，并规定在自然保护区内新建建筑物、改变土地使用现状、采掘矿物、开采土石及其他活动要进行必要的申报。[15]

这些特别措施不仅针对性极强，而且条文规定十分具体，可操作性很强。例如，为了防止营养富化引起危害的发生，该法不仅规定了削减向公共水域排放有关磷及其他指定物质，还对削减的总目标、年度目标以及其他物质削减的指导方针作

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9 《濑户内海环境保护特别措施法》第 5 条。
10 《濑户内海环境保护特别措施法》第 12 条第 1 款
11 《濑户内海环境保护特别措施法》第三章。
12 《濑户内海环境保护特别措施法》第三章第一节。
13 所谓富营养化是指水体中含有大量的磷、氮等植物生长所需的营养物质，造成藻类和其他浮游生物爆发性繁殖，水体中的溶解性氧量下降，水质恶化，导致鱼类和其它生物大量死亡的现象。
14 《濑户内海环境保护特别措施法》第三章第二节。
15 《濑户内海环境保护特别措施法》第三章第三节。

了详细具体的规定，方便具体执行。同时，该法还有明确的责任规定予以保证实施，从而使得这些措施能够真正落到实处。

特别措施进一步体现了“因地制宜、有的放矢”的立法思想。濑户内海自然环境复杂，不仅整体濑户内海有着与其它海域不同的自然属性，就濑户内海内部构造而言，也是由若干海湾和具有不同功能特点的海区所构成。这些海湾和海区不仅自然条件不同，其污染源也各不相同。《特别措施法》因地制宜，针对不同的自然属性与污染状况采取具体的治理标准，实行不同的具体措施，真正实现了“有的放矢”。我国渤海湾由于缺少专门的法律，对渤海湾、其它开放性的海域以及渤海湾内各海湾海区采用一般的原则、制度，这种千篇一律的套用方法根本无法实现“对症下药”。

五、严格控制陆源污染

按照陆海一体的总体思路，对陆地污染源实行严格的控制，从源头进行治理是濑户内海治理的指导思想。濑户内海的主要污染是陆源污染，尤其是沿海周围的大中型企业，[16] 给濑户内海带来了大量的污染源。针对这一特点，《特别措施法》规定了严格的企业排污设施控制制度，把影响濑户内海生态环境的各种陆地生产经营活动纳入其调整范围，主要包括 3 方面内容：(1) 切断污染源头，将污染严重的化工厂迁离濑户内海，并大大减少填海造地的面积，将其中的大部分区域都规划为国家公园，建立了 800 多个野生动物自然保护区。[17] (2) 严格控制企业排污设施设置。企业要向濑户内海排放污染物需要经过“三关”：首先，要依照总理府令的规定，向府县知事提出排污设施设置申请，申请书的内容必须详细记载包括排污设施种类、构造、使用方法，从特定设施排放的废水或废液的处理方法，外排水量、外排水的污染状态等事项，同时还应附有记载该排污设施环境影响调查结果事前评价事项的书面材料。[18] 其次，府县知事在收到申请书后，要将申请书的内容提供公众阅览 3 周，与排污设施的设置有利害关系的人可在阅览期间向有关府县知事提出书面意见。最后，府县知事还应在规定的期限内征求与该排污

16 这里集中了全日本 70％的钢铁业、63％的炼铜业和 76％的炼铅业。如果把这一地区的工业生产能力加在一起，它比英国这些产业的全部生产能力还要大。参见宋德玲：《70~80 年代日本濑户内海的公害治理》，载于《日本学论坛》1999 年第 4 期。

17 下载于 http://gb.magazine.sina.com/nfcmag/200616/2006-08-28/003417688.shtml，2007 年 2 月 10 日。

18 《濑户内海环境保护特别措施法》第 5 条。

设施的设置有关的府县知事和市、镇、村长的意见。[19] (3)《特别措施法》调整的排污设施设置的企业非常广泛，不仅包括濑户内海沿海一带的企业，而且只要是企业所排放的污染物最终流入该海域就属于《特别措施法》的调整范围。

陆源污染是海洋污染的主要来源，大部分海洋污染物质，主要来自于陆地，海洋环境污染防治，如果“头痛医头，脚痛医脚”，仅仅针对海水污染是远远不够的，必须从源头上予以控制，把好第一关。《特别措施法》通过严格的、具体的法律规定实行对陆地污染源的控制，为陆源污染控制提供了具体的行为规范，陆源污染因此得到了有效控制。而作为一般法的我国《海洋环境保护法》，只有防止陆源污染的一般规定，没有具体的行为规范，无法真正按照陆海一体的思路进行海洋环境治理，这也是《海洋环境保护法》不能有效治理渤海环境污染的重要原因之一。

六、政府规划配合法律

日本政府在制定《特别措施法》进行环境治理的同时，还辅以政府内阁总理大臣制定的《濑户内海环境保护基本计划》与沿海各府县制定的濑户内海环境保护府县规划加以具体配合，[20] 这对该法的有效实施起到了重要作用。

《濑户内海环境保护基本计划》是依据《特别措施法》来制定实施的。在濑户内海的环境保护与治理中，法律起着主导与核心的作用，基本计划则是实现立法目标的主要手段。基本计划虽然不能替代法律，但详细具体的基本计划却是实施法律的有效手段。《濑户内海环境保护基本计划》的规定十分具体，包括防止水质污染、保护自然景观、保护浅滩等 19 项具体措施。每一项措施针对性非常强，治理的目标明确，计划涵盖了整个区域的规划方向、目标和措施。在《特别措施法》的基础上辅之以《濑户内海环境保护基本计划》，有利于从法律原则性的规定到具体实施的转化，从定性到具体的量化指标的转化。[21]

濑户内海沿海各府县根据《濑户内海环境保护基本计划》和其管辖海域的情况再制定了针对措施更强的府县规划，[22] 在不违背《特别措施法》与基本计划的前提下因地制宜，具体问题具体分析，充分发挥各府县对自己管辖区域了解透彻的优势，使《特别措施法》的整治作用发挥到极至。

《特别措施法》与政府基本计划、府县规划相互配合，形成了一种自上而下、由点到面的海洋环境综合整治措施体系。与之相对应的渤海治理中，我国虽然为治理渤海制定和实施了一些规划，如 2000 年的《渤海沿海资源管理行动计划》、

19 《濑户内海环境保护特别措施法》第 5 条。
20 《濑户内海环境保护特别措施法》第二章。
21 张向冰：《立法能给渤海带来什么》，载于《中国海洋报》第 1346 期。
22 《濑户内海环境保护特别措施法》第 4 条第 1 款。

《渤海综合整治规划》和《渤海环境管理战略》，2001 年又制定了《渤海碧海行动计划》等，但由于我国《海洋环境保护法》不是专门针对渤海环境，因此其对海洋环境治理的一般性原则规定也无法落实到颁布的具体行动计划中来，如此一来，各种行动规划也就失去了强有力的法律保障，成了没有一点约束力的一纸空文。以至于这些行动计划在实施以后根本没有达到治理的效果，渤海污染甚至仍呈现持续上升趋势。[23]

七、高效行政保障实施

日本环保执法管理是由中央和地方政府共同负责完成的。上至中央，下至地方政府都有明确的分工，各司其职，基本上做到了对污染时间的及时发现、及时防治，保证法律法规得以顺利执行。在濑户内海的环境治理中，日本政府各部门之间分工合理、权责明确，具有很高的行政效能。中央由内阁总理大臣与环境厅统一协调管理，地方由沿海 13 个府县知事[24] 管理，直接对内阁总理大臣与环境厅长官负责，这样就避免了有权力参与濑户内海治理的行政机关过多以致出现各自为政的不良局面。

《特别措施法》专门设立了濑户内海环境保护审议会，直接对环境厅长官与内阁总理大臣负责，负责调查审议有关濑户内海环境保护的重要事项。[25] 审议会专门针对濑户内海治理与环境保护展开工作，在濑户内海环境保护基本规划的制定中起了主要作用，同时对各府县规划的制定进行有效地监管，使中央与地方的环境保护方针保持一致。

为了更好地进行濑户内海的治理和环保工作，日本政府在该海区沿岸的 13 个府县和 5 个市还建立了知事和市长参加的环境保护工作的会议制度，即知事、市长联席会议制度，形成了一种例会式的组织机构。经过这些年来的实践，进一步证实建立这种形式的联席会议制度是一种非常行之有效的措施。在防止海洋污染的过程中，这种联席会议发挥着非常重大的作用。

以健全的管理体系与地方政府联席会议制度为基础的濑户内海环境保护管理机制，是《特别措施法》有效实施的可靠保障。这对我国的海洋环境治理是一个很好的借鉴。我国的海洋环境管理体系十分庞杂，是一种分散、多头管理体制：国务院环境保护行政主管部门、国家海洋行政主管部门、国家海事行政主管部门、国家渔业行政主管部门、军队环境保护部门都对海洋环境有监督管理权，在地方上，只

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23 2004 年的渤海海洋监测结果显示，严重污染海域面积较 2001 年增加了 1000 平方公里，中度污染海域面积增加了 2300 多平方公里。《中国海洋环境质量公报》2004 年卷。

24 日本的府县知事相当于中国的省级行政机关领导职务。

25 《濑户内海环境保护特别措施法》第 23 条。

要是沿海县级以上地方人民政府也都有海洋环境监督管理的职责。权责分工的不明确导致各个行政部门在海洋环境问题上相互扯皮的现象屡见不鲜，各行其是、各自为政，渤海湾环境治理出现“五龙闹海”、“十三太保”的局面也就不足为奇。

八、充分发挥民众作用

《特别措施法》十分重视社会公众在濑户内海治理中的作用，并采取了一系列措施保障公众的知情与参与。《特别措施法》规定，内阁总理大臣制定或变更基本规划，沿海各府县制定或变更府县规划，都应当公之于众；[26] 各府县要将企业设置排污设施的申请书和各种书面材料提供公众阅览 3 周，与特定设施的设置有利害关系者可以在阅览期内向有关府县提出书面意见；[27] 制定或变更指定物质削减的指导方针，有关府县知事应将有关情况公布于众。[28]《特别措施法》通过具体的法律规定保障了公众的知情权与参与权，为公众有效地参与濑户内海环境保护提供了法律依据，公众参与的积极性和热情高涨。

同时，《特别措施法》还注重发挥环保社团的积极作用。1992 年 6 月联合国环境与发展会议上通过的《21 世纪议程》里就专门强调了环保团体在环境保护方面的重要作用，认为环保团体的真正介入是实现可持续发展的重要条件之一。[29]《特别措施法》中 2 次提到了环保公共团体，从法律的高度赋予环保公共团体参与濑户内海治理的权利。例如，第 4 条第 2 款规定，国家和地方公共团体应努力为实现基本规划和府、县规划而采取必要的措施。第 14 条规定，鉴于濑户内海的污染状况，国家和地方公共团体应该努力促进下水道和废弃物处理设施的完善、污泥疏浚、用于水质监视或测定的设施和设备的完善及其他旨在保护濑户内海水质的必要事业的发展。通过立法的形式肯定环保公共团体的地位与其在环境治理中的重要作用实为鲜见。在国家法律和政府的支持下，环保公共团体大量诞生，规模之大居全世界之首。最知名的莫过于濑户内海环境保护协会，它在濑户内海的环境整治过程中扮演了重要角色。

比较而言，我国的环境保护对公众参与的态度只是口号上的，或者在一些环境法律法规中对公众参与作一些原则性的规定，公众的环境知情权与具体的参与

26 《濑户内海环境保护特别措施法》第二章
27 《濑户内海环境保护特别措施法》第 5 条。
28 《濑户内海环境保护特别措施法》第 12 条第 4 款。
29 蔡守秋主编：《欧盟环境政策法律研究》，武汉：武汉大学出版社 2002 年版，第 148 页。

权根本没有落实。[30] 对于环保社团更是缺乏应有的重视，不管是我国的《海洋环境保护法》还是《水污染防治法》等，我们都看不到环保公共团体的字样。[31] 这对我国环境保护事业的整体发展而言是不利的。

九、普及提高环保思想

广大民众对濑户内海环境保护重要性的认识和对《特别措施法》的内心认同，是《特别措施法》得以有效实施的重要原因，而这应归功于日本政府在普及环保理念、提高公民环保意识方面所作的努力。

日本深刻认识到提高国民环保意识是搞好海洋环保工作非常重要的一环。因此，日本政府通过各种方法和手段，进行大量的宣传，如果不加强环境保护，濑户内海就会变成死海，并且直接威胁到人类自身的存在，从而促使国民自觉地协助政府做好环保工作。由于日本社会各阶层都在宣传保护濑户内海的重要性和必要性，这为濑户内海的整治工作打下了良好群众基础，成为濑户内海整治成功的一条重要原因。为了提高国民的环保意识，鼓励公众参与，日本政府积极开展濑户内海的环保活动，其措施包括：(1) 大力加强普及宣传工作。在濑户内海的沿岸举办各种研讨会、讲演会、开展环保宣传月活动，并印发各种宣传品。（2）加强调查研究。针对沿海居民对濑户内海环境的认识，进行典型事例调查，编写宣传教材，研究今后宣传普及活动及环保教育的具体措施和方法。(3) 指导海洋环保工作。对有关濑户内海的各种海洋环保工作进行技术指导，并予以资助。举办各种讲演会、研讨会、印发宣传画和清扫海滨等有益活动。(4) 成立必要公益法人组织，例如 1976 年成立的濑户内海环境保护协会，旨在通过普及和提高人们对濑户内海环境的认识，开展各种调查研究及其它活动，以利于对濑户内海的环境保护工作。

与之相对应的是，我国的渤海治理似乎只是行政部门的事，对渤海的污染严重情况又有多少平民百姓能够知晓，更有几人能够有效地参与？在缺乏社会力量的必要支持，政府管理没有社会互动的情形下，渤海治理不力也就在所难免了。

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30 许多学者都对我国的公众参与情况作了分析，其结论也大同小异，均强烈呼吁通过法律具体规定来保障公众的环境知情权与参与权。例如李挚萍先生在谈到环境法的修订时指出“应创设环境权以及与环境权相配套的一列权利，如环境知情权、环境参政议政权等。”参见李挚萍：《关于修订〈环境保护法〉的若干思考》，载于王树义主编：《可持续发展与中国环境法治》，北京：科学出版社 2005 年版，第 20 页。

31 中国并不缺少环保公共团体，刚刚发布的《中国环保民间组织发展状况蓝皮书》显示，我国环保民间组织已有近 3000 家。尽管这些团体在艰难中蹒跚地做着中国的环保事业，但如果政府能够给予充分的重视，提供各方面的支持与帮助，相信他们会成为中国环境保护事业的主力军之一。

十、平衡协调环发矛盾

在濑户内海环境问题的治理上，《特别措施法》真正找到了环境、资源与发展的“契合点”。环境保护与追求经济发展之间存在着明显的矛盾。不管是对企业特定设施的控制还是污染物排放总量的削减，都会在一定程度上影响到企业与国家的经济效益。但《特别措施法》没有因为片面地追求这种短期利益而忽视濑户内海长远的综合性利益。日本政府正是从这种长远利益出发，尽管企业的经济效益有所下降，但濑户内海丰富的渔业资源与自然景观所带来的旅游收入却是相当可观。濑户内海经过十几年的整治，海洋渔获量已超过 50 年代，达到年产 80 万吨。1995 年产量为 65 万吨，海水养殖的产量已超过海洋捕捞的产量。除此之外，作为日本最杰出的自然风景区，经过整治后的濑户内海逐渐恢复了原来受到破坏的海水浴场，到 1995 年主要海水浴场已经达到 51 个，每年接待人数可达 773 万人次以上。

十一、结语:经验与启示

《特别措施法》的成功是有目共睹的，在 6 处属于单一主权国家管辖的封闭性海域的环境管理中，濑户内海的治理被证明是最为有效的一个，其中《特别措施法》功不可没。但成功不是偶然的，通过本文上述分析，我们可以理解《特别措施法》在濑户内海治理上的良苦用心，其基本经验或许可以概括为:因地制宜、全面具体。

我国的渤海有着与上述海域同样的自然属性，环境污染也非常严重，甚至出现了渤海将要变成“死海”的严峻形式。[32] 濑户内海的成功治理对我国渤海的治理具有珍贵启示。一方面，濑户内海走的是先污染后整治的道路，这不仅耗资巨大、损失严重，而且整治的时间也很长，为我们及早进行渤海治理提供了警示和教训。另一方面，濑户内海实现成功整治的现实又让我们看到了治理的希望和出路之所在:在这种特殊的区域，以特殊的区域性法律与一般的国家立法配套结合进行综合的整治，可以减少损失、节约时间、少走弯路。渤海污染也很严重，但从整个海域来讲还是比当时的濑户内海要好。[33] 我国治理渤海虽然依据的一般性立法比较多，

32 有关渤海将要变成死海的评论比比皆是。例如，穆易:《渤海会成为死海吗？》，载于《中国经济周刊》2004 年第 37 期;辛文:《渤海会变成“死海”“空海”吗？》，载于《新闻周报》2004 年 5 月 11 日。

33 日本开始工业化的时间比中国早的多，环境问题的出现也早的多。

也制定了 4 个渤海环境计划，[34] 但唯独缺少一部专门针对渤海治理的区域性法律。日本的经验告诉我们，计划虽然重要但代替不了法律的基础与核心地位，一般法更是代替不了特别法强有力的针对性和有效性。不管是临时措施法还是后来的永久措施法，都是作为一部法律存在，其威慑力与强制力是任何其它手段所无法比拟的。如果我们吸取日本在治理濑户内海方面的经验教训，制定专门的区域性法律，借鉴吸收上述《特别措施法》的特殊经验，及时地进行整治，不仅可以节约经费与时间，[35] 成功治理渤海也指日可待。

34 4 个规划分别是《渤海沿海资源管理行动计划》、《渤海综合整治规划》、《渤海碧海行动计划》和《渤海环境管理战略》。

35 我国有过淮河流域治理失败的沉痛教训，600 亿经费“打水漂”是一个不争的事实。

论大陆架界限委员会的法律地位

范云鹏 *

内容摘要: 本文总结了大陆架界限委员会（以下简称“委员会”）成立以来的基本工作，并以《联合国海洋法公约》及该委员会制定的文件为依据认为委员会是一个监督条约执行的专家机构。依据国际法的一般原理，委员会的建议不应对当事国产生法律拘束力，但就条约文本和实践来看这种约束力是事实存在的。委员会的工作事关国际社会、沿海提案国和利害关系国等各方利益的平衡，因此应尽快改善其工作方式、增强透明度和可参与性。

关键词: 大陆架界限委员会　法律地位　改革

一、大陆架界限委员会的设立及工作进展

（一）大陆架界限委员会的设立及职能

《联合国海洋法公约》（以下简称“《公约》”）的生效是海洋法发展中的里程碑事件，它第一次全面地明确了各国在领海、毗连区、专属经济区、公海、大陆架、国际海底区域等各个区域所享有的权利和承担的义务，成为调整国家在海洋领域权利义务关系的综合性法典。尤其重要的是，《公约》明确了海洋及其海床洋底各个部分的法律地位，在国家就海洋产生的主权争议中发挥了定分止争的作用。不管是国家享有主权的领海或是享有主权权利的专属经济区，还是作为人类共同继承财产的国际海底区域，所有水域都将按照《公约》的规则有明确归属。当然，《公约》也为沿海国进行海洋圈地运动保留了最后一丝希望。依据《公约》第 76 条的规定，沿海国可以主张拥有 200 海里以外的外大陆架，并可在一定条件下将此项权利主张的范围延伸至领海基线以外 350 海里处。与沿海国对大陆架直接享有权利不同的是，宽大陆架国家必须依据《公约》确定的准则提出申请，且被审议后方可能取得。于是，《公约》第 76 条和附件二规定设立大陆架界限委员会（以下简称“委员会”），并授权该机构专门负责外大陆架方面的工作。21 名经选举产生的

* 范云鹏，北京大学法学院国际法专业硕士研究生。

委员于 1997 年 6 月 16 日至 20 日召开了委员会的第一届会议，并以鼓掌方式选出俄罗斯联邦的尤里•卡兹明先生担任主席。[1] 自此，委员会正式开始工作，履行《公约》赋予的重大职责。

依据《公约》附件二第 3 条的规定，委员会承担 2 项重要职责，其一是审议沿海国提出的关于扩展到 200 海里以外的大陆架外部界限的资料和其他材料，并按照《公约》第 76 条和 1980 年 8 月 29 日第三次联合国海洋法会议通过的谅解声明提出建议；其二是应有关沿海国请求，在编制这些资料期间，提供科学和技术咨询意见。这 2 项职责是一个有机整体，不可偏废。第一项职能是委员会的实质性工作，直接关涉相关沿海国对外大陆架的权利主张能否实现，另一方面也决定着国际社会享有的利益是否能得到有效保障。第二项职能在某种程度上可以视为委员会对缔约国承担的义务。这种科学和技术上的咨询不仅是委员会对有关沿海国的协助，也从一个侧面反映出委员会的法律地位属性。

基于委员会地位和职责的重要性，它是在国际社会的关注和期待中诞生的。同时，它所立足的法律依据是一套崭新的体系，所面临的是相当复杂的科技难题，因此无论是委员会这个机构本身还是它所负责的外大陆架工作都将在实践中不断发展和变革。

（二）委员会的工作状况

到目前为止，委员会已经召开了十九届会议，各项工作逐渐步入正轨。十年来，委员会一方面不断加强自身建设，努力为各项工作的开展和缔约国的参与提供明确的规则指引；另一方面，委员会积极履行自己肩负的 2 项重要职责，在不断的探索中为今后的工作积累了宝贵经验。

1. 制定和完善工作守则

从第一届会议起，委员会就高度重视议事规则的制定，对由秘书处草拟的议事规则进行了第一轮审议。在第二届会议上，委员会通过了《大陆架界限委员会议事规则》（CLCS/3）和《委员会的工作方式》（CLCS/L.3）。到了第九届会议，委员会制定了《大陆架界限委员会小组委员会内部程序》。上述 3 个文件在制定之后都经历若干修正或更正，成为委员会及小组委员会开展工作的程序性准则。在第十一届会议期间，委员会认为应当对这 3 个基本文件进行文字上的统一，使其相互一致。[2] 目前有效的《大陆架界限委员会议事规则》（CLCS/40）反映了截至 2004 年 4 月 30 日委员会通过的修正案和新增案文。该议事规则的附件三取代了《委员会的工作方式》和《大陆架界限委员会小组委员会内部程序》。另外，委员

1 UN Doc. CLCS/1.
2 UN Doc. CLCS/34.

会在第十六届会议上通过了《大陆架界限委员会内部行为守则》（CLCS/47），为委员会委员确立了道德标准，包括保持正直、独立和公正，保密，避免利益冲突，独立行事和发表否认责任声明等内容。

2. 受理和审议缔约国的划界报告

《公约》确立的外大陆架法律制度无论对于委员会还是准备提出申请的沿海国都是一个新事物。而且《公约》的相关规定十分抽象，特别是无法详尽地提供科学技术上的指引。因此，委员会的成立并没有立即揭开沿海国提出外大陆架申请的序幕，而委员会也利用这一时期着手制定细致的科学技术方面的指南性文件，以协助沿海国拟定划界案，同时也为委员会审议划界案和编写建议提供重要的科学和技术参考基础。自 1997 年起，委员会经过分学科和多学科背景研究和拟定草案这 2 个阶段的准备，最终于 1999 年的第五届会议上通过了《大陆架界限委员会科学和技术准则》（CLCS/11）（以下简称“《准则》”）。考虑到《准则》对沿海国编写划界案极为重要，缔约国第 10 次会议决定，对于《公约》在 1999 年 5 月 13 日之前生效的缔约国，该日是《公约》附件二第四条规定的向委员会提交划界案 10 年期开始日期，从而将沿海国提交划界案的第一个截止日期从 2004 年延至 2009 年。[3]

2001 年 12 月 20 日，俄罗斯联邦向委员会提交其划界案，这是委员会成立以来收到的第一件划界案。该划界案所载数据和其它信息涉及俄罗斯提出的在北冰洋中部、巴伦支海和鄂霍次克海 200 海里以外大陆架外部界限。联合国秘书长为此向所有会员国发出普通照会，告知俄罗斯在其划界案中提出的大陆架外部界限坐标，并收到加拿大、丹麦、日本、挪威和美国针对该普通照会的来文。委员会在第十届会议上重点审议了俄罗斯划界案，并成立了以加洛•卡雷拉为主席的小组委员会。该小组委员会召开会议讨论后将建议提交给委员会第十一届会议。在进行若干修正之后，委员会以协调一致的方式通过了小组委员会提交的建议，并将其提交俄罗斯和联合国秘书长。[4] 该建议载有对俄罗斯联邦所提数据和资料的审查结果，其中特别提到俄罗斯联邦对 200 海里以外大陆架的权利，以及是否按《公约》第 76 条规定适用了公式线和制约线的问题。委员会就划界案内涉及 200 海里以外大陆架的 4 个地区向俄罗斯联邦提出建议。[5] 俄罗斯自然资源部副部长于 2003 年 6 月 3 日致信给委员会主席，就委员会对俄罗斯划界案的建议提出了评论意见和问题。委员会全体成员核准了小组委员会答复该信的草稿，并将其发给俄罗斯自然资源部副部长。[6]

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3 UN Doc. SPLOS/72.

4 At http://www.un.org/Depts/los/clcs_new/submissions_files/submission_rus.htm, 11 June 2007.

5 UN Doc. A/57/57/Add. 1.

6 UN Doc. CLCS/39.

目前委员会正在审议或即将审议的划界案分别来自巴西（2004），澳大利亚（2004），爱尔兰（2005），新西兰（2006），法国、爱尔兰、西班牙、英国、北爱尔兰的联合划界案（2006），挪威（2007）和法国（2007）。[7] 2004 年 1 月 16 日和 7 月 9 日，联合国海洋事务和海洋法分别发出普通照会，请那些必须在 2009 年之前向委员会提交划界案的沿海国家说明打算提交划界案的时间。从答复的情况来看，委员会在 2009 年之前至少还将收到 10 份划界案。[8] 可以预见，委员会在今后一段时期内将面临日益繁重和复杂的对沿海国划界案的审议和建议工作。

二、委员会的法律地位

（一）委员会在国际法上的地位

1. 委员会不是国际组织

二战以后，国际组织成为国际社会的一股重要力量，对国际法的发展和国际秩序的构建产生了深刻的影响。随着国际格局的变动和国家间多边合作形式的多样化，国际组织的定位也成为一个较为复杂的问题。但是，无论是学者还是国际机构都特别强调具有独立的法律人格是国际组织的根本属性。舍尔摩斯教授认为，“国际组织是依照国际法建立、以国际协议为基础而拥有独立法律人格的合作形式，它拥有至少一个机构并具有自己的意志。”[9] 国际法委员会在正在进行的关于国际组织责任的草案编纂中也指出，“国际组织一词是指根据条约或受国际法制约的其他文书建立的拥有自己的国际法律人格的组织。”[10] 因此，尽管委员会是根据条约设立的机构，也受到国际法的规制，但由于缺乏独立的法律人格并不能归于国际组织。指出这一点并不是仅仅为了明确概念，而是强调应当如何看待委员会可以拥有的职权。对于国际组织而言，它可以享有完成章程所赋予职能所必须的暗含权力，也可以对作为其基石的章程进行更大程度地目的性解释。[11] 因而，不具有国际组织地位的委员会就无法完全享有这些自由和灵活，而只能严格按照《公约》的明确授权来开展工作。

2. 委员会是《公约》设立的条约机构

委员会是依据《公约》第 76 条而设立，其职能也是监督第 76 条第 8 款的执行。

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7 At http://www.un.org/Depts/los/clcs_new/clcs_home.htm,13 June 2007.
8 UN Doc. CLCS/39, CLCS/42.
9 H. G. Schermers and N. M. Blokker, *International Institutional Law: Unity within Diversity*, Leiden: Martinus Nijhoff Publishers, 2003, p. 26.
10 UN Doc. A/58/10.
11 J. Klabbers, *An Introduction to International Institutional Law*, Cambridge: Cambridge University Press, 2002, pp. 67, 98.

尽管委员没有独立的法律人格，但它有自己的意志。它通过自己的工作方式形成决议来促使缔约国实施《公约》的相关条款。与其它条约机构相似，委员会没有自己的秘书处和单独的财政来源，而是在很大程度上依靠联合国的秘书处和财政拨款。一般而言，条约机构由某个国际组织的章程或者由国际组织的机构创立，但委员会显然不属于这些情形。委员会是由《公约》缔约方大会负责建立，由联合国秘书处特别是海洋事务与海洋法司协助工作的机构。与《公约》同时创立的其它 2 个机构（国际海洋法法庭和国际海底管理局）不同的是，委员会更像一个《公约》的坚定捍卫者而不是积极实践者。这一方面是因为前 2 个机构都是具有独立法律人格的国际组织，在开展工作时具有更充足的资源和更高的能动性。另一方面，委员会所负责的《公约》条款是由相关缔约国主动援引，而委员会自身只是从《公约》的立场出发起到评判监督的作用。这一点再次验证了委员会无需也不应过于主动地介入缔约国实施条约的过程，而只应严格按照《公约》的授权来进行评价和监管。

3. 委员会是《公约》设立的专家机构

通常条约机构分为 2 类。一类是以多边环境条约缔约方大会为代表的由缔约国政府官员组成的条约机构，如气候变化框架公约缔约方大会等；另一类是以国际人权条约机构为代表的由相关领域专家组成的条约机构，如消除种族歧视委员会等。相比而言，委员会属于后者，因为它的组成人员是具有独立身份、不代表任何政府立场的专家。[12] 第一类条约机构由于其成员来自缔约国政府，因而更多地体现了政府间的意志，是一种广义的政府间国际多边合作形式。它们的任务往往是将多边条约所确立的基本框架具体化，通过定期举行会议的方式落实缔约方先前达成的原则性共识。因此，这类机构不仅从人员构成来看更容易直接体现缔约国的意志，从而促进新的一致意见形成，同时它的任务也要求其不断努力采取措施来实现条约设定的目标。而作为专家型机构的委员会则具有更强的独立色彩。尽管委员会的成员在产生时考虑到尽可能广泛的代表性，但是所有委员以个人身份任职，不代表任何政府，也不从任何政府那里接受指示。他们完全是从专业的角度来发表意见，审视缔约国主张外大陆架的行为是否符合《公约》的相关规定。[13]

（二）大陆架界限委员会建议的效力

1. 委员会建议的应有效力

在委员会的 2 项职责中，向提交外大陆架划界案的国家提出建议是能够反映

12 关于各类条约机构性质的探讨，参见饶戈平、胡茜：《全球化时代国家间多边合作的组织型态》，载于饶戈平主编：《全球化进程中的国际组织》，北京：北京大学出版社 2003 年版，第 70~80 页。

13 UN Doc. CLCS/1.

其意志并能对外界产生实质影响的工作。由于此种建议具有外部效力，因此明确其在国际法上的性质就尤为重要。我们不妨先基于委员会的地位对此种建议的应有效力进行初步分析。首先，从《公约》的文义解释看，“建议”不包含法律拘束力。它只是委员会对沿海国提案发表的专家意见，至于其最终能产生多大影响完全取决于沿海国的斟酌和取舍。第二，作为一个专家机构，委员会尽管担负监督《公约》实施的重任，但毕竟不反映任何缔约国的意志，更不是缔约国意志一致的产物，因此它做出的建议不应对提案国产生强制性的约束力。委员会的建议可以被视为促进《公约》有效实施的机制，但并非带有拘束力的措施，只是为提案国和其它缔约国提供一种权威的来自于第三方的专业意见。其三，从目前其它专家型条约机构的实践来看，委员会的建议要具有拘束力也难以获得国际社会的普遍认可。例如，国际人权条约机构在接受缔约国提交的报告后可以在审议报告的基础上提出一般性建议或评论。这种建议或评论是缺乏法律拘束力的。它的作用在于加强条约机构和缔约国之间的沟通，促使缔约国国内各利益群体了解和改进人权方面的问题，也寄希望于调动包括专家机构在内的国际社会的力量来督促和帮助缔约国有效履行其所担负的人权条约义务。因此，专家型条约机构的建议是一种“软性”的监督机制，并不具有法定的强制性和惩罚性，而着重依靠自身的专业权威和国际社会的尊重来推进条约的有效实施。由此可见，在目前的国际社会中，委员会这样一个全部由地质、地球物理、水文方面的专家组成的机构很难具有让缔约国被动接受其建议的地位和能力。

2. 委员会建议的实际效力

在进行了应然层面的分析之后，我们再结合《公约》的具体规定及委员会的实践来考察委员会建议的实际效力。其一，《公约》没有对委员会建议的效力进行直接界定，但却指出“沿海国在这些建议的基础上划定的大陆架界限应有确定性和拘束力。”该条款并不针对建议的效力进行说明，而只是说明如果沿海国采纳建议后划定大陆架界限可以享有拘束力。应当认为，此处“拘束力”的对象不仅包括沿海国，也包括其他缔约国，即依据委员会建议做出的划界决定应受到其他缔约国的承认和尊重。由此可见，委员会的建议对于沿海国的划界是否能够获得国际社会的认可具有至关重要的作用。同时，我们也应明确《公约》并没有要求沿海国完全按照委员会的建议划界，而只要求其将建议内容作为划界基础即可。这里就牵涉到如何理解“在这些建议的基础上”的措辞。在世界贸易组织争端解决机制受理的美国、加拿大诉欧共体荷尔蒙牛肉案中，上诉机构认为专家组将“在……基础上”理解为“与……一致”是错误的，指出成员方的动植物检验检疫措施以国际标准为基础并不要求两者完全相同。[14] 与此类似，从《公约》的内涵看，它并不要求沿海国将委员会的建议照搬为其划界标准，而是允许其纳入自己的裁量。另外，

14 WT/DS26/AB/R, WT/DS48/AB/R.

由于保密的缘故，除了提案国和联合国秘书长外，其他人至今无法了解委员会建议的确切内容，因此不知道该建议究竟是具体列明应当划界的方式还是仅原则性地提出应当改进的地方。如果委员会的建议的确如同秘书长在关于海洋和海洋法的报告中所说，是对沿海国的划界案提供一些修改时应当考虑的因素，[15] 那么这种建议也自然无法直接成为划界的方案。基于上述分析，我们可以认为，《公约》为委员会的建议赋予了相当高的权威，使其成为沿海国划定有拘束力的外大陆架界限的基础，但同时也没有完全剥夺沿海国基于委员会建议进行最终定夺的权利。

其二，从《大陆架界限委员会议事规则》关于向委员会提交划界案的程序规则来看，[16] 委员会始终对沿海国是否接受其建议实施着有效监控，从而使其建议具有不可忽视的重要地位。当沿海国提出划界案后，除非委员会经过审议对该划界案表示完全同意，委员会都会对沿海国提出修改建议。而此时无论沿海国是否对此项建议表示遵守，它都必须以提交新的或修订的划界案的形式反映出来，那么它将重新经历委员会的审议过程。如果委员会认为此次划界案已经符合要求，那么沿海国即可依此划界。如果委员会认为再次提交的划界案依然没有完全采纳上次的建议则会进一步提出修改意见。所以，委员会实际上掌控着判定沿海国是否接受其建议的最终权力。可以说，委员会利用自己发表建议的权力来不断提升原有建议的事实拘束力。

其三，从委员会对俄罗斯划界案的审议情况来看，委员会的建议对沿海国划界成功与否产生着现实的影响力。目前委员会仅对其收到的第一个划界案完成了审议工作并发表了建议。根据联合国秘书长在其报告中对建议的简要披露，我们可以得知，委员会要求俄罗斯就若干地区的划界案补充信息和考虑委员会建议中提及的审查结果。[17] 由此可见，俄罗斯的第一份划界案实际上没有获得委员会的最终认可，需要进一步地善和加以修改。事实上，俄罗斯在收到建议后也在认真考虑委员会的建议，并通过官方途径向委员会提交评论意见和进行咨询。委员会的初步实践表明沿海国对其发表的建议给予了应有的尊重和重视，并参照建议进行若干修改。至于俄罗斯最后在多大程度上接受了委员会的建议，恐怕还得等到它提出新的划界案甚至委员会作出进一步的建议之时。

综上所述，从实然的角度看，委员会的建议虽然并非判断沿海国划界案是否妥当的最终裁判，但却是沿海国划界案能否产生最终拘束力的不可缺少的重要依据。

三、委员会工作方式的改革

15 UN Doc. A/57/57/Add.1.
16 UN Doc. CLCS/40.
17 UN Doc. A/57/57/Add.1.

委员会毕竟是一个十分年轻的机构，它所面对的任务也是全新的，因而从它诞生之日起国际社会对委员会如何有效地开展工作就众说纷纭。特别是在提出外大陆架主张的沿海国日益增多之时，代表不同利益群体的声音围绕委员会的定位和透明度问题展开了激烈交锋。

（一）主动调查与中立裁判

1. 委员会代表谁的利益？

委员会作为《公约》设立的机构究竟代表谁的利益？对于这个命题的回答直接关系到如何看待委员会的角度定位。在外大陆架划界的问题上，主要存在着 3 个利益群体。其一是主张外大陆架权利的沿海国。如果这些宽大陆架国家对外大陆架的权利主张能够获得承认，那么它们可以将主权权利延伸至领海基线以外最远不超过 350 海里的大陆架区域。其二是对他国主张的外大陆架地区拥有法定权利或历史性权利的利害关系国。这些国家对特定区域拥有主权或主权权利，但由于他国主张的外大陆架与该区域重叠，一旦他国对外大陆架的权利获得认可那么这些权利范围势必受到影响。其三是国际社会，即国际海底区域这一人类共同继承财产的权利主体。如果沿海国主张的外大陆架区域不与另一国家的管辖区域重叠，那么该部分就属于国家管辖以外的国际海底区域。在这种情形下，某个沿海国外大陆架的扩展就意味着国际海底区域的减少，也就会影响国际社会整体权益的得失。尽管明确了各方的利益取向，我们依然难以明确判断委员会完全代表着哪一方的特定利益。首先，委员会的职能是监督沿海国是否按照《公约》要求提出划界案，因此它绝不是外大陆架扩张的积极推动者，而是《公约》的忠实捍卫者。其次，委员会并不代表受到外大陆架主张影响的特定国家的利益。《公约》第 76 条第 10 款规定：“本条的规定不妨害海岸相向或相邻国家间大陆架界限划定的问题。”因此，委员会只立足《公约》判断提案国的划界是否符合特定标准，并不过问其结果是否与其它国家的利益相冲突，将提案国与第三方的问题交由他们自行解决。最后，委员会也并不能完全代表国际社会对国际海底区域享有的利益。从一定程度上说，委员会通过发表建议对沿海国的提案进行审查可以视为它维护了国际海底区域的应有范围。但是这只是委员会工作的客观效果，并没有纳入制度设计的目标范畴内。《公约》第 76 条对外大陆架确定的标准十分模糊晦涩，因而委员会通过制定《准则》将其转变为操作性较强的规范。尽管《准则》所载的内容不是《公约》的有权解释，更不能变更约文的原意，但它实际上发挥着判定尺度的作用。然而《准则》的制定是否将有效保护国际海底区域的范围纳入考量因素目前还不得而知。另外，委员会在审查过程中也没有安排能够代表国际社会利益的主体参与，例如国际海底管理局等。目前委员会仅仅安排在沿海国的划界案具有确定性和拘束力时向国际海底管理局通报，这意味着代表国际海底区域利益的主

体没有渠道来影响委员会的决定。

2. 如何定位：行政抑或司法？

委员会既然不主动代表任何一个利益群体的利益，那么它最理想的定位就是司法机构。作为司法机构，它能够毫无偏私地审查各个利益群体的纷争，以确定的标准来对争议进行裁断。同时，如果委员会能够具有司法机构的权威，它自然也就可以获得做出有拘束力建议的能力，从而与其事实上的效力相衔接。然而，是否同意赋予委员会以司法机构的地位完全取决于缔约国的意志。当今主要的国际司法机构的管辖权取得都是基于争端当事方的同意，因此将委员会升格为司法机构必然影响其管辖范围。况且，《公约》在建立国际海洋法法庭这样一个受案范围极广的司法机构的同时还设立委员会的事实就表明缔约国并不愿意将有关外大陆架的问题完全纳入司法解决的范畴，或者他们认为此类具有复杂科技含量的争议难以单纯通过司法裁判加以解决。因此，尽管将委员会定位为司法机构是最理想化的需求，但国际社会的现实尚不允许采取此等根本性的变革。既然如此，将委员会定位为行政性机构是否合适呢？从目前的作法来看，沿海国提交划界案给委员会并由后者审查后作出建议，这与行政机构的运行颇为相似。委员会由反映缔约国意志的《公约》建立以处理沿海国的申请，这符合行政机构设置的基本原理。但是这其中也存在一些不足。其一，沿海国的申请是否成功不仅关系到其自身的利益，还会对其它利害关系方产生影响，因此委员会不应单纯地局限在沿海国提供的信息内进行消极审查，还要积极主动地获取信息加以综合评判。其二，沿海国的申请是否得到批准直接关系到利益主体权利的得失，因此从现代法治的观点来看应当保障各方获得司法救济的权利，或者至少是在行政审议中发表意见的权利。综上所述，在将委员会确立为司法机构尚不现实的情形下，应当在目前的行政定位中提高透明度、增强参与性，使之逐渐成为准司法化的机构。[18]

（二）严格保密与适度公开

1. 对于保密问题的持久关注

委员会从成立起就对保密问题高度关注。在委员会的工作中，保密的对象主要有 2 类：一是沿海国提交的划界案中被确定为秘密的信息；二是委员会的会议内容。对于沿海国提交信息的保密目前适用《议事规则》附件二保密规则的规定。沿海国有权将自己提供的信息定为秘密，并掌握着解密的最终决定权。委员会在工作中接触和查阅相关秘密信息要严格遵守保密义务，并且保证在任期中及任期

18 Ron Macnab, The Case for Transparency in the Delimitation of the Outer Continental Shelf in Accordance with UNCLOS Article 76, *Ocean Development and International Law*, Vol. 35, 2004, pp. 1~17.

后都不泄露相关信息。沿海国在提交划界案时仅需将相关资料送交联合国秘书长和委员会，而联合国秘书长只是将划界案以概要的形式用普通照会发给会员国。出于对沿海国信息保密的高度重视，委员会也迫切希望获得豁免来对抗因可能出现的违反保密义务而遭受的责任追究。委员会在研究该问题后向联合国法律顾问、主管法律事务的副秘书长进行咨询，最终确定委员会成员在处理机密材料和执行其他职务时享有《联合国特权和豁免公约》第 6 条给予联合国特派专家的特权与豁免。[19] 对于委员会的会议保密，《议事规则》的第 23 条作出了明确规定："委员会、其小组委员会和附属机构的会议应以非公开方式举行，但委员会另有决定的除外。"到目前为止，委员会仅于 2000 年 5 月 1 日举行了一次公开会议，目的在于介绍《公约》第 76 条有关法律和规定与外大陆架的确定有关的最重要和最具挑战性的问题。[20] 因而，委员会的其它会议都对公众进行保密，外界也只能通过每次会议后发布的主席声明来了解会议的大致内容。另外，尽管根据《公约》附件二第五条提案国可派代表参加委员会有关的审议程序，但《议事规则》对"有关程序"作了限制性解释，即提案国代表无权参加委员会审议和做出建议的会议。对于这一点，委员会成员曾在第十一届会议上产生分歧。卡兹明先生认为沿海国代表有权参加所有议事程序，而主席不同意此种看法。最后，此项分歧没有能够协商解决，而是通过表决的方式以 15 票比 3 票的结果维持了沿海国成员不能参与委员会最终审议会议的结论，然而卡兹明先生还是坚持他的意见，并希望将其意见记录在案，因为他认为委员会的决定有悖于《公约》的规定。

2. 各方对公开的渴求

委员会严格保密的作法已经引发诸多指责与不满。如前所述，在外大陆架的问题上涉及多方利益，委员会要想保持利益平衡并赢得各方信任就必须更加开放和透明。然而，目前强调绝对的保密的确是对提出划界案的沿海国给予了充分保护，并且完全将保密的范围交给其确定，同时委员会会议的保密又为提案国的利益增添了双重保险。但如此一来，其他利害关系国和国际社会的利益就无法得到充分的保障。他们既没有正常的渠道去参与委员会的审议工作，也无法从公布的少量信息中找到评价划界案合理性和委员会建议正当性的充足依据。在缺乏参与和了解的情形下，尽管委员会享有极高的专业声誉，但利益相关方仍旧无法完全信任委员会决策的合理性，并不断质疑《公约》体制为委员会树立的权威。[21] 实际上，让缔约国在一定程度扩展对委员会工作的知情度是有益处的。缔约国了解提案国的作法和委员会的态度后，一方面可以积累经验，遵循习惯作法来提出自己的划

19 UN Doc. CLCS/5.

20 UN Doc. CLCS/26.

21 Donald R. Rothwell, Building on the Strengths and Addressing the Challenges: the Role of Law of the Sea Institutions, *Ocean Development and International law*, Vol. 35, 2004, p. 131.

界案，从而也确保委员会决策的一致性和可预见性；另一方面，缔约国可以有充足的信息来评价提案和建议的正当性，有利于督促委员会改进工作和增强委员会的公信力。除了确实需要保密的提案信息外，委员会可以向其他成员国开放的信息还是相当多的。委员会应当建立与各利益主体的良性沟通机制，实现资源的共享和彼此的信任。委员会更开放地面对国际社会也有利于自身借鉴和采纳最新的科技成果，避免因为技术信息的有限而对做出建议犹豫不决。[22]

3. 更广泛的参与

前文述及的利益群体中目前只有提案国和直接利害关系国可以在委员会的审议中发挥作用。根据《公约》附件二和《议事规则》，在海岸相向或相邻国家之间发生争端或在有未决的陆地或海洋争端的情况下，委员会才须审议划界案国以外其他国家的来函。这实际上排除了在没有直接争端的情形下其他国家作为国际海底区域的共同拥有者之一发表意见的权利。巴西提交划界案后美国就向委员会致信发表意见。但委员会第十四届会议和第十五届会议都认为美国与巴西之间没有未决的海洋争端，因而对其意见不予任何考虑。这种做法实际上不利于维护国际社会的整体利益。任何程序只有充分吸纳利害关系方的意见才能保障决策的合理与公正。

四、结　语

委员会毕竟是一个新近设立的国际机构，所承担的职责面临科学技术和国际法上的双重挑战，因而它的自我完善必须是一个逐步发展的过程。然而，由于依照委员会建议进行的划界具有确定性和拘束力，而且在可预见的将来此种建议和划界决定都无法通过司法审查或其它国际法认可的途径予以改变，所以，《公约》缔约国和委员会只有高度合作，加快委员会工作方式的改革，才能使其有能力完成关系各方重大利益的外大陆架划界审查工作，并确保相关划界在日后具有权威性。

22 Ron Macnab, The Case for Transparency in the Delimitation of the Outer Continental Shelf in Accordance with UNCLOS Article 76, *Ocean Development and International Law*, Vol. 35, 2004, pp. 1~17.

海事赔偿责任限制基金程序面临的困境和解决

徐洪霖 * 王建兰 **

内容摘要：我国《海事诉讼特别程序法》规定的海事赔偿责任限制基金程序在实践中产生诸多争议和困惑，根本原因在于相关立法没有处理好赔偿责任限制基金程序与赔偿责任限制诉讼程序之间的关系。笔者在分析了基金程序的设立目的及其面临的尴尬以后，得出设立基金程序仅仅是申请责任限制诉讼程序的一个环节的结论，并在此基础上，提出申请责任限制诉讼程序应先于设立基金程序的构想。

关键词：海事赔偿责任限制 基金程序 诉讼程序

在海事司法实践中，遇到最大困惑、招致诸多质疑的程序当属我国《海事诉讼特别程序法》（以下简称“《海诉法》”）第九章规定的“设立海事赔偿责任限制基金程序”（以下简称“基金程序”）。有的学者甚至在一篇文章中提出 10 个困惑之多，[1] 但笔者认为其中最根本的问题在于，设立基金程序之前是否应对申请人享受赔偿责任限制的权利作出结论。

一、《海诉法》下基金程序的设立目的

在《海诉法》起草过程中，对第九章应规定为海事赔偿责任限制程序，还是仅

* 徐洪霖，大连海事大学海商法专业硕士研究生。
** 王建兰，大连海事大学海商法专业硕士研究生。

1 张贤伟：《现行责任限制程序规则在司法实践中的困惑及解决》，下载于 http://www.ccmt.org.cn/hs/explore/exploreDetial.php?sId=2004，2007 年 2 月 25 日。例如：责任人设立基金是否必须以享受责任限制为条件；责任人享受责任限制是否必须设立基金；责任人是否可以单独就其能否先受责任限制向海事法院提起诉讼；责任人享受责任限制是否必须提起责任限制诉讼；责任人设立基金是否能够达到预期目的；基金尚未设立，债权登记和确权诉讼能否进行；海事债权性质尚未明确，能否进行债权登记等。

仅规定为设立海事赔偿责任限制基金程序存在较大的分歧，[2] 这涉及到该章规定的程序是否应对申请人能否享受责任限制进行审查并做出结论的问题。但经过反复讨论，《海诉法》最终还是采取了后一种意见，立法者的目的就在于通过设立基金程序使责任人的船舶或其他财产在实体责任明确之前不受扣押。根据《海商法》第 214 条规定："责任人设立责任基金后，向责任人提出请求的任何人，不得对责任人的任何财产行使任何权利；已设立责任基金的责任人的船舶或其他财产已经被扣押，或者基金设立人已经提交抵押物的，法院应当及时下令释放或者返还。"海事赔偿责任限制制度就是倾向于保护船舶所有人、经营人、承租人、救助人和保险人的特别制度，这种特别保护应该得到程序上的保障。立法者选择第二种意见的另外一个重要原因是，申请责任限制有很强的程序性，必须在债权人的参与下，经过审判程序才能得出结论，但这会产生这样一个问题，即在有关责任纠纷的实体审理中，对责任人的责任限制问题是否还应进行审查。如果不再审查，先前的责任限制程序就相当于实体判决，这可能要经历相当长的时间，而准予设立基金的裁定和相关实体判决将几乎同时做出，责任人就很难通过设立基金的方式使其船舶或其他财产在责任确定前免受扣押，海事实体法上保护船舶所有人、经营人、承租人、救助人和保险人的倾向性目的就难以实现，设立基金也在很大程度上失去了应有的意义。但如果认为相关的实体程序还应对责任人的责任限制再作审理，那么责任限制程序中明确的责任限制问题可能与后来实体审理得出的结论相反，从而出现矛盾。如果在责任限制程序中的一方当事人上诉并经二审裁定的，还可能出现一审判决否定二审裁定的不正常现象。因此，设立基金程序与确定责任人是否有权限制责任的实体审理应当分开，这样处理才能与实体法的规定相吻合。[3]

总之，《海诉法》的立法者之所以选择了设立基金可以先于责任限制程序的模式，其目的主要是为了使责任人的船舶或其他财产在其责任确定之前免受扣押，设立基金的意义也正在于此。

二、实践中设立基金程序面临的尴尬

根据《海诉法》第 101 条第 3 款，[4] 设立海事赔偿责任限制基金的案件可以分为两类，一类是在起诉前提出申请，一类是在诉讼中提出申请。但是，提出申请设

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2 金正佳主编：《海事诉讼法论》，大连：大连海事大学出版社 2001 年版，第 406 页。前一种意见的思路大致是这样的：首先对申请人是否能享受责任限制做实体审查，只有申请人在被准许限制赔偿责任后，才可以设立责任限制基金。

3 金正佳主编：《海事诉讼法论》，大连：大连海事大学出版社 2001 年版，第 407~408 页。

4 《中华人民共和国海事诉讼特别程序法》第 101 条第 3 款："设立责任限制基金的申请可以在起诉前或者诉讼中提出，但最迟应当在一审判决作出前提出。"

立基金不等于基金已经设立。《海诉法》及《最高人民法院关于适用〈中华人民共和国海事诉讼特别程序法〉若干问题的解释》（以下简称“《海诉法》司法解释”）规定：准予申请人设立责任基金的裁定生效后，申请人应当在 3 日内向海事法院设立海事赔偿责任限制基金。[5] 也就是说，法律规定的设立基金的行为必须待准予申请人设立责任基金的裁定生效后才能进行。对此，在立法过程中，也曾有过两种不同的观点：一种意见认为，法院受理申请并通过相关的形式审查以后，申请人即可在法院设立基金；另一种意见认为，应在利害关系人不持异议或异议不成立的情况下，申请人才能在法院设立基金。[6] 最终后一种意见成了法律，其原因主要是出于对船舶所有人和索赔人利益平衡的考虑，防止船舶所有人滥设基金以逃避责任。

按照规定，法院在作出裁定之前必须进行相应的实体审查，我们清楚，从提出申请到做出准予裁定最快也要 2 个月以上的时间。[7] 当一个特定的重大海损事故发生后，受害人在起诉前采取的保护自己权利的最佳途径和第一选择往往是申请海事法院扣押当事船舶。如果船舶所有人选择诉前申请责任限制基金的方式来防止或解除他的船舶或其他财产被扣押，那可能出现的结果是：1. 船舶未被扣押，则在提出申请设立基金之日起至少 2 个月该船只能躲躲藏藏，不可在有可能被扣押的港口停靠。实际上，船舶航行区域和时间遭到严重限制，如果该船是沿海运输船舶或者是航行固定航线的船舶，那情况就更糟；2. 船舶已被扣押，那也得要 2 个多月的时间才能准许设立基金，即船舶得被扣押 2 个月以上的时间。以上两种结果，无论哪一种对船舶所有人来说都是不利的。其实在实践中，船舶所有人减少其因扣船造成的进一步损失的最佳方法是及时提供海事担保，虽然提供担保可能要交纳数额巨大的担保费，但是设立基金的数额也不少，更何况设立基金程序最快也要 2 个月以上的时间，而且在程序上比提供海事担保慢得多，复杂的多。因此，诉前仅凭申请责任限制基金，实际上并不能有效防止和解除责任人的船舶或其他财产被扣押，只能是在申请责任限制基金的同时又提供海事担保，而真正起到立即释放被扣押船舶作用的其实是及时地提供海事担保。所以，以诉前申请责任限制基金的方式来防止和解除责任人的船舶或其他财产被扣押，缺乏实践中的现实性。[8]

而诉讼中申请设立责任基金的主要目的是要求释放已提供的超过责任限制的担保，其实这种方式也很难行得通。在实践中，即使基金已设立，某些被扣押的船

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5 最高人民法院关于适用〈中华人民共和国海事诉讼特别程序法〉若干问题的解释》第 84 条：“准予申请人设立海事赔偿责任限制基金的裁定生效后，申请人应当在 3 日内向海事法院设立海事赔偿责任限制基金。”

6 潘燕、杨俊敏：《我国海事赔偿责任限制基金设立程序》，载于《水运管理》2005 年第 3 期。

7 关正义：《设立海事赔偿责任限制基金程序的有关问题》，载于《中国海商法年刊》（2002 年卷），大连：大连海事大学出版社 2003 年版，第 308 页。

8 关正义：《设立海事赔偿责任限制基金程序的有关问题》，载于《中国海商法年刊》（2002 年卷），大连：大连海事大学出版社 2003 年版，第 308 页。

舶或担保也不能得到释放或被退还，这是因为：第一，基金并不能涵盖所有的海事请求，有些海事请求的债权性质尚未明确或属于《海商法》第 208 条规定的非限制性债权。这是海事法院不解除扣押或担保的一个主要原因；第二，在未确定责任人能否享受责任限制之前，海事法院释放船舶、退还或降低担保需冒风险，而且如果案件审理后判定责任人不能享受责任限制，而部分担保又被释放，不仅会给判决的执行带来麻烦，也会造成当事人之间利益的失衡。因此法院在处理时通常会谨慎行事，可能会以种种理由拒绝释放担保。

实践中大量发生的情形是责任人首先申请责任限制，进而考虑申请设立责任限制基金，显然《海诉法》的规定同实践相脱节。而且实践中责任人从解除船舶扣押至顺利设立基金，不仅需要较长时间的审理，而且还需提供 3 个担保：(1) 解除扣押的担保；（2）为避免设立基金错误提供的担保；（3）基金担保。[9] 由于设立基金未必能达到预期的目的且需要花费诸多的精力和时间，必然导致原已较少的此类案件变得更少，甚至可能造成海诉法第九章的规定形同虚设，前景令人堪忧。

三、海事赔偿限制基金程序出现困境的原因

我国《海诉法》第九章直接规定了责任人申请设立基金的程序，而没有规定海事赔偿责任限制诉讼程序，实质上是设置了责任人申请设立基金程序和提起海事赔偿责任限制诉讼程序之间相对独立的原则。根据《海商法》第 213 条的规定：“责任人要求依照本法规定限制赔偿责任的，可以在有管辖权的法院设立责任基金。”其中“可以”一词说明，设立基金并不是责任人依法要求并获得责任限制的前提条件和必经程序（船舶油污损害赔偿案件除外），责任人设立基金只表明其有申请责任限制的意向，并不能表明其有权限制责任，责任人不设立基金，也不影响其申请责任限制；而且《海商法》的规定并没有将设立基金的主体限定为“有权”获得责任限制的人，也没有就设立基金程序规定其他的限制条件，即只要责任人“要求”责任限制，即可设立基金，这都可以说明设立基金与确定责任人是否有权责任限制的实体审理是分开的。[10]

海事赔偿责任限制作为海商法中特有的一项法律制度，是《海商法》赋予船舶所有人、经营人、承租人等在发生重大海损事故时，可根据法律的规定，将自己的赔偿责任限制在一定范围内的一种法定特权。及时确定责任人能否享受赔偿责任限制的权利，不仅直接影响着责任人的实体赔偿权益，也直接关系到索赔人的实体补偿权益，而且如果责任人不能够享受责任限制，则诸如基金程序等一系列程

9 张贤伟：《现行责任限制程序规则在司法实践中的困惑及解决》，下载于 http://www.ccmt.org.cn/hs/explore/exploreDetial.php?sId=2004，2007 年 2 月 25 日。

10 金正佳主编：《海事诉讼法论》，大连：大连海事大学出版社 2001 年版，第 408 页。

序都将毫无实际意义。因此，确定责任人能否享受海事赔偿责任限制权利是海事赔偿责任限制制度的基础。《海诉法》第九章“海事赔偿责任限制基金程序”名为《海商法》第十一章“海事赔偿责任限制”的配套程序，而实则不然。因为设立基金程序只是责任限制程序中的一个环节，而且，除船舶油污损害案件外，设立基金并不是责任限制的必经程序。[11]《海诉法》第九章对责任人是否享受责任限制不产生影响的“基金程序”作出了具体规定，而对关系当事人实体权利义务、决定基金程序价值的海事赔偿责任限制诉讼程序却只字未提，由此产生困惑和问题是必然的。

四、对基金程序设立目的的反思

我国立法者没有制定审理海事赔偿责任限制的程序，其中最主要的原因是因为该程序会大大延长申请责任限制程序的审理期限，使得责任人难以通过设立基金而在责任明确前尽早使其船舶或其他财产免受扣押，责任人无法得到我国《海商法》第 214 条规定的保护。然而实践中设立基金也是达不到预期目的的，这说明我国立法者对设立责任基金目的的理解和解释与基金程序最初的设立本意之间是有偏差的。这令许多学者开始对设立基金程序的目的进行深刻的反思。

毋庸置疑，我国《海商法》的“海事赔偿责任限制基金制度”主要是借鉴了国际公约的规定，那么是什么原因促使国际公约起草者设立海事责任限制基金？设立基金的真正目的是什么？是否是我国立法者所解释的那样呢？答案是否定的。

海事赔偿责任基金是由责任人为限制其责任而设立的，并作为分配给所有限制性债权人以偿付债务的一定款项。[12] 因此，基金的实体目的是用于支付限制性债权，如果责任人可以享受责任限制。

海事赔偿责任限制中一个重要原则就是“一次事故，一次限额”，即在一次事故中，不论有多少个限制性债权人索赔，责任人只需赔偿一个法定的限额，就可以对抗所有的限制性债权而无须再承担额外的责任。但是，由于海事事故引起的多个索赔人往往位于不同的法院管辖地，这就造成每个索赔都在不同的法院进行审理，责任人必须奔波于不同的法院而提出相同的责任限制抗辩，也许责任人在每个案件中可能都抗辩成功，但是，责任人最终对这个事故的赔偿总额可能会超过法律规定的限额。[13] 譬如，某船沉没而假定有 10 家货主，其全部损失为 4000 万，每个货主的索赔额均为 400 万，船东的责任限额为 1000 万。如果不同法院分别审理每个债权人的海事请求，由于每个货主的索赔额均未超过 1000 万，所以该责任人显然无法申请责任限制，这样，责任人必须要赔偿 4000 万，限制不了责任。

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11 司玉琢主编：《海商法学案例教程》，北京：知识产权出版社 2003 年版，第 290 页。
12 司玉琢主编：《海商法大辞典》，北京：人民交通出版社 1998 年版，第 692 页。
13 杨良宜著：《海事法》，大连：大连海事大学出版社 1999 年版，第 242 页。

如果再假定该事故损失仍是4000万，船东责任限额仍为1000万，而A、B两货主损失分别为1500万，其他8个货主的总损失是1000万，此时责任人也只能对A、B两货主限制责任，而对其他的货主仍然不能限制责任，其最终的赔偿限额仍为3000万，也远远超过其应享受的1000万限额。

为使“一次事故，一次限额”原则实现，一个理想的解决方案就是将一次事故中引起的所有限制性债权的索赔集中到一个法院来审理，并且由该法院来统一分配责任限额。因此，必须要找到一个可将所有限制性债权的索赔集中到一个法院来审理的连接点，国际公约的制定者最终找到了这个连接点，那就是海事赔偿责任限制基金，通过设立基金来完成这个使命。例如在Miss New York案[14]中，塔夫特大法官将责任限制程序描述为“在某个意义上有禁止多方诉讼的禁令的特征”，期望“对有着多方面的争议作公正的解决”。它表明，责任限制法的基本目的之一是使船东能够将个别的请求“集中起来”，以避免在不同的法庭上为自己辩护的无可否认的负担。[15]正如国际海事委员会对《1976年海事索赔责任限制公约》（以下简称“《1976年公约》”）第11条的评价一样，设立基金有利于将所有的索赔人集中到一个法院，并能快速地赔付受害人。所以，从程序上讲，设立责任限制基金的目的是为了能够将一个事故引起的所有限制性债权的索赔集中到一个法院来审理，在“一个事故，一次限额”的原则能够得以实现的前提下，能够尽快赔付受害人。[16]

因此，国际公约设立责任限制基金的真正初衷，无论从实体目的还是程序目的上来看，并非我国立法者所理解之意。《1976年公约》第13条“其他行为的禁止”的规定（等同于我国《海商法》214条的规定）是基金设立后相应的法律后果，[17]而不是公约立法者引入责任限制基金的目的，因为如果责任人已经设立了基金并且可以用于分配，那么也就为所有的限制性债权人提供了可靠的保障，如果此时还不释放责任人先前提供的担保，而让债权人为同一索赔而再行获得担保，这就很难说是公平的了。

可见，我国《海诉法》将设立基金的目的理解为使责任人的船舶或其他财产在实体责任明确之前不受扣押是错误的。诸如上述，基金并不能涵盖所有的海事请求，对于非限制性债权人的索赔，责任人解除扣押的方法仍然是提供海事担保。

五、设立海事赔偿责任限制程序的构想

14 转引自邢海宝著：《海事诉讼特别程序研究》，北京：法律出版社2002年版，第426页。
15 邢海宝著：《海事诉讼特别程序研究》，北京：法律出版社2002年版．第426页。
16 祝默泉、沈晓平：《论完善我国海事赔偿责任限制程序制度》，载于《中国海商法年刊》（2003年卷），大连：大连海事大学出版社2004年版，第252~253页。
17 李守芹、李洪积著：《中国的海事审判》，北京：法律出版社2002年版，第239页。

现行《海诉法》仅仅设置了“设立海事赔偿责任限制基金程序”，既未涉及到责任人是否可享受责任限制的问题，更未涉及到责任人的赔偿责任的最终解决问题，明了确是明了，但也必然导致没有大的价值。[18] 设立基金程序所面对的尴尬和困惑，仅仅靠增加几条司法解释是于事无补的。越来越多的学者主张我国立法应采取单独设立海事赔偿责任限制诉讼程序，而且笔者认为其还必须作为设立基金程序的前置程序。

（一）单独设立海事赔偿责任限制诉讼前置程序的理论依据和实践依据

海事赔偿责任限制制度涉及到 3 个基本概念，即海事赔偿责任、海事赔偿责任限制和设立海事赔偿责任限制基金。其中我们可以看出，海事赔偿责任是海事赔偿责任限制的前提和基础，没有海事赔偿责任就没有海事赔偿责任限制和设立责任限制基金；海事赔偿责任限制既是海事赔偿责任全部履行的例外，又是设立海事赔偿责任限制基金的前提，它不仅决定责任人的赔偿责任范围，在设立基金的情况下，也决定着基金的标准；而设立海事赔偿责任限制基金则是海事赔偿责任限制的体现和海事赔偿责任最终得以清偿的保证和基础，尽管清偿的并非是全部的海事赔偿责任。所以说，没有海事赔偿责任就不存在海事赔偿责任限制，没有海事赔偿责任限制，即使设立了海事赔偿责任限制基金，也不构成责任人对债权人的最终清偿。

从逻辑关系上讲，没有责任限制的权利，就不存在设立责任限制基金的问题，即使设立了，也不会产生责任限制的法律后果。在责任限制问题未明确的情况下设立责任限制基金，严格地讲，该基金也不能称之为责任限制基金，因为它的前提不存在。

从实践上看，设立基金程序只是海事赔偿责任限制程序中的一个环节，而且也不是责任限制的必经程序或前提条件。如果责任人不享受责任限制的权利，那么设立基金就毫无意义，所以在设立基金之前必须明确责任人能否享受责任限制。

（二）海事赔偿责任限制申请的性质

海事赔偿责任限制诉讼是否可以作为一个独立之诉向海事法院提出，这在我国海商法学界存在很大争议。但基本上有两种观点：一种观点认为，海事赔偿责任限制权利仅仅是一种“抗辩权”。理由是，海事赔偿责任限制制度是海商法赋予船舶所有人、承租人、经营人、救助人等责任限制主体的一种法定特权，它不存在对

18 李守芹、李洪积著：《中国的海事审判》，北京：法律出版社 2002 年版，第 243 页。

海事债权人的义务，不构成海事赔偿责任限制权利义务这种法律关系，因此其仅是一种“抗辩权”。另外，与单位责任限制权利不同，责任限制主体是否提出海事赔偿责任限制申请，只能由责任人在诉讼过程中自主决定并主动援引，法院在确定责任时无主动适用的权利亦无该方面的义务，如果责任人不向法院提出申请，法院不得主动适用。

所以，海事赔偿责任限制本身仅仅是责任限制主体用以对抗索赔方从而依法将赔偿责任限制在法定范围内的一种“抗辩权”。我国《海诉法》立法者没有规定海事赔偿责任限制诉讼程序，很大程度上是因为他们认为责任限制只是一种抗辩权，只能在实体诉讼中通过抗辩行使，不能构成独立之诉。而且如果将责任限制申请视为独立之诉，那么在责任限制的独立审理程序中明确的责任人的责任问题，可能与后来的实体审理得出相反的结论，从而出现矛盾。当然将海事赔偿责任限制的权利视为诉讼抗辩权的并非仅有我国，实际上，有些大陆法系的国家（如德国、挪威、巴拿马、日本等），也认为申请责任限制是对抗海损索赔请求权的抗辩权，而不能作为独立之诉来对待。[19]

另一种观点则认为海事赔偿责任限制权利是“请求权”或“形成权”，可以独立之诉方式行使。理由是，申请海事赔偿责任限制符合诉的定义[20]——海事赔偿责任限制申请之诉的标的是申请人与被申请人之间的海事赔偿责任限制权利义务关系，诉的主体是依据法律规定承担限制性赔偿责任的船舶所有人、救助人等责任限制主体，而《海诉法》第 104 条规定申请人申请设立海事赔偿责任限制基金要附有有关的证据，并在申请书中载明申请的理由，即海事赔偿责任限制之诉的理由。

笔者认为海事赔偿责任限制程序应当独立于产生海事请求的索赔程序（即实体案件程序）之外单独存在，理由是：第一，责任限制申请符合诉的要素，构成独立之诉；第二，虽然在实体案件程序中，责任限制申请人是责任人，但在责任限制程序中，责任人同时也还是权利人，其享有责任限制的权利是法定权利，非经法定程序不得剥夺，因此认为海事赔偿责任限制程序从属于海事索赔程序于法理有悖；第三，实体案件程序并不能解决所有的责任限制问题，当责任人面对的只有一个或几个索赔，且索赔总额没有超过应当设置责任基金的数额时，两个程序尚不冲突；但当责任人面对十几个甚至几十个诉讼时，让责任人在每个法院都以抗辩的形式申请责任限制，即使每个都成功，那总额也有可能超过设置责任基金的数额，实际上所谓的赔偿责任限制权利并得不到最终的贯彻；第四，责任限制程序和设立

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19 这些国家，船舶所有人等只要申请责任限制就须适用特定的责任限制程序（如《德国海事诉讼法》、日本《关于船舶所有人等责任限制的法律》第三章、《挪威海事法》第 231~245 条等）。参见雷霆：《论在我国援引海事赔偿责任限制的性质及其影响》，载于《中国海商法年刊》（2001 年卷），大连：大连海事大学出版社 2002 年版，第 113 页。

20 诉是指当事人向法院提出保护其权益的请求。作为独立之诉，需具备三个要素，即诉的主体、诉的标的和诉的理由。

基金程序一样，也有自己的管辖权（参见下文详述）。总之，我国应当设立独立的海事赔偿责任限制程序，以解决责任限制申请人是否能够享受责任限制权利的问题。

（三）国外立法的借鉴

对于海事赔偿责任限制，英国、美国、日本等国法律规定了专门的诉讼程序，对我国立法将有重要的借鉴作用。笔者依据申请责任限制程序与实体案件诉讼程序是否直接结合分述如下：

第一，责任限制程序与实体案件诉讼程序直接结合——代表国家：英国

依英国《海事诉讼专门规则》，申请责任限制时，申请人可以不必提供责任限制基金。[21] 申请人申请签发的令状送达被申请人后 7 日内，申请人就可申请开庭，由法院的登记官进行审理：1. 如果当事人对申请责任限制的权利没有争议，登记官应做出申请人享受责任限制的裁判，并确定责任数额；2. 如果当事人对此有异议，则允许其提出证据，延期审理；3. 如果双方对此争议很大，则其后的程序与一般的海事诉讼程序大致相同，最后由海事法官对案件做出判决。另外，对责任诉讼有管辖权的法院可以将债权人在其他法院对责任人提起的诉讼合并审理。

应该肯定的是，英国的模式有很大优点：1. 依当事人对责任限制争议的大小，分 3 种情况分别对待，体现出很大的灵活机动性，有利于尽快解决申请人的责任限制问题且易于操作；2. 责任限制以裁决形式做出，有很高的法律效力，避免了在实体案件中重新审理出现的弊端。[22] 这种模式在法制健全，诚信度高的英国实行无疑是科学合理的，但并非适用每个国家。我国现代立法起步晚，法制不是很完善，国民素质参差不齐，使用这种模式大部分都要走第 3 种途径，致使许多规定形同虚设，这就体现不出其本来应有的优势了。

第二，责任限制程序与实体案件诉讼程序相分离——代表国家：美国

在美国，给船东责任限制是美国的公共政策。美国 1851 年《责任限制法》规定了一个独立的法庭裁定船舶所有人是否有权免责或至少能否享受责任限制，这种诉讼被称为 Concursus。

按照《责任限制法》和《规则 F》（即《关于若干海事索赔的补充规则》中的规则 F），责任限制申请必须由船舶所有人接到书面索赔通知（或传票和起诉书）后 6 个月内提出。有多个诉讼请求时，责任限制诉讼必须在接到第一个索赔通知后

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21 但是，几乎所有的申请人都会主动提交，这样，只要法院判决可以设立，就马上有基金可供分配。

22 如前文所述，一审判决否定二审裁定的弊端。

6 个月内提出，否则船舶所有人将丧失一切责任限制的权利。[23] 作为申请责任限制的一个条件，船舶所有人必须向法院提供一笔相当于船价和运费的款项或担保。同时，《责任限制法》规定："所有……对船东的索赔与诉讼均应停止。"即只要责任人提出责任限制的申请，他就被授予一种绝对的权力将所有对他提起的诉讼转到海事法院去，尽管那些法院不愿意放弃保留条款。事实上，"诉讼人"也被剥夺了择地行诉权。

美国这种对责任限制诉讼设立专门的程序和法庭，无疑有利于公平解决当事人双方争议，提高审判效率。但其不分当事人是否对责任限制有争议，一味适用单一的专门诉讼程序，不免有些僵化。而且，美国法律要求申请人必须提供相当于船价和运费的款项或担保，无疑是加重申请人的负担，没有体现出责任限制的优势。

第三，责任限制程序与实体案件诉讼程序"明分暗和"——代表国家：日本

日本《关于船舶所有人等责任限制的法律》规定，当责任人向法院申请责任限制时，法院只有在申请人提供基金后才能做出开始责任限制程序的决定。该决定系在单方申请的基础上做出，无须经过听审。对接受法院决定且不提出异议的债权人，可以登记债权，由法院从基金中分配；而不接受法院开始责任限制程序决定的债权人，既可以就该决定上诉，也可以对责任人提起普通的索赔程序，此时受理责任限制诉讼的法院必须将责任限制诉讼合并到普通诉讼中继续审理。

尽管日本的专门程序看似未将责任限制程序与实体诉讼直接结合在一起，但有时仍免不了涉及实体诉讼问题。这种模式对申请人来说提供了足够的保障，只要提供基金，就可以得到责任限制的保护，而且对一部分债权人（不提出异议的债权人）来说也能够在最短时间里得到赔偿。但是日本法律在绝对保障船东权利的同时也就是对索赔人不利，而且没有确定责任人是否享受限制责任的权利，就开始分配基金，如果在普通诉讼中审理结果表明责任人不能享受责任限制，就可能导致那些提出异议的债权人反而没有得到足够的基金或担保进行赔偿。而且，如果提出异议的债权人一部分上诉，一部分提起诉讼，难免会出现法院之间裁决相互矛盾的弊端。

针对我国现行《海诉法》面临的问题，结合对国外立法的借鉴，笔者认为我国的海事赔偿责任限制诉讼程序应当遵循以下几个基本原则：1. 单独设立海事赔偿责任限制诉讼程序，责任人要申请责任限制，必须首先提起责任限制诉讼程序，责任限制诉讼程序既可以在诉前提起也可以在诉讼中提起；2. 责任限制诉讼程序应当独立于产生海事索赔请求的诉讼之外，应当先解决责任人能否享受责任限制权利问题，再解决当事人双方赔偿问题；3. 只有在确定责任人能否享受责任限制权

23 G•吉尔摩、C•L•布莱克著，杨召南等译：《海商法》（下），北京：中国大百科全书出版社 2000 年版，第 1151 页。

利后才能裁定是否准许责任人设立责任基金，是否设立基金应当由责任人自主决定；4. 确定责任人能否享受责任限制权利应当以裁决的方式做出，适用普通诉讼程序，对于双方当事人没有争议，或争议很小时，经双方当事人同意，法院可以以简易程序确定责任人能否享受责任限制权利问题；5. 如果确定责任人可以享受责任限制的权利，则所有针对责任人的索赔诉讼都应当集中到责任人提出限制申请的海事法院审理；6. 即使申请人享有责任限制的权利，但是如果其不设立责任基金，也不能起到中止其他程序的效果。

（四）审理海事赔偿责任限制诉讼程序的具体步骤

在遵循上述基本原则的基础上，笔者构想出如下的海事赔偿责任限制程序：

1. 申请和管辖

（1）申请

①申请人。根据《海商法》第 204 条和第 206 条，有权申请责任限制的权利主体包括船舶所有人、救助人和责任保险人以及船舶所有人、救助人的受雇人、代理人。其中所有人包括船舶承租人和船舶经营人，与《海诉法》规定可以申请设立基金的主体保持一致。

②申请方式。借鉴《海诉法》第 104 条的规定，申请应当以书面形式提出，并附有关证据。申请书的内容应当载明：申请人名称或名字（申请人众多的，应列清所有人及推荐的申请人代表人）、地名，当事船舶的船名及国籍、吨位，已知的包括债权人及其利害关系人的名称、地址、联系方式方法及索赔的总金额，引起海事事故的经过、损失及责任情况等等。

③申请期限。申请人可以在起诉前或者诉讼中，最迟应当在一审判决前申请赔偿责任限制诉讼。

（2）管辖

由于管辖对当事人的权利义务产生重大影响，因此应尽量缩小当事人选择法院的权利，使管辖法院具有相对的确定性。借鉴《海诉法》第 102 条对设立基金的规定，应确立如下规则：诉前申请责任限制的，应当在事故发生地、合同履行地或者船舶扣押地海事法院提出申请。合同履行地包括与责任限制有关的船载货物卸货港等，但不包括当事船舶最初到达地、当事船舶船籍港、提供担保地、被告住所地；诉讼中提出申请的，根据《海诉法》司法解释第 81 条，当事人应当向审理相关海事纠纷案件的海事法院提出。

2. 初步审查和受理

法院应对当事人提交的责任限制申请进行必要的初步审查，借鉴《海诉法》司法解释第 83 条的规定，审查内容应包括：

（1）申请人是否符合海商法所规定的责任限制主体资格。根据申请人提交的

表面证据，初步审查申请人是否具备《海商法》规定的可以享受海事赔偿责任限制的主体资格。

（2）当事船舶是否是能够享受责任限制的海船。这主要根据当事人提交的当事船舶所有权证书等有效必备的证书进行书面审查。

（3）事故的经过及原因等。根据《海商法》第 209 条的规定，虽然最终决定申请人能否享受责任限制的条件是责任人对海损事故的造成是否存在故意和重大过失，但这需要有关当事人举证、反驳和辩论才能确定，法院在初步审查中无法进行。

法院经过初步审查认为申请人的申请理由充分、程序合法，应在 3 日内立案，并通知当事人，反之，应在 3 日内裁定不予受理。这里的初步审查与设立基金程序中的不同点在于没有审查申请人要求限制责任的债权是否属于限制性债权，所以法院确定立案日期就相对提前了 4 天。申请人对裁定不服的，应当通知其可以提起上诉，上诉法院应当在 7 日内作出裁定。

3. 法院的通知和公告

海事法院受理责任限制申请后，应当在 3 日内通知已知的利害关系人，同时通过报纸或者其他新闻媒体至少连续公告 3 日。如果涉及的船舶是航行于国际航线的，应当通过对外发行的报纸或其他新闻媒体发布公告，以确保利害关系人能够通过合理的途径获悉该信息。

通知、公告的内容一般应包括：申请人名称、地址，申请的事实、理由，对裁定提出异议的期限（一般不少于 30 日）、地点、要求，利害关系人放弃异议权利的法律后果等。

4. 异议和开庭

（1）异议期限。利害关系人提出异议的时间应当在收到通知之日起 7 日内，未收到通知的应在公告之日起 30 日内以书面形式向有管辖权的海事法院提出。在法院做出判决前，利害关系人发现新证据而对申请人提出异议的，法院应当准许其直接参加诉讼。

（2）异议范围。有关的利害关系人可以对申请人的主体资格、当事船舶是否是能够享受责任限制的海船、申请人要求限制责任的债权是否属于限制性债权及所涉债权是否为同一事故所引起、责任人对海损事故的造成是否存在故意和重大过失等提出异议，有关利害关系人提出书面异议的负举证责任。

（3）开庭审理。法院收到利害关系人的书面异议后，并待异议期间届满后，法院应当向申请人及提出异议的利害关系人送达开庭传票，由审判员组成合议庭开庭审理海事赔偿责任限制案件，当庭举证、质证，进行辩论和最后陈述，但不能进行调解、和解。

5. 判决和上诉

海事法院应综合事实、结合案情，在 30 日内裁判申请人是否依法享受责任限

制权利，对申请人应当享受责任限制的，判决申请人享受责任限制，如果申请人同时申请设立基金程序的，法院应当同时裁定准许申请人设立基金。对不能享受责任限制的申请判决驳回其责任限制申请。

责任限制制度既然是一种法定特权，当事人便可以上诉。当事人不服判决的，应当在收到判决书之日起 7 日内提起上诉，上诉审法院应当在收到上诉状之日起 15 日内作出判决。

6. 设立基金和其他程序的中止

判决享受责任限制权利的申请人，可以申请设立基金程序，设立基金法院应与作出准予裁定法院保持一致，申请人应当在准予设立海事赔偿责任限制基金的裁定生效后 3 日内向海事法院提交海事赔偿责任限制基金，逾期未设立基金的，按自动撤回申请处理。[24] 有权申请责任限制的其中任何一个人设立的基金等同于所有责任人共同设立的基金。

责任人设立责任基金后，向责任人提出请求的任何人，不得对责任人的任何财产行使任何权利；已设立责任基金的责任人的船舶或其他财产已经被扣押，或者基金设立人已经提交抵押物的，法院应当及时下令释放或者返还。

7. 登记债权和债权清偿

（1）登记公告。准予申请人设立海事赔偿责任限制基金的裁定应当通过报纸或者其他新闻媒体至少连续公告 3 日，所有与特定场合发生的海事事故有关的、属于限制性债权的债权人应在 30 日内到设立基金的法院进行债权登记，逾期不登记债权的，视为放弃债权。

（2）提供债权证据。债权人向海事法院申请登记债权的，应当提交书面申请，并提供有关债权证据。债权证据，包括证明债权的具有法律效力的判决书、裁定书、调解书、仲裁裁决书或者公证债权文书，以及其他能够证明具有海事请求权的证据材料。

（3）债权审查。海事法院应当对债权人的申请进行审查，对提供债权证据的，裁定准予登记；对不提供债权证据的，裁定驳回申请。债权人提供证明债权的判决书、裁定书、调解书、仲裁裁决书或者公证债权文书，经审查认定上述文书真实合法的，裁定予以确定。债权人提供其他证据证明具有海事请求权的，应当在办理债权登记后，在受理债权登记的法院提起确权诉讼。当事人有仲裁协议的，应当及时申请仲裁。海事法院对债权人的债权审查应当包括对该债权性质的审查，即该债权是否属于限制性债权。

（4）确权诉讼。海事法院对确权诉讼作出的判决具有法律效力，当事人不得上诉。但这不等于债权消灭，当事人可以另行起诉。

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24 参见《最高人民法院关于适用〈中华人民共和国海事诉讼特别程序法〉若干问题的解释》第 84 条。

（5）债权人会议。海事法院审理并确认债权后，应当向债权人发出债权人会议通知书，组织召开债权人会议。最后按照协商原则和法定原则，确定清偿顺序和金额。

六、设立海事赔偿责任限制程序构想的可行性分析

也许有学者认为笔者所提倡的单独设立海事赔偿责任限制诉讼程序也是有弊端的。勿庸置疑，没有一个法律制度是完美无缺的，我们只能从众多的选择中挑选一个适合本国国情、相对弊端较小的制度，笔者认为单独设立海事赔偿责任限制程序的构想是可行的。

（一）单独设立海事赔偿责任限制诉讼程序并不会取代基金程序的作用

有学者提出这样的疑问：如果确定了赔偿责任后才允许责任人设立基金，责任人一般就不会主动再设立基金，因为在漫长的诉讼中，其可扣押的船舶或其他财产，可能已经被扣押，能够提供担保的可能已经提供，设立基金对他几乎没有好处，即使不设立基金，对他也不会再增加坏处。此时，与其主动把钱交到法院供各债权人分配，还不如由债权人按照法院的判决去直接执行好了。这样，基金制度也就变得几乎没有任何存在的必要。[25] 针对这种观点，我们需要探讨设立基金的意义和法律效果。

1. 是否能消灭所有的限制性债权？

责任人设立基金后，根据《海诉法》第 112 条的规定，债权人应当在公告期间就与特定场合发生的海事事故有关的债权进行登记，公告期间届满不登记的，视为放弃债权。“放弃债权”就意味着债权的消灭，该债权因法律规定不得再行起诉，[26] 债权人不能再向责任人主张债权。

根据《海诉法》101 条，责任人依法申请责任限制虽然也可以不设立基金，但其没有规定不设立基金该如何赔偿。《1976 年公约》第 10 条对未设立责任限制基金时的责任限制做了原则性规定，其中第 2 款指出此种情况下应适用公约第 12 条（基金的分配）的规定，也就是说不设立基金也要按照第 6 条和第 7 条规定的顺序在索赔人之间按比例受偿——几乎和设立基金无异。因此根据该公约第 6 条第 1 款，不设立基金也要遵守“一次事故，一次限额”的原则。但这在实践中就很难

25 黄永申：《关于海事赔偿责任限制程序有待澄清的几个问题》，载于《中国海商法年刊》（2005 年卷），大连：大连海事大学出版社 2006 年版，第 295 页。

26 刑海宝著：《海事诉讼特别程序研究》，北京：法律出版社 2002 年版，第 423 页。

实现，不设立基金，就很难能集中所有的限制性债权，每个索赔有可能在不同的法院进行审理，出现的结果要么是责任人无法享受责任限制，要么是最终的责任限额将超过《海商法》规定的限额。

2. 是否能阻止依某些船舶优先权而扣船？

按照《海商法》第 30 条的规定，船舶优先权不影响有关海事赔偿责任限制规定的实施。而船舶优先权必须通过法院扣押当事船舶行使。由于设立基金后，任何人就不得以可向基金索赔的债权申请扣船，如果船舶优先权所担保的债权为同一事故引起的限制性债权，那么该项债权就不能通过扣押船舶来行使，只能请求从基金中清偿。

3. 属于限制性债权的债权人是否能扣押船舶？

设立基金产生的当然法律后果：一是将责任人的赔偿责任限制在一定范围之内；二是避免或解除对责任人财产的扣押。《海商法》第 214 条规定："责任人设立责任基金后，向责任人提出请求的任何人，不得对责任人的任何财产行使任何权利；已设立责任基金的责任人的船舶或其他财产已经被扣押，或者基金设立人已经提交抵押物的，法院应当及时下令释放或者返还。"本条颇受学者指责，原因是本条中"向责任人提出请求的任何人"范围过宽，明显将非限制性债权人也包含在内。然而，立法者本意显然并不是如此，因为非限制性债权根本不受责任限制基金的影响。所以有学者建议将"向责任人提出请求的任何人"改为"向基金提出索赔的任何人"。[27] 然而，按照这一修改建议，如果限制性债权人不向基金提出索赔，仍可以对申请人的其他财产行使权利，因此这样可能走向另一个极端。[28] 笔者认为可以将这句话改为"可以或能够向基金提出索赔的任何人"，原因是属于非限制性债权范围的无论如何都不能对基金提出索赔，责任基金就是针对限制性债权的，所以，"可以"、"能够"向基金提出索赔的都是属于限制性债权的，属于限制性债权的都是"可以"或"能够"向基金索赔的，这样既避免属于限制性债权的债权人扣押责任人的其他财产的可能，又将非限制性债权排除在外。

不论国际公约还是我国《海商法》都没有强制责任人必须设立基金程序，是否设立、何时申请设立基金都由责任人自由选择。虽然这不影响责任人是否享受责任限制的权利，但实际上却影响着责任人海事赔偿责任限制权利的实现。

（二）单独设立海事赔偿责任限制诉讼程序不会影响审理时间

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27 我国本来不承认对"物"诉讼，但《最高人民法院关于适用〈中华人民共和国海事诉讼特别程序法〉若干问题的解释》第 86 条规定："设立海事赔偿责任限制基金后，向基金提出请求的任何人，不得就该项索赔对设立或以其名义设立基金的任何其他财产，行使任何权利。"司法解释的规定似乎与这一原则有矛盾。

28 金正佳主编：《海事诉讼法论》，大连：大连海事大学出版社 2001 年版，第 425 页。

将责任限制诉讼程序作为责任人申请设立基金程序的前提，最大的障碍就是反对者担心审理时间过长，他们认为判定责任人是否可以享受责任限制要同全案联系起来，要等待全案的判决结果而定。其实不然，对一个特定事故造成的纠纷进行审理，同对责任人是否享受责任限制权利的查明是不同的。根据我国《海商法》第 209 条的规定，查明责任人是否享受责任限制只需要排除“……责任人的故意或者明知可能造成损失而轻率的作为或不作为”，虽然对这种主观过错的查明是同全案事实相联系的，但仅是全案事实的一个相对集中的部分，是可以通过当事人的举证、质证由法院先行作出判断的。[29] 其实，我国《海商法》的规定是摘抄《1976 年公约》第 4 条“不得限制责任的行为”的规定，而《1976 年公约》在责任人丧失责任限制的条件这方面与《1957 年船舶所有人责任限制公约》（以下简称“《1957 年公约》”）相比，明显地加重了举证人的责任，即更难打破责任人的限制。在《1957 年公约》下，只要责任人本人存在过失或过错，就会丧失享受责任限制的权利，故责任人很容易丧失责任限制权利；而《1976 年公约》必须得证明责任人本人存在主观上的故意行为或存在重大过失，提高了举证责任的门槛，增加了举证人的举证难度，这无疑提高了责任人申请责任限制的成功率。另一方面看，这使法院在审查责任人是否享受责任限制权利的范围和难度减少了，从而也就相应的缩短了审查时间。因此从时间上看，从申请人提出责任限制申请，到作出一审判决至多就只要 2 个月时间，相比现行的设立基金程序“至少需要 2 个月时间”来看，已经有很大的改进。更重要的是，它避免了在责任人实体责任未明确前就设立基金程序所造成的困惑和混乱局面。

（三）实体案件审理中无须对责任人的行为问题进行重新审查

笔者认为确定责任人能否享受责任限制权利应当适用普通诉讼程序，以裁决的方式做出，当事人可以对一审裁决上诉，但只要所做的裁决已经生效，根据我国民诉法“一事不再理”的原则，在其后相应的实体案件诉讼中，当事人不得对责任人的行为认定再提出异议。

总之，笔者认为，只有解决了责任人能否享受限制责任的权利问题，才能产生设置基金、分配基金以及最终赔偿等一系列问题，因此，笔者建议我国《海诉法》应当设立海事赔偿责任限制诉讼程序，并且其不仅应独立于产生海事索赔诉讼程序之外，而且还应当是设立限制基金的前置程序。

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29 关正义：《设立海事赔偿责任限制基金程序的有关问题》，载于《中国海商法年刊》（2002 年卷），大连：大连海事大学出版社 2003 年版，第 316 页。

中国依《联合国海洋法公约》第 298 条规定提交排除性声明

2006 年 8 月 25 日，中国依据《联合国海洋法公约》第 298 条规定，向联合国秘书长提交书面声明，对于《公约》第 298 条第 1 款（a）、（b）和（c）项所述的任何争端（即涉及海洋划界、领土争端、军事活动等争端），中国政府不接受《公约》第 15 部分第 2 节规定的任何国际司法或仲裁管辖。

China’s Exclusion Declaration Issued According to Art. 298 of the UNCLOS

The Government of the People’s Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention.

ITLOS Forms a Standing Special Chamber to Deal with Maritime Delimitation Disputes

The International Tribunal for the Law of the Sea, meeting at its twenty-third session from 5 to 16 March 2007, today adopted a resolution to form a standing special chamber to deal with maritime delimitation disputes pursuant to article 15, paragraph 1, of the Tribunal's Statute. The Chamber, to be known as the Chamber for Maritime Delimitation Dispute, will be available to deal with maritime delimitation disputes which the parties agree to submit to it concerning the interpretation or application of any provision of United Nations Convention on the Law of the Sea or any other agreement which confers jurisdiction on the Tribunal.

The Chamber is composed of eight members of the Tribunal. If the number of members available to sit in a given case falls below the required quorum of six, new members will be selected by the Tribunal in order to bring the number to six at least. The Tribunal selected the following members of the tribunal to serve on the Chamber with immediate effect:

President of the Tribunal Rüdiger Wolfrum (President of the Chamber ex officio)

Judges L. Dolliver M. Nelson,
P. Chandrasekhara Rao,
Tafsir Malick Ndiaye,
Jose Luis Jesus,
Jean-Pierre Cot,
Stanislaw Pawlak,
Shunji Yanai.

The term office of current members will end on September 2008.

【编者按】保护海洋渔业资源的可持续发展对于全球经济产业的发展和海洋生物多样性的维护都有着极为重要的意义。2007 年 4 月 30 日至 5 月 4 日，20 个国家的代表团齐集智利首都圣地亚哥，在这里召开建立南太平洋区域渔业管理机制第三次会议，中国亦派团出席了本次会议。会议最终通过的有关南太平洋区域渔业管理的临时措施将于 2007 年 9 月 30 日生效。届时，南太平洋公海中上层渔业和深海底层渔业的捕捞能力将受到严格限制，并必须符合复杂的科学评估程序。这次会议及其通过的有关决议表明了各国对于海洋渔业资源的高度关注，并将积极采取有效措施保护脆弱的海洋生态系统，保证深海鱼类资源的长期可持续性发展。

Interim Measures Adopted by Participants in Negotiations to Establish South Pacific Regional Fisheries Management Organization

Participants in the negotiations to establish a South Pacific Regional Fisheries Management Organization (SPRFMO) are to take the following interim measures in accordance with their laws and regulations, taking into account an ecosystem approach to fisheries management and the precautionary approach, for vessels flying their flag and fishing for non-highly migratory fish species in the high seas of the South Pacific Ocean (the Area)[1] in order to achieve the sustainable management of fish stocks and the protection of vulnerable marine ecosystems of the Area.

These interim measures are voluntary and are not legally binding under international law.

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1 The area is under negotiation, but for the purposes of these interim measures it will be the high seas area south of the Equator, north of the CCAMLR Convention area, east of the SIOFA Convention Area and west of the areas of fisheries jurisdictions of South American States.

Period of Application and Review

These interim measures are to be effective from 30 September 2007 and，unless specified otherwise, are to be applied until the Agreement under negotiation to establish the SPRFMO and the adoption of conservation and management measures pursuant to that Agreement enter into force.

The Participants are to review these interim measures, as necessary, so that they may be revised at future meetings.

The interim Secretariat is requested to make these interim measures publicly available.

Pelagic fisheries

In respect of pelagic fisheries, Participants resolve:

1. To commit themselves to limit the total level of gross tonnage (GT) of vessels flying their flag fishing for pelagic stocks in 2008 and 2009 to the levels of total GT recorded in 2007 in the Area. Participants will communicate by 1January 2008 to the interim Secretariat the total level of GT recorded in the Area in 2007 for those vessels flying their flag actively fishing in 2007. In notifying this information, Participants will verify the effective presence of their vessels in the Area in 2007 through VMS records, catch reports, port calls or other means. The interim Secretariat will have access to such information upon request.

2. That taking into account the interests of coastal and fishing States with a catch history in the pelagic fisheries in the South Pacific, but not exercising their fisheries activities in 2007，these States may enter the fishery in the Area in 2008 and 2009 and will exercise voluntary restraint of fishing effort. These States will promptly notify the Interim Secretariat of the names and characteristics, including GT, of their vessels engaged in the fishery in the Area.

3. To submit for review to the interim Science Working Group any stock assessments and research in respect of pelagic stocks in the Area and to promote the active participation of their scientific experts in the Jack Mackerel Stock Structure Task Team, the Jack Mackerel Stock Structure and Assessment Workshop, and, when established, the interim Science Working Group is Jack Mackerel subgroup.

4. That in 2009，the interim Science Working Group will give advice to the Meeting of Participants on the status of the pelagic stocks and that the Participants,

based on the advice from the interim Science Working Group, will determine the conservation and management measures to be applied from 2010onwards.

5. To cooperate through coastal States adjacent to the Area informing the interim Secretariat of their own conservation and management measures in respect of straddling pelagic stocks.

6. In undertaking scientific research activities on pelagic stocks in the Area, including joint research, for assessment purposes, to do so in accordance with a research plan that has been provided to the interim Secretariat for for-warding to the interim Science Working Group and all Participants, preferably 60 days prior to the commencement of that activity. Participants will provide promptly a report of the results of such scientific research activities to the interim Secretariat for circulation to all Participant.

7. To ensure, to the extent practicable, an appropriate level of observer coverage on fishing vessels flying their flag in order to observe the pelagic fisheries in the Area and collect relevant scientific information.

8. To strengthen its control over vessels flying its flag fishing for pelagic fisheries by ensuring that all such vessels operating in the Area be equipped with an operational vessel monitoring system no later than 31 December 2007, or earlier if so decided by the flag State.

9. That these interim measures do not apply to squid fisheries in the Area.

Bottom fisheries

Management of bottom fishing

In respect of bottom fisheries, Participants resolve to:

1. Limit bottom fishing effort or catch in the Area to existing levels[2] in terms of the number of fishing vessels and other parameters that reflect the level of catch, fishing effort, and fishing capacity.

2. Not expand bottom fishing activities into new regions of the Area where such fishing is not currently occurring.

3. Starting in 2010，before opening new regions of the Area or expanding fishing effort or catch beyond existing levels, establish conservation and management measures to prevent significant adverse impacts on vulnerable marine

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2 Existing levels of fishing effort or catch means the average annual levels over the period 1 January 2002 to 31 December 2006.

ecosystems[3] and the long-term sustainability of deep sea fish stocks from individual bottom fishing activities or determine that such activities will not have adverse impacts, based on an assessment undertaken in accordance with paragraphs 11 and 12 below.

4. Cooperate through coastal States adjacent to the Area informing the interim Secretariat of their own conservation and management measures in respect of deep sea fish stocks.

5. Cooperate to identify, on the basis of the best available scientific information, vulnerable marine ecosystems in the Area and to map sites where these ecosystems are located, and provide such data and information to the Interim Secretariat for circulation to all Participants.

6. In respect of areas where vulnerable marine ecosystems are known to occur or are likely to occur based on the best available scientific information, close such areas for bottom fishing, unless based on an assessment undertaken in accordance with paragraphs 11 and 12 below, conservation and management measures have been established to prevent significant adverse impacts on vulnerable marine ecosystems and the long-term sustainability of deep sea fish stocks, or it has been determined that such bottom fishing will not have significant adverse impacts on vulnerable marine ecosystems, or the long term sustainability of deep sea fish stocks.

7. Require that vessels flying their flag cease bottom fishing activities within 5 nautical miles of any site in the Area where in the course of fishing operations, evidence of vulnerable marine ecosystems is encountered and report the encounter, including the location and the type of ecosystem in question, to the interim Secretariat so that appropriate measures can be adopted in respect of the relevant site. Such sites will then be treated in accordance with paragraph 6 above.

8. Notwithstanding paragraph 2, in regions of the Area where bottom fishing is not currently occurring, undertake, as appropriate, scientific re-search activities for stock assessment purposes in identified parts of such regions and only in accordance with a research plan that has been provided to the interim Secretariat for forwarding to the interim Science Working Group and all Participants, preferably 60 days prior to the commencement of that activity. Participants will provide promptly a report of the results of such scientific re-search activities to the interim

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3 For the purposes of these interim measures, "vulnerable marine ecosystems" includes seamounts, hydrothermal vents, cold water corals and sponge fields.

Secretariat for circulation to all Participants.

9. Appoint observers to each vessel flying their flag, and undertake or proposie to undertake bottom trawling activities in the Area, ensure an appropriate level of observer coverage on vessels flying their flag and undertake other bottom fishing activities in the Area.

10. To strengthen its control over bottom fishing vessels flying its flag, each participant will ensure that all such vessels operating in the Area be equipped with an operational vessel monitoring system no later then 31 December 2007, or earlier if so decided by the flag State.

Assessment of bottom fishing

Participants resolve to:

11. Assess, on the basis of the best available scientific information, whether individual bottom fishing activities would have significant adverse impacts on vulnerable marine ecosystems, and to ensure that if it is assessed that these activities would have significant adverse impacts, they are managed to prevent such impacts, or not authorized to proceed.

12. Apply the following procedures regarding the assessment described in paragraph 11 above:

a) Participants are to submit to the interim Science Working Group their assessments of whether individual bottom fishing activities would have significant adverse impacts on vulnerable marine ecosystems, including the proposed management measures to prevent such impacts, and make these assessments publicly available.

b) The interim Scientific Working Group will review the assessments and proposed management measures and provide comments to the submitting Participant. For the purposes of carrying out such reviews, the interim Scientific Working Group will design a preliminary interim standard for reviewing the assessments and develop a process to ensure comments are provided to the submitting Participant and all other Participants within two months. In the mean-time, the submitting Participant may provisionally apply their proposed management measures.

c) Participants may, on the basis of the assessments submitted under sub-paragraph (a) above and the comments provided under sub-paragraph (b) above, authorize vessels flying their flag to undertake bottom fishing activities in the region of the Area for which the assessment was conducted and require such vessels to implement conservation and management measures to prevent significant

adverse impacts.

d) Participants are to notify the interim Secretariat of the measures required under sub-paragraph (c) above and a list of the vessels to which the measures relate, and to make that information publicly available.

13. In undertaking the assessments as described in paragraphs 11 and 12 above, take into account any international technical guidelines regarding standards, criteria or specifications for identifying vulnerable marine ecosystems and the impacts of fishing activities on such ecosystems that may have been developed.

Data collection and sharing

In respect of data collection and sharing, Participants resolve:

To collect, verify and provide data in accordance with the procedures out-lined in the SPRFMO Standards for the collection, reporting, verification and exchange of data.

Cooperation with other States

Participants resolve, individually or jointly, to request those States that are fishing for non-highly migratory fish species in the Area but not participating in the negotiations to establish a South Pacific Regional Fisheries Management Organization（SPRFMO) to cooperate fully in the implementation of these interim measures and to consider participating in the SPRFMO negotiations.

Special Requirements of Developing States

In recognition of the special requirements of developing States, in particular small island developing States and territories, Participants are urged to pro-vide financial, scientific and technical assistance, where available, to enhance the ability of those developing States to implement these interim measures and participate effectively in the negotiations for the SPRFMO Agreement under discussion.

中华人民共和国水文条例

（2007 年 3 月 28 日国务院第 172 次常务会议通过，
自 2007 年 6 月 1 日起施行）

第一章 总 则

第一条 为了加强水文管理，规范水文工作，为开发、利用、节约、保护水资源和防灾减灾服务，促进经济社会的可持续发展，根据《中华人民共和国水法》和《中华人民共和国防洪法》，制定本条例。

第二条 在中华人民共和国领域内从事水文站网规划与建设，水文监测与预报，水资源调查评价，水文监测资料汇交、保管与使用，水文设施与水文监测环境的保护等活动，应当遵守本条例。

第三条 水文事业是国民经济和社会发展的基础性公益事业。县级以上人民政府应当将水文事业纳入本级国民经济和社会发展规划，所需经费纳入本级财政预算，保障水文监测工作的正常开展，充分发挥水文工作在政府决策、经济社会发展和社会公众服务中的作用。

县级以上人民政府应当关心和支持少数民族地区、边远贫困地区和艰苦地区水文基础设施的建设和运行。

第四条 国务院水行政主管部门主管全国的水文工作，其直属的水文机构具体负责组织实施管理工作。

国务院水行政主管部门在国家确定的重要江河、湖泊设立的流域管理机构（以下简称流域管理机构），在所管辖范围内按照法律、本条例规定和国务院水行政主管部门规定的权限，组织实施管理有关水文工作。

省、自治区、直辖市人民政府水行政主管部门主管本行政区域内的水文工作，其直属的水文机构接受上级业务主管部门的指导，并在当地人民政府的领导下具体负责组织实施管理工作。

第五条 国家鼓励和支持水文科学技术的研究、推广和应用，保护水文科技成果，培养水文科技人才，加强水文国际合作与交流。

第六条 县级以上人民政府对在水文工作中做出突出贡献的单位和个人，按照国家有关规定给予表彰和奖励。

第七条 外国组织或者个人在中华人民共和国领域内从事水文活动的，应当

经国务院水行政主管部门会同有关部门批准，并遵守中华人民共和国的法律、法规；在中华人民共和国与邻国交界的跨界河流上从事水文活动的，应当遵守中华人民共和国与相关国家缔结的有关条约、协定。

第二章　规划与建设

第八条　国务院水行政主管部门负责编制全国水文事业发展规划，在征求国务院有关部门意见后，报国务院或者其授权的部门批准实施。

流域管理机构根据全国水文事业发展规划编制流域水文事业发展规划，报国务院水行政主管部门批准实施。

省、自治区、直辖市人民政府水行政主管部门根据全国水文事业发展规划和流域水文事业发展规划编制本行政区域的水文事业发展规划，报本级人民政府批准实施，并报国务院水行政主管部门备案。

第九条　水文事业发展规划是开展水文工作的依据。修改水文事业发展规划，应当按照规划编制程序经原批准机关批准。

第十条　水文事业发展规划主要包括水文事业发展目标、水文站网建设、水文监测和情报预报设施建设、水文信息网络和业务系统建设以及保障措施等内容。

第十一条　国家对水文站网建设实行统一规划。水文站网建设应当坚持流域与区域相结合、区域服从流域，布局合理、防止重复，兼顾当前和长远需要的原则。

第十二条　水文站网的建设应当依据水文事业发展规划，按照国家固定资产投资项目建设程序组织实施。

为国家水利、水电等基础工程设施提供服务的水文站网的建设和运行管理经费，应当分别纳入工程建设概算和运行管理经费。

本条例所称水文站网，是指在流域或者区域内，由适当数量的各类水文测站构成的水文监测资料收集系统。

第十三条　国家对水文测站实行分类分级管理。

水文测站分为国家基本水文测站和专用水文测站。国家基本水文测站分为国家重要水文测站和一般水文测站。

第十四条　国家重要水文测站和流域管理机构管理的一般水文测站的设立和调整，由省、自治区、直辖市人民政府水行政主管部门或者流域管理机构报国务院水行政主管部门直属水文机构批准。其他一般水文测站的设立和调整，由省、自治区、直辖市人民政府水行政主管部门批准，报国务院水行政主管部门直属水文机构备案。

第十五条　设立专用水文测站，不得与国家基本水文测站重复；在国家基本水文测站覆盖的区域，确需设立专用水文测站的，应当按照管理权限报流域管理机

构或者省、自治区、直辖市人民政府水行政主管部门直属水文机构批准。其中，因交通、航运、环境保护等需要设立专用水文测站的，有关主管部门批准前，应当征求流域管理机构或者省、自治区、直辖市人民政府水行政主管部门直属水文机构的意见。

撤销专用水文测站，应当报原批准机关批准。

第十六条 专用水文测站和从事水文活动的其他单位，应当接受水行政主管部门直属水文机构的行业管理。

第十七条 省、自治区、直辖市人民政府水行政主管部门管理的水文测站，对流域水资源管理和防灾减灾有重大作用的，业务上应当同时接受流域管理机构的指导和监督。

第三章 监测与预报

第十八条 从事水文监测活动应当遵守国家水文技术标准、规范和规程，保证监测质量。未经批准，不得中止水文监测。

国家水文技术标准、规范和规程，由国务院水行政主管部门会同国务院标准化行政主管部门制定。

第十九条 水文监测所使用的专用技术装备应当符合国务院水行政主管部门规定的技术要求。

水文监测所使用的计量器具应当依法经检定合格。水文监测所使用的计量器具的检定规程，由国务院水行政主管部门制定，报国务院计量行政主管部门备案。

第二十条 水文机构应当加强水资源的动态监测工作，发现被监测水体的水量、水质等情况发生变化可能危及用水安全的，应当加强跟踪监测和调查，及时将监测、调查情况和处理建议报所在地人民政府及其水行政主管部门；发现水质变化，可能发生突发性水体污染事件的，应当及时将监测、调查情况报所在地人民政府水行政主管部门和环境保护行政主管部门。

有关单位和个人对水资源动态监测工作应当予以配合。

第二十一条 承担水文情报预报任务的水文测站，应当及时、准确地向县级以上人民政府防汛抗旱指挥机构和水行政主管部门报告有关水文情报预报。

第二十二条 水文情报预报由县级以上人民政府防汛抗旱指挥机构、水行政主管部门或者水文机构按照规定权限向社会统一发布。禁止任何其他单位和个人向社会发布水文情报预报。

广播、电视、报纸和网络等新闻媒体，应当按照国家有关规定和防汛抗旱要求，及时播发、刊登水文情报预报，并标明发布机构和发布时间。

第二十三条 信息产业部门应当根据水文工作的需要，按照国家有关规定提

供通信保障。

第二十四条 县级以上人民政府水行政主管部门应当根据经济社会的发展要求，会同有关部门组织相关单位开展水资源调查评价工作。

从事水文、水资源调查评价的单位，应当具备下列条件，并取得国务院水行政主管部门或者省、自治区、直辖市人民政府水行政主管部门颁发的资质证书：

（一）具有法人资格和固定的工作场所；

（二）具有与所从事水文活动相适应并经考试合格的专业技术人员；

（三）具有与所从事水文活动相适应的专业技术装备；

（四）具有健全的管理制度；

（五）符合国务院水行政主管部门规定的其他条件。

第四章 资料的汇交保管与使用

第二十五条 国家对水文监测资料实行统一汇交制度。从事地表水和地下水资源、水量、水质监测的单位以及其他从事水文监测的单位，应当按照资料管理权限向有关水文机构汇交监测资料。

重要地下水源地、超采区的地下水资源监测资料和重要引（退）水口、在江河和湖泊设置的排污口、重要断面的监测资料，由从事水文监测的单位向流域管理机构或者省、自治区、直辖市人民政府水行政主管部门直属水文机构汇交。

取用水工程的取（退）水、蓄（泄）水资料，由取用水工程管理单位向工程所在地水文机构汇交。

第二十六条 国家建立水文监测资料共享制度。水文机构应当妥善存储和保管水文监测资料，根据国民经济建设和社会发展需要对水文监测资料进行加工整理形成水文监测成果，予以刊印。国务院水行政主管部门直属的水文机构应当建立国家水文数据库。

基本水文监测资料应当依法公开，水文监测资料属于国家秘密的，对其密级的确定、变更、解密以及对资料的使用、管理，依照国家有关规定执行。

第二十七条 编制重要规划、进行重点项目建设和水资源管理等使用的水文监测资料，应当经国务院水行政主管部门直属水文机构、流域管理机构或者省、自治区、直辖市人民政府水行政主管部门直属水文机构审查，确保其完整、可靠、一致。

第二十八条 国家机关决策和防灾减灾、国防建设、公共安．全、环境保护等公益事业需要使用水文监测资料和成果的，应当无偿提供。

除前款规定的情形外，需要使用水文监测资料和成果的，按照国家有关规定收取费用，并实行收支两条线管理。

因经营性活动需要提供水文专项咨询服务的，当事人双方应当签订有偿服务合同，明确双方的权利和义务。

第五章 设施与监测环境保护

第二十九条 国家依法保护水文监测设施。任何单位和个人不得侵占、毁坏、擅自移动或者擅自使用水文监测设施，不得干扰水文监测。

国家基本水文测站因不可抗力遭受破坏的，所在地人民政府和有关水行政主管部门应当采取措施，组织力量修复，确保其正常运行。

第三十条 未经批准，任何单位和个人不得迁移国家基本水文测站；因重大工程建设确需迁移的，建设单位应当在建设项目立项前，报请对该站有管理权限的水行政主管部门批准，所需费用由建设单位承担。

第三十一条 国家依法保护水文监测环境。县级人民政府应当按照国务院水行政主管部门确定的标准划定水文监测环境保护范围，并在保护范围边界设立地面标志。

任何单位和个人都有保护水文监测环境的义务。

第三十二条 禁止在水文监测环境保护范围内从事下列活动：

（一）种植高秆作物、堆放物料、修建建筑物、停靠船只；

（二）取土、挖砂、采石、淘金、爆破和倾倒废弃物；

（三）在监测断面取水、排污或者在过河设备、气象观测场、监测断面的上空架设线路；

（四）其他对水文监测有影响的活动。

第三十三条 在国家基本水文测站上下游建设影响水文监测的工程，建设单位应当采取相应措施，在征得对该站有管理权限的水行政主管部门同意后方可建设。因工程建设致使水文测站改建的，所需费用由建设单位承担。

第三十四条 在通航河道中或者桥上进行水文监测作业时，应当依法设置警示标志。

第三十五条 水文机构依法取得的无线电频率使用权和通信线路使用权受国家保护。任何单位和个人不得挤占、干扰水文机构使用的无线电频率，不得破坏水文机构使用的通信线路。

第六章 法律责任

第三十六条 违反本条例规定，有下列行为之一的，对直接负责的主管人员和其他直接责任人员依法给予处分；构成犯罪的，依法追究刑事责任：

（一）错报水文监测信息造成严重经济损失的；

（二）汛期漏报、迟报水文监测信息的；

（三）擅自发布水文情报预报的；

（四）丢失、毁坏、伪造水文监测资料的；

（五）擅自转让、转借水文监测资料的；

（六）不依法履行职责的其他行为。

第三十七条 未经批准擅自设立水文测站或者未经同意擅自在国家基本水文测站上下游建设影响水文监测的工程的，责令停止违法行为，限期采取补救措施，补办有关手续；无法采取补救措施、逾期不补办或者补办未被批准的，责令限期拆除违法建筑物；逾期不拆除的，强行拆除，所需费用由违法单位或者个人承担。

第三十八条 违反本条例规定，未取得水文、水资源调查评价资质证书从事水文活动的，责令停止违法行为，没收违法所得，并处5万元以上10万元以下罚款。

第三十九条 违反本条例规定，超出水文、水资源调查评价资质证书确定的范围从事水文活动的，责令停止违法行为，没收违法所得，并处3万元以上5万元以下罚款；情节严重的，由发证机关吊销资质证书。

第四十条 违反本条例规定，使用不符合规定的水文专用技术装备和水文计量器具的，责令限期改正。

第四十一条 违反本条例规定，有下列行为之一的，责令停止违法行为，处1万元以上5万元以下罚款：

（一）拒不汇交水文监测资料的；

（二）使用未经审定的水文监测资料的；

（三）非法向社会传播水文情报预报，造成严重经济损失和不良影响的。

第四十二条 违反本条例规定，侵占、毁坏水文监测设施或者未经批准擅自移动、擅自使用水文监测设施的，责令停止违法行为，限期恢复原状或者采取其他补救措施，可以处5万元以下罚款；构成违反治安管理行为的，依法给予治安管理处罚；构成犯罪的，依法追究刑事责任。

第四十三条 违反本条例规定，从事本条例第三十二条所列活动的，责令停止违法行为，限期恢复原状或者采取其他补救措施，可以处1万元以下罚款；构成违反治安管理行为的，依法给予治安管理处罚；构成犯罪的，依法追究刑事责任。

第四十四条 本条例规定的行政处罚，由县级以上人民政府水行政主管部门或者流域管理机构依据职权决定。

第七章 附 则

第四十五条 本条例中下列用语的含义是：

水文监测，是指通过水文站网对江河、湖泊、渠道、水库的水位、流量、水质、水温、泥沙、冰情、水下地形和地下水资源，以及降水量、蒸发量、墒情、风暴潮等实施监测，并进行分析和计算的活动。

水文测站，是指为收集水文监测资料在江河、湖泊、渠道、水库和流域内设立的各种水文观测场所的总称。

国家基本水文测站，是指为公益目的统一规划设立的对江河、湖泊、渠道、水库和流域基本水文要素进行长期连续观测的水文测站。

国家重要水文测站，是指对防灾减灾或者对流域和区域水资源管理等有重要作用的基本水文测站。

专用水文测站，是指为特定目的设立的水文测站。

基本水文监测资料，是指由国家基本水文测站监测并经过整编后的资料。

水文情报预报，是指对江河、湖泊、渠道、水库和其他水体的水文要素实时情况的报告和未来情况的预告。

水文监测设施，是指水文站房、水文缆道、测船、测船码头、监测场地、监测井、监测标志、专用道路、仪器设备、水文通信设施以及附属设施等。

水文监测环境，是指为确保监测到准确水文信息所必需的区域构成的立体空间。

第四十六条 中国人民解放军的水文工作，按照中央军事委员会的规定执行。

第四十七条 本条例自 2007 年 6 月 1 日起施行。

中华人民共和国船员条例

（2007年3月28日国务院第172次常务会议通过，自2007年9月1日起施行）

第一章　总　则

第一条　为了加强船员管理，提高船员素质，维护船员的合法权益，保障水上交通安全，保护水域环境，制定本条例。

第二条　中华人民共和国境内的船员注册、任职、培训、职业保障以及提供船员服务等活动，适用本条例。

第三条　国务院交通主管部门主管全国船员管理工作。

国家海事管理机构依照本条例负责统一实施船员管理工作。

负责管理中央管辖水域的海事管理机构和负责管理其他水域的地方海事管理机构（以下统称海事管理机构），依照各自职责具体负责船员管理工作。

第二章　船员注册和任职资格

第四条　本条例所称船员，是指依照本条例的规定经船员注册取得船员服务簿的人员，包括船长、高级船员、普通船员。

本条例所称船长，是指依照本条例的规定取得船长任职资格，负责管理和指挥船舶的人员。

本条例所称高级船员，是指依照本条例的规定取得相应任职资格的大副、二副、三副、轮机长、大管轮、二管轮、三管轮、通信人员以及其他在船舶上任职的高级技术或者管理人员。

本条例所称普通船员，是指除船长、高级船员外的其他船员。

第五条　申请船员注册，应当具备下列条件：

（一）年满18周岁（在船实习、见习人员年满16周岁）但不超过60周岁；

（二）符合船员健康要求；

（三）经过船员基本安全培训，并经海事管理机构考试合格。

申请注册国际航行船舶船员的，还应当通过船员专业外语考试。

第六条　申请船员注册，可以由申请人或者其代理人向任何海事管理机构提

出书面申请，并附送申请人符合本条例第五条规定条件的证明材料。

海事管理机构应当自受理船员注册申请之日起 10 日内做出注册或者不予注册的决定。对符合本条例第五条规定条件的，应当给予注册，发给船员服务簿，但是申请人被依法吊销船员服务簿未满 5 年的，不予注册。

第七条 船员服务簿是船员的职业身份证件，应当载明船员的姓名、住所、联系人、联系方式以及其他有关事项。

船员服务簿记载的事项发生变更的，船员应当向海事管理机构办理变更手续。

第八条 船员有下列情形之一的，海事管理机构应当注销船员注册，并予以公告：

（一）死亡或者被宣告失踪的；

（二）丧失民事行为能力的；

（三）被依法吊销船员服务簿的；

（四）本人申请注销注册的。

第九条 参加航行和轮机值班的船员，应当依照本条例的规定取得相应的船员适任证书。

申请船员适任证书，应当具备下列条件：

（一）已经取得船员服务簿；

（二）符合船员任职岗位健康要求；

（三）经过相应的船员适任培训、特殊培训；

（四）具备相应的船员任职资历，并且任职表现和安全记录良好。

第十条 申请船员适任证书，应当向海事管理机构提出书面申请，并附送申请人符合本条例第九条规定条件的证明材料。对符合规定条件并通过国家海事管理机构组织的船员任职考试的，海事管理机构应当发给相应的船员适任证书。

第十一条 船员适任证书应当注明船员适任的航区（线）、船舶类别和等级、职务以及有效期限等事项。

船员适任证书的有效期不超过 5 年。

第十二条 中国籍船舶的船长和高级船员应当由中国籍船员担任；确需外国籍船员担任高级船员的，应当报国家海事管理机构批准。

第十三条 中国籍船舶在境外遇有不可抗力或者其他特殊情况，无法满足船舶最低安全配员要求，需要由本船下一级船员临时担任上一级职务时，应当向海事管理机构提出申请。海事管理机构根据拟担任上一级船员职务船员的任职资历、任职表现和安全记录，签发相应的批准文书。

第十四条 曾经在军用船舶、渔业船舶上工作的人员，或者持有其他国家、地区船员适任证书的船员，依照本条例的规定申请船员适任证书的，海事管理机构可以免除船员培训和考试的相应内容。具体办法由国务院交通主管部门另行规定。

第十五条 以海员身份出入国境和在国外船舶上从事工作的中国籍船员，应

当向国家海事管理机构指定的海事管理机构申请中华人民共和国海员证。

申请中华人民共和国海员证，应当符合下列条件：

（一）是中华人民共和国公民；

（二）持有国际航行船舶船员适任证书或者有确定的船员出境任务；

（三）无法律、行政法规规定禁止出境的情形。

第十六条 海事管理机构应当自受理申请之日起 7 日内做出批准或者不予批准的决定。予以批准的，发给中华人民共和国海员证；不予批准的，应当书面通知申请人并说明理由。

第十七条 中华人民共和国海员证是中国籍船员在境外执行任务时表明其中华人民共和国公民身份的证件。中华人民共和国海员证遗失、被盗或者损毁的，应当向海事管理机构申请补发。船员在境外的，应当向中华人民共和国驻外使馆、领馆申请补发。

中华人民共和国海员证的有效期不超过 5 年。

第十八条 持有中华人民共和国海员证的船员，在其他国家、地区享有按照当地法律、有关国际条约以及中华人民共和国与有关国家签订的海运或者航运协定规定的权利和通行便利。

第十九条 在中国籍船舶上工作的外国籍船员，应当依照法律、行政法规和国家其他有关规定取得就业许可，并持有国务院交通主管部门规定的相应证书和其所属国政府签发的相关身份证件。

在中华人民共和国管辖水域航行、停泊、作业的外国籍船舶上任职的外国籍船员，应当持有中华人民共和国缔结或者加入的国际条约规定的相应证书和其所属国政府签发的相关身份证件。

第三章 船员职责

第二十条 船员在船工作期间，应当符合下列要求：

（一）携带本条例规定的有效证件；

（二）掌握船舶的适航状况和航线的通航保障情况，以及有关航区气象、海况等必要的信息；

（三）遵守船舶的管理制度和值班规定，按照水上交通安全和防治船舶污染的操作规则操纵、控制和管理船舶，如实填写有关船舶法定文书，不得隐匿、篡改或者销毁有关船舶法定证书、文书；

（四）参加船舶应急训练、演习，按照船舶应急部署的要求，落实各项应急预防措施；

（五）遵守船舶报告制度，发现或者发生险情、事故、保安事件或者影响航行

安全的情况，应当及时报告；

（六）在不严重危及自身安全的情况下，尽力救助遇险人员；

（七）不得利用船舶私载旅客、货物，不得携带违禁物品。

第二十一条 船长在其职权范围内发布的命令，船舶上所有人员必须执行。

高级船员应当组织下属船员执行船长命令，督促下属船员履行职责。

第二十二条 船长管理和指挥船舶时，应当符合下列要求：

（一）保证船舶和船员携带符合法定要求的证书、文书以及有关航行资料；

（二）制订船舶应急计划并保证其有效实施；

（三）保证船舶和船员在开航时处于适航、适任状态，按照规定保障船舶的最低安全配员，保证船舶的正常值班；

（四）执行海事管理机构有关水上交通安全和防治船舶污染的指令，船舶发生水上交通事故或者污染事故的，向海事管理机构提交事故报告；

（五）对本船船员进行日常训练和考核，在本船船员的船员服务簿内如实记载船员的服务资历和任职表现；

（六）船舶进港、出港、靠泊、离泊，通过交通密集区、危险航区等区域，或者遇有恶劣天气和海况，或者发生水上交通事故、船舶污染事故、船舶保安事件以及其他紧急情况时，应当在驾驶台值班，必要时应当直接指挥船舶；

（七）保障船舶上人员和临时上船人员的安全；

（八）船舶发生事故，危及船舶上人员和财产安全时，应当组织船员和船舶上其他人员尽力施救；

（九）弃船时，应当采取一切措施，首先组织旅客安全离船，然后安排船员离船，船长应当最后离船，在离船前，船长应当指挥船员尽力抢救航海日志、机舱日志、油类记录簿、无线电台日志、本航次使用过的航行图和文件，以及贵重物品、邮件和现金。

第二十三条 船长、高级船员在航次中，不得擅自辞职、离职或者中止职务。

第二十四条 船长在保障水上人身与财产安全、船舶保安、防治船舶污染水域方面，具有独立决定权，并负有最终责任。

船长为履行职责，可以行使下列权力：

（一）决定船舶的航次计划，对不具备船舶安全航行条件的，可以拒绝开航或者续航；

（二）对船员用人单位或者船舶所有人下达的违法指令，或者可能危及有关人员、财产和船舶安全或者可能造成水域环境污染的指令，可以拒绝执行；

（三）发现引航员的操纵指令可能对船舶航行安全构成威胁或者可能造成水域环境污染时，应当及时纠正、制止，必要时可以要求更换引航员；

（四）当船舶遇险并严重危及船舶上人员的生命安全时，船长可以决定撤离船舶；

（五）在船舶的沉没、毁灭不可避免的情况下，船长可以决定弃船，但是，除紧急情况外，应当报经船舶所有人同意；

（六）对不称职的船员，可以责令其离岗。

船舶在海上航行时，船长为保障船舶上人员和船舶的安全，可以依照法律的规定对在船舶上进行违法、犯罪活动的人采取禁闭或者其他必要措施。

第四章　船员职业保障

第二十五条　船员用人单位和船员应当按照国家有关规定参加工伤保险、医疗保险、养老保险、失业保险以及其他社会保险，并依法按时足额缴纳各项保险费用。

船员用人单位应当为在驶往或者驶经战区、疫区或者运输有毒、有害物质的船舶上工作的船员，办理专门的人身、健康保险，并提供相应的防护措施。

第二十六条　船舶上船员生活和工作的场所，应当符合国家船舶检验规范中有关船员生活环境、作业安全和防护的要求。

船员用人单位应当为船员提供必要的生活用品、防护用品、医疗用品，建立船员健康档案，并为船员定期进行健康检查，防治职业疾病。

船员在船工作期间患病或者受伤的，船员用人单位应当及时给予救治；船员失踪或者死亡的，船员用人单位应当及时做好相应的善后工作。

第二十七条　船员用人单位应当依照有关劳动合同的法律、法规和中华人民共和国缔结或者加入的有关船员劳动与社会保障国际条约的规定，与船员订立劳动合同。

船员用人单位不得招用未取得本条例规定证件的人员上船工作。

第二十八条　船员工会组织应当加强对船员合法权益的保护，指导、帮助船员与船员用人单位订立劳动合同。

第二十九条　船员用人单位应当根据船员职业的风险性、艰苦性、流动性等因素，向船员支付合理的工资，并按时足额发放给船员。任何单位和个人不得克扣船员的工资。

船员用人单位应当向在劳动合同有效期内的待派船员，支付不低于船员用人单位所在地人民政府公布的最低工资。

第三十条　船员在船工作时间应当符合国务院交通主管部门规定的标准，不得疲劳值班。

船员除享有国家法定节假日的假期外，还享有在船舶上每工作 2 个月不少于 5 日的年休假。

船员用人单位应当在船员年休假期间，向其支付不低于该船员在船工作期间

平均工资的报酬。

第三十一条 船员在船工作期间，有下列情形之一的，可以要求遣返：

（一）船员的劳动合同终止或者依法解除的；

（二）船员不具备履行船上岗位职责能力的；

（三）船舶灭失的；

（四）未经船员同意，船舶驶往战区、疫区的；

（五）由于破产、变卖船舶、改变船舶登记或者其他原因，船员用人单位、船舶所有人不能继续履行对船员的法定或者约定义务的。

第三十二条 船员可以从下列地点中选择遣返地点：

（一）船员接受招用的地点或者上船任职的地点；

（二）船员的居住地、户籍所在地或者船籍登记国；

（三）船员与船员用人单位或者船舶所有人约定的地点。

第三十三条 船员的遣返费用由船员用人单位支付。遣返费用包括船员乘坐交通工具的费用、旅途中合理的食宿及医疗费用和 30 公斤行李的运输费用。

第三十四条 船员的遣返权利受到侵害的，船员当时所在地民政部门或者中华人民共和国驻境外领事机构，应当向船员提供援助；必要时，可以直接安排船员遣返。民政部门或者中华人民共和国驻境外领事机构为船员遣返所垫付的费用，船员用人单位应当及时返还。

第五章 船员培训和船员服务

第三十五 条申请在船舶上工作的船员，应当按照国务院交通主管部门的规定，完成相应的船员基本安全培训、船员适任培训。

在危险品船、客船等特殊船舶上工作的船员，还应当完成相应的特殊培训。

第三十六条 依法设立的培训机构从事船员培训，应当符合下列条件：

（一）有符合船员培训要求的场地、设施和设备；

（二）有与船员培训相适应的教学人员、管理人员；

（三）有健全的船员培训管理制度、安全防护制度；

（四）有符合国务院交通主管部门规定的船员培训质量控制体系。

第三十七条 依法设立的培训机构从事船员培训业务，应当向国家海事管理机构提出申请，并附送符合本条例第三十六条规定条件的证明材料。

国家海事管理机构应当自受理申请之日起 30 日内，做出批准或者不予批准的决定。予以批准的，发给船员培训许可证；不予批准的，书面通知申请人并说明理由。

第三十八条 从事船员培训业务的机构，应当按照国务院交通主管部门规定

的船员培训大纲和水上交通安全、防治船舶污染、船舶保安等要求，在核定的范围内开展船员培训，确保船员培训质量。

第三十九条 从事代理船员办理申请培训、考试、申领证书（包括外国船员证书）等有关手续，代理船员用人单位管理船员事务，提供船舶配员等船员服务业务的机构，应当符合下列条件：

（一）在中华人民共和国境内依法设立的法人；

（二）有 2 名以上具有高级船员任职资历的管理人员；

（三）有符合国务院交通主管部门规定的船员服务管理制度；

（四）具有与所从事业务相适应的服务能力。

第四十条 从事船员服务业务的机构（以下简称船员服务机构），应当向海事管理机构提交书面申请，并附送符合本条例第三十九条规定条件的证明材料。

海事管理机构应当自受理申请之日起30日内做出批准或者不予批准的决定。予以批准的，发给相应的批准文件；不予批准的，书面通知申请人并说明理由。

第四十一条 船员服务机构应当建立船员档案，加强船舶配员管理，掌握船员的培训、任职资历、安全记录、健康状况等情况，并将上述情况定期报海事管理机构备案。

船员用人单位直接招用船员的，应当遵守前款的规定。

第四十二条 船员服务机构应当向社会公布服务项目和收费标准。

第四十三条 船员服务机构为船员提供服务，应当诚实守信，不得提供虚假信息，不得损害船员的合法权益。

第四十四条 船员服务机构为船员用人单位提供船舶配员服务，应当督促船员用人单位与船员依法订立劳动合同。船员用人单位未与船员依法订立劳动合同的，船员服务机构应当终止向船员用人单位提供船员服务。

船员服务机构为船员用人单位提供的船员失踪或者死亡的，船员服务机构应当配合船员用人单位做好善后工作。

第六章 监督检查

第四十五条 海事管理机构应当建立健全船员管理的监督检查制度，重点加强对船员注册、任职资格、履行职责、安全记录，船员培训机构培训质量，船员服务机构诚实守信以及船员用人单位保护船员合法权益等情况的监督检查，督促船员用人单位、船舶所有人以及相关的机构建立健全船员在船舶上的人身安全、卫生、健康和劳动安全保障制度，落实相应的保障措施。

第四十六条 海事管理机构对船员实施监督检查时，应当查验船员必须携带的证件的有效性，检查船员履行职责的情况，必要时可以进行现场考核。

第四十七条 依照本条例的规定，取得船员服务簿、船员适任证书、中华人民共和国海员证的船员以及取得从事船员培训业务许可、船员服务业务许可的机构，不再具备规定条件的，由海事管理机构责令限期改正；拒不改正或者无法改正的，海事管理机构应当撤销相应的行政许可决定，并依法办理有关行政许可的注销手续。

第四十八条 海事管理机构对有违反水上交通安全和防治船舶污染水域法律、行政法规行为的船员，除依法给予行政处罚外，实行累计记分制度。海事管理机构对累计记分达到规定分值的船员，应当扣留船员适任证书，责令其参加水上交通安全、防治船舶污染等有关法律、行政法规的培训并进行相应的考试；考试合格的，发还其船员适任证书。

第四十九条 船舶违反本条例和有关法律、行政法规规定的，海事管理机构应当责令限期改正；在规定期限内未能改正的，海事管理机构可以禁止船舶离港或者限制船舶航行、停泊、作业。

第五十条 海事管理机构实施监督检查时，应当有 2 名以上执法人员参加，并出示有效的执法证件。

海事管理机构实施监督检查，可以询问当事人，向有关单位或者个人了解情况，查阅、复制有关资料，并保守被调查单位或者个人的商业秘密。

接受海事管理机构监督检查的有关单位或者个人，应当如实提供有关资料或者情况。

第五十一条 海事管理机构应当公开管理事项、办事程序、举报电话号码、通信地址、电子邮件信箱等信息，自觉接受社会的监督。

第五十二条 劳动保障行政部门应当加强对船员用人单位遵守劳动和社会保障的法律、法规和国家其他有关规定情况的监督检查。

第七章 法律责任

第五十三条 违反本条例的规定，以欺骗、贿赂等不正当手段取得船员服务簿、船员适任证书、船员培训合格证书、中华人民共和国海员证的，由海事管理机构吊销有关证件，并处 2000 元以上 2 万元以下罚款。

第五十四条 违反本条例的规定，伪造、变造或者买卖船员服务簿、船员适任证书、船员培训合格证书、中华人民共和国海员证的，由海事管理机构收缴有关证件，处 2 万元以上 10 万元以下罚款，有违法所得的，还应当没收违法所得。

第五十五条 违反本条例的规定，船员服务簿记载的事项发生变更，船员未办理变更手续的，由海事管理机构责令改正，可以处 1000 元以下罚款。

第五十六条 违反本条例的规定，船员在船工作期间未携带本条例规定的有

效证件的，由海事管理机构责令改正，可以处2000元以下罚款。

第五十七条 违反本条例的规定，船员有下列情形之一的，由海事管理机构处1000元以上1万元以下罚款；情节严重的，并给予暂扣船员服务簿、船员适任证书6个月以上2年以下直至吊销船员服务簿、船员适任证书的处罚：

（一）未遵守值班规定擅自离开工作岗位的；

（二）未按照水上交通安全和防治船舶污染操作规则操纵、控制和管理船舶的；

（三）发现或者发生险情、事故、保安事件或者影响航行安全的情况未及时报告的；

（四）未如实填写或者记载有关船舶法定文书的；

（五）隐匿、篡改或者销毁有关船舶法定证书、文书的；

（六）不依法履行救助义务或者肇事逃逸的；

（七）利用船舶私载旅客、货物或者携带违禁物品的。

第五十八条 违反本条例的规定，船长有下列情形之一的，由海事管理机构处2000元以上2万元以下罚款；情节严重的，并给予暂扣船员适任证书6个月以上2年以下直至吊销船员适任证书的处罚：

（一）未保证船舶和船员携带符合法定要求的证书、文书以及有关航行资料的；

（二）未保证船舶和船员在开航时处于适航、适任状态，或者未按照规定保障船舶的最低安全配员，或者未保证船舶的正常值班的；

（三）未在船员服务簿内如实记载船员的服务资历和任职表现的；

（四）船舶进港、出港、靠泊、离泊，通过交通密集区、危险航区等区域，或者遇有恶劣天气和海况，或者发生水上交通事故、船舶污染事故、船舶保安事件以及其他紧急情况时，未在驾驶台值班的；

（五）在弃船或者撤离船舶时未最后离船的。

第五十九条 船员适任证书被吊销的，自被吊销之日起2年内，不得申请船员适任证书。

第六十条 违反本条例的规定，船员用人单位、船舶所有人有下列行为之一的，由海事管理机构责令改正，处3万元以上15万元以下罚款：

（一）招用未依照本条例规定取得相应有效证件的人员上船工作的；

（二）中国籍船舶擅自招用外国籍船员担任船长或者高级船员的；

（三）船员在船舶上生活和工作的场所不符合国家船舶检验规范中有关船员生活环境、作业安全和防护要求的；

（四）不履行遣返义务的；

（五）船员在船工作期间患病或者受伤，未及时给予救治的。

第六十一条 违反本条例的规定，未取得船员培训许可证擅自从事船员培训

的，由海事管理机构责令改正，处 5 万元以上 25 万元以下罚款，有违法所得的，还应当没收违法所得。

第六十二条 违反本条例的规定，船员培训机构不按照国务院交通主管部门规定的培训大纲和水上交通安全、防治船舶污染等要求，进行培训的，由海事管理机构责令改正，可以处 2 万元以上 10 万元以下罚款；情节严重的，给予暂扣船员培训许可证 6 个月以上 2 年以下直至吊销船员培训许可证的处罚。

第六十三条 违反本条例的规定，未经批准擅自从事船员服务的，由海事管理机构责令改正，处 5 万元以上 25 万元以下罚款，有违法所得的，还应当没收违法所得。

第六十四条 违反本条例的规定，船员服务机构和船员用人单位未将其招用或者管理的船员的有关情况定期报海事管理机构备案的，由海事管理机构责令改正，处 5000 元以上 2 万元以下罚款。

第六十五条 违反本条例的规定，船员服务机构在提供船员服务时，提供虚假信息，欺诈船员的，由海事管理机构责令改正，处 3 万元以上 15 万元以下罚款；情节严重的，并给予暂停船员服务 6 个月以上 2 年以下直至吊销船员服务许可的处罚。

第六十六条 违反本条例的规定，船员服务机构在船员用人单位未与船员订立劳动合同的情况下，向船员用人单位提供船员的，由海事管理机构责令改正，处 5 万元以上 25 万元以下罚款；情节严重的，给予暂停船员服务 6 个月以上 2 年以下直至吊销船员服务许可的处罚。

第六十七条 海事管理机构工作人员有下列情形之一的，依法给予处分：

（一）违反规定签发船员服务簿、船员适任证书、中华人民共和国海员证，或者违反规定批准船员培训机构、船员服务机构从事相关活动的；

（二）不依法履行监督检查职责的；

（三）不依法实施行政强制或者行政处罚的；

（四）滥用职权、玩忽职守的其他行为。

第六十八条 违反本条例的规定，情节严重，构成犯罪的，依法追究刑事责任。

第八章 附 则

第六十九条 申请参加取得船员服务簿、船员适任证书考试，应当按照国家有关规定交纳考试费用。

第七十条 引航员的注册、培训和任职资格依照本条例有关船员注册、培训和任职资格的规定执行。具体办法由国务院交通主管部门制订。

第七十一条 军用船舶船员的管理，按照国家和军队有关规定执行。

渔业船员的管理由国务院渔业行政主管部门负责，具体管理办法由国务院渔业行政主管部门参照本条例另行规定。

第七十二条 除本条例对船员用人单位及船员的劳动和社会保障有特别规定外，船员用人单位及船员应当执行有关劳动和社会保障的法律、行政法规以及国家有关规定。

船员专业技术职称的取得和专业技术职务的聘任工作，按照国家有关规定实施。

第七十三条 本条例自 2007 年 9 月 1 日起施行。

中华人民共和国国际船舶保安规则

（2007 年 3 月 12 日第 3 次交通部部务会议通过，自 2007 年 7 月 1 日起施行）

第一章 总 则

第一条 为加强国际航行船舶保安管理，根据经过修订的《1974 年国际海上人命安全公约》（以下简称“SOLAS 公约”）和《国际船舶和港口设施保安规则》（以下简称“ISPS 规则”）的规定，制定本规则。

第二条 本规则适用于下列从事国际航行的中国籍船舶和从事国际航运业务的中国公司以及进入中国管辖海域的外国籍船舶：

（一）客船；

（二）500 总吨及以上的货船；

（三）500 总吨及以上的特种用途船；

（四）移动式海上钻井装置。

适用本规则的船舶以下简称船舶。

本规则不适用于军用船舶和仅用于政府公务用途的船舶。

第三条 交通部主管全国船舶保安工作。中华人民共和国海事局负责具体执行 SOLAS 公约和 ISPS 规则规定的缔约国政府船舶保安主管机关的职责。

交通部在沿海设立的海事管理机构按照本规则具体履行下列职责：

（一）负责管理船舶保安员和公司保安员的培训，对通过规定的船舶保安培训并经考试合格者，签发相应的培训合格证；

（二）接收船舶海上保安信息，并在法定的职责内按照规定的程序采取相应的行动；

（三）向已经进入中国领海或者已经报告拟进入中国领海的船舶提供相应的保安信息，向相关部门通报保安信息，并按照法定职责采取相应的行动；

（四）实施船舶保安监督管理，检查《船舶连续概要记录》、《国际船舶保安证书》、《临时国际船舶保安证书》、保安报警装置、保安演习以及本规则规定的其他船舶保安事项，检查已经批准的船舶保安计划以及修订内容的有效性；

（五）对船舶保安员、公司保安员实施监督管理；

（六）中华人民共和国海事局规定的其他船舶保安职责。

第四条 本规则下列用语的含义是：

（一）特种用途船，是指根据船舶功能的需要而载有 12 名以上特殊人员（包括乘客）的机械自航船舶，包括以下类型：

1．从事科研、考察及测量的船舶；

2．用于海上人员训练的船舶；

3．不从事捕捞的鲸船及鱼类加工船；

4．不从事捕捞的其他海洋生物资源加工船；

5．设计特点与作业方式与第 1 目至第 4 目相类似的其他船舶。

（二）船港界面活动，是指船舶与港口之间的人员来往、货物装卸或者接受港口服务时发生的交互活动。

（三）船到船活动，是指从一船向另一船转移物品或者人员且与港口设施不相关的行为。

（四）保安事件，是指威胁船舶、港口设施或者船港界面活动、船到船活动安全的任何可疑行为或者情况。

（五）保安联络点，是指由交通部公布并设立在各直属海事管理机构的联络点。船舶、公司可通过该联络点向海事管理机构就船舶保安事项请求建议或者援助，报告关于其他船舶、动向或者通信的任何保安问题。

（六）保安等级，是指可能导致保安事件或者发生保安事件的风险级别划分。

（七）保安声明，是指船舶与其所从事活动的港口设施或者其他船舶之间达成谅解的书面协议，规定各自的保安措施。

（八）《船舶保安计划》，是指为确保在船上采取旨在保护船上人员、货物、货物运输单元、船舶物料或者船舶免受保安事件威胁的措施而制订的计划。

（九）船舶保安员，是指由公司指定的承担船舶保安责任的船上人员。该保安员对船长负责，其职责包括实施和维护《船舶保安计划》以及与公司保安员和港口设施保安员进行联络。

（十）公司保安员，是指由公司所指定的，负责开展船舶保安评估、制订和报批《船舶保安计划》、实施和维持批准后的《船舶保安计划》，并与港口设施保安员和船舶保安员进行联络的人员。

（十一）港口设施保安员，是指被指定负责落实《港口设施保安计划》的制订、实施、修订和维护工作，并与船舶保安员和公司保安员进行联络的人员。

（十二）公司，是指承担安全与防污染管理责任和义务的航运企业，包括船舶所有人、经营人、管理人和光船承租人。

第二章 船舶保安等级

第五条 船舶保安等级从低到高分为三级，分别是保安等级 1、保安等级 2 和保安等级 3。

保安等级 1 是指应当始终保持的最低防范性保安措施的等级。

保安等级 2 是指由于保安事件危险性升高而应在一段时间内保持适当的附加保护性保安措施的等级。

保安等级 3 是指当保安事件可能或者即将发生（尽管可能尚无法确定具体目标）时应在一段有限时间内保持进一步的特殊保护性保安措施的等级。

第六条 中华人民共和国海事局应当根据威胁信息的可信程度、得到佐证的程度、具体或者紧迫程度以及保安事件潜在的后果确定和调整船舶的保安等级。

前款所称威胁信息包括但不限于以船舶为载体或者工具对下列对象产生威胁的信息：国家安全、公共安全、公共卫生、公共环境、公共资源、海上通信安全、重要设施安全、社会治安等。

第七条 船舶保安等级由交通部发布。

交通部发布船舶保安等级时，可以视情发出适当的指令，并向可能受到影响的船舶提供保安信息。

第三章 船舶和公司的保安要求

第一节 一般规定

第八条 船舶应当按照 SOLAS 公约的要求和中华人民共和国海事局的规定，配备船舶自动识别系统（AIS）、《船舶连续概要记录》，安装船舶保安警报系统，标记船舶永久识别号。

第九条 公司应当履行以下职责：

（一）负责对所属船舶进行船舶保安评估；

（二）负责编制《船舶保安计划》和已批准计划的后续修订；

（三）实施经过批准的《船舶保安计划》；

（四）采取适当的措施，避免泄漏船舶保安评估或者《船舶保安计划》及其相关的保安敏感性、保密性资料；

（五）应当安排一名或者数名人员作为公司保安员，确定每人所负责的船舶，并确保其能够 24 小时与船舶、港口设施保安员和海事管理机构保持联系；

（六）向船籍港海事管理机构及时提供最新的公司保安员名单以及 24 小时联络方式等资料；

（七）在每艘船舶上指定一名适合履行船舶保安职责的人员作为船舶保安员；

（八）为船舶保安员、公司保安员、船长履行职责提供必要的条件；

（九）赋予船长在船舶保安以及在必要时请求公司或者海事管理机构提供帮助方面的决定权；

（十）根据确定的保安等级，采取相应的保安措施；

（十一）组织、参加船舶保安培训、训练和演习；

（十二）收集船舶保安信息，并向相关部门报告或者通报。

第十条 在各等级保安状态下，船舶应当按照经批准的船舶保安计划开展工作。

发现保安威胁，在船舶保安等级未确认改变之前，船舶可以按照经过批准的保安计划，采取高于其所处保安等级的保安措施，包括附加保护性措施和特殊保护性措施。

船舶的保安等级高于其拟进入或者所在港口的保安等级，船舶应当立即将此情况通知拟进入或者所在国家的保安联络点。

船舶的保安等级低于其拟进入或者所在港口的保安等级，船舶应当立即按照本船的《船舶保安计划》升高船舶的保安等级至不低于港口的保安等级，并向拟进入或者所在国家的保安联络点报告。

第十一条 船长在职责范围内做出的维护船舶安全或者保安的决定，不受公司或者任何其他人员的限制。其中包括拒绝人员（经确定为 SOLAS 公约、ISPS 规则缔约国政府正式授权的人员除外）及其物品上船或者拒绝装货（包括集装箱或者其他封闭的货运单元）。

不论处于何种保安等级，船长在任何时候对船舶的安全负有最终责任。如果有理由相信执行任何有关指令会危及船舶的安全，船长可以要求澄清或者修改指令。

第十二条 船舶在进人中华人民共和国港口之前、在港口期间，船长和船舶保安员应当履行下列义务：

（一）了解拟挂靠的港口设施履行 SOLAS 公约和 ISPS 规则的情况；

（二）与我国海事管理机构公布的保安联络点联系，以确定适合其的船舶保安等级，并掌握有关船舶保安等级的任何变化；

（三）与拟挂靠的港口设施的保安员联系，了解该港口设施的保安等级，并掌握有关港口设施保安等级的任何变化；

（四）如果保安联络点确定了该船需要提升保安等级并就此发出指令，船长和船舶保安员应当向保安联络点确认已收到关于保安等级改变的指令，并确认已开始实施《船舶保安计划》所列明的措施和程序；如果在实施中遇到任何困难，应当与港口设施保安员联系，并协调适当的行动；

（五）如果船舶按照本条第（四）项规定需要提高的保安等级或已处于的保安等级高于其拟挂靠或所在港口的保安等级，船长和船舶保安员应当立即将此情况通知港口所在地海事管理机构和港口设施保安员，并在必要时与港口设施保安员协调适当的行动。

第十三条 在中华人民共和国领海或者拟进入中华人民共和国领海的船舶，发现可能影响所在区域海上保安的任何信息，应当立即向沿岸保安联络点报告。

第二节 船舶保安评估

第十四条 公司保安员应当确保船舶保安评估由具备评价船舶保安技能的人员按照本规则、SOLAS 公约和 ISPS 规则的要求开展，并对船舶保安评估的妥善实施负有最终责任。

公司可以由公司保安员实施保安评估，也可就某一具体船舶的保安评估委托具备船舶保安评估资质的机构实施，实施船舶保安评估的机构应当对评估的结论负责。

第十五条 船舶保安评估应当符合下列要求以及中华人民共和国海事局规定或者认可的船舶保安评估规范：

（一）确定现有保安措施、程序和操作；

（二）确定并评价应予重点保护的船上关键操作；

（三）确定船上关键操作可能受到的威胁及其发生的可能性，以确定并按优先顺序排定保安措施；

（四）找出船舶设施、设备和重要部位以及方针和程序中的弱点，包括人为因素。

船舶保安评估应当包括现场保安检验。现场保安检验应当检查和评估船上的现有保护措施、指南、程序和操作。

船舶发生重大变化时，应当及时重新进行保安评估。前述重大变化包括：船舶的通信、报警、消防、救生等重要设备结构、功能发生变化，船舶的保安组织机构、职责和协调程序发生重大变化，船舶发生了保安事件等。

第十六条 如果同一公司所有、租赁或者管理的船舶的种类，通信、报警、消防、救生等主要设备、结构相同或者相近，经向海事管理机构说明，可以共同评估并制作一份《船舶保安评估报告》。

第十七条 完成船舶保安评估后，评估人应当制作书面的《船舶保安评估报告》。

《船舶保安评估报告》应当由公司加以审查、接受并保存。

《船舶保安评估报告》应当保密，公司和承担船舶保安评估的机构应当制定并落实防止擅自接触、泄露的措施。

第三节　船舶保安计划

第十八条　《船舶保安评估报告》被公司接受后，公司应当根据船舶保安评估已经确定的船舶特点、潜在威胁和薄弱环节等情况，编制《船舶保安计划》。

《船舶保安计划》应当就本规则定义的三个保安等级作出规定，并至少包括以下内容：

（一）船舶的保安组织机构以及各自职责；

（二）标明船舶保安员和公司保安员，包括公司保安员的 24 小时联系方式；

（三）船舶与公司、港口设施、其他船舶和具有保安职责的有关主管机关的关系；

（四）保安等级 1 状态下应当落实的保安措施，以及保安等级提高时应当落实的全部附加和特别保安措施；

（五）《船舶保安计划》的保密措施；

（六）《船舶保安计划》的定期审查和更新程序；

（七）与海事管理机构、港口设施保安员及其他部门联系、报告的程序，船舶内部联系和报告保安事件的程序；

（八）防止将企图用于攻击人员、船舶或者港口的武器、危险物质和装置擅自携带上船的措施；

（九）对限制区域的确定以及防止擅自进入限制区域的措施；

（十）防止擅自上船的措施；

（十一）对保安威胁或者保安状况的破坏作出反应的程序，包括维持船舶或者船港界面的关键操作的规定；

（十二）对缔约国政府在保安等级 3 时可能发出的指令作出反应的程序；

（十三）在保安威胁或者保安状况受到破坏时的撤离程序；

（十四）保安活动审核程序；

（十五）与计划有关的培训、训练和演习程序；

（十六）确保检查、测试、校准和保养船上装备的任何保安设备的程序；

（十七）测试或者校准船上装备的任何保安设备的频度；

（十八）指明船舶保安警报系统启动点的安装位置；

（十九）船舶保安警报系统的使用，包括试验、启动、关闭、复位和减少误报警的程序、说明和指导；

（二十）保安和监控设备或者系统的类型和维护要求；

（二十一）建立、保持和更新危险货物或者财产及其地点清单的程序；

（二十二）向有关缔约国政府联络点报告的程序；

（二十三）自身要求签署《保安声明》的条件以及如何处理港口设施提出《保

安声明》要求的做法；

（二十四）位于非缔约国的港口、与不符合 SOLAS 公约第 XI-2 章和 ISPS 规则 A 部分的港口设施或者未取得《国际船舶保安证书》的船舶发生界面活动以及与固定、浮动平台或者就位的移动式海上钻井装置进行界面活动时将采取的程序和保安措施。

第十九条 公司应向中华人民共和国海事局或者其指定的海事管理机构提出《船舶保安计划》审查申请。

中华人民共和国海事局或者其指定的海事管理机构应当自受理申请之日起 20 个工作日内书面做出批准或者不批准《船舶保安计划》的决定。对于批准的，应当出具批准文书，对不批准的，应当书面告知理由。

第二十条 《船舶保安计划》批准后，船舶不得擅自更换该计划中所述的任何保安设备。

船舶更换已经批准的《船舶保安计划》涉及的任何保安设备，应当与本规则和 ISPS 规则规定的内容等效。更换保安设备后的《船舶保安计划》应当经批准该计划的海事管理机构重新认可后方可实施。

第二十一条 船舶重新进行保安评估，公司或者公司保安员应当对《船舶保安计划》作出相应的修订后，按本节规定的程序提出申请。

第二十二条 《船舶保安计划》应当保密。

在符合下列条件时，执法人员可以查看《船舶保安计划》中与不符合情况有关的具体部分：

（一）有明确理由相信船舶不符合 SOLAS 公约第 XI-2 章或者 ISPS 规则 A 部分的要求，且只能通过审查船舶保安计划的相关要求验证或者纠正不符合情况；

（二）中国籍船舶征得船籍港海事管理机构或者船长的同意，但对计划中的保密信息未经中华人民共和国海事局另行同意，不能受到检查；外国籍船舶征得其所属缔约国政府或者船长的同意，但对计划中的保密信息未经其所属缔约国政府同意，不能受到检查。

本条前款所述的保密信息包括：

（一）对限制区域的确定以及防止擅自进入限制区域的措施；

（二）对保安状况受到的威胁或者破坏作出响应的程序，包括维持船舶或者船港界面的关键操作的规定；

（三）对缔约国政府在处于保安等级 3 时可能发出的任何指令作出响应的程序；

（四）船舶上负有保安责任人员的职责和船舶上其他人员在保安方面的职责；

（五）确保检查、测试、校准和保养船上任何保安设备的程序；

（六）指明船舶保安警报系统启动点所在位置；

（七）船舶保安警报系统的使用，包括试验、启动、关闭和复位以及限制误发警报的程序、说明和指导。

第二十三条 如果同一公司所有、租赁或者管理的船舶的种类，通信、报警、消防、救生等主要设备、结构相同或者相近，事先取得船籍港海事管理机构同意，可以共同制作一份《船舶保安计划》。

第四节 审核和发证

第二十四条 从事国际航行的船舶必须持有《国际船舶保安证书》或者《临时国际船舶保安证书》。

《国际船舶保安证书》或者《临时国际船舶保安证书》应当随船携带。

第二十五条 中国籍船舶应当向中华人民共和国海事局或者其指定的海事管理机构申请《国际船舶保安证书》。

中华人民共和国海事局或者其指定的海事管理机构应当自受理申请之日起的10日内，对船舶是否具备取得《国际船舶保安证书》的条件进行审核，并对审核合格的船舶核发《国际船舶保安证书》，审核不合格的，书面告知理由。

有下列情况之一的，中华人民共和国海事局或者其指定的海事管理机构应当核发《临时国际船舶保安证书》：

（一）在交船时或者在投人营运或者重新投人营运之前，船舶没有《国际船舶保安证书》；

（二）船舶从SOLAS公约和ISPS规则的一缔约国政府换旗到另一缔约国政府；

（三）船舶从一非SOLAS公约和ISPS规则缔约国政府换旗到一缔约国政府；

（四）公司承担了其以前未经营过的某一船舶的经营责任。

第二十六条 《国际船舶保安证书》的有效期最长不超过5年，《临时国际船舶保安证书》的有效期最长不超过6个月。

第二十七条 船舶应当按照中华人民共和国海事局的规定，在《国际船舶保安证书》有效期内的第2周年和第3周年之间，至少申请一次船舶保安期间审核。

第二十八条 中国籍船舶有以下情况之一的，应当申请附加审核：

（一）在接受海事管理机构检查时，检查人员有充分理由确认船舶不符合ISPS规则A部分及本规则的要求；

（二）船舶保安计划作出修正并经批准后，公司应当在3个月内申请对船舶进行附加审核，以检查修正后计划的执行情况；

（三）船舶因不满足ISPS规则的要求被滞留、被禁止进港或者驱逐出港。

第五节 船舶保安声明

第二十九条 海事管理机构可以根据船港界面活动或者船到船活动对人员、财产和环境可能造成危险程度的判断，要求船舶与港口设施或者其他船舶签署《保安声明》。

签署《保安声明》的双方，应当确保在船舶与港口设施或者其他船舶之间就各方所分别采取的保安措施达成协议，说明各自的责任，并按照协议开展行动。

第三十条 在下列情况下，船舶可以要求与港口设施或者其他船舶签署《保安声明》：

（一）该船舶所处的保安等级高于其所从事界面活动的港口设施或者另一船舶的保安等级；

（二）在中华人民共和国政府与其他缔约国政府之间有涉及某些国际航线或者这些航线上的特定船舶的关于《保安声明》的协议；

（三）曾经有涉及该船舶或者涉及该港口设施的保安威胁或者重大保安事件；

（四）该船舶位于一个不要求具有和实施经过批准的《港口设施保安计划》的港口设施；

（五）该船舶与另一艘不要求具有和实施经批准的《船舶保安计划》的船舶进行船到船活动；

（六）符合该船舶《船舶保安计划》要求签署《保安声明》的其他条件。

对于上述第（一）项至第（五）项签署《保安声明》的请求，有关港口设施或者船舶应当回应。

船舶接到港口设施或者其他船舶签署《保安声明》的请求，应当予以回应。

第三十一条 《保安声明》应当由船长或者船舶保安员、港口设施保安员代表相关各方签署。

《保安声明》应当根据保安等级变化做相应的改变或者重新签署。

《保安声明》应当留船保存 3 年。

第六节 船舶保安的训练、演习

第三十二条 为了保证《船舶保安计划》的有效实施，公司应当每隔 3 个月进行一次船舶保安训练，测试下列威胁保安的因素：

（一）对船舶、货物、船舶基础设备或者系统以及船舶物料的损坏或者破坏；

（二）劫持或者扣留船舶或者船上人员；

（三）未经允许进入船舶的人员（包括藏于船上的偷渡人员）；

（四）走私武器或者设备（包括大规模杀伤性武器）；

（五）使用船舶载运企图制造保安事件的人员、设备；

（六）使用船舶本身作为损坏或者破坏的武器；

（七）在港或者锚泊时从海上发动的攻击；

（八）在海上时的攻击。

如果一次有25%以上船员发生变更，而这些人员在最近的适当间隔期中没有参加过该船的保安训练，则必须在发生变更后的一个星期内进行训练。

第三十三条 为了保证《船舶保安计划》的有效实施，测试通信、协调、资源共享和应答能力，公司保安员、船舶保安员应当每日历年至少参加一次由公司或者海事管理机构组织的保安演习，最长间隔不超过18个月。

保安演习可以采用实地或者模拟的形式，也可以与相关演习结合进行。

中国籍船舶如果参加国外有关主管当局组织的保安演习，应当事先通报船籍港海事管理机构。未事先通报的，海事管理机构不予承认。

第七节 船舶保安记录

第三十四条 船舶应当保存涉及以下活动的记录：

（一）培训、训练、演习；

（二）保安状况受到的威胁和保安事件；

（三）保安状况受到的破坏；

（四）保安等级的改变；

（五）与船舶保安状况直接有关的通信；

（六）保安活动的内部审核和评审；

（七）对船舶保安评估的定期评审；

（八）对船舶保安计划的定期评审；

（九）对船舶保安计划任何修正的实施；

（十）船舶保安设备的保养、校准和测试，包括对船舶保安警报系统的测试；

（十一）在任何港口进行船港界面活动时其所处的保安等级；

（十二）在任何港口进行船港界面活动时所采取的特别和附加的保安措施；

（十三）任何船到船活动时维持的适当的保安程序；

（十四）其他与船舶保安有关的实用信息（但不包括船舶保安计划的细节）。

第三十五条 船舶应当对船舶保安记录加以保护，防止擅自接触、删除、破坏、修改或者泄露。

船舶应当建立专门的船舶保安记录簿。

船舶保安记录应当存船保留3年。

第八节 对保安员和有关人员的要求

第三十六条 公司保安员和船舶保安员，应当按照 ISPS 规则的有关要求，完成海事管理机构规定的船舶保安培训，具备履行其职责的知识和能力。

公司和船舶的其他相关人员，应当按照 ISPS 规则的有关要求，经过相应的培训，具备履行其担任职责方面的知识和能力。

第三十七条 公司保安员履行下列职责：

（一）利用适当的保安评估和其他相关信息，就船舶可能遇到威胁的情况提出建议；

（二）确保船舶保安评估得以开展；

（三）确保《船舶保安计划》得以制定、提交批准以及随后得以实施和维护；

（四）确保对《船舶保安计划》进行适当修改，以纠正缺陷并符合各船舶的保安要求；

（五）安排对保安活动进行内部审核和审查；

（六）安排船舶进行初次和后续的审核；

（七）确保迅速解决和处理在内部审核、定期审查、保安检查和其它审核期间确定的缺陷和不符合项；

（八）加强保安意识和警惕性；

（九）确保负责船舶保安的人员受到适当的培训；

（十）确保船舶保安员和有关港口设施保安员之间的有效沟通与合作；

（十一）及时接收海事管理机构发布的船舶保安信息，并确保将信息及时传递到公司所属船舶；

（十二）确保保安要求和安全要求的一致性；

（十三）若采用了姊妹船或者船队的保安计划，确保每条船舶的计划均准确反映该船具体信息；

（十四）确保海事管理机构为某一特定船舶或者某一组船舶批准的任何替代或者等效措施得以实施和保持。

第三十八条 船舶保安员履行下列职责：

（一）承担船舶的定期保安检查，确保船舶保持适当的保安措施；

（二）保持和监督《船舶保安计划》的实施；

（三）与船上其他人员和有关港口设施保安员协调货物和船舶备品装卸中的保安事项；

（四）对《船舶保安计划》提出修改建议；

（五）向公司保安员报告内部审核、定期审查、保安检查和其它审核期间所确定的缺陷和不符合项，并采取纠正措施；

（六）加强船上保安意识和警惕性；

（七）确保为船上人员提供充分的培训；

（八）报告所有保安事件；

（九）与公司保安员和有关港口设施保安员协调实施《船舶保安计划》；

（十）确保正确操作、测试、校准和保养保安设备。

中国籍船舶的船舶保安员无法履行职责的，海事管理机构出具书面的证明文件，指定其他船员短时间替代船舶保安员的职责，并由船公司通知船舶停靠的下一港口的海事主管当局。

第四章　海上保安报警和处置

第三十九条　中国海上搜救中心总值班室是全国船舶和港口设施保安的总联络点，负责全国船舶和港口设施的保安报警接收和保安信息联络工作。

第四十条　交通部在沿海设立的各海事管理机构的值班室，负责下列事项的对外联系工作：

（一）接收港口保安信息和船舶保安信息，针对接到的保安报警及时按照船舶保安应急反应程序采取通告有关部门等保安行动，

（二）对船舶提供保安建议或者援助；

（三）为拟进入我国领海和港口的船舶提供保安信息和保安通信联系；

（四）按规定程序向中国海上搜救中心总值班室报告保安信息。

第四十一条　当出现威胁船舶、船港界面活动或者船到船活动安全的任何可疑行为或者情况，船长或者船舶保安员应当向船舶所在公司进行船舶保安报警。

公司保安员收到船舶保安报警后，应当立即与保安事件发生地的海事管理机构联系，报告船舶的船名、船籍、位置、船舶种类、船上人员和货物情况、受到的保安威胁等情况，同时通报船籍港海事管理机构；如涉及到港口设施，还应通报港口设施所在地港口行政管理部门。

第四十二条　船舶应当制定并落实有关措施妥善使用船舶保安警报设备，以防止船舶发生误报警。保安报警的测试应当避免采取直接与海上保安联络点之间测试的方式，以保证海上保安报警线路的畅通。

第四十三条　船舶发生误报警，应当采取措施立即消除，并向有关海事管理机构报告；海事管理机构以及其他单位和个人因对误报警采取行动支付的额外费用，由误报警的船舶承担。

第四十四条　中华人民共和国海事局负责统一对外发布除保安等级以外的船舶保安信息，并发布全国性或者局部重要性的船舶保安指令。

各海事管理机构根据中华人民共和国海事局的授权，向相关单位发布船舶保安信息和指令。

第四十五条 海事管理机构收到港口保安事件和其他港口保安信息，应当按照应急反应程序，通知相关的公司和船舶，协调港口设施和船舶的保安行动，同时及时通报港口行政管理部门。

第四十六条 海事管理机构收到中华人民共和国管辖水域内船舶的保安报警后，应当按照规定的程序及时采取应急反应措施。

海事管理机构收到中华人民共和国管辖水域外船舶的保安报警后，应当立即向中华人民共和国海事局报告，由中华人民共和国海事局按照规定的程序采取通知该船舶航行位置附近国家等行动。

第五章 监督检查与法律责任

第四十七条 海事管理机构依法对船舶保安活动实施的监督检查，任何单位或者个人不得拒绝、妨碍或者阻挠。

有关单位或者个人应当接受海事管理机构依法实施的监督检查，并为其提供方便。

海事管理机构的工作人员实施监督检查时，应当出示执法证件，表明身份。

第四十八条 海事管理机构应当对船舶的下列保安事项进行监督检查：

（一）《国际船舶保安证书》或者《临时国际船舶保安证书》及证书签发机关的有效性；

（二）《船舶保安计划》在船上实施的有效性；

（三）《船舶连续概要记录》记载和保存的情况；

（四）船舶永久识别号的标识情况，以及保安报警装置、船舶自动识别系统（AIS）的配备情况；

（五）中华人民共和国海事局规定的其他检查事项。

经检查，海事管理机构有明显理由认为船舶不符合 SOLAS 公约第 V、XI 章、ISPS 规则 A 部分和本规则要求的，海事管理机构可以对船舶采取进一步强制检查、责令船舶立即或者限期纠正、限制操作（包括限制在港内活动）、责令驶向指定地点、禁止进港、滞留船舶、驱逐出港等行政强制措施。

第四十九条 对拟进入中华人民共和国港口的国际航行船舶，海事管理机构可以在其提交国际航行船舶进口岸申请的同时要求提供以下信息，以确保船舶符合 SOLAS 公约第 XI 章、ISPS 规则和本规则的要求：

（一）船舶当前运营所处的保安等级；

（二）船舶挂靠前 10 个港口进行船港界面活动时其所处的保安等级；

（三）船舶挂靠前 10 个港口进行船港界面活动时所采取的特别和附加的保安措施；

（四）船舶挂靠前 10 个港口进行船港界面活动时维持的适当的保安程序；

（五）船舶挂靠前 10 个港口与未取得《国际船舶保安证书》的船舶发生界面活动或者与固定、浮动平台或者就位的移动式海上钻井装置进行界面活动时采取的保安程序和保安措施；

（六）其他海事管理机构要求提供的实用保安信息。

对于船舶未按要求提供前款所述的信息，或者海事管理机构认为提供的信息不符合 SOLAS 公约第 XI 章、ISPS 规则和本规则的要求，海事管理机构可以采取强制检查、责令船舶立即或者限期纠正、责令驶向指定地点、禁止进港等行政强制措施。

第五十条 对外国籍船舶按照第四十八、四十九条规定采取强制检查、责令船舶立即或者限期纠正、限制操作（包括限制在港内活动）、责令驶向指定地点、禁止进港、滞留船舶、驱逐出港的行政强制措施，中华人民共和国海事局应当将此情况通报船旗国海事当局和国际海事组织。

采取禁止进港或者驱逐出港的措施，还应当通知可知的船舶随后拟挂靠港口的国家当局以及其他有关沿岸国。

第五十一条 对于挂靠未按规定取得有效《港口设施保安符合证书》的我国港口设施的船舶，港口所在地海事管理机构应当采取禁止进港或者驱逐出港的行政强制措施。

第五十二条 对于违反本规则规定的中国公司，海事管理机构可以责令改正；情节严重的，可以责令对有关船舶重新进行保安评估或者修订《船舶保安计划》。

第五十三条 违反本规则规定，公司保安员和船舶保安员未经必要的培训，海事管理机构可以责令公司更换；公司保安员和船舶保安员未能履行本规则规定的职责，海事管理机构可以责令其参加保安培训，情节严重的，可以责令公司暂停或者撤销其保安员资格。

第五十四条 对于违反本规则的行为，依法应当给予海事行政处罚的，海事管理机构按照交通部颁布的海事行政处罚有关规定实施行政处罚。

第五十五条 海事管理机构工作人员违反本规则规定，滥用职权，玩忽职守，给人民生命财产造成损失的，由所在单位或者其上级主管机关给予行政处分；涉嫌犯罪的，依法移送司法机关。

第六章 附则

第五十六条 中华人民共和国海事局可以许可中国籍船舶实施等效于 SOLAS 公约第 XI 章、ISPS 规则 A 部分所述措施的其他保安措施。

交通部应当将许可该种保安措施的要求、程序等细节通知国际海事组织秘书长。

第五十七条 中国籍船舶的《船舶保安计划》、《国际船舶保安证书》和《临时国际船舶保安证书》的许可条件和程序，按照交通部颁布的关于海事行政许可条件和程序的有关规定执行。

第五十八条 《国际船舶保安证书》、《临时国际船舶保安证书》的内容和格式，由中华人民共和国海事局按照 SOLAS 公约和 ISPS 规则的要求统一制定。

第五十九条 本规则自 2007 年 7 月 1 日起施行。但是，500 总吨及以上的特种用途船自 2008 年 7 月 1 日起适用本规则。交通部于 2004 年 6 月 16 日发布的《船舶保安规则》（交海发 [2004]315 号）同时废止。

最高人民法院关于审理海上保险纠纷案件若干问题的规定

（2006 年 11 月 13 日最高人民法院审判委员会第 1405 次会议通过，法释[2006]10 号）

为正确审理海上保险纠纷案件，依照《中华人民共和国海商法》、《中华人民共和国保险法》、《中华人民共和国海事诉讼特别程序法》和《中华人民共和国民事诉讼法》的相关规定，制定本规定。

第一条 审理海上保险合同纠纷案件，适用海商法的规定；海商法没有规定的，适用保险法的有关规定；海商法、保险法均没有规定的，适用合同法等其他相关法律的规定。

第二条 审理非因海上事故引起的港口设施或者码头作为保险标的的保险合同纠纷案件，适用保险法等法律的规定。

第三条 审理保险人因发生船舶触碰港口设施或者码头等保险事故，行使代位请求赔偿权利向造成保险事故的第三人追偿的案件，适用海商法的规定。

第四条 保险人知道被保险人未如实告知海商法第二百二十二条第一款规定的重要情况，仍收取保险费或者支付保险赔偿，保险人又以被保险人未如实告知重要情况为由请求解除合同的，人民法院不予支持。

第五条 被保险人未按照海商法第二百三十四条的规定向保险人支付约定的保险费的，保险责任开始前，保险人有权解除保险合同，但保险人已经签发保险单证的除外；保险责任开始后，保险人以被保险人未支付保险费请求解除合同的，人民法院不予支持。

第六条 保险人以被保险人违反合同约定的保证条款未立即书面通知保险人为由，要求从违反保证条款之日起解除保险合同的，人民法院应予支持。

第七条 保险人收到被保险人违反合同约定的保证条款书面通知后仍支付保险赔偿，又以被保险人违反合同约定的保证条款为由请求解除合同的，人民法院不予支持。

第八条 保险人收到被保险人违反合同约定的保证条款的书面通知后，就修改承保条件、增加保险费等事项与被保险人协商未能达成一致的，保险合同于违反保证条款之日解除。

第九条 在航次之中发生船舶转让的，未经保险人同意转让的船舶保险合同至航次终了时解除。船舶转让时起至航次终了时止的船舶保险合同的权利、义务由船舶出让人享有、承担，也可以由船舶受让人继受。

船舶受让人根据前款规定向保险人请求赔偿时，应当提交有效的保险单证及船舶转让合同的证明。

第十条 保险人与被保险人在订立保险合同时均不知道保险标的已经发生保险事故而遭受损失，或者保险标的已经不可能因发生保险事故而遭受损失的，不影响保险合同的效力。

第十一条 海上货物运输中因承运人无正本提单交付货物造成的损失不属于保险人的保险责任范围。保险合同当事人另有约定的，依约定。

第十二条 发生保险事故后，被保险人为防止或者减少损失而采取的合理措施没有效果，要求保险人支付由此产生的合理费用的，人民法院应予支持。

第十三条 保险人在行使代位请求赔偿权利时，未依照海事诉讼特别程序法的规定，向人民法院提交其已经向被保险人实际支付保险赔偿凭证的，人民法院不予受理；已经受理的，裁定驳回起诉。

第十四条 受理保险人行使代位请求赔偿权利纠纷案件的人民法院应当仅就造成保险事故的第三人与被保险人之间的法律关系进行审理。

第十五条 保险人取得代位请求赔偿权利后，以被保险人向第三人提起诉讼、提交仲裁、申请扣押船舶或者第三人同意履行义务为由主张诉讼时效中断的，人民法院应予支持。

第十六条 保险人取得代位请求赔偿权利后，主张享有被保险人因申请扣押船舶取得的担保权利的，人民法院应予支持。

第十七条 本规定自 2007 年 1 月 1 日起施行。

【编者按】《日本水产业协会法》对于亟需健康发展远洋渔业的中国而言，不失为一部具有相当参考价值的法律。但由于本法的篇幅较长，编辑部不得不将其分三期依次刊出，并舍去若干“附则”。不便之处，恳请读者谅解！

日本水产业协会法（三之三）

(1948 年 12 月 15 日法律第 242 号，2004 年法律第 124 号最终修正）

杨立敏* 申政武** 孙娜*** 译

第六章 水产品加工业协会联合会

【事业的种类】

第九十七条 1. 水产加工业协会联合会（以下此章中称为“联合会”）进行下列事业的全部或部分：

一、对直接或间接构成联合会的人员（以下此章中称为“所属成员”）其事业中必要资金的贷款。

二、对所属成员储蓄或定期择金的接受。

三、对所属成员事业必要物资的供给。

四、所属成员事业中必要的共同利用的设施。

五、所属成员生产物的搬运、加工、保管或贩卖。

六、对所属成员的产品、原理、材料或制造加工的设备进行检查的设施。

七、会员的监察及指导。

八、与所属成员的福利保健相关的设施。

九、谋求提高关于水产物制造加工的经营、技术以及所属成员对联合会事业的知识而进行的，对所属成员提供一般信息的设施。

十、为改善所属成员的经济地位而进行的团体协约的缔结。

十一、前面各号事业的附带事业。

2. 进行前项第一号或二号事业的联合会，尽管有同项规定，除这些事业的附

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* 杨立敏，中国海洋大学渔业资源专业 2003 级博士研究生，主要研究方向为渔业资源管理。

** 申政武，中国海洋大学法学院副教授，留学日本并获得博士学位，主要研究方向为国际私法。

*** 孙娜，中国海洋大学外国语学院 2004 级日本语言文学硕士研究生。

带事业或次项、第四项、第五项的事业外，不可进行其他事业。

3．进行第 1 项第二号事业的联合会，为了所属成员可进行下列事业的全部或部分：

一、票据的贴现。

二、汇替贸易。

三之二、有价证券的买卖等。

四、有价证券的贷款。

五、国债的承兑（除以减价出售为目的的情况）或与该承兑相关的国债的募集的办理。

六、有价证券（限符合国债等的证券及证券交易法第 2 条第 1 项第 7 号及第 7 号之二中所载证券）的私募的办理。

七、农林中央金库及其他主管大臣指定的金融机构或以此为基准的机构的业务的办理。

八、对国家、地方公共团体、公司等的金钱有关的事务的办理。

九、对有价证券、贵金属及其他物品的保存。

九之二、转账业。

十、兑换。

十一、金融期货交易的受托等。

十二、前面各号事业的附带事业。

4．同时进行第 1 项第一号及第二号事业的联合会，在不妨碍这些事业实行的限度内，对于证券交易法第 65 条第 2 项第一号及第四号中规定行为的事业（除据前项规定所进行的事业）。

5．同时进行第 1 项第一号及第二号事业的联合会，在不妨碍这些事业实行的限度内，据与金融机构的信托业务的兼营等相关的法律，可进行与信托业务相关的事业。

6．第 11 条第 6 项规定适用于联合会要进行第 3 项第五号事业中关于募集办理的事业的情况。

7．第 11 条第 7 项规定适用于联合会据第 4 项规定要进行同项中规定中的事业情况。

8．联合会据第 5 项规定要进行与信托业务相关的事业时，适用第 11 条第 8 项规定。

9. 联合会进行第 3 项第八号事业时，适用第 n 条第 9 项规定。

10．据章程规定，联合会可让所属成员以外的人员利用其设施（第 3 项第三号及第四号规定的设施中，仅限主管省令规定的设施）。但，除与同项第 2 号到第十号、第十二号及第 4 项规定的设施相关的情况外，一经营年度内所属成员以外的人员可利用的事业分量的总额，不得超过该经营年度中所属成员利用的事业分

量总额的 1/5。

11．关于与下列各号中所载事业的利用相关的前项但书中规定的适用，将该各号中规定的人员视为所属成员。

一、第 1 项第一号事业对于不以营利外目的的法人，以其储蓄或定期租金为担保而贷款给他们时的人员。

二、第 1 项第二号事业不以营利为目的的法人。

三、第 1 项第八号事业同所属成员同一户口者。

12．联合会，尽管有第 10 项规定，在不妨碍为其所属成员而进行的事业的实行的限度内，据章程规定，可对下列进行资金贷款。

一、政令规定的对地方公共团体的资金贷款。

二、政令规定的对于由地方公共团体为主要投资者，构成成员或地方公共团体的投人占其基本财产额过半的不以营利为目的的法人的资金贷款。

三、政令规定的为提高渔港地区的产业基础或生活环境所需资金的贷款。

四、对银行及其他金融机构的资金贷款。

【会员资格】

第九十八条 具有联合会会员资格者，为章程规定的下列人员：

一、以该联合会地区的全部或部分作为地区的协会或联合会。

二、在该联合会地区内有住所，并且进行与前号中人员所进行事业同类事业的以法律为基础设立的协会。

【决议权及选举权】

第九十八条之二 1. 会员拥有决议权及对董事及总代表的选举权各 1 个。但，前条第二号规定中的会员（以下本章中称为“准会员”）不拥有决议权及选举权。

2．会员的决议权及选举权，适用第 89 条第 2 项及第 32 项规定。

第九十九条 设立联合会，必须有 2 个以上的协会或联合会作为发起人。

【适用规定】

第一百条 1．除第 97 条规定外，第 11 条之三到第 11 条之九，第 12 条到第 15 条，第 16 条，第 87 条之二第 1 项及第 2 项的规定适用于联合会的事业，第 87 条之三及第 87 条之四的规定适用于联合会的分公司等。此时，第 11 条之三第 1 项。第 11 条之四第 1 项，第 11 条之六第 1 项、第 11 条之七第 1 项，第 11 条之八第 1 项及第 11 条之九中“第 11 条第 1 项第 4 号”换读为“第 97 条第 1 项第 2 号”，第 11 条之三第 2 项中“1 亿日元（符合政令规定的协会成员（除第 21 条第 1 项但书中规定的协会成员）数，地理条件及其它事项等必要条件的协会中，14 万日元）”，换读为“1 亿日元”，第 11 条之四第 2 项中“第 11 条第 1 项第 3 号及第 4 号”，换读为“第 97 条第 1 项第 1 号及第 2 号”，第 11 条之五中“第 11 条第 12 项，换读为“第 97 条第 12 项”，“协会成员及其他协会的成员”，换读为“所属成员”，第 12 条第 1 项中“第 11 条第 1 项第 7 号”换读为“第 97 条第 1 项第 5 号”，第 16

条第 1 项中“第 11 条第 1 项第 14 号”换读为“第 97 条第 1 项第 10 号”，第 87 条之二第 1 项中“前条第 1 项第 10 号规定的会员的监察或同条第 11 项规定的特定协会的监察”换读为“第 97 条第 1 项第 7 号规定的会员的监查”，第 87 条之三第 1 项、第 2 项第 2 号及第 3 号、第 87 条之四第 1 项中“第 87 条第 1 项第 4 号”换读为“第 97 条第 1 项第 2 号”，第 87 条之三第 1 项中“第 92 条第 1 项”换读为“第 100 条第 1 项”，同条第 2 项第 4 号及第 4 项中“第 87 条第 1 项第 3 号或第 4 号”换读为“第 97 条第 1 项第 1 号或第 2 号”，同条第 4 项及第 9 项第 1 号及第 2 号中“第 92 条第 3 项”换读为“第 100 条第 3 项”，同条第 4 项及第 9 项第 1 号中“第 92 号第 5 项”换读为“第 100 条第 5 项”。

2. 除第九十八条及第九十八条之二规定外，第十九条第三项至第五项、第十九条之二、第二十二条至第三十亿条及第九十五条的规定准用于联合会的会员。

3. 第三十二条、三十三条、第三十四条第一项至第三项、第四项本文、第五项至第七项及第九项至第十二项、第三十五条、第三十五条之二第一项、第二项、及第五项、第三十六条、第三十七条至第四十条、第四十一条之二、第四十二条第一项及第三项至第八项、第四十三条至第四十七条之三、第四十七条之四第一项、第四十七条之五、第四十八条第一项至第四项、第四十九条至第五十一条、第五十二条至第五十四条之二以及第五十四条之四至第五十八条之三的规定，准用于联合会的管理。这种情况下，三十四条第三项、第十一项及第十二项、第三十五条之二第一项、第四十一条之二第一项、第五十四条之二第一项及第二项、第五十五条第一项及第二项、第五十八条之二第一项以及第五十八条之三第一项中的“第十一条第一项第四号”可理解为“第九十七条第一项第二号、第三十四条第六项中的“一个人”可理解为“一个人（根据准用于第九十八条之二第二项的第八十九条的规定，对其会员给于两个以上选举权的联合会，其选举权是一个）”；同条第十项中“准协会会员以外的会员”可理解为“所属成员（准会员及构成此的人除外）”；“协会会员（准协会会员除外）资格拥有者得到设立的同意”可理解为“会员（准会员除外）资格拥有者得到设立的同意的，或直接或间接构成此的（准会员及构成此的人除外）”；同条第十一项中“工会会员或作为该工会会员的法人”可理解为“作为会员的法人”，第四十一条之二第一项中“工会”（未达到法定规模的除外）可理解为“联合会”；第四十七条“（该协会会员的经营或者从事的渔业及该协会所属的渔业协会联合会或者互助水产业协会联合会实行的事业除外）”可理解为“（该联合会所属成员经营的加工业以及作为该联合会所属成员的协会及联合会以及该联合会所属的联合会实行的事业除外）”；第四十八条第一项第五号及第五十条第三号之二中的“第十一条第一项第五号、第七号或第十一号”，可理解为“第九十七条第一项第三号或第五号”；第五十二条第七项中“事项”可理解为“事项或准用于第一百条第五项的第九十一条之三规定中的权利义务之继承”；第五十四条之二第一项及第二项中“其他协会”可理解为“其他联合会”，“实行第

九十七条第一号事业的水产加工业协会联合会”可理解为“实行第十一条第一项第四号事业的渔业协同会”，同项中“准用于第九十二条第一项、第九十六条第一项或第一百条第一项的第十一条之四第二项”可理解为“第十一条之四第二项（包括了准用于第九十二条第一项及第九十六条第一项的场合）”；第五十五条第七项中“第十一条第一项第二号及第十三号”可理解为“第九十七条第一项第九号”。

4. 除前条规定之外，第六十条至第六十七条之二的规定准用于联合会的设立。这种情况下，第六十一条第二项中“二十人（行业类别协会十五人）”可换作“二人”；第六十二条第六项中“第二十一条第一项以及第四十九条第二项及第三项”可换作“第四十九条第二项及第三项以及第九十八条之二第一项”。

5. 第六十九条至第七十四条、第七十五条第一项及第三项、第七十六条第一项及第三项、第七十七条、第九十一条之二以及第九十一条之三的规定，准用于联合会的解散及清算。这种情况下，第六十九条第三项中“第十一条第一项第四号”可换作“第九十七条第一项第二号”；准用于第七十二条第二项的第三十四条第十项本文中“准协会会员以外的协会会员”可换作“破产及基于准用于第一百条第五项的第九十一条之二第四项的同项第一号中的事由”；第九十一条之三第一项中“协会、渔业生产协会或者联合会”可换作“协会或者联合会”。

第六章之二　互助水产业协会联合会

【事业的种类】

第一百条之二　1. 互助水产业协会联合会（以下此章作“联合会”）可实行以下事业。

一、关于直接或间接构成联合会的人（以下此章作“所属成员”）的互助设施。

二、附带于前号事业的事业。

2. 联合会根据定款之规定，可以让所属会员以外的人利用其设施。但是，一个事业年度内，所属成员及其他联合会的所属成员能利用的事业总量，不能超过过事业单位内所属成员及其他联合会的所属成员的事业总量。

3. 对于关于第 1 项第一号事业之利用的前项但书的规定的适用，和所属成员同一家庭的人可视之为所属成员。

【作为会员的资格】

第一百条之三　联合会会员资格的拥有者是如下定款中的人：

一、以该联合会的全部或部分地区为区域的渔业协会、渔业协会联合会、水产加工协会、水产加工协会联合会或者联合会。

二、该联合会区域内拥有住所的渔业生产工会。

三、在该联合会区域内拥有住所，且基于法律设立的协会，且实行与前两号事业同种的事业。

四、第一号中的人是主要出资者或者成员的法人（同号及前号规定中的人除外）。

【决定权及选举权】

第一百条之四 1．会员拥有决定权以及董事及全体代表的选举权各一个。但是，前条第三号及第四号规定的会员（以下此章作“准会员”）不具有决定权及选举权。

2．关于会员的决定权及选举权，第八十九条第二项及第三项规定适用。这种情况下，同条第二项中“协会”可换作“渔业协会或者水产加工业协会”，“联合会的场合”可换作“渔业协会联合会、水产加工业协会联合会或者联合会的场合”。

【发起人】

第一百条之五 为设立联合会，必须有两个人以上的渔业协会、渔业生产协会、渔业协会联合会、水产加工业协会、水产加工业协会联合会或者联合会作为发起人。

【准用规定】

第一百条之六 1．除第一百条之二规定以外，第十五条之二、第十五条之三及第十五条之五准用于联合会的事业。这种情况下，第十五条之二第一项及第十五条之三中“第十一条第一项第十一号”可换作“第一百条之二第一项第一号；“第十五条之五中“第十一条第一项第十一号”可换作“第一百条之二第一项第一号，”“根据前条规定作为与同号事业相关的而被划归为属于会计的财产”可换作“财产”。

2．除第一百条之三及第一百条之四规定外，第十九条第三项至第五项、第十九条之二、第二十条、第二十二条至第三十一条及第九十五条的规定，准用于联合会的会员。

3．第三十二条、第三十三条、第三十四条第一项、第二项、第四项本文、第五项至第七项、第九项及第十项、第三十四条之二、第三十五条、第三十五条之二第三项至第五项、第三十六条至第四十条、第四十二条至第五十一条、第五十二条至第五十四条、第五十四条之四、第五十五条第一项至第六项以及第五十六条至第五十八条的规定，准用于联合会的管理。这种情况下，第三十四条第六项中“一个人”可换作“一个人（根据准用于第一百条之四第二项的第八十九条第二项的规定，给与其会员两个以上选举权的联合会，其选举权是一个）”;同条第十项及第三十四条之二第二项中“准协会会员以外的协会会员”可换作“所属成员（准会员、第十八条第五项规定中的协会会员、第八十八条第三号或第四号或者第九十八条第二号规定中的会员及构成此的人除外）”；“协会会员（准会员除外）资格拥有者得到设立的同意的”可换做“会员（处准会员除外）资格拥有者得到设立统一的，或者直接或者间接构成次的人（准会员、第十八条第五项规定中的工会会员、第八十三条第三号或者第四号或者第九十八条第二号规定中的会员及构成此的人除

外）”；第四十七条中“（该协会会员的经营或从事的渔业及该工会所属的渔业协会联合会或互助水产业协会联合会实行的事业除外）”可换作“（作为该联合会所属成员的渔业协会、水产加工业协会及联合会以及该联合会所属的联合会实行的事业除外），第四十八条第五项中“第十一条第一项第十一号”可换作“第一百条之二第一项第一号”。

4．除前条规定外，第六十条第六十七条之二的规定准用于联合会的设立。这种情况下，第六十一条第二项中“二十人（行业类别协会是十五人）”可换作“两人”；第六十二条第六项中“第二十一条第一项以及第四十九条第二项及第三项”可换作“第四十九条第二项及第三项以及第一百条之四第一项”。

5．第六十八条至第七十七条的规定准用于联合会的解散及清算。这种情况下，第六十八条第四项中“二十人（行业类别协会是十五人）未满”可换作“一人”；准用于第七十条第二项的第三十四条第十项本文及第三十四条之二第二项本文中“准协会会员以外的协会会员”可换作“所属成员（准协会会员、第十八条第五项规定中的协会会员、第八十八条第三号或第四号或者第九十八条第二号规定中的会员及构成这些的人除外）”。

第七章　登　记

【设立之登记】

第一百零一条　1．不让协会会员或会员（以下总称“协会会员”）出资的协会，自得到设立认可之日起，让协会会员出资的协会（以下作“出资协会”），自出资的第一次汇款之日起两周以内，必须去主要事务所所在地进行设立登记。

2．设立登记必须记入如下事项，但是渔业生产协会的设立登记不必记入第三号事项：

一、事业。

二、名称。

三、地区。

四、事务所。

五、出资协会要记入一份出资的金额及汇款的方法以及出资的总份数及汇款结束时的出资总额。

六、确定了存在的期间的要记入这个时间。

七、代表权所有者的姓名、住所及资格。

八、确定了数人共同代表协会（渔业生产协会除外）的要记入这个规定。

九、公告的方法。

3．协会进行设立登记两周以内，必须去从属事务所所在地登记前项事项。

【从属事务所的新设登记】

第一百零二条 1．协会成立后设立从属事务所时，必须在两周以内到主要事务所所在地登记此事，在三周以内到其从属事务所登记前条第 2 项的事项，在同期间到其它从属事务所登记此事。

2. 新设从属事务所时，在管辖主要事务所或者从属事务所所在地的登记处的管辖区域内，可以登记新设从属事务所之事。

【事务所搬迁的登记】

第一百零三条 1．协会搬迁主要事务所时，必须在两周以内向原所在地登记搬迁情况，向新所在地登记第一百零一条第 2 项的事项；搬迁从属事务所时，必须在三周以内向原所在地登记搬迁情况，在四周内向新所在地登记同项事项。

2. 在同一登记处管辖区域内搬迁主要事务所或从属事务所时，可以进行搬迁登记。

【主要设立登记事项的登记】

第一百零四条 1．变更第一百零一条第 2 项中的事项时，必须在两周以内向主要事务所所在地、在三周以内向从属事务所进行变更登记。

2．变更了第一百零一条第 2 项第五号事项中的出资总份数及汇款结束时的出资总额时，不管前项规定如何，可以在事业年度结束后四周以内向主要事务所登记。在五周以内向从属事务所登记此事。

【停止理事职务等的登记】

第一百零四条之二 停止代表协会（渔业生产协会除外）的理事或者渔业生产协会的理事之职务，或作出选举代行其职务者暂时处理意见，或者变更或取消这个暂时处理意见时，必须向主要事务所以及从属事务所登记此事。

【参事的登记】

第一百零五条 协会选出参事时，必须在两周以内到事务所所在地登记参事的姓名及住所、设置参事的事务所，以及确定了数个参事共同行使代理权时，必须登记其要点。变更登记事项及取消参事的代理权时也如此。

【解散的登记】

第一百零六条 协会解散时，因合并、破产，第九十一条之二第 4 项第一号规定中的事由及基于准用于第一百条第五项的第九十一条之二第四项规定的同项第一号中的事由而解散的情况除外，必须在两周以内向主要事务所所在地，在三周以内向从属事务所所在地登记解散事宜。

【合并情况的登记】

第一百零七条 协会合并或继承第九十一条之三（包括准用于第一百条第五项的场合）规定中的权利义务（以下本条、第一百十三条第二项及第三项以及第一百三十条第一项第二十九号中略作“继承”）时，自合并或继承被认可之日起，必须在两周以内向主要事务所，在三周以内向从属事务所，进行关于合并或继承后存续的协会的变更登记；关于合并或继承后消亡的协会的解散登记，关于合并后

成立的协会的第一百零一条第 2 项规定中的登记。

第一百零八条 删除。

【清算结束的登记】

第一百零九条 协会在清算结束时，必须自清算结束之日起两周以内向主要事务所，在三周以内向从属事务所进行清算结束的登记。

【管辖登记处及登记簿】

第一百一十条 1. 关于协会的登记，管辖事务所所在地的法务局或地方法务局或以上的支局或者以上的派出机构，作为管辖登记处负责此事。

2. 各登记处要备有渔业协会登记簿、渔业生产协会登记簿、渔业协会联合会登记簿、水产加工协会登记簿、水产加工协会联合会登记簿及互助水产业协会联合会登记簿。

【设立登记时申请】

第一百一十一条 1．协会设立登记申请书的后面，必须附有证明定款及代表权所有者的书面材料以及证明出资总份数及出资第一回汇款已完成的书面材料。

2．通过合并而设立协会的登记申请书的后面，必须附有因合并而消亡的协会的登记簿副本。但是，在该登记处管辖区域内因合并而消亡的协会事务所，不在此限。

3．通过合并而设立出资协会的登记申请书的后面，除前两项的书面材料外，如果进行了准用于第六十九条第 4 项（包括准用于第八十六条第 5 项、第九十二条第 5 项、第九十六条第 5 项、第一百条第 5 项及第一百条之六第 5 项的场合）的第五十三条第二项规定中的公告及催告（进行合并的出资协会在政府公报及刊登时事的日报上登载了工期公告一对于这种情况下的该出资协会来说值得使这些公告。第一百十三条第二项也如此），以及提出了异议的债权者存在时，必须附有证明偿还他或提供担保或提供信托或者即使合并也不伤害债权者利益的书面材料。

第一百一十二条 删除。

【事务所新设、搬迁及变更设立登记事项的登记之申请】

第一百一十三条 1．协会的事务所新设或事务所搬迁及变更第一百零一条第 2 项事项的登记申请书的后面，必须附有证明事务所新设或者变更登记事项的书面材料。

2．减少一份出资额的金额或者因出资协会合并继承而产生变更的登记申请书的后面，除前项书面材料外，如果进行了第五十三条第 2 项（包括了准用于第六十九条第 4 项〈包括了准用于第八十六条第五项、第九十条之三第二项｛包括了准用于第一百条第五项的场合｝、第九十二条第五项、第九十六条第五项、第一百条第五项及第一百条之六第五项的场合〉、第八十六条第二项、第九十二条第三项、第九十六条第三项、第一百条第三项及第一百条之六第三项的场合）规定中的公告及催告，以及提出了异议的债权者存在时，必须附有证明偿还他、或提供担保、

或提供信托，或者即使减少一份出资额的金额或合并、继承，也不伤害债权者利益的书面材料。

3．因协会合并或继承而产生变更的登记，准用于第一百一十一条第 2 项的规定。

第一百十四条 删除。

【解散登记的申请】

第一百一十五条 根据第一百零六条规定而解散协会的登记申请书的后面，必须附有证明解散事由的书面材料。

第一百一十六条 删除。

第一百一十七条 删除。

【清算结束的登记申请】

第一百一十八条 协会清算结束的登记申请书的后面，必须附有证明清算人根据第七十六条第 1 项（包括了准用于第八十六条第五项、第九十二条第五项、第九十六条第五项、第一百条第五项及第一百条之六第五项的场合）的规定，取得了认可的决算报告书的书面材料。

【登记期间的计算】

第一百一十九条 需要行政厅认可的应登记事项，其登记期间自认可书到达之日起计算。但是，第六十五条第二项及第五项（包括准用于第八十六条第四项、第九十二条第四项、第九十六条第四项、第一百条第四项及第一百条之六第四项的场合）的情况下，其登记期间自关于认可的证明书到达之日起计算。

【登记事项的公告】

第一百二十条 已登记的事项必须在登记处迅速公告。

【商业登记法的准用】

第一百二十一条 商业登记法第二条至第五条、第七条至第二十三条、第二十四条第一号至第十二号及第十四号、第二十五条、第二十六条、第五十三条、第五十五条第一项、第五十六条至第五十九条、第六十一条第一项及第三项、第六十六条、第六十八条第二项、第六十九条、第七十条以及第一百零七条至第一百二十条的规定，准用于协会的登记。这种情况下，同法第二十五条中“诉求”可换作“对于行政厅的请求”；同条第三项中“管辖本事务所所在地的地方法院”可换作“行政厅”，同法第五十六条第三项中“商法第六十四条第一项”可换作“水产业协会法第一百零一条第二项”；同法第六十一条第三项中的“根据商法第一百二十九条第二项规定而代表公司”可换作“根据水产业协会法第七十四条本文（包括准用于同法第八十六条第五项、第九十二条第五项、第九十六条第五项、第一百条第五项及第一百条之六第五项的场合）的规定”；同法第六十六条中的“通过合并”，可换作“通过合并或者根据水产业协会法第九十一条之三第一项（包括了准用于同法第一百条第五项的场合）的权利义务之继承（以下作“继承”）”，“通

过合并”可换作“通过合并或继承”，“合并了”可换作“合并或继承了”；同法第九十六条第一项中的“通过合并”可换作“通过合并或继承”、“合并后”可换作“合并或继承后”；同法第七十条第二项中“合并”可换作“合并或继承”。

第八章　监督（报告的征收）

第一百二十二条　1．行政厅为了了解该协会是否遵守了法令，基于法令的行政处理命令或者定款、规约、信用事业规程或者互助规程等，可以向该协会征收必要的报告，也可以命令协会提交关于协会会员、职员、管理者、事业的工作量等其它状况的资料等依法行政所必需的东西。

2．行政厅为了了解协会（渔业生产协会除外）是否遵守了法令，基于法令的行政处理命令或者定额、规约、信用事业规程或者互助规程等，在特别必要的时间和限度内，可以命令该协会的子公司提交该协会关于业务或者会计的报告或资料。

3. 前各项规定的“子公司”是指协会（渔业生产协会除外）拥有其 50％以上的议决权的公司。这种场合，该协会及一个或两个以上的子公司，或者该协会的一个或两个子公司，拥有总议决权的 50％以上，其它的公司也被认为是该协会的子公司。

4. 第 11 条之 6 的第 3 项规定适用于前项中协会（渔业生产协会除外）或它的子公司所拥有的议决权。

5．协会（渔业生产协会除外）的子公司（第 3 项规定的子公司，下一条、第 129 条及第 130 条也同上）如有正当的理由，可以拒绝提交第 2 项中规定的报告或材料。

【业务或会计状况的检查】

第一百二十三条　1．协会会员征得总会员十分之一以上的同意，以协会的业务或会计有违反法令、基于法令的行政厅的处理命令或者定款、规约、信用事业规程或者互助规程之嫌疑为由请求检查时，行政厅必须检查该协会的业务或会计状况。

2．行政厅认为协会的业务或会计有违反法令、基于法令的行政厅的处理命令或定款、规约、信用事业规程或者互助规程之嫌疑时，可以随时检查该协会的业务或会计状况。

3．行政厅为确保实行第 11 条第 1 项第四号或第十一号、第 87 条第 1 项第四号、第 93 条第 1 项第二号或第六号之二，第 97 条第 1 项第二号、第 100 条之二第 1 项第一号所规定的事业的协会健康运营，在必要时候，可以随时检查该协会的业务会会计状况。

4．行政厅对于出资协会（渔业生产协会除外）的业务或会计状况按每年一回

的常例，必须实行账薄检查及其它检查。

5．行政厅根据前面各项规定，检查协会（渔业生产协会除外）的业务或会计状况时，在特别必要的场合和必要的限度内，可以检查该协会的子公司的业务或会计状况。

6．关于前项的检查，前条第 5 项的规定适用。

【行政厅监督上的命令】

第一百二十三条之二 1．针对实行第 11 条第 1 项第四号、第 87 条第 1 项第四号、第 93 条第 1 项第二号或第 97 条第 1 项第二号所规定的事业的协会，为确保其信用事业健康运营，因该协会的业务或财产、或者该协会及其子公司等的财产状况而产生必要时，行政厅可以制定应采取的措施及时限，以及要求该协会提交为确保健康运营的改进计划，或者要求其变更已提交的改进计划。

2．针对施行第 11 条第 1 项第四号、第 87 条第 1 项第四号、第 93 条第 1 项第二号或者第 97 条第 1 项第二号所规定的事业的协会，为确保该事业的健康运营或者保护协会会员，因该协会的业务或财务或该协会及其子公司等的财产或者情况的变更而产生必要时，行政厅可以命令其变更定款、规约、信用事业规程或互助规程，变更业务执行方法，停止全部或一部分业务，或提存财产，或者可以禁止或限制其处分财产，可以发布其它监督上的必要命令。

3．针对施行第 11 条第 1 项第十一号、第 93 条第 1 项第六号之 2 二或者第 100 条之二第 1 项第一号所规定的事业的协会，为确保该事业的健康运营或者保护协会会员，因该协会的业务或财务状况或者情况的变更而产生必要时，行政厅可以命令其变更定款、规约、信用事业规程或者互助规程，变更业务执行方法，停止全部或一部分业务，或提存财产，或者可以禁止或限制其处分财产，可以发出其它监督上的必要命令。

4．根据第 1 项或第 2 项的规定，所规定的为确保信用事业的健康运营的相关命令（包括要求其提交改进计划），而且由协会或者协会及其子公司自己资本的充实状况而产生必要时所依据的命令，必须是主管机关按照协会或者协会及其子公司的自己资本充实状况的区分所确定的命令。

【对于违反法令的措施】

第一百二十四条 1．行政厅根据第 122 条的规定征收报告时，或者根据第 123 条的规定进行检查时，如认定该协会的业务或会计违反了法令、基于法令的行政厅的处理命令或者定款、规约、信用事业规程或者互助规程，可以对该协会设定期限，命令其采取必要的措施。

2．如果协会不服从前项命令，行政厅可以设定期限，命令其停止全部或一部分业务，或者命令其改选管理者。

3．协会违反了信用事业规程或者互助规程中特别需要的事项时，行政厅尽管下达了第 1 项的命令，但是协会不服从，行政厅可以取消第 11 条之 4 第 1 项（包

括适用于第 92 条第 1 项、第 96 条第 1 项及第 100 条第 1 项的情况）或者第 15 条之二第 1 项（包括适用于第 96 条第 1 项及第 100 条之 6 第 1 项的情况）中的认可。

【行政厅发布的解散命令】

第一百二十四条之二 以下情况，行政厅可以命令该协会解散。

一、协会施行了法定事业范围之外的事业时。

二、虽无正当理由，协会自成立之日起一年以后还未开始运营，或者停业一年以上时。

三、协会违反法令后，行政厅虽下达了前条第 1 项的命令，但其不服从时。

四、渔业生产协会违反了第 80 条、第 81 条或者第 82 条第 2 项的规定。

【解散命令的通知特例】

第一百二十四条之三 1．协会的法人代表缺位或行踪不明时，行政厅可以把前条规定的命令登在政府公报上。

2．前项的情况下，该命令自登在公报上 20 日之后失效。

【决议、选举或者当选的取消】

第一百二十五条 1．协会会员（第 18 条第 5 项规定中的协会会员及第 88 条第 3 号或第 4 号、第 98 条第 2 号，或者第 100 条之三第 3 号或第 4 号规定中的会员除外）征得协会总会员（第 18 条第 5 项规定中的协会会员及第 88 条第 3 号或第 4 号、第 98 条第 2 号或者第 100 条之 3 第 3 号或第 4 号规定中的会员除外）十分之一以上的同意，以（股东）大会的召集手续，议决方法或者选举违反了法令、基于法令的行政厅的处理命令或者定款、规约为由，自该决议或者选举、当选决定之日起一个月内，请求取消该决议或者选举、当选时，行政厅认为确有违法事实后，可以取消该决议或者选举、当选。

2．前各项规定适用于创立大会的情况。

3．关于前两项规定的处分，行政手续法（平成五年法律第 88 号）第三章（第 12 条及第 14 条除外）的规定不适用。

【专用合同的取消】

第一百二步六条 行政厅认为根据第 24 条第 1 项（包括了准用第 92 条第 2 项、第 96 条第 2 项、第 100 条第 2 项及第 100 条之 6 第 2 项的情况）规定所制定的合同内容违反了公众利益时，可以取消该合同。

【认可等的条件】

第一百二十六条之二 1．对于法律规定的认可、许可或承认（此项略作“认可等”），可以附加条件及变更。

2．前项的条件必须是参照认可等的趣旨，或者为确定实施认可等相关事项所必需的最小限度的条件。

【监督行政厅等】

第一百二十七条 1．这部法律中的“行政厅”是在第 72 条（包括了准用第

86 条第 5 项、第 92 条第 5 项、第 96 条第 5 项及第 100 条之 6 第 5 项的情况）及第 91 条之三第 1 项（包括了准用第 100 条第 5 项的情况）的情况之外，在以跨都、道、府、县的区域为地区的协会（渔业生产协会除外）以及以都道府县的区域为地区的渔业协会联合会、水产加工业协会联合会及互助水产业协会联合会的场合指的是主管大臣，在其它协会的场合指的是管辖主要事务所的都、道、府、县知事。

2．这部法律中（第 11 项规定中的规定除外）的主管大臣是农林水产大臣。

3．第 122 条及 123 条规定的行政厅的权限（根据前项但书的规定，内阁总理大臣单独管理的除外），不管同项但书的规定如何，不妨碍农林水产大臣及首相分别单独行使。

4．首相根据第 2 项但书或者前项的规定单独检查时，应迅速将结果通知农林水产大臣。

5．农林水产大臣根据第 3 项规定单独检查时，应迅速将结果通知首相。

6. 参照协会或协会及其子公司等的自己资本充实状况，或者信用的供给等状况，为维持信用秩序而特别需要，并且符合政令规定之场合，不管第 2 项但书如何，第 123 条之二第 1 项及第 2 项所规定的行政厅的权限不妨碍首相单独行使。

7．首相根据前项规定单独行使权限时，必须事先和农林水产大臣协商。

8．准用于第 12 条第 1 项（包括准用于第 92 条第 1 项、第 96 条第 1 项及第 100 条第一项的场合）以及第 12 条第 4 项（包括准用于第 92 条第 1 项、第 96 条第 1 项及第 100 条第 1 项的场合，次项同上）的仓库业法第 8 条第 2 项、第 12 条第 2 项、第 22 条及第 27 条第 1 项所规定的主管大臣是农林水产大臣及国土交通大臣。

9．不管前项规定如何，准用于第 12 条第 4 项的仓库业法第 27 条第 1 项所规定的主管大臣权限不妨碍农林水产大臣及国土交通大臣单独行

10．农水相根据前项规定单独检查时，应迅速将结果通知国土交通相。

11．国土交通相根据第 9 条规定单独检查时，应迅速将结果通知农水相。

12．这部法律中的主管省令是农林水产省令、内阁府令。但是准用于第 12 条第 4 项（包括了准用于第 92 条第 1 项、第 96 条第一项及第 100 条第 1 项的场合）的仓库业法第 12 条中的主管省令是农林水产省令、国土交通省令，第 123 条之二第 4 项中的主管省令是农林水产省令、内阁府令、财务省令。

13．首相可以把这部法律中的权限（政令规定的除外）委任给金融厅长官。

14．这部法律中的农林水产相的权限及前项中委任给金融厅长官的权限之一部分，根据政令的规定，可以委任给地方分支部局的长官（委任给金融厅长官的权限可以委任给财务局长或财务支局长）。

15．属于这部法律中的农林水产相的权限及 13 项中委任给金融厅长官的权限之事务的一部分，根据政令的规定，都、道、府、县知事可以行使。

第一百二十七条之二 农林水产相及首相针对实施第 11 条第 1 项第四号、第

87 条第 1 项第四号、第 93 条第 1 项第二号或者第 97 条第 1 项第二号所规定的事业的协会（只限于以跨都、道、府、县区域为地区的协会以及以都、道、府、县区域为地区的渔业协会联合会及水产加工业协会联合会，下一条同上），认为如下的处分可能对维持信用秩序产生重大影响时，必须事先就要采取的必要措施和财务相协商。

一、第 123 条之二第 2 项或者第 124 条第 2 项规定中的全部或者一部分业务之停止令（只限于与信用事业相关的）。

二、根据第 124 条第 3 项，取消第 11 条之四第 1 项的认可。

三、根据第 124 条之二规定的解散令。

【通知财务相】

第一百二十七条之三 首相针对施行第 11 条第 1 项第四号、第 87 条第 1 项第四号、第 93 条第 1 项第二号或者第 97 条第 1 项第二号所规定事业的协会，下达以下处分时，应迅速通知财务相。

一、第 11 条之四第 1 项或者第 3 项（同项规定中只限于信用事业规程废止的相关情况）（包括了这些规定准用于第 92 条第 1 项、第 96 条第 1 项及第 100 条第 1 项的场合）规定的认可

二、第 64 条规定中的设立之认可。

三、根据第 68 条第 2 项（包括了准用于第 96 条第 5 项的场合）、第 69 条第 2 项（包括了准用于第 91 条之三第 2 项（包括了准用于第 100 条第 5 项的场合）、第 92 条第 5 项、第 96 条第 5 项及 100 条第 5 项的场合）、或者第 91 条之二第 2 项（包括了准用于第 100 条第 5 项的场合）的规定所进行的认可。

四、第 91 条之二第 4 项第二号（包括了准用于第 100 条第 5 项的场合）规定中的不认可之处分。

五、第 123 条之二第 1 项或第 2 项或者第 124 条第 1 项或第 2 项规定中的命令（包括要求提出改进计划、仅限于与信用事业相关的）。

六、根据第 124 条第 3 项规定，取消第 11 条之四第 1 项中的认可。

七、根据第 124 条规定的解散令。

【向财务相提出资料等】

第一百二十七条之四 财务相关于所管的金融破绽处理制度及金融危机管理。为了与施行第 11 条第 1 项第四号、第 87 条第 1 项第四号、第 93 条第 1 项第二号或者第 97 条第 1 项第二号所规定事业的协会相关的制度之企划或立案，在必要时，可以要求首相提交必要资料及说明情况。

【事务的区分】

第一百二十七条之五 根据这部法律（第 127 条第 15 项除外），都、道、府、县可以处理的事务（只限于与施行第 11 条第 1 项第四号事业的渔业协会、施行第 87 条第 1 项第四号事业的渔业协会联合会、施行第 93 条第 1 项第二号事业的水

产加工业协会或者施行第 97 条第 1 项第二号事业的水产加工业协会联合会相关的方面）是指，地方自治法（昭和 22 年法律第 67 号）第 2 条第 9 项第一号中规定的第 1 号法定受托事务。

第九章 罚 则

第一百二十八条 1. 不论协会的董事拥有何种名义，一旦其在协会事业范围外贷款或贴现票据或者为投机交易而处分协会财产，处以三年以下徒刑或 100 万日元以下罚款（对施行第 11 条第 1 项第四号、第 87 条第 1 项第四号、第 93 条第 1 项第二号或者第 97 条第 1 项第二号事业的协会的董事，处以三年以下徒刑或 300 万日元以下罚款）

2. 对犯前项罪者，根据情况可以并科徒刑和罚款。

3. 刑法中有正条时，第 1 项规定不适用。

第一百二十八条之二 符合以下任一项者，处以一年以下徒刑或 300 万日元以下罚款。

一、按照第 58 条之二第 1 项或第 2 项（包括了这些规定准用于第 92 条第 3 项，第 96 条第 3 项及第 100 条第 3 项的场合）的规定，不提交业务报告书的，或者不在业务报告书上记载应记入事项的，或记入虚假信息并供公众阅览的。

二、对实施第 11 条第 1 项第四号、第 g7 条第 1 项第四号、第 93 条第 1 项第二号或者第 97 条第 1 项第二号所规定事业的协会的代表者或代理人，雇员及其他人员违反前项规定时，除对行为者进行处罚外，还要对该协会处以 2 亿日元以下罚金。

第一百二十九条 1. 按照准用于第 12 条第 4 项（包括了准用于第 92 条第 1 项、第 96 条第 1 项及第 100 条第 1 项的场合）的仓库业法第 27 条第 1 项或本法第 122 条的规定，不报告的或进行虚假报告的，或者按照准用于第 12 条第 4 项的仓库业法第 27 条第 1 项或本法第 123 条的规定，拒绝、妨碍、规避检查的，处以 50 万日元以下的罚金（对于与实施第 11 条第 1 项第四号、第 87 条第 1 项第四号、第 93 条第 1 项第二号或第 97 条第 1 项第二号事业的协会或其子公司相关的报告或者检查事宜，处以一年以下徒刑或者 300 万日元以下罚金）。

2. 协会或协会（渔业生产协会除外）的子公司（以下此项中略作“协会等”）的法人、代理人、雇员或其他人员违反前项规定时，除对行为者处罚外，还要对协会等处以同项的罚金（如是实施第 11 条第 1 项第四号、第 87 条第 1 项第四号、第 93 条第 1 项第二号获第 97 条第 1 项第二号事业的协会或其子公司，处以 2 亿日元以下罚款）。

第一百三十条 1. 如下场合对协会的董事或清算人处以 50 万日元以下罚款。但是，对其行为处以刑罚时，并不限于此。

一、进行本法或其它法律规定以外的事业时。

二、违反第 11 条第 10 项但书，第 87 条第 12 项但书、第 93 条第 9 项但书，第 97 条第 10 项但书或第 100 条之 2 第 2 项但书时。

三、违反第 11 条之四第 1 项（包括了准用于第 92 条第 1 项、第 96 条第 1 项及第 100 条第 1 项的场合）或者第 11 条之十（包括了准用于第 96 条第 1 项的场合）之规定时。

四、按照第 11 条之四第 4 项（包括了准用于第 92 条第 1 项、第 96 条第 1 项及第 100 条第 1 项的场合）、第 48 条第 4 项（包括了准用于第 86 条第 2 项，第 92 条第 3 项、第 96 条第 3 项、第 100 条第 3 项及第 100 条之 6 第 3 项的场合）、第 68 条第 5 项（包括了准用于第 86 条第 5 项、第 96 条第 5 项及第 100 条之 6 第 5 项的场合）的规定，不申报或进行虚假申报的。

五、违反第 11 条之五（包括了准用于第 92 条第 1 项、第 96 条第 1 项及第 100 条第 1 项的场合）的规定时。

六、违反第 15 条之二第 1 项或第 15 条之三（包括了这些规定准用于第 96 条第 1 项及第 100 条之六第 1 项的场合），第 15 条之四（包括了准用于第 96 条第 1 项的场合）或者第 15 条之五（包括了准用于第 96 条第 1 项及第 100 条之六第 1 项的场合）的规定时。

七、违反了第 17 条第 4 项的规定时。

八、违反了第 17 条之二第 1 项（包括了准用于第 96 条第 1 项的场合，以下此条中皆如此），并以第 17 条之二第 1 项规定中的子公司对象公司以外的，且是第 17 条之三第 1 项（包括了准用于第 96 条第 1 项的场合）规定中的信用事业公司为子公司时。

九、违反了第 17 条之二第 3 项（包括了准用于第 96 条第 1 项的场合）规定。

十、违反了第 17 条之三第 1 项或者第 2 项但书（包括了这些规定准用于第 96 条第 1 项的场合）规定时。

十一、违反了按第 17 条之三第 3 项或者第 5 项（包括了准用于第 96 条第 1 项的场合）的规定所附加的条件时。

十二、违反了第 24 条第 2 项（包括了准用于第 92 条第 2 项、第 96 条第 2 项、第 100 条第 2 项及第 100 条之六第 2 项的场合）规定时。

十三、违反了第 25 条（包括了准用于第 92 条第 2 项、第 96 条第 2 项、第 100 条第 2 项及第 100 条之六第 2 项的场合）规定时。

十四、违反了第 27 条第 2 项后段（包括了准用于第 86 条第 1 项、第 92 条第 2 项、第 96 条第 2 项、第 100 条第 2 项及第 100 条第 2 项及第 100 条之六第 2 项的场合）规定时。

十五、违反了第 34 条第 3 项（包括了准用于第 92 条第 3 项、第 96 条第 3 项及第 100 条第 3 项的场合）规定时。

十六、违反了第 34 条第 11 项（包括了准用于第 92 条第 3 项、第 96 体第 3 项及第 100 条第 3 项的场合，以下此号皆如此）的规定，并没有符合第 34 条第 11 项的人担任监事时。

十七、没有履行确定第 34 条第 12 项（包括了准用于第 92 条第 3 项、第 96 条第 3 项及第 100 条第 3 项的场合）规定中的常勤监事之手续。

十八、违反了第 35 条之二第 1 项（包括了准用于第 92 条第 3 项，第 96 条第 3 项及第 100 条第 3 项的场合）、第 3 项或第 4 项（包括了准用于第 92 条第 3 项及第 100 条之六第 3 项的场合）或者第 5 项（包括了准用于第 86 条第 2 项、第 92 条第 3 项、第 96 条第 3 项、第 100 条第 3 项及第 100 条之六第 3 项的场合）规定时。

十九、违反了第 36 条之二第 6 项（包括了准用于第 92 条第 3 项及第 100 条之六第 3 项的场合）或者第 42 条第 6 项或第 46 条第 4 项（包括了准用于第 86 条第 2 项、第 92 条的 3 项、第 96 条第 3 项、第 100 条第 3 项及第 100 条之六第 3 项的场合）规定时。

二十、根据准用于第 37 条第 5 项（包括了准用于第 44 条第 2 项（包括了准用于第 92 条第 3 项、第 96 条第 3 像、第 100 条第 3 项及第 100 条之六的场合，第二十三号及此项皆如此）、第 86 条第 2 项及第 3 项、第 92 条第 3 项、第 96 条第 3 项、第 100 条第 3 项以及第 100 条之六第 3 项的场合）的商法第 266 条第 8 项之规定，怠慢了开示时。

二十一、违反了第 39 条第 1 项、第 2 项或第 3 项（包括了准用于第 51 条之二第 7 项、第 92 条第 3 项、第 100 条第 3 项及第 100 条之六第 3 项的场合）的规定。第 40 条第 6 项（包括了准用于第 86 条第 2 项、第 92 条第 3 项、第 96 条第 3 项、第 100 条第 3 项及第 100 条之六第 3 项的场合）或第 8 项（包括了准用于第 41 条之二第 12 项（包括了适用于第 92 条第 3 项、第 96 条第 3 项及第 100 条第 3 项的场合，此号同上），以及准用于第 86 条第 2 项、第 92 条第 3 项、第 96 条第 3 项、第 100 条第 3 项及第 100 条之六第 3 项的场合）的规定、第 41 条之二第 5 项或第 8 项（包括了准用于第 92 条第 3 项、第 96 条第 3 项及第 100 条第 3 项的场合）的规定或者第 84 条第 1 项、第 2 项或第 3 项的规定，不准备文件的，不在文件上记入应记入事项的，或记入不实事项的。

二十二、根据第 39 条第 4 项（包括了准用于第 51 条之二第 7 项、第 92 条第 3 项、第 96 条第 3 项、第 100 条第 3 年项即第 100 条之六第 3 项的场合）、第 40 条第 9 项（包括了适用于第四十一条之二第 12 项的场合，以及准用于第八十六条第 2 项、第九十二条第 3 项、第九十六条第 3 项、第一百条第 3 项及第一百条之六第 3 项的场合）或者第八十四条第 4 项的规定，无正当理由，拒绝阅览和誊写的。

二十三、根据准用于第四十一条之二第 10 项（包括了准用于第九十二条第 3 项、第九十六条第 3 项及第一百条第 3 项的场合，此号及此项皆如此）或第四十四条第 2 项的商法第二百七十四条第 2 项的规定，或者准用于第四十四条第 2 项的

同法第二百七十五条的规定，妨碍调查的。

二十四、根据准用于第四十一条之二第 10 项的商法特例法第十七条第 1 项或者第 2 项的规定，陈述意见时，做虚假陈述或隐瞒事实的。

二十五、违反第四十二条第 5 项（包括了准用于第八十六条第 2 项、第九十二条第 3 项、第九十六条第 3 项、第一百条第 3 项及第一百条之六第 3 项的场合）规定的。

二十六、违反了分别准用于第四十四条第 3 项（包括了准用于第九十二条第 3 项、第九十六条第 3 项、第一百条第 3 项及第一百条之六第 3 项的场合）或第七十七条（包括了准用于第九十二条第 5 项、第九十六条第 5 项、第一百条第 5 项及第一百条之六第 5 项的场合。以下此项皆如此）的商法第二百六十条之四第 1 项或第 2 项的规定、分别准用于第五十一条（包括了准用于第五十一条之二第 7 项、第九十二条第 3 项、第九十六条第 3 项、第一百条第 3 项及第一百条之六第 3 项的场合）、第六十二条第 6 项（包括了准用于第九十二条第 4 项、第九十六条第 4 项、第一百条第 4 项及第一百条之六第 4 项的场合）、或者第八十六条第 2 项或第 4 项的同法第二百四十四条第 1 项或第 2 项的规定、准用于第五十四条之四（包括了准用于第八十六条第 2 项、第九十二条第 3 项、第九十六条第 3 项、第一百条第 3 项及第一百条之六第 3 项的场合）的同法第三十二条第 1 项的规定、第七十五条第 1 项（包括了准用于第八十六条第 5 项、第九十二条第 5 项、第九十六条第 5 项、第一百条第 5 项及第一百条之六第 5 项的场合）的规定、或第七十六条第 1 项（包括了准用于第八十六条第 5 项的场合）的规定，不做成议事录、会计账簿、财产目录、借贷对照表或决算报告书的，或者在这些文件中不记入应记入事项的、记入不实事项的。

二十七、违反了准用于第四十七条之二（包括了准用于第九十二条第 3 项、第九十六条第 3 项、第一百条第 3 项及第一百条之六第 3 项的场合）、第四十七条之三第 3 项或第四十七条之四第 1 项（包括了准用于第四十二条第 8 项（包括了准用第五十一条之二第 7 项、第九十二条第 3 项、第九十六条第 3 项、第一百条第 3 项及第一百条之六第 3 项的场合）、第五十一条之二第 7 项、第八十六条第 2 项、第九十二条第 3 项、第九十六条第 3 项、第一百条第 3 项及第一百条之六第 3 项的场合）、第四十七条之四第 2 项（包括了准用于第五十一条之二第 7 项、第九十二条第 3 项及第一百条之六第 3 项的场合）或第八十六条第 2 项的民法第六十条之规定的。

二十八、违反了准用于第五十一条（包括了准用于第五十一条之二第 7 项、第九十二条第 3 项、第九十六条第 3 项、第一百条第 3 项及第一百条之六第 3 项的场合）或者第六十二条第 6 项（包括了准用于第九十二条第 4 项、第九十六条第 4 项、第一百条第 4 项及第一百条之六第 4 项的场合）的商法第二百三十七条第 1 项或第 2 项规定，无正当理由但未说明的。

二十九、违反了第五十三条或第五十四条第 2 项（包括了准用于第八十六条第 2 项、第九十二条第 3 项、第九十六条第 3 项、第一百条第 3 项及第一百条之六第 3 项的场合）的规定，减少一份出资金额的；违反了准用于第五十四条之二第 6 项（包括了准用于第九十二条第 3 项、第九十六条第 3 项及第一百条第 3 项的场合）的第五十三条或第五十四条第 2 项的规定，让渡或承受全部或一部分信用事业的；违反了准用于第五十四条之三第 3 项（包括了准用于第九十六条第 3 项的场合）的第五十三条或第五十四条第 2 项规定，让渡全部或一部分互助事业，或转移与互助事业相关财产的；违反了准用于第六十九条第 4 项（包括了准用于第八十六条第 5 项、第九十二条第 5 项、第九十六条第 5 项、第一百条第 5 项及第一百条之六第 5 项的场合）的第五十三条或第五十四条第 2 项规定，合并出资协会的；违反了准用于第六十九条第 4 项（本项又准用于第九十一条之三第 2 项《包括了准用于第一百条第5项的场合》）的第五十三条或五十四条第2项规定，继承了出资协会的。

三十、违反了第五十四条之二第7项（包括了准用于第五十四条之三第4项《包括了准用于第九十六条第 3 项的场合》、第九十二条第 3 项、第九十六条第 3 项及第一百条第 3 项的场合）规定时。

三十一、违反了第五十五条第 1 项至第 6 项（包括了准用于第八十六条第 2 项、第九十二条第 3 项、第九十六条第 3 项、第一百条第 3 项及第一百条之六第 3 项的场合）、第五十五条第 7 项（包括了准用于第九十二条第 3 项、第九十六条第 3 项及第一百条第 3 项的场合）、第五十六条（包括了准用于第九十二条第 3 项、第九十六条第 3 项、第一百条第 3 项及第一百条之六第 3 项的场合）或者第八十五条规定的。

三十二、违反了第五十八条（包括了准用于第八十六条第 2 项、第九十二条第 3 项、第九十六条第 3 项、第一百条第 3 项及第一百条之六第 3 项的场合）规定，取得协会会员份额，或者以质押为目的接受其份额的。

三十三、违反了准用于第七十七条的商法第一百二十四条第 3 项，或者准用于第八十六条第 5 项的民法第八十一条第 1 项的规定，怠慢了请求破产宣告的。

三十四、按照准用于第七十七条的商法第一百二十四条第 3 项或同法第四百二十一条第 1 项，或者准用于第八十六条第 5 项的民法第七十九条第 1 项或同法第八十一条第 1 项的规定，怠慢了公告或进行虚假公告的。

三十五、违反了准用于第七十七条或者第八十六条第 5 项的商法第一百三十一条的规定，处分了协会财产的。

三十六、以拖延清算完成为目的，不当地确定了准用于第七十七条的商法第四百二十一条第 1 项，或者准用于第八十六条第 5 项的民法第七十九条第 1 项规定中的期间时。

三十七、违反了准用于第七十七条的商法第四百二十三条的规定，偿还债务的；或者在准用于第八十六条第 5 项的民法第七十九条第 1 项规定中的期间偿还

债权者的。

三十八、违反了准用于第八十七条之三第1项（包括准用于第一百条第1项的场合）规定中的行政厅之认可，并以第八十七条之三第1项规定中的子公司对象公司以外的公司为子公司时。

三十九、不取得第八十七条之三第4项（包括准用于第一百条第1项的场合）规定中的行政厅之认可，并以第八十七条之三第4项规定中的认可对象公司为子公司时；或者不取得准用于同条第6项（包括准用于第一百条第1项的场合）的第八十九条之三第4项规定中的行政厅之认可，并把同条第1项各号中列举的公司当作符合其它各号中规定的公司（只限于同条第4项规定中的认可对象公司）的子公司时。

四十、违反了准用于第八十七条之三第9项（包括准用于第一百条第1项的场合）规定的。

四十一、违反了准用于第八十七条之四第1项（包括准用于第一百条第1项的场合）规定、或者准用于第八十七条之四第2项（包括准用于第一百条第1项的场合）的第十七条之三第2项但书规定时。

四十二、违反了准用于第八十七条之四第2项的第十七条之三第3项或者第5项的规定而附加的条件时。

四十三、违反了第一百二十三条之二第1项规定，不提交改进计划的；或者不服从同项或同条第2项规定中的命令的。

四十四、违反了按照第一百二十六条之二第1项规定而附加的条件时（只限于与第八十七条之三第4项《包括了准用于同条第6项的场合》规定中的认可相关的）。

四十五、怠慢了本法规定中的登记，或进行不实登记的。

2．商法第四百九十八条第1项、商法特例法第二十九条之二第1项或者有限公司法第七十七条第1项、第2项规定中的人，妨碍了第四十一条之二第10项或者第四十四条第2项规定中的调查时，与前项同样。

3．渔业协会联合会或者水产加工业协会联合会的董事或者职员，无故泄露或盗用与第八十七条第1项第十号或第十一号或者第九十七条第1项第七号规定中的监察事业相关的秘密时，处50万日元以下罚款。即使该人不再是董事或职员以后，发现有该违法行为时，同样论处。

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第一百三十二条 违反了准用于第九十五条之四的禁止个人垄断法第四十条、第四十六条、第五十一条之二及第五十三条之二规定时，准用同法第九十二条之二、第九十四条及第九十四条之二的规定。

《中国海洋法学评论》稿约

《中国海洋法学评论》(*China Oceans Law Review*, 以下简称《评论》) 是全国性的海洋法领域优秀学术著述的汇辑，着重研究与海洋相关的法律与政策，秉承“海纳百川，有容乃大”的精神，力求吸取国内外该领域的一切先进成果。同时在现有法学学科划分的基础上，打破学科藩篱，将视野拓展到一切关于海洋的法学理论、司法实践以及法律运作实务。本刊对于理论探索与实证究并重，以期推动海洋相关法律科学的发展，为各位专家学者提供学术研究和交流的平台。

《评论》由厦门大学法学院以及厦门大学海洋政策与法律中心（Xiamen University Center for Oceans Policy and Law, XMU-COPL）主办，由（香港）中国评论文化有限公司出版，每年两期。为此，热忱欢迎各位学界同仁及实务界人士不吝赐稿，并立稿约如下：

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地址:中国福建厦门大学法学院
厦门大学海洋政策与法律研究中心《中国海洋法学评论》编辑部
邮编: 361005
电话:（86-592）-2187383；（86-592）-2187781
传真:（86-592）-2187781
E-mail: colr@xmu.edu.cn; copl@xmu.edu.cn

《中国海洋法学评论》编辑部 敬启

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（3）傅崐成：《联合国教科文组织 2001 年〈水下文化遗产保护公约〉评析》，

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（4）褚晓琳、傅崐成：《两岸合作开发南海渔业资源规划研究》，载于《中国海洋法学评论》2012 年第 2 期，第 7 页。

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（2）John Hare, Maritime Law Update South Africa 2002, at http://www.ports.co.za/legalnews/article_0732.html, 14 May 2004.

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《中国海洋法学评论》编辑部编订

On China's Regulation of Foreign Military Ships in Its Territorial Seas: Reflections on the Incident of Iran's Seizure of British Navy Soldiers

TIAN Shichen*

Abstract: Recently, the incident of Iran's seizure of British Navy soldiers has brought about widespread concern in the international community and became a classic case of international law. Taking a neutral point of view, this article puts forward and analyzes the main issues of international law involved in this event, and presents suggestions on how to improve China's current systems for regulating foreign military ships in its territorial seas. .

Key Words: Incident regarding the seizure of navy soldiers; Territorial sea; Regulation of foreign military ships; United Nations Convention on the Law of the Sea

I. Foreword

On March 23, 2007, in the waters connecting Iran and Iraq (called Shatt-al-Arab waterway by Iraq and Arvand Roud by Iran),[1] Iran captured 15 British Navy

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* TIAN Shichen, assistant researcher at Research Office of Policy for Maritime Security, Naval Academic Institute. Any views or positions presented in this paper are solely those of the author and do not necessarily represent those of the institute.

1 On June 13, 1975, based on the Algiers Agreement signed by the two States on March 6 of the same year, Iran and Iraq concluded the Treaty concerning the Frontier and Neighborly Relations between Iran and Iraq. This Treaty delimited the land frontier between the two States as well as the river frontier from the terminal of the land frontier in Shatt-al-Arab Waterway to the estuary of Shatt-al-Arab Waterway, including the boundary of their territorial seas. However, the Treaty did not delimitate the maritime frontier between the two States beyond the estuary of Shatt-al-Arab Waterway. Before the outbreak of the Iran-Iraq war in 1980, Iraq terminated this Treaty unilaterally. The complete text of the Treaty, at http://www.meij.or.jp/text/border/Iran-Iraq/iraqiran1975.htm, 6 April 2007.

soldiers and Marines[2] while, according to a UN resolution, they were performing an anti-smuggling task on two rubber dinghies affiliated to Type 22 Frigate "Cornwall" (HMS Cornwall) of the Royal Navy. Through diplomatic efforts of both parties and multilateral mediation, on April 4, the incident dramatically ended. Iran took the initiative to release these navy soldiers, which was deemed an "Easter gift to the British people". The incident occurred during a sensitive period when the UN Security Council was discussing possible sanctions to be imposed on Iran's nuclear program and it was rumored that the UK and the USA would take military action against Iran. In addition, the USA had just detained Iranian diplomats in Iraq. As a result, the international community paid special attention to the incident. Putting aside complex international politics and international relations, from the perspective of international law the incident is a classic case of international law involving a multitude of international law aspects, such as the international law of the sea, State jurisdictional immunities and so on. Therefore, in particular, this incident could serve as an excellent example to reflect upon when considering China's regulation of foreign military ships in its territorial seas.

The entire process of Iran's seizure of British Navy soldiers involved many legal facts and acts, which need to be examined individually in order to determine which State was wrongdoing. Meanwhile, because the incident was finally settled without recourse to judicial proceedings, the place of the incident, which was the biggest dispute between both parties on the facts of the case, had never been determined (see Fig. 1): the UK believed that the incident occurred in Iraqi waters, while Iran believed that the incident occurred in Iranian waters. This made it difficult to determine the legal nature of the whole incident. Therefore, it is necessary to analyze the issues of international law involved in this incident from a neutral standpoint. The uncertain fact mentioned above shall be used as a logical point to kick start the investigation on the legitimacy of both State parties. To this end, through assumptions and logical reasoning, the following questions of international law will be discussed in this paper: 1) If the incident occurred in Iraqi territorial sea, or in the territorial sea of Iran, does Iran have jurisdiction over British warships and Royal Navy soldiers? 2) If the incident occurred in the territorial sea of Iran, can the UK assert that its warships enjoy the right of innocent

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2 They were collectively referred to as "Navy soldiers" in Chinese news media. In fact, according to British media, they included Navy soldiers and Marines. In view of the popular Chinese saying, "Navy soldiers" herein refers to "Navy soldiers and Marines".

passage? 3) If the incident occurred in the territorial sea of Iran, what legal facts and basis may Iran assert for its seizure? 4) If the incident occurred in the territorial sea of Iran, can the UK assert State jurisdictional immunity for its warships and Navy soldiers? 5) If the British navy was acting in accordance with a resolution of the UN Security Council, is Iran obliged to tolerate the UK's performance of tasks in its territorial sea? 6) If the incident occurred in the territorial sea of Iran, can Iran prosecute the British Navy soldiers for "espionage"? 7) If the incident occurred in the territorial sea of Iran, is Iran obliged to inform the British Consulate in Iran regarding its seizure of British Navy soldiers? 8) If the incident occurred in the territorial sea of Iran, can the UK exercise the right of diplomatic protection in respect of the detained Navy soldiers? 9) What proceedings have been provided in international law to resolve the dispute between the UK and Iran? 10) Finally, it is worth reflecting on whether China will have sufficient measures to deal with similar incidents (if any) in China's territorial seas in terms of legislation and law enforcement?

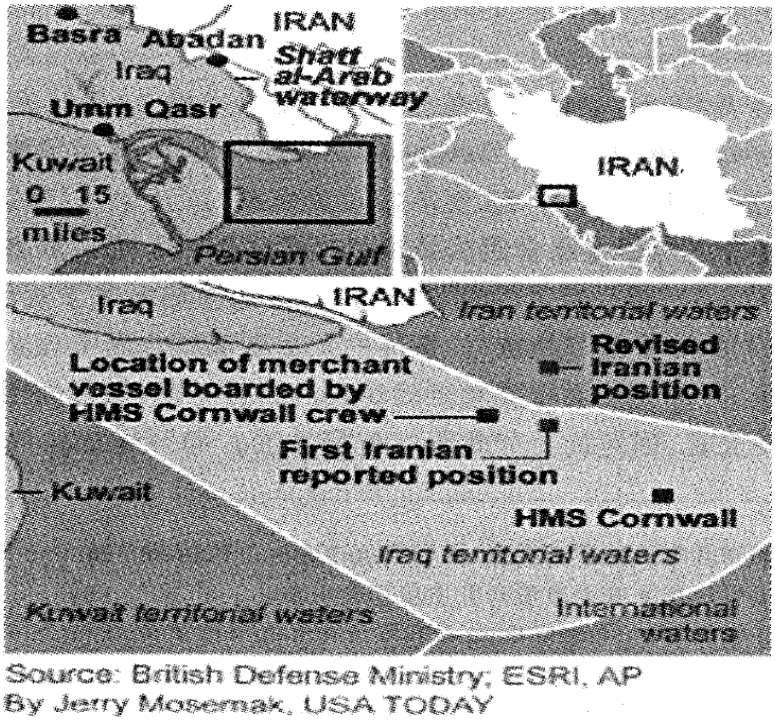

Fig. 1 Location of the Incident Provided by British Defense Ministry[3]

3 At http://www.mod.uk/DefenceInternet/DefenceNews/MilitaryOperations/ModBriefingShowsRoyalNavyPersonnelWerelnIraqiWaters.htm, 18 May 2007.

II. Does Iran Have Jurisdiction over British Warships and Royal Navy Soldiers?

In accordance with the general principle of international law, sovereign equality, every State holds maximum internal power and external independence and no State may exercise jurisdiction over any other State or any national thereof. To this end, international law has provided general principles for the exercise of State jurisdiction, namely the principle of territoriality and the principle of nationality. According to the principle of territoriality, a State can only exercise jurisdiction over all persons, things or acts within its own territory. According to the principle of nationality, a State may exercise jurisdiction over its own nationals in another State as well as any person or act aimed at its own nationals. State jurisdiction involves many aspects including legislation, administration and jurisdiction, in which the exercise of an international criminal jurisdiction contains the principle of protective jurisdiction and the principle of universal jurisdiction. According to the principle of protective jurisdiction, a State may exercise jurisdiction over a foreigner who has committed a crime against it in a foreign State. According to the principle of universal jurisdiction, a State may exercise jurisdiction over any international crime applicable to universal jurisdiction, regardless of the nationality of the offender or the place where the crime occurs. However, the protective jurisdiction and the universal jurisdiction are complementary and exceptional to territorial supremacy and personal supremacy and there are strict restrictions in international law. Regarding this case, as an act to exercise State jurisdiction, Iran's seizure of British Navy soldiers shall comply with the above-mentioned internationally accepted principles of exercising State jurisdiction. In this case, the British Navy soldiers were implementing an anti-smuggling task in disputed waters between Iran and Iraq and the British Navy soldiers are not Iranian nationals. In addition, the anti-smuggling action was not clearly aimed at Iran or any Iranian national. The British Navy soldiers had not committed any international crime clearly applicable to universal jurisdiction. Therefore, it is clear that the principles of nationality, protective jurisdiction and universal jurisdiction are not applicable to the case. Consequently, the dispute between both parties focused on the specific location of the incident, which was critical to whether Iran could exercise jurisdiction over the British Navy soldiers according to the principle of territoriality.

Judging by Iran's statement, these Navy soldiers were detained because they had entered the waters of Iran illegally, which referred to its territorial sea

according to the specific circumstances of the case. Iran supported its statement with the confession of the British Navy soldiers and claimed that it had provided the UK with the geographic coordinates of the location of the incident. In contrast, the UK believed that the Navy soldiers were implementing an anti-smuggling action in the waters of Iraq and supported such an opinion with its GPS data. The opposing statements of both parties made it difficult to determine the legal nature of the incident. Furthermore, the border dispute between Iran and Iraq in such waters has yet to be settled even in present times. In 1975, both States concluded a delimitation protocol recognizing the river frontier between them as the middle line of the main channel of Shatt-al-Arab Waterway from the terminal of the land frontier in Shatt-al-Arab Waterway to the estuary of Shatt-al-Arab Waterway in the Persian Gulf.[4] The foregoing protocol also provided that the river frontier should be re-measured every ten years by both States.[5] For the purpose of this protocol, on the one hand, both parties had not re-determined the position of the middle line for more than 20 years; on the other hand, with the outbreak of the Iran-Iraq war five years after the conclusion of the protocol, the protocol was unilaterally terminated by Saddam.[6] In addition, the impact of war on the effectiveness of border treaties was still unclear in international law.[7] Due to the above-mentioned factors, it is difficult to determine whether the 1975 delimitation protocol between the two States was still valid when this incident occurred, which in turn further complicates the dispute regarding the location of the seizure. In terms of the impact of the protocol on this case, if it were to be valid it would have only an indirect impact. This is due to the fact that the incident occurred in the disputed territorial

4 See Art. 2 (1) of the Protocol concerning the Delimitation to the River Frontier between Iran and Iraq under the 1975 Treaty concerning the Frontier and Neighborly Relations between Iran and Iraq.

5 See Art.6 of the Protocol concerning the Delimitation to the River Frontier between Iran and Iraq under the 1975 Treaty concerning the Frontier and Neighborly relations between Iran and Iraq; See also Craig Murray, "Fake Maritime Boundaries" and "Captured Marines (Again)", at http://www.craigmurray.co.uk/, 3 April 2007. Craig Murray, a former British ambassador to Uzbekistan in Central Asia, attended the Third United Nations Conference on the Law of the Sea as a representative of the British government. In addition, he has participated in several negotiations between the United Kingdom and its neighboring States (such as Ireland, France and Denmark) on maritime delimitation.

6 Dugdale-Pointon, TDP., Iran-Iraq War 1980–1988, at http://www.historyofwar.org/articles/wars_iraniraq.html, 3 April 2007.

7 Some scholars argue that the treaties on cession of territories and delimitation of borders shall not be terminated due to the outbreak of war. See Li Haopei, *An Introduction to the Law of Treaties*, Beijing: Law Press China, 2003, p. 469. (in Chinese)

sea beyond the estuary of Shatt-al-Arab Waterway in the Persian Gulf where the extended line of the river frontier has no legal effect in determining the sea frontier between the two States. From a neutral standpoint, we can only make some logical inferences in accordance with international law based on specific assumed facts. If the incident occurred in the territorial sea of Iraq, Iran's act of seizure was clearly illegal. Conversely, if the incident occurred in Iran's territorial sea, there was not sufficient evidence to prove the legitimacy of Iran's act of seizure. The legitimacy of Iran's act of seizure shall be further investigated according to other rules of international law, involving a series of issues of international law, such as the innocent passage of foreign warships in territorial seas, the right of protection of the State in its territorial seas, the immunity of warships from State jurisdiction, the diplomatic protection of foreign States and so on.

III. Can the UK Assert that Its Warships Can Exercise the Right of Innocent Passage in the Territorial Sea of Iran?

According to the 1982 UNCLOS (hereinafter "the Convention"), the coastal State has complete and exclusive sovereignty in its territorial sea, but subject to the regime of innocent passage for foreign ships. The regime of innocent passage refers to the navigation regime based on which foreign ships may pass through the territorial seas of the coastal State continuously and expeditiously, without being prejudicial to the peace, good order or security of the coastal State. The Convention formulates express provisions on the right of innocent passage of foreign merchant ships in the territorial seas of the coastal States. Such provisions are codified based on the relevant provisions of customary international law and have not caused much dispute among various States. However, with regard to whether foreign warships could enjoy the same right of innocent passage as merchant ships in the territorial seas of coastal States, there have always existed heated debates in the international community. On the Third UN Conference on the Law of the Sea on which the Convention was formulated, the United States, the former Soviet Union and other maritime powers advocated that all ships, including warships, were entitled to the right of innocent passage, while China and more than 20 other developing countries argued that foreign warships shall give notice to the coastal State and obtain its approval prior to entering the territorial seas of such coastal State. Eventually, no

express provisions related to this issue were formulated in the Convention. As a consequence, there were no such provisions in the law of international agreements. Since the Convention was adopted, based on the legislation and practices of various States concerning the passage of foreign warships through the territorial seas thereof, the coastal States may permit the innocent passage of foreign warships through their territorial seas without adding special restrictions, or provide that such passage shall be subject to prior notice or approval or performance of other obligations. The foreign warships intending to exercise such rights are obliged to comply with the laws and regulations of the coastal States on foreign warships passing the territorial sea thereof.[8]

Iran issued a statement when signing the 1982 Convention, requiring foreign warships to obtain its prior permission before entering its territorial sea.[9] In Article 9, "Exceptions to Innocent Passage" of the Act on the Marine Areas of the Islamic Republic of Iran in the Persian Gulf and the Oman Sea as of May 1993, it was further defined that warships, submarines, nuclear-powered ships as well as ships carrying nuclear substances or any other hazards or toxic substances that are dangerous to the environment shall seek Iran's approval before they exercise the right of innocent passage in the territorial sea of Iran. Therefore, in terms of this case, if Iran's assertions were true, the British Navy soldiers' act of entering the territorial sea of Iran without the permission of the Government of Iran was illegal. In addition, the main dispute between both parties focused on the location of the incident, rather than whether the British warships could enjoy the right of innocent passage in the territorial sea of Iran. This in turn can explain that if the incident really occurred in the territorial sea of Iran, even the UK itself would deem the said act illegal. The UK had not advocated that its warships may enjoy the right of innocent passage in the territorial sea of Iran. [10]

However, even if the British warships could not exercise the right of innocent passage in the territorial sea of Iran, and if the only violation was the failure to seek

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8 Shao Jin, General Rules of International Law concerning the Innocent Passage of Foreign Warships through the Territorial Sea, *Chinese Yearbook of International Law*, Vol. 1989, pp. 134~135. (in Chinese)

9 "Declarations and statements", prepared by the Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, at http://www.un.org/Depts/los/convention-agreements/convention-declarations.htm, 3 April 2007.

10 In a similar incident, namely, Iran's seizure of British soldiers in 2004, the UK made an official apology to Iran and admitted its illegal entry into the territorial sea of Iran because the British soldiers were not aware of entering Iran's territorial waters.

prior approval from the Iranian government, there was still not sufficient evidence to support Iran's legitimacy in its seizure act. It is provided in Article 30 of the Convention that "[i]f any warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance therewith which is made to it, the coastal State may require it to leave the territorial sea immediately." It is provided in Article 31 of the Convention that "[t]he flag State shall bear international responsibility for any loss or damage to the coastal State resulting from the non-compliance by a warship or other government ship operated for non-commercial purposes with the laws and regulations of the coastal State concerning passage through the territorial sea or with the provisions of this Convention or other rules of international law." Therefore, because the British Navy soldiers had just entered the territorial sea of Iran without permission but had not conducted any act that was not innocent passage, in principle, Iran could only ask the British Navy soldiers, and the rubber dinghies they traveled in, to leave its territorial sea immediately. The UK should bear international responsibilities arising from the illegal act of its warships. If Iran intended to take further measures and detain the British Navy soldiers and their rubber dinghies, it should propose other facts and legal basis.

There are other issues concerning the innocent passage of warships through the territorial seas of other States. For example, whether a warship can navigate into foreign territorial seas directly to avoid danger, or whether a warship can enter the territorial seas of a coastal State directly without its permission in order to render assistance to those in distress at sea, namely, danger entry and assistance entry. There is still no uniform legislation or practices concerning this issue among various States. Some States allow warships to exercise the right of innocent passage directly under any circumstance without special restrictions, including exercising such right to avoid danger and to render assistance to those in distress at sea; some States require prior notice or permission, but allow warships to go into the territorial sea thereof directly in case of danger. For example, according to the Ordinance Governing the Admission of Foreign Warships and Military Aircraft to Danish Territory in Time of Peace (May 1999), foreign warships shall not be allowed to stop or anchor within territorial waters of Denmark except where stopping or anchoring is essential for ordinary navigation or is rendered

necessary by force majeure or by distress.[11] For the purpose of this case, there is no direct evidence to prove that the rubber dinghies were in danger or looking to offer assistance to those in distress at sea, and no State party had claimed any right thereby.

IV. What Legal Facts and Basis May Iran Assert for Its Seizure of British Navy Soldiers?

As mentioned earlier, Iran could not detain the British Navy soldiers and their rubber dinghies just because of their act of non-innocent passage through the territorial sea of Iran. If Iran intended to prove the legitimacy of its seizure, it should have been able to assert other legal acts and legal basis. In Article 19 of the Convention, the "meaning of innocent passage" was defined and some acts of non-innocent passage were listed in particular. It was stipulated in Paragraph 1, Article 27 of the Convention that "[t]he criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases: (1) if the consequences of the crime extend to the coastal State; (2) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; (3) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or (4) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances." In addition, Article 25 of the Convention specially stipulated "rights of protection of the coastal State", based on which the coastal State may take necessary steps to prevent passage which is not innocent and suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships, but only after such a suspension has been duly published. The foregoing provisions in the Convention had been transformed into legislation in the Act on the Marine Areas of the Islamic Republic of Iran in the Persian Gulf and the Oman Sea as of May 1993. Accordingly, it can be inferred that if Iran intended to prove the legitimacy of its act of seizure, it should prove at least that the British Navy soldiers had committed

11 Ordinance Governing the Admission of Foreign Warships and Military Aircraft to Danish Territory in Time of Peace, at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DNK-1999_Ordinance.pdf, 3 April 2007.

any of the following illegal acts in its territorial sea: (1) British Navy soldiers and their rubber dinghies had engaged in the above-mentioned non-innocent passage as stipulated in Article 19 of the Convention and shall be detained according to Iran's domestic law; (2) British Navy soldiers had committed any illegal act over which Iran may exercise jurisdiction in accordance with Article 27 of the Convention; (3) British Navy soldiers had violated the measures and steps taken by Iran in accordance with Article 25 of the Convention to prevent passage which is not innocent or suspend innocent passage; (4) In any such case, with regard to the enforcement actions of Iran in its territorial sea, if the British Navy soldiers resort to violence or resist by force, Iran may exercise the right of self-defense in accordance with the requirements of proportionality in international law, including detaining British Navy soldiers and their rubber dinghies.

V. Can the UK Assert State Jurisdictional Immunity for Its Warships and Navy Soldiers in Iran's Territorial Sea?

Whether in the high seas or the territorial seas or internal waters of a foreign State, warships have a special legal status. From the perspective of international law, the particularity of the legal status of warships lies in the privileges and immunities they may enjoy.[12] First, warships are State property, thus they cannot be the object of any judicial execution and can be exempt from arrest or seizure. Second, warships have the attributes of State territory and are often called "floating territory of the flag State" from the perspective of legal fiction. What's more, they may enjoy jurisdictional immunity from any other country other than the flag State. Police and any official of any port agency or coastal State may not board warships unless approved by the commander thereof. The personnel and materials loaded aboard a warship shall be under the exclusive jurisdiction of the State to which the warship belongs, even in the territorial seas or internal waters of a foreign State.

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12 Robert Jennings and Arthur Watts eds., Wang Tieya et al. trans., *Oppenheim's International Law* (Book II, Volume I), Beijing: Encyclopedia of China Publishing House, 1995, p. 589 (in Chinese); Gong Renren, *A Comparative Study of State Immunity: A Common Subject among Contemporary Public International Law, Private International Law and International Economic Law*, Beijing: Peking University Press, 2005, pp. 19, 295 (in Chinese); Article 21 of United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004.

Any criminal behavior of any serviceman on a warship shall be under the exclusive jurisdiction of the captain of the warship and other authorities of the flag State of the warship. Finally, a warship is a State organ itself and its act belongs to a State act. A warship may benefit from the sovereign immunity of the State to which it belongs from the jurisdiction of other countries. Warships cannot be boarded, searched or inspected. In accordance with the provisions of the Convention, warships shall comply with the traffic control of coastal States as well as their provisions on sewage, sanitation, quarantine, etc. However, even if a warship violates these provisions, the measure a coastal State may take is limited to asking the warship to leave its territorial seas.

Although foreign warships can exercise certain privileges and immunities, it does not mean that they may act arbitrarily in the territorial seas of coastal States, free from the jurisdiction of international law or any domestic legislation of any coastal State. In fact, a civil or criminal case may be settled through diplomatic means only when the foreign warship enjoys judicial immunity. Moreover, such privileges and immunities are not absolute. In addition to the previously mentioned international responsibility for any loss or damage incurred to the coastal State the flag State shall assume, the privileges and immunities should be restricted at least in the following aspects. First, the privileges and immunities foreign warships can exercise apply mainly to times of peace, rather than to wartime. During wartime, warships are certainly military targets and can be attacked by force. Clearly, this point did not apply to this case because the two States were at peace at that time. Second, respect for the privileges and sovereignty immunities of warships are applicable mainly to those warships entering the territorial seas of another State legally. As for warships invading illegally, it is a different matter. It was specially stipulated in Article 32 "Immunities of warships and other government ships operated for non-commercial purposes" of the Convention that "[w]ith such exceptions as are contained in subsection A and in Articles 30 and 31, nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes." Therefore, in case a warship violates any provision in the "rules applicable to all ships" as contained in subsection A, Article 30 "Non-compliance by warships with the laws and regulations of the coastal State" and Article 31 "Responsibility of the flag State for damage caused by a warship or other government ship operated for non-commercial purposes", there may be exceptions to the respect for the privileges and immunities thereof. In case a warship violates any of the foregoing provisions, there are only two expressly

stipulated exceptional measures in the Convention: "The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent" as stipulated in Article 25 and "the coastal State may require it to leave the territorial sea immediately" as stipulated in Article 30. However, there are no clear answers to two questions in the Convention: 1) What are the "necessary steps" the coastal State may take? Do such steps include seizure, arrest, or even the use of force? 2) What are the steps the coastal State may take if the warships required to leave refuse to do so?

When there are no clear rules of international law, it is necessary to examine the practices of relevant States. With regard to entry into the territorial seas of the coastal States by merchant ships in violation of the provisions concerning the right of innocent passage, the case of the "Rainbow Warrior" can be referred to. In 1995, in order to conduct a nuclear test in its territorial sea, France suspended the right of innocent passage in a specified territorial area in accordance with the provisions of Article 25 of the Convention. In order to protest against the French nuclear test, the ship "Rainbow Warrior" of "Greenpeace" entered the territorial sea illegally regardless of the ban. Finally, the French government dispatched warships to board and seize the ship and to arrest the crew on board. In addition, tear gas was used during the enforcement process. With regard to entry into the territorial sea of the coastal States by warships, the case of "U137 Submarine" in 1981 and the case of "USS Pueblo" in 1968 can be referred to. In the first case, the "U137 Submarine" of Level W of the former Soviet Union intruded into the territorial sea of Sweden and ran aground, for which Sweden lodged a strong protest against the former Soviet Union. Finally, after the Swedish government interrogated the relevant personnel of the submarine, "U137 Submarine" left the territorial sea of Sweden under Swedish military ships and aircraft guard. The former Soviet Union made an official apology and compensated Sweden. In the case of "USS Pueblo", North Korea attacked the U.S. surveillance ship by force, killing one U.S. soldier and wounding several others. Finally, under the premise that the U.S. made an apology, North Korea released the 82 soldiers of the U.S. surveillance ship "Pueblo" after detaining them for one year, without returning "USS Pueblo".

Based on State practices, the privileges and immunities warships may enjoy are not absolute. As for the warships and civilian ships that enter territorial seas illegally, the coastal State may take necessary enforcement or self-defense measures, including using force. With regard to this case, if the British warships and Navy soldiers were proved to have intruded into Iran's territorial sea illegally,

in such an exceptional case as the non-innocent passage as mentioned above or when Iran took self-defense measures, the privileges and immunities of the British warships and Navy soldiers would not be respected. Based on the actual situation, Iran may seize or arrest the British warships and Navy soldiers, or even take other coercive measures.

VI. Is Iran Obliged to Tolerate the UK's Performance of Anti-smuggling Tasks in Accordance with a UN Resolution in the Territorial Sea of Iran?

Some British and American media claimed that the British Navy was implementing a task based on UN Security Council Resolution No. 1723 in Iraqi waters and Iran should respect such an act. Then, as a member of the UN, is Iran obliged to tolerate the UK's performance of anti-smuggling tasks in accordance with a UN resolution in the territorial sea of Iran? It is provided in Article 25 of the Charter of the United Nations that "[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." In addition, it is provided in Article 2 of the Charter of the United Nations that "[a]ll Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter" and that "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State." Therefore, the UN Security Council Resolution shall be binding on Iran, a member State of the UN, and Iran was obliged to help fulfill the Resolution. However, when Resolution No. 1723 is examined in detail,[13] there is no provision authorizing any military action in Iran's territorial sea. Instead, Resolution No. 1723 "[n]otes that the presence of the multinational force in Iraq is at the request of the Government of Iraq" and "affirm[s] the importance for all forces promoting the maintenance of security and stability in Iraq to act in accordance with international law". As it was shown in the Resolution, Iran was not obliged to tolerate the multinational force's implementation of military operations within its territorial sea. It was also impossible for the Resolution to provide that a State shall fulfill its international obligations with its sovereignty disregarded. An official of the Foreign and Commonwealth Office also said that

13 Security Council Resolution 1723, at http//www.un.org/News/Press/docs/2006/sc8879.doc.htm, 30 March 2007.

the British Navy soldiers were implementing an anti-smuggling task in accordance with an agreement with the Government of Iraq. Therefore, Resolution No. 1723 cannot become the legal basis for the implementation of an anti-smuggling task by the British Navy soldiers in the territorial sea of Iran, and Iran has no corresponding obligation to tolerate such action.

VII. Can Iran Prosecute the British Navy Soldiers for "Espionage"?

If the British Navy soldiers and their rubber dinghies were proved to have intruded into Iran's territorial sea illegally, can Iran prosecute the British Navy soldiers for "espionage"? In international law, espionage is defined mostly in international treaties applicable to armed conflicts. Both the Hague Convention (II) of July 29, 1899 respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land and the Hague Convention (IV) of October 18, 1907 respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land had formulated provisions related to espionage. These relevant provisions were reaffirmed in the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 1977. All of these provisions emphasize that espionage is the action of gathering intelligence in a "secret or disguised manner", with the relevant personnel not wearing military uniforms. Except for the fact that these provisions do not apply to bilateral relations in peacetime, based on the prima facie evidence in this case, the British Navy soldiers were wearing uniforms when they performed the task. However, in the domestic legislations of various States regarding the crime of espionage, there are usually no special references to the wearing of military uniforms. Taking as an example the provisions of Article 110 of the Criminal Law of the People's Republic of China of 1997 on the crime of espionage, objectively speaking, there are only two acts of espionage: (1) Joining an espionage organization or accepting a mission assigned by it or its agent; or (2) Pointing out bombing or shelling targets to the enemy. Therefore, if the British Navy soldiers entering the territorial sea of Iran were proved to have engaged in acts of espionage by Iran in accordance with the judicial proceedings thereof, Iran may prosecute them for espionage in accordance with the judicial proceedings thereof. Considering that this incident occurred during a sensitive period when it

was rumoured that the UK and the USA would take military action against Iran, if the British Navy soldiers were proved to have entered the territorial sea of Iran, they may have been suspected of committing an act of espionage simply based on their entry. It wouldn't seem difficult to find the relevant evidence.

VIII. Is Iran Obliged to Inform the British Consulate in Iran?

Referring to Iran's handling of this incident, the UK criticized Iran for its failure to fulfill its obligations under international law, specifically the failure to notify the British consulate in Iran of the incident, and the failure to send details of the detained personnel and their specific location. In domestic law, after a suspect is summoned or a coercive measure is taken against a suspect, he is usually entitled to appoint a lawyer to provide legal advice and to file petitions and complaints on his behalf. This provision usually applies to any foreigner who has committed any crime in a State, too. In order to strengthen the protection of foreign nationals, international law imposes an obligation to notify the consular post of the sending State regarding any incidents involving its nationals. It is stipulated in Article 36 of the Vienna Convention on Consular Relations of 1963 that "if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph." It is also provided in Article 36 of the same convention that "consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation." The foregoing provisions are part of international law concerning the right to inform the consular post. The sending State shall bear "the obligation to inform the consular post of the sending State" and the sending State enjoys "the right to receive notice". However, it is also provided in Article 36 that "[t]he rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded

under this article are intended." In fact, in the domestic legislation of various States, there are certain restrictive provisions regarding the rights of suspects to meet with a lawyer or to accept a public trial, which are usually related to the crime endangering State security or the crime involving State secrets. For example, in the Criminal Procedure Law of the People's Republic of China, it is provided in Article 96 that "[i]f a case involves State secrets, the criminal suspect shall have to obtain the approval of the investigation organ for appointing a lawyer" and it is provided in Article 152 that "[c]ases of first instance in a People's Court shall be heard in public. However, cases involving State secrets or private affairs of individuals shall not be heard in public." Therefore, with respect to this case, if there are similar provisions in the domestic legislation of Iran, Iran may restrict the rights of the British consular officials to meet with the detained British Navy soldiers, even without a public trial.

IX. Can the UK Exercise the Right of Diplomatic Protection regarding Its Detained Navy Soldiers?

Customary international law has specific rules regarding a State's right to exercise its diplomatic protection towards its nationals from being infringed upon by any illegal act while in a foreign State. According to Article 1 of the Draft Articles on Diplomatic Protection, adopted on the first reading of the International Law Commission of the United Nations: "diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility." Generally speaking, a State may exercise the right of diplomatic protection based on three conditions:[14] 1) Injury caused by an internationally wrongful act. Injury caused by an internationally wrongful act of another State to a national of the State (including a natural or legal person) shall be one of the preconditions for diplomatic protection. 2) The person proved to have been injured has the nationality of the State. It is required in Draft Articles on Diplomatic Protection that the injured person shall have the "continuous nationality" of the

14 Bai Guimei, *International Law*, Beijing: Peking University Press, 2006, pp. 269~270. (in Chinese)

State claiming diplomatic protection. 3) Exhaustion of local remedies. According to this rule, a State may not present an international claim in the international community on behalf of an individual, or an individual may not resort to an international organ directly before such individual has exhausted all judicial or administrative remedies within the State where the rights thereof have been infringed.

With respect to this case, two of the foregoing three preconditions can hardly be met, except that the detained navy soldiers are UK nationals. First, there was a serious dispute between the two States over whether Iran had implemented an internationally wrongful act. Second, before the incident was finally settled, the judicial proceedings within Iran had been ongoing all the time, although it couldn't be said that the local judicial remedies had been exhausted. Therefore, the UK could not exercise diplomatic protection for its detained navy soldiers because the conditions in the relevant rules of international law had not been met.

X. What Proceedings Have Been Provided in International Law to Resolve the Dispute between the UK and Iran?

To settle international disputes peacefully is one of the principles of the Charter of the UN and a fundamental principle of international law. This is complementary to the principle of prohibiting the threat or use of force, and together they form the basis of contemporary international law.[15] In contemporary international law, methods of settling international disputes are divided into two types: the political method (also called the diplomatic method) and the judicial method (also called the legal method). The former mainly includes consultation and negotiation, good offices and mediation as well as investigation and conciliation, while the latter mainly includes international arbitration and international courts. As for this case, whether through a legal method or a political method, using peaceful means to settle the disputes between the two States is the international obligation that should be borne by both the UK and Iran. In fact, a similar dispute between the UK and Iran had been settled through negotiation, a political method, before. In 2004, Iran seized eight British Navy soldiers who intruded into the

15 Bai Guimei, *International Law*, Beijing: Peking University Press, 2006, p. 548. (in Chinese)

same waters in a similar incident. For such an action, the British government made an official apology to Iran, asserting that the British Navy soldiers did not know they had entered the waters of Iran. Three days later, Iran released the detained British soldiers. With respect to the possibility of using legal methods to settle disputes, because other complex issues such as arbitration agreements and jurisdiction are involved, the State parties are usually reluctant to settle disputes by resorting to legal proceedings. For both State parties of the incident, the UK and Iran, because there were great disputes over the facts of the incident, either party should have had adequate and sufficient legal evidence if it intended to go to the court without being suspected of any illegal act. Finally, the incident was settled peacefully, which showed that to settle international disputes peacefully was still the fundamental principle followed by various States. Those unilateral actions of settling international disputes by resorting to force frequently are in violation of the fundamental principles of international law.

XI. Reflections on China's Regulation of Foreign Military Ships in Its Territorial Seas

In recent years, it's not uncommon to see foreign military ships or aircraft break into China's territorial seas or airspace due to mechanical failure, bad weather and other causes. In May 2001, a warship of a certain State entered China's territorial sea without permission due to bad weather and navigated in China's territorial seas for a long time, nearly causing a friction with a China's warship that was performing monitoring tasks at that time. In May 2003, a warship of a certain State intending to visit Shanghai entered a non-agreed place in China's territorial sea several days in advance due to bad weather, giving rise to an unpleasant experience with a China's warship that was performing patrolling tasks at that time. The embassy of that State in China expressed its concern about the matter.[16] The most serious incident was the China-U.S. Spy Plane Incident of April 1, 2001. After crashing onto China's fighter aircraft, the US surveillance aircraft got damaged, intruded into China's airspace and landed on Lingshui Military Airport, Hainan Island forcibly. With the in-depth development of China's international

16 Ren Xiaofeng and Zheng Hong, To Improve the Laws concerning Entry into China's Territory of Foreign Military Ships and Aircraft in Case of Danger in Time of Peace as Soon as Possible, *Naval Military Studies*, No. 6, 2003. (in Chinese)

military exchanges and cooperation, the number of foreign warships that enter China's territorial seas lawfully, with China's approval for visits or joint military exercises, has increased dramatically. Those Russian warships participating in China-Russia joint military exercises may even be stationed in China's territorial sea for a long period. The foregoing foreign warships are likely to violate China's laws and regulations related to China's territorial seas, regardless of whether they are engaged in a legitimate or illegal military activity, whether they are in China's territorial seas or in other waters under China's jurisdiction. Regarding the illegal entry of foreign warships into China's territorial seas or the violation of existing laws while entered China's territorial sea legally, there are currently several loopholes in China's regulation systems that need to be improved.

A. China's Current Systems for Regulation of Foreign Military Ships in Its Territorial Seas

The systems for the regulation of territorial seas involve the baseline system, marine transportation, mineral resources, fisheries, environmental protection, marine scientific research, customs, immigration, health and other aspects, which are adjusted by different laws and regulations respectively. When discussing the laws involving the regulation of foreign military ships in territorial seas, they mainly include the Declaration of the Government of the People's Republic of China on the Territorial Sea of September 4, 1958, the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone of 1992, the Law of the People's Republic of China on Marine Environment Protection of 1982, the Regulations of the People's Republic of China on Prevention of Vessel-Induced Sea Pollution of 1983, the Maritime Traffic Safety Law of the People's Republic of China of 1983, the Law of Surveying and Mapping of the People's Republic of China of 1992, the Provisions of the People's Republic of China on Administration of Foreign-related Marine Scientific Research of 1996, etc.[17]

Based on a survey of the foregoing laws and regulations, China's current systems for regulating foreign military ships in its territorial seas are lacking at least in the following aspects:

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17 See the full text in Office of Policies and Regulations, State Oceanic Administration ed., *Collection of the Sea Laws and Regulations of the People's Republic of China*, 3rd ed., Beijing: China Ocean Press, 2001 edition. (in Chinese)

1. In the current legislation, there are no sufficient effective rules for the administration of military ships entering China's territorial seas legally. With respect to navigation systems for foreign warships in China's territorial seas, there are mainly the following provisions in China's current laws and regulations: No foreign aircraft and vessels for military use may enter China's territorial sea and the air space above it without the permission of the Government of the People's Republic of China;[18] While navigating through Chinese territorial seas, every foreign vessel must observe the relevant laws and regulations of the Government of the People's Republic of China;[19] Foreign submarines and other underwater vehicles, when passing through the territorial seas of the People's Republic of China, shall navigate on the surface and display their flag; The Government of the People's Republic of China has the right to take all necessary measures to prevent and stop non-innocent passage through its territorial seas; Cases of foreign ships violating the laws or regulations of the People's Republic of China shall be handled by the relevant organs of the People's Republic of China in accordance with the law;[20] In the case of violation of the laws or regulations of the People's Republic of China by a foreign ship for military purposes when passing through its territorial sea, the competent authorities of the People's Republic of China shall have the right to order it to leave the territorial sea immediately and the flag State shall bear international responsibility for any loss or damage thus caused.[21] However, the following questions cannot be answered based on the foregoing provisions: If a foreign warship intends to enter China's territorial seas, which level of governmental department should it apply for approval? What are the specific procedures? If a foreign warship violates any law or regulation applicable to China's territorial sea after it enters China's territorial sea legally with China's approval, which level of governmental department should handle the matter? What are the specific procedures? What are the necessary measures? If a foreign submarine or underwater vehicle violates the relevant provisions and

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18 Declaration of the Government of the People's Republic of China on the Territorial Sea; Article 6 of the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone of 1992; Article 11 of the Maritime Traffic Safety Law of the People's Republic of China of 1983.

19 Declaration of the Government of the People's Republic of China on the Territorial Sea.

20 Article 7 of the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone.

21 Article 10 of the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone.

does not surface, should we take appropriate measures to force it to surface, or sink it directly? What are all the necessary measures China is entitled to take to prevent and stop non-innocent passage through China's territorial sea? Do these measures include the use of force? Specifically speaking, which level of "competent authority" should command the foreign warships that have acted illegally to leave China's territorial sea? If the foreign warships that have acted illegally refuse to leave China's territorial sea, what should we do? There also exist many similar problems in applying the legislation related to environmental protection, marine pollution, marine surveying and research, etc. to military ships. Specific rules for the implementation of superordinate laws need to be formulated as subordinated laws, otherwise it will be very difficult to handle the illegal activities of foreign warships in China's territorial seas in practice.

2. In the current legislation, there are no provisions for controlling foreign military ships that enter China's territorial sea illegally, or in case of danger, or for the purpose of rendering assistance for those in distress, or the illegal activities conducted by foreign military ships after they enter China's territorial sea legally with China's approval. In the current legislation, there are provisions that foreign military ships shall enter China's territorial sea only after being approved by China, but there are no provisions on foreign military ships that enter China's territorial sea illegally, or in case of danger. It is provided in Article 11 of the Maritime Traffic Safety Law of the People's Republic of China that "[n]on-military vessels of foreign nationality may not enter the internal waters and harbors of the People's Republic of China without the approval of its competent authorities. However, under unexpected circumstances such as critical illness of personnel, engine breakdown or the vessels being in distress or seeking shelter from weather when they do not have the time to obtain approval, they may, while entering China's internal waters or harbors, make an emergency report to the competent authority and shall obey its directions." This Article lays down general provisions for the procedures that non-military vessels of foreign nationality shall follow when they enter China's territorial seas in case of danger, but does not lay down any provisions for military vessels of foreign nationality to follow when they enter China's territorial seas in case of danger. Similarly, in accordance with the provisions of the existing laws, if a ship is in distress within China's territorial seas, foreign warships in adjacent sea areas still cannot enter China's territorial sea to render assistance. Regarding foreign warships temporarily stationed in China's territorial seas or internal waters when they visit a Chinese harbor, and the foreign

ships that are stationed in China's territorial sea for long periods of time to perform joint military exercises, there are still no provisions in the existing laws of China concerning jurisdiction over the illegal acts thereof and other related problems.

3. There are no uniform law enforcement forces and authorities to regulate foreign warships in China's territorial seas. Based on China's current systems for regulating its territorial seas, one matter may be modulated by several authorities and different aspects of an action may be regulated by several authorities respectively. For example, marine environmental pollution is regulated by the competent administrative department for environmental protection under the State Council, the competent administrative department of State Oceanic Administration of the People's Republic of China, the competent administrative department of State Fishery Administration of the People's Republic of China, military environmental protection department, etc. In addition, in China's existing legislation, "relevant authorities", "competent authorities" and other terms are used too much. With respect to which national authority at which level should handle which kind of matter specifically in practice, there are no definite provisions in China's current laws. Due to the foregoing problems, in practice, it is very difficult to regulate foreign warships in China's territorial seas.

B. Reflections on the Improvement of China's Current Systems for the Regulation of Foreign Military Ships in Its Territorial Seas

In summary, if foreign military ships that have entered China's territorial sea legally with China's approval violate the laws and regulations applicable to China's territorial seas, such as intelligence gathering, illegal surveying, causing environmental pollution, performing criminal acts and so on; if foreign military ships or aircraft enter China's territorial seas without permission or in case of danger, regardless in terms of legislation or in terms of law enforcement, no sufficient and effective countermeasures can be provided based on China's current systems for regulating foreign military ships in its territorial seas and it will be difficult for us to prevent a second China-U.S. Spy Plane Incident. Presently, it is of prime importance to consider two courses of action:

1. To improve the relevant legislation. In the previous section of this paper, detailed rules that should be formulated for the implementation of superordinate laws have been illustrated. Next, we should make amendments to existing legislation and formulate new laws. The right of protection of coastal States is

expressly stipulated in Article 25 of the 1982 Convention. Based on such a right of protection, the coastal State may suspend innocent passage within specified territorial seas after issuing a proper notice (such as for the purpose of military exercises in its territorial seas). However, there are no such provisions in China's current territorial sea-related laws. With respect to foreign warships visiting China temporarily, or foreign warships stationed in the territorial seas of the receiving State for a long period for the purpose of military exercises, we may fill in the gaps in China's legislation by learning from foreign legislative practices. There are four major legislative models in foreign States: 1) Formulating a special law to regulate foreign warships entering the territorial seas during the time of peace, such as The Government on the Activities of Foreign Warships Visiting the Socialist Republic of Vietnam of 1996, as well as the previously mentioned laws of Sweden and Denmark on the entry into territorial seas and airspace of foreign naval ships and military aircraft during times of peace. 2) Formulating provisions on the entry into territorial seas and airspace of foreign naval ships and military aircraft during the time of peace in comprehensive maritime codes, such as the legislative model of Iran and the practices of many other Eastern European countries. 3) Formulating Visiting Forces Law aimed at foreign forces stationed in the receiving State temporarily or for a long period, such as the Visiting Forces Law of the UK and many commonwealth countries (Australia, New Zealand and Singapore), as well as the Law on Transit of Foreign Forces formulated by Mongolia. 4) Signing a Status of Forces Agreement (SOFA) between the sending State and the receiving State, such as the SOFA between the United States and Japan, South Korea and other allies, the SOFA between NATO and its member States, as well as the SOFA between the UN and the receiving States during the process of United Nations peacekeeping operations.

2. To unify the law enforcement forces and to clarify the competent authorities and the extent of powers they hold. It is not new but a commonplace topic to unify maritime law enforcement forces. It is not only related to law enforcement in territorial seas, but also related to law enforcement in contiguous zones, exclusive economic zones and other sea areas under jurisdiction. To unify law enforcement forces has been called for several times. However, with intersecting and conflicting interests of different departments, this suggestion is likely to simply remain a slogan for quite a long period.

Currently, the maritime safety in China's territorial seas remains complex. Every year, the surveying ships of the United States Navy conduct illegal marine

scientific investigation activities (called "military surveying activities" free from the jurisdiction of coastal States by the USA) for long periods of time in the East China Sea and the Yellow Sea. In addition, every year, the USA carries out routine joint military exercises with South Korea and Japan respectively. Year in and year out, the USA and Japan carry out military reconnaissance over the exclusive economic zones under the jurisdiction of China. These foreign military ships and aircraft are prone to enter China's territorial seas or airspace illegally or in case of danger. Those foreign warships that enter China's territorial sea legally are also likely to commit serious crimes. Therefore, it's urgent for us to improve China's current systems for the regulation of foreign military ships in China's territorial seas.

Translator: LI Cun'an
Editor (English): Vasile Gadinceanu

Current Developments in Marine Affairs of Japan and Lessons for China

JIN Yongming*

Abstract: Currently, major States in the world have begun to attach great importance to the exploration and exploitation of oceans, and developed comprehensive strategy and legislations to safeguard their maritime rights and interests. Since the time China-Japan East China Sea dispute became prominent, Japan has issued a series of policies and acts, and taken corresponding measures with an aim to protect its maritime rights and interests. This article seeks to make an analysis of Japan's moves on marine affairs from three aspects, namely, maritime measures regarding the East China Sea dispute, maritime legislation for safeguarding its maritime rights and interests, and development of its integrated maritime strategy. On the basis of the analysis, this article proposes some detailed suggestions for the improvement of China's marine policies and legislation as well as the implementation of China's strategy for marine development.

Key Words: Maritime measures; Maritime legislation; Integrated strategy

I. Introduction

As more attention has been given to marine rights and interests in the 21st century by various States, protection of maritime rights and interests has become a prominent issue. Some of the world's major maritime States have already developed strategies or laws on marine affairs, for example, the Oceans Act of 2000 (the US, 2000), An Ocean Blueprint for the 21st Century: Final Report of the U.S. Commission on Ocean Policy (the US, 2004), National Ocean Policy Implementation Plan (the US, 2004), Canadian Maritime Strategy (2002), the UK Marine Research and Development Funds (2004), Oceans in the 21st Century (South

* JIN Yongming, Associate Research Fellow at Institute of Law, Shanghai Academy of Social Sciences & visiting research fellow at Graduate School of Letters, Hiroshima University.

Korea, 2000), Constitution of the Oceans (South Korea, 2005), and Towards the Future Maritime Policy for the Union: a European Vision for the Oceans and Seas (EU Maritime Policy: Green Paper 2006). As an island nation whose survival and development depend largely on the sea, Japan has put a lot of attention into the protection of its maritime rights and interests since the advent of the 21st century. Analyzing the latest steps taken by Japan in three aspects of its maritime policies, namely, maritime measures regarding the East China Sea dispute, maritime legislation for safeguarding its maritime rights and interests, and development of its comprehensive maritime strategy, this article proposes a strategical framework which China should follow in order to safeguard China's maritime rights and interests, improve China's legal system, and promote the development and implementation of the strategy and planning for China's national marine development.

II. Some Noteworthy Steps Taken by Japan on Maritime Affairs

A. Relevant Measures Taken by Japan in Response to the East China Sea Dispute

Though seven rounds of consultations have been held since the East China Sea dispute gained prominence in May 2004, the two sides still have serious disagreements on the applicable principles for the delimitation of the East China Sea, the designation of disputed sea areas, and especially the designation of the

Joint Development Zone.[1] In response to these maritime issues, particularly since the East China Sea dispute became prominent, Japan has taken several measures to improve maritime institutions and relevant legal systems. Such measures include:

1. Suggestions and measures on maritime issues put forward by the Liberation Democratic Party (the ruling party of Japan) in 2004.

On June 15, 2004, the Policy Research Council of the Liberal Democratic Party put forward "nine suggestions for safeguarding Japan's maritime rights and interests", which can be divided into two main categories:

(1) Suggestions on the planning and implementation of an integrated maritime strategy. Specific suggestions include: first, cabinet meetings relating to maritime rights and interests should be established and maritime strategies and policies should be formulated and implemented; second, the Japanese government should lead the implementation of resource investigation and have the authority to grant enterprises and organizations the right to trial mining on the Japanese side of the "median line"; third, the delimitation dispute in the East China Sea should be resolved as soon as possible; fourth, the application for the investigation of the outer continental shelf should be expedited and submitted to the Commission on the Limits of the Continental Shelf in 2009.

Suggestions on the maintenance of maritime order. Specific suggestions are: first, the crisis management system of Japan should be improved so as to better respond to unexpected events including any emergencies arising out of daily incidents; second, the warning and monitoring system used by the Coast Guard in the maintenance of the security of the Diaoyu Islands and their surrounding areas

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1 So far, China and Japan have held seven round of consultations on the East China Sea issue: the first consultation was held on October 25, 2004 in Beijing; the second from May 30 to May 31, 2005 in Beijing; the third from September 30 and to October 1, 2005 in Tokyo; the fourth from March 6 to March 7, 2006 in Beijing; the fifth on May 18, 2006 in Tokyo; the sixth from July 8 to July 9, 2006 in Beijing; the seventh on March 29, 2007 in Tokyo. It should be fully affirmed that, though theses consultations have not achieved any substantial progress, but they have eased the dispute between the two sides to some degree. The most noteworthy is the sixth round of consultations where the two sides reached principled consensus on the establishment of maritime liaison mechanism to cope with unexpected events in the East China Sea, which undoubtedly delayed the further escalation of the East China Sea dispute, prohibited both sides from carrying out exploration and exploitation activities in the sea areas surrounding the median line, and had laid the foundation of cooperation for further dialogues between the two sides. Considering that there may be controversy over the identification and definition of unexpected events in the East China Sea in the future, it is necessary to further refine the principles on the maritime liaison mechanism to cope with unexpected events in the East China Sea so that they can be effectively implemented and executed.

should be strengthened; third, tough measures should be taken against Chinese marine survey vessels; fourth, the administrative management and control over the Okinotori Reef and the Diaoyu Islands should be reinforced; fifthly, a system which can respond to all unexpected events should be established by strengthening the capacity of Japan Self-Defense Forces and making flexible use of the Japan-U.S. Security Framework.[2]

It should be noted that some of above suggestions are specific measures to ensure Japan's maritime rights and interests in the East China Sea, while others are measures to respond to maritime crisis, institutional arrangements to deal with the conflict of maritime interests between China and Japan, and the plan to develop maritime strategy.

Following these suggestions, the Japanese government established the "cabinet meeting relating to maritime rights and interests" in June 2004, and encouraged Japanese enterprises to exploit seabed oil and gas resources in the East China Sea (especially on the east of the median line between China and Japan). In July 2004, the Japanese government began its oil and gas exploration in the disputed sea areas on the east of the so-called "median line", with research vessels rented from Norway. It was attempting to conduct a survey of the geological structure of the seabed surrounding the Chunxiao gas field.

2. Suggestions for marine issues and relevant measures put forward by the Liberation Democratic Party in 2005.

On March 29, 2005, the Liberation Democratic Party of Japan proposed "urgent suggestions for safeguarding Japan's rights and interests in the East China Sea" (hereinafter referred to as the "Urgent Suggestions"), which can be summarized into three categories:

(1) Suggestions on the implementation of trial exploration. The Urgent Suggestions pointed out that, according to the Mining Act of Japan, it is totally legitimate to enact legislation providing rights to trial exploration and conduct trial exploitation in the Japanese side of the median line. This is obviously a measure for the protection of national resources. However, it also goes with risks for private enterprises to exploit resources in undelimited seabed. Therefore, it is advisable that the government should commission private enterprises to undertake the trial exploitation.

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2 Ocean Shipping Consortium Ocean Policy Institute ed., *Marine White Paper: Trends of Japan and the Rest of the World*, 2005, pp. 186~187.

(2) Specific measures for the trial exploitation. Such measures mainly inclu-de: setting rights to trial exploitation, creating favorable conditions for the trial exploitation, and establishing cabinet meetings relating to maritime rights and interests.

(3) Negotiations may be made with China, for example, demanding China to provide information on the development of the Chunxiao gas field and stop development activities, or taking tough measures against China.[3]

In line with these suggestions, the Japanese government granted the Teikoku Oil Company the right of trial exploitation in gas fields in the East China Sea in July 2005. In August 2005, the Japanese government announced that the Teikoku Oil Company had gone through all the formalities for the trial exploitation, but the company shall not conduct official exploitation until holding consultations with the government and obtaining its consent.

In fact, the Japanese government's position and the measures it took during its consultations with China on the East China Sea issue, were predetermined on the basis of the above policies or suggestions. For example, during its consultations with China on the East China Sea issue, the Japanese side demanded China to provide data and information on the development of the East China Sea gas fields, and issued the instrument on trial exploitation of gas fields in the East China Sea to the Teikoku Oil Company. Certainly, the above suggestions are not put forward solely for the resolution of the East China Sea issue, but as part of Japan's integrated strategy on maritime issues.

B. Japan Is Stepping up Legislation to Safeguard Its Maritime Rights and Interests

With an aim to exploit and utilize the sea, Japan has all long been paying great attention to maritime policies and legislation, and has built its maritime legal system. Since the East China Sea dispute gained prominence, Japan has speeded up the pace of forming legislation on maritime affairs, aimed mainly at safeguarding its maritime rights and interests and providing the legal basis for various activities at sea. Japan has drafted or revised the following laws:

1. The Democratic Party of Japan put forward a proposal on the formulation of maritime legal system. On October 21, 2005, the Democratic Party of Japan drafted legal regulations such as the Act on the Exercise of Sovereign Rights and

3 At http://www.jimin.jp/seisaku/2005/seisaka-003.html, 12 March 2007.

Other Rights Relating to the Implementation of Natural Resources Exploration and the Conducting of Scientific Investigations in Sea Areas including the Exclusive Economic Zone and the Act on the Promotion of Seabed Resources Exploration.

(1) The Act on the Exercise of Sovereign Rights and Other Rights Relating to the Implementation of Natural Resources Exploration and the Conducting of Scientific Investigations in Sea Areas including the Exclusive Economic Zone is made up of five chapters (24 Articles) and an annex (6 Articles): Chapter I General Provisions (Articles 1~2), Chapter II The Prohibition of Foreigners from Exploration of Natural Resources (Articles 3~4), Chapter III Foreigners' Marine Scientific Investigation (Articles 5~15), Chapter IV Supplementary Provisions (Articles 16~20), and Chapter V Penalty Provisions (Articles 21~24).

(2) The Act on the Promotion of Seabed Resources Exploration is composed of 3 chapters (18 Articles) and an annex: Chapter I General Provisions (Articles 1~2), Chapter II Guiding Principles for the Exploitation of Seabed Resources (Articles 3~8), and Chapter III Headquarter for the Promotion of Seabed Resources Exploitation (Articles 9~18) which provides for the establishment of the Headquarter and other affairs such as its responsibilities and composition.

These two Acts are designed to maintain Japan's rights and interests in sea areas such as the exclusive economic zone, and properly manage marine scientific investigations conducted by foreigners, so as to protect the rights and interests of coastal States which have been provided for under the United Nations Convention on the Law of the Sea (hereinafter referred to as the "Convention"). It is obvious that the above draft legislations for safeguarding Japan's maritime rights and interests are aimed at taking actions against disputes, including the East China Sea issue, so as to maintain the its position to delimit according to the median line, which unilaterally claimed by Japan, ensuring its jurisdiction over resources on the continental shelf. In accordance with these suggestions put forward by the Democratic Party of Japan, the Japanese government has taken corresponding measures, i.e., attempting to improve the supporting regulations on coastal States' jurisdiction over continental shelf resources, which has been provided for under the continental shelf regime of the Convention, including the jurisdiction over the continental shelf resources in the East China Sea.

2. The Japanese government has made revisions and amendments to relevant laws. In order to maintain its rights and interests in the marine area falling under the jurisdiction of Japan, especially the exclusive economic zone and the continental shelf, the Japanese government renamed the Act on Comprehensive Development

of National Territory to National Spatial Planning Act in July 2005. New provisions on the utilization and protection of marine areas (including the exclusive economic zone and the continental shelf) have been added into the renamed Act, that is, the utilization and protection of the exclusive economic zone and the continental shelf have been included among the objects of national spatial planning.[4] In other words, the amendments have expanded the Japan's previous definition of "national territory" and strengthened its jurisdiction over its "territory".

3. Japan's latest accomplishments in formulating maritime policies and the Basic Act on Ocean Policy. The Ocean Policy Research Foundation released the latest documents on Japan's marine policies and legislation on December 7, 2006. On December 20, 2006, the Foundation introduced the latest progress of the formulation of the Basic Act on Ocean Policy to relevant institutions and personnel. Those latest documents included the Ocean Policy Outline – towards a New Maritime State (hereinafter referred to as the "Ocean Policy Outline") and the Outline of the Basic Act on Ocean Policy. In fact, these documents are formulated by the Basic Act on Ocean Policy Strategic Studies Group after ten discussions and reviews within 8 months (from April 2006 to December 2006) on the basis of the Proposal for a 21st Century Ocean Policy submitted by the Ocean Policy Research Foundation to the Japanese government in December, 2005. Thus, it can be said that they are mid-term research results. Afterwards, specific legal regulations were promulgated by the relevant bodies of the Japanese government, based on the principles established in these documents. It was submitted by Japanese lawmakers to their Congress for consideration. If they are approved, the Basic Act on Ocean Policy will become the comprehensive basic law regulating Japan's maritime affairs.

The aforesaid documents were issued by the Basic Act on Ocean Policy Strategic Studies Group (hereinafter referred to as the "Studies Group"). The Studies Group was founded in April 2006 and composed of 35 members, including 10 senators and congressmen from various parties (the Liberal Democratic Party, the New Komei Party, and the Democratic Party of Japan), 15 experts and scholars on maritime affairs, and 10 observers who were officials form relevant ministries and agencies (including the Cabinet Secretariat, Continental Shelf Investigation Office of the Cabinet Secretariat, Defense Policy Bureau of the Defense Ministry,

4 Ocean Policy Research Foundation ed., *Marine White Paper: Trends of Japan and the Rest of the World*, 2006, pp. 193~194.

Economic Affairs Bureau of the Ministry of Foreign Affairs, the Research and Development Bureau of the Ministry of Education, Culture, Sports, Science and Technology, Fisheries Agency, the Agency for Natural Resources and Energy, the Policy Bureau of the Ministry of Land, Infrastructure, Transportation and Tourism, the Coast Guard of Japan, and Global Environment Bureau of the Ministry of the Environment). Considering the composition of the observers, it is obvious that the Studies Group is a comprehensive legislative committee composed of members from various fields including defense, foreign affairs, history, fisheries, resources, transportation, maritime law enforcement, and environment protection, a clear reflection of comprehensive factors that are to be considered in the maritime legislation of Japan. The bureau of the Studies Group is based in the Ocean Policy Research Foundation.

The main task of the Studies Group is to propose comprehensive maritime policies and legislations to the Japanese government based on its research and deliberation. With the goal of achieving the harmony between ocean and man, and securing Japan's national interests, the Studies Group is established to change Japan's old maritime management system which has long been plagued by administrative segmentation, and to formulate and promote Japan's maritime policies in an integrated manner by joining the governmental and the civilian forces.

C. Japan's Integrated Maritime Strategy, Maritime Outline, and Maritime Laws Have Taken Shape

What deserve even more attention are the steps taken by Japan on the formulation of maritime strategy and outline. Up till now, four comprehensive proposals have been made to the Japanese government concerning the exploitation and utilization of oceans:

1. The first proposal is about ocean development. Entitled The Promotion of the Exploitation of Oceans as an Important Subject, it was made by Nippon Keidanren (the Japan Business Federation) on November 15, 2005. In accordance with the proposal, the Japanese government should: 1) substantially promote the scientific exploration of the outer continental shelf; 2) tighten the security measures in case of natural disasters by developing and utilizing the ocean observing and monitoring system, building disaster prevention and alleviation system, and conducting relevant research and development activities for the purpose of

protecting the global environment, etc.; 3) exploit maritime resources including ocean energy resources and marine biological resources; and 4) strengthen the system of maritime exploitation.[5] It can be concluded that it is a strategic proposal aiming at the exploitation of oceans.

2. The second proposal was a suggestion about maritime policies or integrated maritime strategy. It was put forward by the Ocean Policy Research Foundation on November 18, 2005, and was entitled Proposal for a 21st Century Ocean Policy (hereinafter "the 2005 Proposal").[6] As a comprehensive strategic proposal on the exploitation of ocean, it is the outcome of two years' considerations and discussions by the Marine and Coastal Sea Areas Research Committee, which is composed of 12 professionals and experts on marine or marine-related issues. In fact, early in May 2002, the Ship & Ocean Foundation (SOF), the predecessor of the Ocean Policy Research Foundation, had put forward a proposal also titled "Proposal for a 21st Century Ocean Policy" (hereinafter "the 2002 Proposal"), offering specific suggestions.[7]

(1) Contents of the 2005 Proposal and the 2002 Proposal and the relationship between them. Both Proposals requested the Japanese government to formulate the integrated policies on the exploitation of ocean or ocean policy outlines. For example, the 2002 Proposal suggested that the government should establish an administrative institution which is in charge of the formulation and implementation of maritime policies, while the 2005 Proposal suggested that the Japanese

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5 At http://www.keidanren.or.jp/japanese/policy/2005/085.html, 25 April 2007.

6 Since April 2005, Japan's "Ocean Shipping Consortium" has been renamed "Ocean Policy Research Foundation." Ocean Shipping Consortium was established in September 10, 1990, and began to engage in marine consulting activities from April 2000. Ocean Policy Research Foundation is a comprehensive advisory body dealing with marine issues. Its research areas include maritime policy, maritime transport, security, offshore management, marine environment and marine education, involving both natural and social sciences.

7 In the Proposal for a 21st Century Ocean Policy promulgated in May 2002, the Japanese government was given the following six suggestions: first, to formulate integrated maritime policies; second, to improve the administrative institutions involved in the formulation and implementation of maritime policies; third, to improve laws governing the integrated management of the coastal regions and sea areas; fourth, to maintain rational management of fishery resources and adjust the relationship between fishery and other industries utilizing oceans; fifth, to refine the content of the integrated management of the exclusive economic zone and the continental shelf; sixth, to offer maritime education to the youth and conduct interdisciplinary educational and research activities. The Proposal was compiled on the basis of investigations and research by the Marine Management Research Committee composed of 12 professionals and experts, an advisory body of the former Ship & Ocean Foundation (SOF) under the Ocean Policy Research Foundation. See the Ship & Ocean Foundation ed., *Proposal for a 21st Century Ocean Policy*, May 2002.

government should take the opportunity of the formulation of the Basic Act on Ocean Policy to improve Japan's maritime management system, including the establishment of cabinet meetings relating to maritime rights and interests and the appointment of maritime policy minister. Though different measures are recommended in the two Proposals, they share the common goal of improving institutions and systems relating to maritime affairs.

Besides, it should be noted that the 2005 Proposal, which has offered specific guidelines and measures, is a supplement to and improvement upon the 2002 Proposal. For example, the 2005 Proposal has established five principles or purposes in respect of the formulation of an ocean policy outline (to be discussed in the following paragraphs), offered the suggestion that the government should take the opportunity of the formulation and promulgation of the Basic Act on Ocean Policy to improve the maritime administrative institutions, expand the definition of the term "territory" which used to exclude the exclusive economic zone, the continental shelf, and deep-sea islands and their surrounding marine areas, the management of which, as the Proposal 2005 requests, should be strengthened.

(2) The 2005 Proposal are mainly composed of three suggestions:

First, an ocean policy outline should be formulated. Such outline should contain the following details (principles or purposes): defining the basic viewpoints, improving the framework of maritime policies, enhancing the measures to tackle problems, strengthening cooperation, and promoting the understanding, research and education on marine-related issues.

Second, the system to promote the formulation of the Basic Act on Ocean Policy should be improved. Considering that Japan has always been dealing with maritime issues in accordance with separate substantial laws, the 2005 Proposal points out that it is necessary to improve the framework of maritime policies and its legal basis as soon as possible, so as to set up an integrated management of maritime affairs. The suggestion mainly include: a) in order to promote the development of integrated maritime policies, it is necessary to formulate the Basic Act on Ocean Policy, which should contain basic ideas, policies, guiding principles, and the basic maritime plan; b) for the purpose of promoting the development of the integrated maritime policies centering on the Basic Act on Ocean Policy, it is necessary to integrate institutions engaged in the planning and implementation of maritime policies and improve some administrative institutions by establishing cabinet meetings relating to maritime affairs and appointing maritime policy minister.

Third, Japan's jurisdiction should be extended to the jurisdiction over its marine "territory" and international cooperation should be strengthened. Specific suggestions are as follows: (a) strengthen management of the exclusive economic zone, the continental shelf, deep-sea islands and their surrounding marine areas; (b) ensure the security in marine areas newly included as Japan's marine "territory" and the safety of maritime transportation; (c) establish the environmental impact assessment system and protect marine ecosystems (protect biodiversity); (d) keep a reasonable control on fish catches so as to strengthen the conservation of fishery resources and conduct exploration of the mineral resources and marine microbe resources; (e) build an ocean governance system which relies mainly on local efforts and encourages the participation of citizens so as to govern marine areas in collaboration with them; (f) Japan should develop regional disaster prevention plans as soon as possible and offer citizens a thorough and systematic education and training on disaster prevention and alleviation; (g) plan the amalgamation of national strategies relating to marine intelligence and enhance the management of marine intelligence agencies; and (h) in order to maintain better management of the marine areas under the jurisdiction of Japan, and conduct comprehensive governance of oceans, including addressing and responding to maritime emergencies, Japan should popularize marine education, study maritime management, and facilitate studies on marine science and technology.

As has been mentioned above, the 2005 Proposal has provided a framework for Japan's maritime strategy. Thus, it can be expected that in the future the Japanese government will promote its maritime strategy in a continuous and substantive manner and promulgate relevant policies and legislations. The Ocean Policy Outline and the Draft of the Basic Act on Ocean Policy that will be elaborated in detail in the following paragraphs are one of the specific steps or achievements. Acting out of its aspiration to become a maritime power, Japan has developed to safeguard its maritime rights and interests by improving Japan's maritime legislation, strategy, and policies. It continues to make use of its maritime advantage in technology and capital by providing foreign aids and personnel training to small developing States, so as to conduct joint maritime law enforcement with them.

3. The Ocean Policy Outline. The Ocean Policy Outline has pointed out that Japan should pay due attention to maritime affairs based on the following considerations. On the one hand, the survival and prosperity of human beings rely heavily on resources in oceans, which cover about 70% of the Earth's surface, and will be increasingly dependent on the ocean with the growth of the world

population. On the other hand, the actual situation is worsening with fiercer competition and confrontation between States surrounding oceans, growing abuse of ocean resources, and graver marine pollution.

Meanwhile, realizing that maritime affairs are too important and complicated to be dealt with properly by an individual State, the Ocean Policy Outline has also pointed out that the international community should take coordinated actions to conduct integrated and peaceful management of the oceans for the benefit of all humankind on the basis of each State's management of its coastal sea areas in the principle of international consensus.

On the contrary, however, Japan's current policies and system for the integrated management of maritime affairs have not been improved and maritime affairs of Japan remain to be handled with the old management system that has long been plagued by administrative segmentation and where there are no integrated maritime policies, let alone officials or institutions in charge. One of the negative consequences of this is that the Japanese government cannot submit relevant maritime acts to the Congress. As a result, the Ocean Policy Outline points out that it is necessary to establish a new maritime affairs management system in a timely manner so as to meet the requirement of the new situation, that the idea of building a new maritime State should be upgraded into an important national policy, i.e., maritime policies should be treated as national policies, and that it is also essential to conduct comprehensive management and international cooperation and coordination in marine areas abundant with resources. The Ocean Policy Outline concludes by pointing out that the key to promote an integrated maritime policy is to formulate the Basic Act on Ocean Policy as early as possible.

4. The outline of the Draft of the Basic Act on Ocean Policy. The Draft of the Basic Act on Ocean Policy mainly includes:

(1) The purpose of the Basic Act on Ocean Policy: to engage in maritime management activities for the purpose of preserving maritime environment, developing and utilizing oceans, and ensuring maritime security.

(2) The basic ideas of maritime policies: the idea of preserving maritime environment, the idea of ensuring maritime security, the idea of sustainable development and utilization, the idea of equipping with scientific knowledge about oceans, the idea of comprehensive management of oceans, and the idea of international cooperation.

(3) The powers and obligations of each party and the guiding principles for the formulation and implementation of policies and measures: the Basic Act on Ocean

Policy should provide for the powers and obligations of institutions and individuals in connection with maritime affairs and the guiding principles for the formulation and implementation of maritime management measures.

(4) Basic maritime plan. In order to promote the integrated and planned implementation of maritime management measures, the Japanese government should develop a basic maritime plan, which should define the obligations of the government, local public groups, enterprises, and citizens, and provide for the basic policies on maritime comprehensive management such as the development of the basic maritime plan and new administrative organization which can improve marine administration in a comprehensive way. In a word, the basic maritime plan is a plan which not only integrates and systemizes the maritime policies, but also provides for specific Ocean Policy Outline.

(5) The appointment of maritime policy minister. The Prime Minister should appoint maritime policy minister who should take effective control and coordination of maritime policies requiring high continuity and professionalism, systemize the sectionalized maritime functions previously performed by relevant sectors, and promote the development of national policies on integrated maritime management.

(6) The establishment of an integrated maritime policy meeting. In order to make an investigation into and consideration over important matters such as the principle for the allocation of resources needed in the formulation of the basic maritime plan and the integrated management of oceans, the integrated maritime policy meeting should be established with the Prime Minister as the Chairperson, the maritime policy minister as the Vice Chairperson, other members of which should include the Chief Cabinet Secretary, Ministers of State designated by the Prime Minister, and people with visions and experience.

(7) Other relevant regulations. Other relevant and necessary regulations should be improved so as to promote the implementation of policies and measures on integrated maritime management.

It should be noted that the Ocean Policy Outline and the Draft of the Basic Act on Ocean Policy are developed in line with specific requirements of the 2005 Proposal with an aim to realize integrated management of maritime affairs at the institutional level by improving Japan's maritime policies and system. As can be seen from the above documents, Japan not only pays high attention to maritime affairs but has also begins to handle them in an integrated way. Therefore, China should study Japanese maritime policies and laws (acts) carefully, which can serve as a good reference.

III. Japan's Actions on Maritime Issues and Their Lessons for China

Maritime interests concern the national security, unity and development of China; however, China is disadvantaged by not only a relatively unfavorable marine geography but also by its poor ocean awareness and backward maritime legislation and strategy. Japan's latest moves on maritime issues will undoubtedly provide some lessons and a good reference for China to speed up development of its maritime strategies, formulate and improve its relevant maritime laws, and better respond to and deal with the East China Sea dispute.

A. The Lessons from Japan's Integrated Maritime Strategy on Promoting the Implementation of China's Marine Exploitation Strategy

Following the former Secretary General Jiang Zemin's Report at the 16th Party Congress in 2002 which put forward the task of "carrying out maritime development", and former Premier Wen Jiabao's Report on the Work of the Government (2004) which put forward the policy that "special attention should be attached to the development and protection of marine resources", in recent years, China has made remarkable achievements in improving its maritime policies and measures and revising and improving its maritime legal system. However, so far, China has not developed its national strategic plan on maritime development or national marine development plan, which would not facilitate the implementation of China's integrated marine development strategy. Yet, to promote the implementation of China's maritime development strategy is of great significance to the supply of resources required in China's social and economic development, the change of Chinese deep-rooted idea that more importance should be attached to the development of land rather than the development of oceans, and the safeguarding of China's maritime rights and interests.

On the other hand, the conditions for marine development have become mature, owing to China's remarkable achievements since the reform and opening up in economic foundation, marine science and technology, marine management, maritime cooperation and other aspects. Meanwhile, the conclusion and implementation of multilateral or bilateral treaties or related documents on maritime affairs between China and other States provide a good external environment for

China's marine development.[8]

In addition, the development of an integrated maritime policy or plan can ensure the resolution of disputes over sovereignty of islands or those relating to maritime delimitation, the realization of national reunification, and the maintenance of maritime security, rights and interests.

In short, given the comprehensiveness and complexity of maritime issues, China's strategic plan on maritime development should mainly include: the establishment of an institution which can engage the participation of all current institutions relating to maritime affairs for the integrated consultation and management of maritime affairs, the rational development and utilization of marine resources in the waters under the jurisdiction of China, the strengthening of deep-sea resources explorations, the protection of the marine environment, the active participation in international, regional and bilateral maritime activities, and the peaceful and rational settlement of maritime disputes, etc., so as to coordinate and manage marine issues in a comprehensive way, reasonably manage maritime

8 Maritime treaties and their related agreements between China and relevant States mainly include: first, the Treaty of Amity and Cooperation in Southeast Asia and its two revision protocols. China's accession to the Treaty on 28 June 2003 indicated that deepened mutual political trust and strengthened cooperation between China and the Association of Southeast Asian Nations, which was helpful for the two sides to jointly safeguard the peace and stability in the region; second, the multilateral agreement Declaration on the Code of Conduct on the South China Sea signed by China on 4 November 2002, which created favorable conditions for the peaceful and permanent settlement of differences and disputes between related States; third, the China-Vietnam Agreement on the Delimitation of Territorial Seas of the Beibu Bay and the China-Vietnam Fisheries Agreement entered into force on 30 June 2004, which shows China's sincerity and the ability to resolve differences and disputes between the two States. And the China-Vietnam Agreement on the Delimitation of Territorial Seas of the Beibu Bay provided valuable experience and useful reference for future maritime delimitation between China and other neighboring States; fourth, the Tripartite Agreement for Joint Marine Seismic Undertaking in the Agreement Area in the South China Sea signed by China, the Philippines and Vietnam on March 14, 2005, which indicated a substantial step for the implementation of the principle of shelving disputes and seeking common development, was of great significance to the maintenance of peace and stability in the region, and as one of the major initiatives to implement the Declaration on the Code of Conduct on the South China Sea, had set a good example for the settlement of maritime disputes between other States.

activities, and further to safeguard China's national maritime rights and interests.[9] Of course, the formulation and implementation of strategic plan on maritime development involves the participation of all related institutions and the promotion of organization of various disciplines, both of which should be well coordinated to form joint forces.

B. Lessons for China from Japan's Revision of Its Maritime Laws

The implementation of marine development strategy and its plan needs to be secured by a full-fledged system of maritime laws and regulations. However, though China has formulated and implemented a series of laws and regulations on the development and utilization of marine resources, there remain many problems. Taking Japan's experience in maritime legislation as a reference, this article holds that during its effective implementation of the Convention and related bilateral treaties, China should strengthen the following aspects when improving domestic maritime policies and legal system:

Firstly, the status of ocean should be established under China's Constitution. It is advisable that "ocean" be added into the categories of natural resources which have been provided for under Article 9 of China's Constitution so as to strengthen

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9 It should be noted that the Guidelines of the Eleventh Five-Year Plan for National Economic and Social Development of the People's Republic of China adopted at the Fourth Session of the Tenth National People's Congress on 14 March 2006 has given a clear direction for the development of China's maritime industry and thus should be effectively implemented. In the part concerning the protection and development of ocean resources, the Guidelines points out that China should "strengthen ocean awareness, maintain ocean rights and interests, protect ocean ecology, develop ocean resources, carry out comprehensive ocean management, promote ocean economic development; comprehensively treat sea area environment and inhibit the ecological deterioration trend in offshore areas such as Changjiang Estuary and Zhujiang Estuary; restore offshore ocean ecological function, protect the ecologic system in ocean and coastal zone such as mangrove, sea shore wetland and coral reef and strengthen inland protection and ocean nature reserve management; improve ocean functional division, standardize ocean use order and strictly restrict sea sand exploitation; pertinently explore and develop exclusive economic zone and continental shelf and international submarine resources." See Guidelines of the Eleventh Five-Year Plan for National Economic and Social Development of the People's Republic of China, Beijing: People's Publishing House, 2006, p. 49. (in Chinese)

the protection of ocean by securing its due status in the Constitution.[10]

Secondly, the basic law on marine development should be formulated.[11] In particular, the purpose, principles, specific plans, and measures of the basic law should be clearly defined, such as the principles on the sustainable development and use of marine resources, the principles on the prevention and abatement of marine environment pollution, the principles on the all-around integrated management of oceans, and the principles on internal, regional, or bilateral cooperation, and others.

Thirdly, regulations supporting the Law on the Exclusive Economic Zone and the Continental Shelf of China should be formulated. Since the promulgation and implementation of Law on the Exclusive Economic Zone and the Continental Shelf of China in 1998, neither supporting regulations nor detailed implementation rules for the law have been formulated so far, which include Rules on the Exploitation of Oil and Gas Resources on Chinese Continental Shelf, Regulations on the Management of Safety Zones around Installations and Structures, Measures against the Infringements of Foreign Enterprises and Vessels on Exploitation of Resources in Chinese Exclusive Economic Zone and Continental Shelf, Measures against Foreign Vessels' Survey Activities in Sea Areas under China's Jurisdiction, and many others. Supporting regulations for the law should be formulated and improved as soon as possible, so as to refine the above basic principles and rules, in an effort to cope with maritime conflicts, including delimitation disputes.

Fourthly, China's territorial sea baseline should be further announced and the boundaries of the marine areas under China's jurisdiction should be clearly defined. Since China's announcement of some of the territorial sea baselines of mainland and those of the Paracel islands in May 1996, no announcement has been made so far on the territorial sea baselines of other islands. Therefore, the boundaries of marine areas under China's jurisdiction should be clearly defined by making

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10 As provided for under Article 9(1) of the Constitution of the People's Republic of China, "Mineral resources, waters, forests, mountains, grassland, wild land, beaches and other natural resources are owned by the State, that is, by the whole people." Its Article 9(2) further stipulates that the State ensures the rational use of natural resources and protects rare animals and plants. The appropriation or damage of natural resources by any organization or individual by whatever means is prohibited.

11 In fact, the name and formulation of the maritime basic law has already been discussed in the China's Maritime Agenda in the 21st Century (2006), which has pointed out that China should develop and implement the Law on the Management of the Exploration of Oceans. See State Oceanic Administration ed., China's Maritime Agenda in the 21st Century, Beijing: China Ocean Press, 1996, p. 39 (in Chinese). The basic law on the exploitation of oceans is named in this article as the Maritime Basic Law.

further announcement on the territorial sea baselines of other Chinese islands, so as to effectively protect China's maritime rights and interests.[12] However, it should be noted that if Japan's unilaterally claimed 4.05-million-square-kilometer exclusive economic zone, extending from such territorial sea base points as the Diaoyu Islands and the Okinotorishima Island, would be confirmed, Japan, which already has a territorial sea area of 430,000 square kilometers, would have a total of marine areas of 4.47 million square kilometers under its jurisdiction, ranking the sixth in the world.[13] Compared with Japan, China has been announcing that it has 1.5 million square kilometers of disputed surrounding marine area, but it fails to clearly define the boundaries of its marine area under its jurisdiction. Therefore, it is obvious that China has not taken an active attitude, which may land itself onto a disadvantageous position in the era where competition is fierce on maritime rights.

Fifthly, investment should be further increased, and talent development efforts should be further strengthened in respect of marine science and technology. As maritime development requires not only money, but also technological support, China should continue to increase investment in research and development on marine science and technology, and constantly expand cooperation with other States. It is fair to say that the development process of China's marine science and technology has been secured by such documents as the Guidelines on National Medium-term and Long-term Program for Science and Technology Development (2006-2020) (hereinafter "the Guidelines") released by the State Council on February 9, 2006, and the National Eleventh Five-year Plan for the Development of

12 The legal basis for China's announcement of the baseline of territorial sea of other islands under its jurisdiction is the Statement of the Chinese Government on the Baseline of the Territorial Sea of the People's Republic of China promulgated on 15 May 1996, which provides that "the other part of the baseline of the territorial sea of the People's Republic of China shall be announced separately by the government of the People's Republic of China."

13 Ocean Shipping Consortium Ocean Policy Institute ed., *Marine White Paper: Trends of Japan and the Rest of the World*, 2005, pp. 9~10.

Science and Technology promulgated by the Ministry of Science and Technology.[14] Recently, the State Oceanic Administration, the former Commission for Science, Technology and Industry for National Defense (COSTIND), the National Natural Science Foundation of China (NSFC) jointly formulated the National Eleventh Five-year Plan for the Development of Marine Science and Technology (hereinafter "the Plan") in accordance with the Guidelines.[15] The implementation of the Plan will undoubtedly have significant implications for accelerating the development of marine science and technology, promoting the establishment of the innovation system for marine science and technology, enhancing China's level and capacity in marine science and technology, leading and supporting the rapid development of marine economy, and safeguarding China's maritime security. In addition, China should not lag in the cultivation and guidance of talents on marine science and technology, and maritime law enforcement personnel.[16] The Vocational Skills Appraisal Center of the State Oceanic Administration recently established upon the approval of the Ministry of Labor and Social Security, will play an active role in improving the talent structure of China's maritime industry and deepening the pool of skilled talents. Such centers are worthy of recognition and should be widely

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14 For example, the efficient development and utilization of marine resources has been designated as one of the key areas and thematic priorities of China's scientific and technological development in the Guidelines on National Medium- and Long-term Program for Science and Technology Development (2006-2020) released by the State Council. In accordance with the Guidelines, China will focus on the development of comprehensive technologies on the exploration of neritic subtle reservoirs and the improvement of viscous oil recovery, and the development of the technologies on the preservation and efficient utilization of marine living resources, technologies on direct utilization of seawater, and technologies on the comprehensive utilization of chemical resources in seawater. See *Xinhua Monthly: Records*, the 2nd Issue of the Month, March, 2006, pp. 48~49. (in Chinese)

15 Zhang Yiling, China's Eleventh Five-Year Plan on the Development of Marine Science and Technology has Been Formulated, *China Ocean News*, 24 November 2006, p. A1. (in Chinese) .

16 In recent years, China's development of marine science and technology and the cultivation of relevant talents have been constrained by the following factors: a. China has only a small number of academic leaders in key disciplines on marine science and technology; b. there are not sufficient young and middle-aged talents in certain disciplines; c. investment into marine science and technology is not adequate; d. equipment related to marine technology has become out-dated; e. not enough efforts have been made to keep pace with the latest development in the forefront academic areas; and f. China lacks integrated arrangements and measures for team work. See Song Zenghua, On the Steps to Implement China's Maritime Exploitation Strategy, *China Ocean News*, 16 July 2004, p. A3. (in Chinese)

established.[17]

Sixthly, maritime law enforcement should be further strengthened. The implementation of maritime development strategy and plan need to be guaranteed by a strong law enforcement team safeguarding China's maritime rights and interests. Due to the fact that China's maritime affairs management lacks unity and is divided into different functions which are taken charge by different sectors, China's maritime law enforcement forces cannot form joint forces. Therefore, China should further integrate its maritime law enforcement forces from various sectors relating to maritime affairs. What's more, China should strengthen its maritime law enforcement forces by equipping necessary facilities and enhancing the training of law enforcement officers so as to better maintain China's maritime interests.

C. Lessons for China from the Japan's Actions regarding the East China Sea Dispute

Since the Sino-Japan dispute over the East China Sea is mainly focused on the principles and methods of the delimitation of the East China Sea and the definition of the boundaries of disputed marine area (including the Joint Development Zone). China should, during its consultations with Japan on the East China Sea issue, highlights the following issues:

1. The relationship between the exclusive economic zone and the continental shelf. Japan holds that the regime of the continental shelf that has its extensions within 200 nautical miles from the baseline, can be interpreted by the exclusive economic zone regime since the former has been integrated into the latter. Though it is true that the exclusive economic zone which extends 200 nautical miles from the baseline may overlap with the continental shelf, and that the exclusive economic zone regime is far more complete than the continental shelf regime, there is no denying that the two regimes are parallel and independent with each other due to their differences in legal basis, legal content, and legal effect. Furthermore, at the Third United Nations Convention on the Law of the Sea (1973-1982), the proposal raised by some States to incorporate the national continental shelf within 200 nautical miles from the baseline into the exclusive economic zone

17 Major Initiatives to Cultivate High-skilled Marine Talents, *China Ocean News*, 21 November 2006, p. A1. (in Chinese)

regime, was rejected. In practice, in compliance with the Convention, if there are both disputes on the exclusive economic zone and disputes on the continental shelf between States with adjacent or opposite coasts, the interested States are under no obligation to draw one and single boundary; on the contrary, different boundaries can be drawn in line with different regimes. Meanwhile, different factors which play different roles should be considered in the delimitation of the continent shelf and that of the exclusive economic zone. Since the Sino-Japan dispute on the East China Sea is mainly focused on the ownership and exploitation of the seabed resources, the continental shelf regime should be applied in the delimitation of the continental shelf. The main reasons are as follows:

(1) The legal basis derived from the Convention. For example, as has been provides for under Article 56, Paragraph 3 of the Convention, the rights with respect to the seabed and subsoil in the exclusive economic zones shall be exercised by the coastal States in accordance with the continental shelf regime. Thus, it can be concluded that as for the rights with respect to the seabed and subsoil, the continental shelf regime shall prevail over the exclusive economic zone regime.

(2) Since the signing of the 1997 Sine-Japan Fisheries Agreement, there has been no practical necessity for the delimitation of exclusive economic zones. As the Agreement has provided for each party's rights and obligations, including the obligation to cooperate, in each side's marine area and the common area of both sides, it is no longer necessary in practice to delimit the exclusive economic zone between China and Japan and define the boundaries in the East China Sea.

Since there is not any agreement between the two sides with respect to the delimitation of the continental shelf, and that both sides are contracting parties to the Convention, all issues and disputes covered by the Convention shall be resolved in an equitable manner in compliance with the Convention.[18] Therefore, the Convention shall be applied when China and Japan are delimitating their continental shelves in the East China Sea.

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18 According to the suggestion proposed by Kuen-chen FU in his speech at the Shanghai Academy of Social Science on 7 April 2006, the "equitable principle" which is derived from the provision of "equitable solution" under the Convention, should be translated into Chinese as " 衡平原则 " instead of the generally accepted translation of " 公平原则 ". In the opinion of Professor FU, the Chinese phrase " 公平原则 " places more emphasis on the equity in the delimitation results than on the equity in the delimitation process while " 衡平原则 " attaches equal emphasis to both the process and results of the delimitation. However, as " 公平原则 " has already been generally accepted, it is rather difficult to replace it with " 衡平原则 ".

2. Principles on the delimitation of the continental shelf. In practice, there are two opposing views in the international community on the delimitation of the continental shelf. Some hold that the principle of equidistance or that of the median line should be followed in the delimitation of the continental shelf, while others favor the equitable principle. The two opposing views were also the focus of controversy at the Third United Nations Conference on the Law of the Sea. Since neither side dominated the debate, the Convention made some compromise on the provisions on the delimitation of the exclusive economic zone and the continental shelf and the wordings of the provisions with respect to the exclusive economic zone are completely the same as those relating to the continental shelf. Specific provisions on delimitation principles are made under Article 74 and Article 83 of the Convention.[19]

Given that the provisions under the Convention on the delimitation of the exclusive economic zone and the continental shelf is the result of compromises and trade-offs of international politics, the interpretation of such provisions on delimitation principles can only be confirmed and enriched by international judicial decisions and State practices. International judicial practice shows that, since the promulgation of the Truman Proclamation in 1945, i.e., Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, it has become a rule in the customary international law that the equitable principle should be complied with during continental shelf delimitation. The equitable principle was confirmed by the North Sea Continental Shelf Cases (1969), and the Anglo-French Continental Shelf Arbitration (1977). Afterwards,

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19 For example, as provided for under Article 83(1) of the Convention, the delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution. In accordance of Article 83(3) of the Convention, pending agreement as provided for in Paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation. Article 83(4) provides, where there is an agreement in force between the States concerned, questions relating to the delimitation of the continental shelf shall be determined in accordance with the provisions of that agreement. Based on the above provisions, the author holds that after the occurrence of the dispute concerning the East China Sea issue, both China and Japan have the obligations to: first, restrain itself so as to avoid further escalation of the dispute; second, try to promote consultations on the basis of mutual understanding in order to reach an agreement; third, strengthen cooperation, that is, faithfully fulfill consensus reached prior to the conclusion of the final agreement.

it was applied invariably in a series of delimitation cases such as the Libya-Tunisia Continental Shelf Case (1982), the Libya-Malta Continental Shelf Case and the Guinea/Guinea-Bissau Case (1985), the Case Concerning the Delimitation of Maritime Areas between Canada and the French Republic (1992), the Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (1993), and others. These judicial decisions and arbitral awards, while affirming the equitable principle as a rule in the international customary law, has made it clear that the equidistant/median line is just a convenient and sometimes necessary delimitation method, but not a legal rule that interested parties must observe. For this reason, China should not only seek the legal basis for its position by continuing to study the Convention and related international judicial practice, but also continue to adhere to the principle of natural prolongation as the basis for continental shelf delimitation, and to hold the position that the delimitation of continental shelf should be independent to that of exclusive economic zone, so as to achieve delimitation results favorable to China.

3. Natural boundaries concerning the delimitation of the continental shelf in the East China Sea. Based on the fact that the continental shelf is a natural prolongation of land territory, i.e., the legal basis for the continental shelf, China holds that its continental shelf in the East China Sea extends to the Okinawa Trough, which should be designated as the natural boundary between the continental shelf of China and that of Japan. However, Japan contends that the Okinawa Trough is just an incidental depression in a continuous continental margin between the two States whose surrounding areas including the sunken part and uplifted one are made of the same materials, and hence should not be deemed as the natural boundary between the continental shelf of China and that of Japan in the East China Sea. Japan further alleges that Japan and China share a continental shelf. Therefore, the main task for China in future in this regard, should be to confirm the role of the Okinawa Trough in the delimitation, and support China's position that its continental shelf extends to the Trough by demonstrating and illustrating from geographical and geological structures that the composition and structure of the Trough are different from those of the surrounding continental shelf, and that Japan and China don not share a continental shelf in the East China Sea.

4. The status and role of the Diaoyu Islands. It is very difficult to resolve the sovereignty dispute over the Diaoyu Islands in the near future. As both, China and Japan, claim sovereignty over the Diaoyu Islands which boasts of great strategic importance and considerable resources (oil and gas resources and fishery resources)

in surrounding areas. To solve this problem, an effective approach would be for the two sides to shelve the sovereignty dispute over the Diaoyu Islands, and make provisional arrangement for the early exploitation of resources in the East China Sea continental shelf. However, it is urgent for China to confirm the effectiveness of the Diaoyu Islands in the delimitation of the East China Sea continental shelf. In international judicial practice, there are many cases where a dispute over sovereignty or territory is submitted to the International Court of Justice. This is a quite feasible choice for China, as even if both sides has agreed to submit the dispute to the International Court of Justice, the two sides should compromise with each other, especially in the case where China has not chosen to accept the jurisdiction of International Court of Justice. Obviously, the ownership of the Diaoyu Islands will have a direct influence on the delimitation of the East China Sea, including the confirmation of the territorial sea baseline, and will influence to a great extent the size and scope of each side's marine areas. Some scholars suggest that zero effect be given to the Diaoyu Islands when delimiting the exclusive economic zone and the continental shelf in the East China Sea based on the international judicial practice in connection with islands, considering that the Diaoyu Islands are small in size and near the median line unilaterally claimed by Japan, and that the sovereignty over these Islands is being disputed.[20] It is fair to say that this suggestion is worth considering.

In short, in the Sino-Japan consultations on the East China Sea issue, China should especially emphasize that since the regime of the continental shelf and that of the exclusive economic zone are parallel with and independent of each other due to many differences between them, different factors should be emphasized in the

20 Wang Keju, The Diaoyu Islands and Their Place in the East China Sea Delimitation, *China Oceans Law Review*, No. 1, 2006. (in Chinese)

delimitation of the continental shelf and that of the exclusive economic zone.[21] The delimitation of the disputed sea areas in the East China Sea should be conducted in compliance with the Convention and the equitable principle.

IV. Prospects and Conclusion

In an effort to meet the challenges of the 21st century, which is known as the century of oceans, most of the States have developed strategies, rules and regulations on maritime issues, so as to promote marine exploitation. In order to ensure coordinated and sustainable development of the economy and the society, and secure the supply of energy and resources, it is a feasible and necessary choice for China to put its maritime exploitation strategy in place. To this end, China should, in the shadow of the East China Sea dispute, actively develop and implement national maritime strategic plan to modify and improve the national maritime development legislation. It should also attempt to strengthen international, regional, and bilateral cooperation on maritime affairs, so as to ensure the supply of energy and resources needed to build a prosperous and harmonious society and safeguard China's maritime rights and interests.

At present, China and Japan should find an effective solution to the East

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21 Although there is a tendency in the international community to draw only a single boundary line when delimiting the continental shelf and the exclusive economic zone, it cannot be denied that different factors should be taken into consideration in determining the boundaries of the continental shelf and the exclusive economic zone. In general State practice, with the goal of achieving an equitable solution, the main factors which should be taken into consideration in the delimitation of the continental shelf shall include geographical factors such as natural extension, the shape and length of the coastline, and the location and nature of an island, geological and topographical factors including changes in the shape of major seabed, and other factors such as the uniformity of mineral deposits, interests of the third State, etc. See Kuenchen Fu, A Single Boundary Line Should be Drawn in the Delimitation of the Exclusive Economic Zone and the Continental Shelf in the East China Sea, *Social Science Weekly*, 27 April 2006, p. A4 (in Chinese). However, in the delimitation of the exclusive economic zone, the main factors to be considered should be as follows: the stock and distribution of fishes, previous annual catch, geographic, economic, and social conditions of the coastal areas, and etc. See Shigeru Oda, *Annotations on the United Nations Conference on the Law of the Sea (Volume 1)*, Tokyo: Yuhikaku Publishing, 2002, p. 243. From the above, it can be concluded that the delimitation of the exclusive economic zone should be mainly based on the consideration of economic factors while that of the continental shelf should mainly examine natural factors such as geological, topographical, and geographical conditions, natural resources, and the structure and composition of non-living resources. It is obvious that the above different emphasis on factors to be considered conforms to the original intention to establish the exclusive economic zone and the continental shelf.

China Sea issue, which is apparently one of the important approaches in promoting strategic and mutually beneficial relations between the two States. And joint development is undoubtedly a reasonable choice. Apart from easing the conflict between the two sides, such a partnership would bring real benefits through joint development of resources. It is beneficial not only for maintaining international and regional peace, stability and development, but also for strengthening the cooperation and exchanges in economy and trade, science and technology, intellectual property, energy, environmental protection, and other fields. It can be anticipated that the Sino-Japan dispute over the East China Sea is a long-term issue. Hence, China should prepare for a rainy day to treat this issue seriously and reasonable, transforming the disputed East China Sea into a harmonious sea. By doing so, China would set a good example for other States in resolving maritime delimitation disputes.

Translator: ZHANG Zhiyun
Editor (English): Arpita Goswami

Analysis of the Status Quo of Private Yachts in China and Speculation on Their Development

WEI Ronghui* Kuen-chen FU**

Abstract: At present, there are only a few private yachts in China Mainland and the idea of private yachts is still not popular. With regard to development prospects, yachts will certainly play a leading role in the "post-car era". Through analysis of the barriers to the development of private yachts in China Mainland, this paper speculates on the development of private yachts in China Mainland and the establishment of unified yacht management standards.

Key Words: Private yacht; Analysis of status quo; Speculation on development

Yachting, as its (Chinese) name implies, is a way for the well-off to enjoy their leasure time. Today, as social stratifications increasingly differentiate, a yacht becomes a symbol of identity and status. Meanwhile, the number of yachts owned by a country or region reflects its degree of wealth.[1] Based on the development track of other advanced countries in the world, when the per capita income of a country increases and most families can own a second car, it will be very natural to use yachts and carry out relevant water activities.

With numerous islands, a circuitous coastline and rich natural landscapes, the southeast coast of China boasts a mild climate. Combined with such automobile production bases as South East Motor, the southeast coast of China is quite suitable for the development of the yacht industry, especially on both sides of the Taiwan Strait where marine leisure activities become more and more popular with the help

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* WEI Ronghui, Master of Laws.
** Kuen-chen FU, PhD of University of Virginia in the USA, Professor and doctoral supervisor of Xiamen University.

1 An Fei, Where Should the Dream of the Yacht Industry Begin?, *China Ship Survey*, No. 12, 2003. (in Chinese)

of yachts, a most natural tool. With the increase of marine yachting activities in the area, it is believed that people on both sides of Taiwan Strait will communicate with each other more frequently, which is helpful to the general trend of peaceful reunification of both sides of the Taiwan Strait.

I. Status Quo of Private Yachts in China Mainland, China Taiwan and the United States

A. Status Quo of Private Yachts in China Mainland

With the rapid development of tourism and the increasing improvement of people's living standards in China Mainland, people are no longer satisfied with onshore tourism, and water tourism becomes a hot spot. Waterfronts, lakes and city water systems, such as Huangpu River by the Bund, Shanghai, Li River in Guilin, West Lake in Hangzhou and Tien Lake in Kunming, have become good places for people to go sightseeing. However, it is not difficult for us to find out that the pleasure-boats traveling on such waters are mainly motor pleasure-boats, gaily-painted pleasure-boats, battery pleasure-boats, fishing pleasure-boats as well as other pleasure-boats with small engine power or human power. By contrast, it is still rare to see household private yachts.[2]

According to incomplete statistics, there are no more than 2,000 people owning private yachts in China Mainland. In addition, they are distributed unevenly, mainly in major cities such as Beijing, Shanghai and Dalian as well as coastal provinces like Zhejiang, Guangdong and Fujian, while there are almost no private yachts in large areas of Midwest China. Dalian has over 40 private yachts, ranking first in North China. About 500 to 600 people in the Yangtze River Delta region have a private yacht and there are about 60 private yachts in the Pearl River Delta.[3] Private yachts are prevented from becoming popular mainly because their prices are relatively high and they are expensive to maintain. According to Huang Zhengang, Secretary of Branch of Ships and Boats, China Association of the National Shipbuilding Industry, yachts fall into high speed boats, high speed

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2 Yao Shuzhen, Status Quo of the Yacht Industry in China Mainland and Speculation on Its Development, at http://chineseboating.com.cn/ytgy/2-2.asp, 11 July 2006. (in Chinese)

3 See *Dalian Evening News*, 13 July 2004, at http://www.dlwb.com.cn/dlwb/news/jsp/shownews.jsp?id=45898, 13 July 2006. (in Chinese)

racing boats, luxury yachts, motorboats and other categories. Currently, the yachts entering the China Mainland's market are mainly small and medium size yachts with a length of about 10 meters and are worth RMB 2 or 3 million in general. The few successful people owning private yachts achieve consumption mainly by joining a yacht club. At present, there are about 20 yacht clubs in China Mainland, which are distributed mainly in the Yangtze River Delta region and the southeast coastal areas. For example, U.S. Mercury Yacht Club located by Tai Lake in Jiangsu Province is the only domestic yacht club constructed based on international standards. It is a private membership-based yacht club established by U.S. Mercury Marine, a subsidiary of the world's largest entertainment equipment manufacturing company, U.S. Brunswick Group (a Fortune Global 500 company), with USD 15 million. Now, it has more than 200 members, nearly one hundred yachts and 12 private yachts.[4] According to the introduction of its sales director, Gu Yiming, U.S. Mercury Yacht Club is running mainly based on a system of membership. The membership cards fall into two types: ordinary membership cards (USD 16,000) and VIP cards (USD 33,000). People can join the club by renting a yacht of the club or buying a yacht by oneself. If one person joins the club by buying a private yacht, he is required to pay USD 1,500 for berthing, repair, maintenance, etc. of the yacht every year.[5]

B. Status Quo of Private Yachts in China Taiwan

Due to the coast defense in the past, no deep marine leisure culture has taken shape in China Taiwan even though it is an island. Because of the high prices of yachts, too many legal restrictions, unpopularization of the idea of having a yacht and other reasons, yacht companies established in earlier times died out one after another and only a few survive until now. However, after the Taiwan authorities revised Yacht Management Measures in 2000, the situation has changed. In the past, because a yacht would cost NTD (similarly hereinafter) one or several million, no more than 10 yachts had been registered as "yachts" by their owners, although China Taiwan had more than 20,000 people holding a yacht license. Most people let

4 Lu Yiping, Reappearance of Domestic and Foreign Yachts on Huangpu River: To Create a New World of "Water Leisure, *Shanghai Business*, No. 5, 2002. (in Chinese)

5 Cooking a Big Meal of Yachts of RMB 300 billion: The Yangtze River Delta Becomes a Leading Role in Consumption in the Post-car Era, at http://www.chineseboating.com.cn/qytd/detail2.asp?q_id=79&qy_id=1, 10 October 2006. (in Chinese)

their yacht license idle, or registered their yachts as "fishing boats" to circumvent onerous regulatory restrictions. Later, the government actively promoted the yacht harbor and gradually relaxed restrictions on sailing and import of yachts. Now, the cheapest yacht will cost only about NTD 800 thousand, just a little more expensive than an imported car. In addition, no fuel tax or license tax is payable. In the past, a yacht could go travelling on the sea for a maximum of 48 hours per time and had to return to the port from which it went to sea. A certificate of a local water authority had to be obtained before a yacht was allowed to park at a port. By contrast, now, one person may go yachting on the sea as long as he or she makes an appointment one day in advance. The port where the yacht is parked may apply to the authority on behalf of the owner and the owner may be released once his identity is verified. There is no limit to the travelling time on the sea. Owners may depart from one port and return to another one, only by applying to the port where they plan to park the yacht in advance. Therefore, now, when someone owns a yacht, it is possible to go yachting to appreciate whales, to dive, to barbecue or to fish on Orchid Island or Green Island. On holidays, traffic jams or room reservations are no longer a worry.[6] With the construction of yacht ports, now, yachts can be parked even more cheaply than cars. As early as 1985, the people in the yacht industry in China Taiwan began planning a professional yacht port in the only coastal park in Taiwan Kenting Park – Houbihu Yacht Port. Now the yacht port has been completed and can provide 120 offshore floating quay berths and 130 road parking places. In the future, Kenting Park plans to build a multistoried boathouse which can accommodate more than 300 yachts based on the development of the market.[7] The yacht berthing fee will vary based on the size of the yacht. Taking a common yacht with a length of 26~35 feet as an example, the berthing fee will be NTD 5,500 per month or NTD 49,500 per year. If a yacht is parked on land, it will be even cheaper, at only NTD 27,000 per year. Currently, the parking fee for a car is NTD 3,000 per month or NTD 36,000 per year. Therefore, the berthing fee of a yacht is not significantly higher than that of a car. In addition, 12 recreational fishing ports where yachts can be berthed will be open in various parts of China Taiwan. Therefore, private yachts will become more popular in Taiwan because the problem of berthing yachts has

6 At http://gb.ettoday.com.tw:6060/2004/05/24/930-1634352.htm, 18 November 2006. (in Chinese)

7 Cao Huifen, China Taiwan's Yacht Industry Becomes Famous around the World Again, *Waterway Transportation Digest*, No. 6, 2003. (in Chinese)

been solved.[8]

C. Status Quo of Private Yachts in the United States

In the United States, the marine leisure culture has become quite diversified, including swimming, diving, yachting, fishing, sailing, surfing, etc. Some people even live aboard ship, with all their belongings on the ship. According to estimates, the U.S. yacht industry enjoys 55% of the market share around the world. In the United States, on average there is a private yacht among every 16 people and the proportion of the number of people owning a private yacht to the total population of the country ranks first around the world. In 1998, the number of registered yachts in the U.S. reached as high as 13 million.[9] This is mainly attributed to America's long coastlines, numerous ports, lakes, rivers and other natural conditions, together with developed economy, popularity of the idea of having a yacht and other social-economic conditions. In the United States, there are a wide variety of yachts, ranging from a super yacht with a length of sixty or seventy meters to a small boat on which you can fish in the smallest lake. Each of the yachts can relax you fully on waters and everything becomes perfect with the help of the excellent equipment. In addition, America has about 12,000 water sports centers, of which over 2000 are located in Florida.[10] These water sports centers are not only berths but also full-featured entertainment centers and destinations. They can provide the necessary supporting services for yachts, such as maintenance, refueling, maintenance, etc. In addition, they can meet people's basic needs, such as drinking water, clean toilets, waste treatment facilities, etc. They even have vending machines, restaurants, swimming pools and so on. The complete supporting facilities and perfect supporting services have relieved the potential worries of owners of private yachts and promoted the popularity of private yachts in the U.S.

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8 At http://gb.ettoday.com.tw:6060/2004/05/24/930-1634352.htm, 18 November 2006. (in Chinese)

9 Jerry Martin, China's Yacht Industry Is Facing a Huge Business Opportunity, at http://chineseboating.com.cn/ytgy/1-1.asp, 11 July 2006. (in Chinese)

10 Ron Stone, The Yacht Industry Is Walking toward Us, at http://chineseboating.com.cn/ytgy/1-2.asp, 11 July 2006. (in Chinese)

Table 1 Statistics of Number of Yachts in the World's Major Developed Countries[11]

Country	Number of Yachts	The proportion of the number of people owning a private yacht to the total population of the country
USA	170,000,000	1/16
United Kingdom	500,000	1/100
Switzerland	103,000	1/69
Sweden	1,200,000	1/7
Spain	130,000	1/300
Portugal	60,000	1/170
Norway	620,000	1/6
New Zealand	300,000	1/12
Netherlands	500,000	1/30
Italy	800,000	1/71
Ireland	10,000	1/366
Greece	100,000	1/103
Germany	420,000	1/231
France	1,000,000	1/64
Finland	690,000	1/7
Denmark	369,000	1/14
Canada	5,500,000	1/5
Belgium	15,000	1/680
Austria	28,000	1/200
Australia	550,000	1/33

II. Development Prospects of Private Yachts in China Mainland

In foreign countries, an era in which leisure yachts and hand-line boats become prevalent is known as the "post-car era". To be sure, yachts will play a leading role

11 Hua Chengchang, A Brief Introduction to the Yacht Industry at Home and Abroad, *Technology and Economy Information of Shipbuilding Industry*, No. 10, 2004. (in Chinese)

in China's "post-car era" for the following five aspects:

(1) The geographical conditions in China Mainland are superior. At present, China has sea areas of 4.73 million square kilometers and coastlines of 18,000 kilometers, of which 14,000 kilometers are island coastlines. Over 90,000 lakes and rivers are scattered all over China Mainland like stars in the sky or men on a chessboard, with an inland water area of 17 million hectares. In addition, China has a consumer population of 1.3 billion. The natural waterways in China Mainland are 2.5 times those in the U.S. and the population in China Mainland is four times that of the United States. The rich cultural and natural conditions and the huge crowd of consumers are suitable for the development of the yacht industry.

(2) Since the reforms and opening up, with China's rapid economic growth and the increase in people's income level, a wealthy class appears gradually. This wealthy class has great consumption desire and consumption potential, which promotes consumption in holidays and of leisure sports. Currently, the most popular leisure way among these successful people is to play golf. However, with the transfer of interest and the changes in concepts of consumption and leisure, these people began to seek new leisure varieties. Leisure yachting is most likely to become the new lifestyle of these wealthy people, especially those private owners, senior white-collar workers, etc. In addition, the increase in foreigners who come to work in China will give a new impetus to the development of China's yacht industry.

(3) The era of leisure is coming and leisure in spare time will be one of the important characteristics of the times. Currently, there are 114 statutory holidays in one year in China Mainland, which means people will be on vacation during 1/3 of a year. However, so far, China's land tourism resources have been developed and utilized almost fully and are becoming overwhelmed, so it is difficult for them to meet the needs of people for leisure activities. As a result, the hot spot of people's leisure activities will shift to water activities and the development of landscape water resources will certainly become a new bright spot in the development of China's tourism. Therefore, the yacht market is certain to expand and the yacht industry will certainly become an emerging industry in China with great potential.

(4) The improvement of supporting facilities and services for yachts will promote the development of the yacht industry in China Mainland. We can develop yacht associations (clubs) energetically by learning from the mode of water sports centers in the U.S. and provide good supporting services for yacht owners. Currently, Shenzhen has made a good beginning in this respect. The successful

operation of Shenzhen Longcheer Yacht Club makes a breakthrough in the yacht economy in China. Constructed in 1998 with RMB 317 million, Longcheer Yacht Club is located on Judiaosha Beach, Dongshan Village, Nan'ao Town, Shenzhen, covering a total area of 140,000 square meters (including land area and sea area). It has 275 berths and 400 dry cabins. This fully enclosed private membership-based yacht club now has more than 300 members.[12] We have every reason to believe that as the operating models of various clubs become mature, there will be more and more yacht associations (clubs) in China.

According to the current business conditions of yacht clubs around the world, their operating models may be divided into the following types:

Table 2 Features of Various Types of Yacht Clubs[13]

Types / Features	Sports entertainment	Leisure	Business
Service object	Young groups, white-collar workers, etc.	Family, friends, lovers	Companies, enterprises and other high-level businessmen
Requirements for yacht	Excellent speed performance, small and medium size, middle and low level, equipped with powerful engines, relatively simple internal facilities	Middle level, internal facilities with the characteristics of a home, household appliances	Large size, high costs, luxurious interior facilities, exquisite decoration, supporting communications equipment, conference equipment and office equipment, fully reflecting the needs of a modern corporate for office affairs

12 *The Economic Observer*, 21 March 2005, p. A45. (in Chinese)

13 Cheng Juehao. Preliminary Exploration into the Operating Models of Yacht Clubs, *Technology and Economic Information of Shipbuilding Industry*, No. 5, 2004. (in Chinese)

(Continued from the previous page)

Intention to hire / purchase yacht	Sports, recreation, leisure	Leisure, vacation	Entertaining customers, business negotiations, meetings, leisure and entertainment of company executives
Charging standards	Common	Common	High
Membership system	More temporary charter or membership system	Recruiting fixed members or charter	Fixed members or charter
Service content	Insurance, arrangements for programs and travelling, organization of special events, etc.	Insurance, daily care on behalf of the owner, refueling, refurbishment and repair of yachts	Provide professional skippers, upscale restaurants, bars and entertainment venues; arrange full-service or self-determined voyage or activities
Club hardware facilities	Few external supporting facilities	Parking lot, repairing dock	Comprehensive and complete leisure and vacation facilities

(5) With the maturity of the market, improvement of infrastructure and diversification of supporting facilities, yacht products will polarize. In the future, an imported yacht may cost only RMB 200,000, while a domestic yacht may cost only RMB 50 to 100 thousand, almost equivalent to some current private cars. In China, after years of rapid economic growth, people's purchasing power has significantly improved. In some large and medium cities, consumption up to RMB 10 thousand or 100 thousand has become very popular. It is foreseeable that in the near future, the wealthy residents of Beijing, Shanghai, major cities in Zhejiang, Guangdong and Fujian, as well as other coastal cities will have absolute ability to be the first in China to own a private yacht and enjoy leisure activities just like those people in

other countries around the world.[14] What's more, it will be a good way for the not quite so wealthy to hire a yacht together with others. According to the introduction of insiders, all the families with a per capita monthly income of more than RMB 20,000 have the ability to hire a yacht.

III. Obstacles to Development of Private Yachts in China Mainland

China Mainland's consumption of yachts has a common characteristic among developing countries, namely, consumption has shifted gradually from public consumption in water attractions to public affair-based consumption of big companies and groups. Private consumption of yachts has not become the mainstream type of consumption of yachts mainly due to the following reasons:

(1) Because yachts are high-end and durable luxury consumer goods, the hire or purchase of yachts is based on a high degree of economic development. The price of an ordinary yacht ranges from several hundred thousand yuan to 1 million yuan, while a large luxury yacht will cost up to 10 million yuan. In addition, it is far more expensive to maintain a yacht than to maintain a car. Every year, it will cost a total of no less than RMB 50,000 to maintain a yacht, including docking fees of RMB 7,000 to 12,000, fuel costs, repair expenses, maintenance fees, etc. These costs will not be a problem for the wealthy. However, for most ordinary families, it is still an elusive dream to own a private yacht.[15]

(2) Problem of driving license. Currently, one person can pilot a yacht only after he obtains a Class A Yacht Driving License issued by a State transport department. Because water transportation is unlike ground transportation, relevant training items are great in number and complex and relevant tests are demanding. As a result, until now, China has only one club that can provide yacht training. The club is the U.S. Mercury Yacht Club in Suzhou. It has concluded an agreement with Suzhou Maritime Bureau, based on which it can provide training on yacht, and Suzhou Maritime Bureau will issue a Yacht Driving License to those who have

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14 Cooking a Big Meal of Yachts of RMB 300 billion: The Yangtze River Delta Becomes a Leading Role in Consumption in the Post-car Era, at http://www.chi-neseboating.com.cn/qytd/detail2.asp?gy_id=1&q-id=79, 10 October 2006. (in China)

15 Cao Xinhua, Yacht: A Quietly Emerging New Consumption Highlight, *Waterway Transportation Digest*, No. 6, 2003. (in Chinese)

passed relevant tests.[16] Therefore, China has only a few people owning a Private Yacht Driving License. In addition, because fairways are different from waters to waters, a Yacht Driving License will be valid only in the local place. Therefore, we should make further efforts to enable private yacht owners to drive their beloved yachts personally and freely across various sea areas.

(3) Problem of piers. Another important factor restricting the development of private yachts in China Mainland is "the difficulty to launch yacht". There are still no special piers for yachts around China Mainland. Even for such a big company as the U.S. Mercury Yacht Club, yachts can only be launched from a rented passenger terminal. However, it is still more difficult to know whether a small private yacht can rent such a passenger terminal for a long period.

(4) Cumbersome launching procedures. Before using a yacht, one has to register his yacht with the relevant department and define the sailing water area, sailing time and speed limits. However, up to now, the government has not formulated special provisions on yachts and just applies those provisions on passenger ships. Therefore, even Shanghai's private yacht owners have to go to the U.S. Mercury Yacht Club located by Tai Lake to accept training on yacht, to use piers and water areas provided by the U.S. Mercury Yacht Club and to go through other cumbersome procedures before they are allowed to set sail.[17]

(5) The insufficiency in yacht associations (clubs) also restricts the development of private yachts. Yacht associations (clubs) emerged in England in the 18th century. At the beginning, they only provided small docks to yachts. Later, with the development of yachts, they had more and more functions, including those functions of clubs and hotels. In addition, they now provide catering, meeting services, fitness services, entertainment, water sports training, yacht docking, repairing and maintaining services, leisure on holidays, business services, living on waters, port joint inspection, etc. and even plan tourist activities for groups (or individuals).[18] It is no exaggeration to say that yacht associations (clubs) have become indispensable "stewards" of private yacht owners. Currently, China has about more than 20 yacht associations (clubs), which are far from enough for a new

16 Cao Xinhua, Yacht: A Quietly Emerging New Consumption Highlight, *Waterway Transportation Digest*, No. 6, 2003. (in Chinese)

17 Cooking a Big Meal of Yachts of RMB 300 billion: The Yangtze River Delta Becomes a Leading Role in Consumption in the Post-car Era, at http://www.chineseboating.com.cn/qytd/detail2.asp?gy_id=1&q-id=79, 10 October 2006. (in Chinese)

18 Cheng Juehao, Preliminary Exploration into the Operating Models of Yacht Clubs, *Technology and Economic Information of Shipbuilding Industry*, No. 5, 2004. (in Chinese)

rapidly growing industry. At present, it's obvious that the demand of private yacht owners in Zhejiang and Xiamen cannot be satisfied because there are no yacht associations (clubs) in such areas.

IV. Speculation on the Development of Private Yachts in China Mainland

A. Improvement of Social Awareness and What Measures the Government May Take

China's yacht industry has just started, so it is most critical to utilize various means to enable people to know about yachts, an entertainment tool worth promoting. In particular, the government should recognize the significance of the development of the yacht industry and emphasize the role of the yacht industry in promoting economic development. The yacht industry is a new industry, a new source of tax revenue and a new economic growth point. In developed countries, one in every 171 people have a yacht. Global annual consumption of yachts reaches as high as USD 40 billion. Combined with revenues arising from relevant maintenance, management, entertainment, etc., global annual income arising from yacht exceeds USD 50 billion.[19] At present, China's exports of yachts total only USD 17 million. However, due to its comparative advantage of labor costs and manufacturing cost advantage, China has the potential to earn up to USD 10 billion in the international yacht market. Because the yacht industry is a labor-intensive, technology-intensive, knowledge-intensive and capital-intensive long-chain industry, the promotion of the yacht industry will drive the development of dozens of supporting industries, including the industries of new materials, coatings, electronic instruments, meters, power, propulsion systems, etc. and the consumption the yacht industry will promote the rapid development of a number of relevant industries, including the industries of yacht piers, yacht transportation, yacht maintenance, fueling, water recreation, catering services, etc. In addition, the development of the yachting industry can lead to reuse of some presently disused shore facilities.[20] At the current stage, the government can make a difference in the

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19 See *The Economic Observer*, 21 March 2005, p. A45. (in Chinese)

20 Hu Xiaogang and Ye Jiawei, The Yacht Industry in the Pearl River Delta and Its Development Prospects, *Guangdong Shipbuilding*, No. 1, 2004. (in Chinese)

following areas:

1. To construct special piers for yachts as soon as possible to solve the difficulty in launching yachts. Since there are no special piers for yachts at present and it's very complicated to hire a passenger terminal, so many private yacht owners can only heave a sigh in the face of the vast sea. It was gratifying that there was good news from the Ninth China International Boat Show, which commenced on March 24, 2004. According to the relevant planning, in the future, more than 10 special piers for yachts will be constructed in Shanghai. According to some other reports, an all-weather yacht pier is being planned in Zhoushan, Zhejiang and Nanjing has begun to construct the first international yacht pier on the Yangtze River. In addition, two yacht ports have been completed at Xinghai Bay and Xiaoping Island in Dalian, with four other yacht ports under construction.[21] Additionally, private yacht owners with a good waterscape can also build private pier in front of their own houses. For example, private piers have been built by some villa owners by the lake in Forest Hills near the North Fourth Ring Road in Beijing, reflecting the advanced needs of the market.[22] At the same time, we should accelerate the construction of water infrastructure and supporting facilities for yachts.

2. To do well in yacht driving license training, assessment, issuance and management.

3. To refer to the practices in Malaysia and institute tax exemptions on imported yachts and equipment. Ten years ago, the Malaysian Government stopped taxes on imported yachts and equipment, making the yachting industry in Malaysia develop rapidly. Because only a small number of yachts were imported, the shipbuilding industry in Malaysia had not been damaged and there had been no significant tax losses.[23] Exemption (if any) from taxes on imported yachts and equipment will be of great help to China's import of yachts and enable China's middle class to buy and own private yachts rather easily.

B. Give Full Play to the Role of Market in Developing the Yacht Market

1. To build more yacht associations (clubs) to meet market demand. As the

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21 See *The Economic Observer*, 21 March 2005, p. A45. (in Chinese)
22 See *The Economic Observer*, 25 October 2004, p. A44. (in Chinese)
23 Jerry Martin, China's Yacht Industry Is Facing a Huge Business Opportunity, at http://chineseboating.com.cn/ytgy/1-1.asp, 11 July 2006. (Chinese)

yacht industry is an emerging industry, there are no State enterprises engaged in the industry, or other system-related problems. Therefore, except the overall planning of the yacht industry and the control of the number of yachts, the government should try to avoid interfering with the internal affairs of the enterprises engaged in the yacht industry, so that they can have a lenient external market environment. In addition, the Chinese Government has been controlling ocean exploitation through legislation over a long period of time and the tasks of various Border Control Departments are to prevent lurkers, to prevent fleeing to a foreign country or region and to prevent smuggling, so to establish yacht associations (clubs) in coastal areas will face high policy risks. Therefore, the government should moderately relax controls over the enterprises engaged in the yacht industry, so that they can have a good external policy environment.[24] In fact, up to now, more than 20 yacht clubs have been officially registered in China Mainland and yacht associations (clubs) have become the focus of coastal governments at all levels as a new favorite. When the term "yacht association (club)" is used to search relevant news through Baidu, 17,100 web links will appear, including the following news: RMB 5.3 billion will be invested to build the world's largest yacht association - Oriental International Yacht Association in Hangu District, Tianjin. It was also understood that Lam Soon (Thailand) had signed an agreement with Xiamen Government to invest USD 120 million into an international yacht club. As can be seen from above, yacht associations (clubs) are developing vigorously.

2. As the yacht market matures and relevant laws and regulations improves, we can also consider working with banks and offer installment payment for yachts, which can lower the threshold for private yacht ownership and enable ordinary families to own a private yacht. Because of the well-developed practices in the real estate market and the auto market, there will be no technical difficulty with this method.

3. To develop the market of second-hand yachts and the yacht leasing market actively. According to a report of *Xiamen Evening News*, on December 15, 2004, the only private yacht (Min Xiamen Jiao 0017) in Xiamen was auctioned for the first time by Fujian Chengxin Auctioneers Co., Ltd. Finally, it was auctioned off at a price of RMB 250,000.[25] With the further development of the yacht industry, the

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24 See *The Economic Observer*, 21 March 2005. (in Chinese)

25 At http://search.csnn.com.cn/scripts/pws.dll/pkuir_tnodels/wb2001/dispdoc.irm?%23didoc=1&%23start_disp=0&%23distep=10, 10 April 2006. (in Chinese)

market of second-hand yachts and the yacht leasing market will be promising.

V. Speculation on Establishment of Unified Yacht Management Standards

In terms of legal norms related to yacht management, up to now, in China Mainland, only the Port and Shipping Administration Bureau of Hangzhou has issued the Interim Measures of Hangzhou for Management of Yachts. In terms of legal hierarchy, the Interim Measures are just a normative document prepared by a functional department of a municipal government, so they are far from being able to meet the needs of the development of the entire yacht market. Therefore, it is necessary to separate shipbuilding regulations, navigation regulations, navigation license-related regulations, etc. from the regulations for management of the ship industry and develop unified national rules for management of yachts (to be called Regulations for Management of Yachts of the PRC by the authors of this paper). It is believed that the Regulations shall contain the following contents:

Part I General Provisions

This part is to define some concepts. Firstly, a yacht refers to a ship for recreational activities, with a length of more than 5 meters. With reference to China Taiwan's Yacht Management Measures, we will divide yachts into business yachts and private yachts and will manage them in different ways.

Article 1 These Regulations are formulated to standardize management of yachts, to maintain water traffic order, to protect the safety of navigation, and to promote the development of water tourism, including water sports, entertainment, etc.

Article 2 These Regulations are applicable to yacht-based navigation, berthing, fishing, sightseeing, entertainment and other relevant activities in or on waters.

Article 3 The term yacht in these Regulations refers to a ship for recreational activities, with a length of more than 5 meters.

Yachts fall into business yachts and private yachts:

(1) Business yachts refer to profit-making yachts for which fees will be settled directly or indirectly;

(2) Private yachts refer to non-profit-making yachts to be used by the owner him or herself or to be lent to others, for which no fees will be settled in any way.

Article 4 Yacht association (club) refers to an organization in which a manager

of yacht business may provide yacht services or yacht owners in accordance with their agreements or operate such services itself.

Article 5 Yachts shall be managed based on the principles of "safety first" and orderly and moderate development.

Article 6 The State Maritime Administration shall be responsible for supervision and management of yachts and yacht associations (clubs) around the country.

The local maritime administrative organizations across the country shall be responsible for supervision and management of yachts and yacht associations (clubs) within their administrative regions.

Part II Management of Yachts

The main contents of this part are provisions on technical inspection and registration of ownership of yachts prepared based on the Regulations of the People's Republic of China Governing the Registration of Ships. Both a Technical Inspection Certificate of Yacht and a Ownership Registration Certificate of Yacht (tentative names produced by the authors of this paper) shall be obtained for a yacht. For a profit-making yacht, a business license and an operating permit shall also be obtained.

Article 7 A yacht shall meet the following conditions before sailing:

(1) being inspected in accordance with the law by a ship inspection body recognized by the maritime administrative organization, with a valid Technical Inspection Certificate of Yacht obtained;

(2) being legally registered with the maritime administrative organization, with a valid Ownership Registration Certificate of Yacht and a valid Nationality Certificate of Yacht obtained;

(3) being equipped with crew who are in compliance with the provisions of the maritime administrative organization;

(4) being equipped with the necessary navigational information and communication and rescue facilities;

(5) a profit-making yacht should apply to the local maritime administrative organization and obtain the Commercial Transportation License for Yacht.

Article 8 A yacht shall comply with the special safety and environmental protection requirements of the water areas where it is to be used.

Article 9 Relevant taxes on a profit-making yacht shall be paid in accordance with relevant State regulations.

Article 10 Relevant liability insurance shall be handled for a profit-making

yacht in accordance with relevant State regulations and for a private yacht voluntarily.

Part III Management of Certificate and License

The skipper of a yacht shall participate in appropriate training and obtain the corresponding driving license before he or she is allowed to set sail. With reference to car driving license management model, based on the type of yacht, yacht driving licenses can be divided into different categories, with different assessment criteria. During a yacht driving license test, special attention shall be paid to practical training and a certain probationary period may also be required. A yacht driving license shall be inspected every year.

Article 11 Yacht skippers and other crew members shall receive professional training on water traffic safety, pass the examination of local maritime administrative organization and obtain the competency certificate or any other competency document of the appropriate level. No skipper or crew member shall be allowed to take up a post before obtaining the competency certificate of the appropriate level or any other competency document.

The skipper and other crew members shall abide by professional ethics, improve their professional quality and perform their duties strictly according to the law.

Article 12 A person shall meet the following conditions when he or she applies for a certificate for being a yacht skipper or other crew member:

(1) being 18 years old or above and not more than 65 years old;

(2) being physically fit;

(3) having a high school education or above;

(4) having the water service experience set forth in Article 13 hereunder.

Article 13 A person applying for a yacht driving license shall have the following experience:

(1) having participated in at least 15 hours of practical training;

(2) being confirmed to have been on probation on a yacht for at least 30 hours;

(3) having participated in at least five days of training on basic professional knowledge after meeting the conditions set forth in Items (1) and (2) of this Article.

Article 14 A person holding a crew member competency certificate of Inland River Grade V or above shall participate in at least 15 hours of practical training and take up a post on a yacht only after passing the examination of the maritime administrative organization.

Article 15 Yacht skippers and other crew members shall use the Yacht Crew

Member Competency Certificate in a uniform manner.

Article 16 Skippers and other crew members shall participate in the annual training and examination organized by the local maritime administrative organization every year.

Article 17 The establishment of positions as well as assessment, issuance, verification, replacement and management of certificates of yachtsmen and other crew members shall be implemented by the maritime administrative organization in accordance with the provisions in the Rules for the Examination and Certification for Sailors of Inland Waterway Vessels.

Part IV Management of Navigation

This part shall refer to the provisions related to piers, berths, sailing areas, sailing speed, etc. of yachts in Regulations of the People's Republic of China on Administration of Traffic Safety in Inland Waters, Maritime Traffic Safety Law of the People's Republic of China, Port Law of the People's Republic of China and the Provisions on the Administration of Port Operations.

Article 18 A yacht shall sail at a safe speed within the water areas approved by the local maritime administrative organization.

Article 19 A visa shall be obtained at the local maritime administrative organization in accordance with the relevant provisions before a yacht sails into or out of a port. A yacht shall not be allowed to sail out of a port in adverse weather or in a circumstance which may endanger the navigation safety.

Article 20 The activities of yachts shall not pollute water or damage the ecological environment.

Article 21 The activities of yachts shall not be conducted in any reservoir of drinking water, except with the consent of the reservoir management office.

Article 22 Yachts shall not be used in smuggling or other illegal actions.

Article 23 The activities that may hinder public order or good customs shall not be held or allowed on yachts.

Article 24 Yachts shall be in line with other requirements established by the maritime administrative organization.

Article 25 Yachts shall be berthed in a concentrated manner at the piers, berths and berthing areas approved by the local maritime administrative organization.

Article 26 The piers for yachts shall meet safety and environmental requirements and have the environment which can ensure safe, rapid and convenient embarkation and disembarkation.

Article 27 The piers for yachts shall be managed in accordance with the Port

Law of the People's Republic of China and the Provisions on the Administration of Port Operations.

Part V Management of Yacht Operations

As mentioned above, yacht operations are managed through yacht associations (clubs), so it is necessary to define the functions of yacht associations (clubs) and regulate business qualifications and business practices. Because maritime accidents are likely to cause huge losses, a yacht owner or operator shall be obliged to participate in insurance.[26] With regard to this issue, the authors believe that the operator of a profit-making yacht shall be obliged to participate in insurance, while a private yacht owner may participate in insurance voluntarily.

Article 28 Yacht associations (clubs) are organizations managing business of yachts or managing yachts on commission. Yacht associations (clubs) may be managed based on the system of membership.

Article 29 Yacht associations (clubs) can provide the following services:

(1) yacht maintenance and maritime management services;

(2) yacht overhauling and maintaining services;

(3) crew rationing and management services;

(4) yacht berthing and supply services;

(5) yacht leasing and operating services;

(6) other yacht management services;

(7) provide fixed places for members to relax, dine, exercise, live temporarily, etc.

Article 30 Yacht associations (clubs) shall handle business registration according to the law, obtain the appropriate business qualifications and get engaged in management of yacht operations within the approved business scope.

(1) The yacht associations (clubs) providing services for private yachts shall meet the conditions of and requirements for business qualifications set forth in Provisions on Domestic Vessel Management Business and obtain the Waterway Transportation Service License;

(2) A yacht association (club) which leases its own private-profit-making yacht to its members or other people shall meet the conditions of and requirements for business qualifications set forth in the Administrative Provisions on the Operation Qualifications for Domestic Waterway Transport and obtain the Waterway

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26 Peng Xiaojun, Thought Arising from China Taiwan's Management of Yahcts, *Zhujiang Water Transportation*, No. 8, 2011. (in Chinese)

Transportation License;

(3) A yacht association (club) whose operating items and scope integrating those in Items (1) and (2) of this Article shall meet the conditions of and requirements for business qualifications set forth in both the Provisions on Domestic Vessel Management Business and the Administrative Provisions on the Operation Qualifications for Domestic Waterway Transport and obtain both the Waterway Transportation Service License and the Waterway Transportation License.

Article 31 Yacht associations (clubs) shall strengthen management of yacht safety, establish and improve relevant traffic safety management systems and carry out responsibility of management of yacht safety.

Article 32 In case of merger or division of a yacht association (club), or change of business scope, business name, address and legal representative thereof, or other matters, the relevant formalities shall be handled according to the law.

Part VI Legal Liability

This part is mainly to set forth penalties for violation of the above-mentioned provisions and define the yacht administrative organization. Under existing conditions, yacht management authorities shall be local maritime sectors and port and shipping sectors.

Article 33 The maritime administrations shall establish and perfect those systems for supervising and inspecting yachts and yacht associations (clubs) and organize the implementation thereof.

When a staff member of the maritime administration conducts supervision and inspection in accordance with these Regulations, he or she shall produce a law enforcement document to prove identity.

Article 34 Yacht owners and yacht associations (clubs) shall accept the supervision and inspection of the maritime administration, provide truthful information and provide convenience for its work. No unit or individual shall refuse or obstruct.

Article 35 The maritime administration shall make more efforts to supervise and inspect whether there is any business activity involving any private yacht, whether any yacht has sailed out of the approved water area and whether there is any other illegal action, so as to standardize management of the business activities of yacht associations (clubs).

Article 36 If a yacht which should be out of service continues to sail or be used in any activity in violation of these Regulations, the sailing or activity shall be

stopped by the maritime administration and the yacht shall be confiscated.

Article 37 If a yacht sails or is used in any activity arbitrarily without any valid inspection certificate, registration certificate or the necessary information on navigation, the sailing or activity shall be stopped by the maritime administration; if the yacht owner refuses to stop, the yacht shall be withheld. If the case is serious, the yacht shall be confiscated.

Article 38 If no crew is rationed to a yacht in accordance with the provisions of the State Maritime Administration and the yacht sails or is used in any activity without permission, the maritime administration may order the yacht owner or operator to make corrections within a limited period and fine him or her more than RMB 10 thousand and less than RMB 100 thousand. Should the owner or operator fail to make corrections within the limited period, he or she shall be ordered to stop the sailing or activities.

Article 39 The maritime administration may order that any person who is engaged in any yacht sailing or activity without passing the relevant examinations, or having a competency certificate or any other competency document shall be removed immediately and fine the person directly responsible for the case more than RMB 2,000 and less than RMB 20,000. The person or entity employing the foregoing incompetent person shall be fined more than RMB 10,000 and less than RMB 100,000.

Article 40 In any of the following circumstances during any sailing or activity of a yacht, the maritime administration may order the yacht owner or operator to make corrections and pay a fine of more than RMB 5 thousand and less than RMB 50 thousand; if the case is serious, the maritime administration may order him or her to stop sailing or activities and even withhold the competency certificate or any other competency document of the responsible crew member for three to six months:

(1) having not applied to the maritime administration for a visa to sail out of or into a port;

(2) having not applied for pilotage in accordance with the relevant provisions;

(3) sailing into or out of a port without permission; passing any traffic control area, intensive navigation area, restricted navigation area or prohibited navigation area;

(4) having not applied for sailing route or time or having not sailed in accordance with the approved sailing route or time.

Article 41 Should a yacht be berthed at an unapproved yacht pier, berthing

place or berthing area, the maritime administration may order the yacht owner or operator to make corrections; if the owner or operator refuses to make corrections, the yacht may be hauled away and the expenses arising therefrom shall be borne by the yacht owner or operator.

Article 42 A punishment may be imposed on any other breach of these Regulations in accordance with the provisions of the relevant laws and regulations if such provisions are applicable.

Article 43 A party which challenges any administrative penalty or decision of administrative compulsory measure of the maritime administration may apply for administrative reconsideration or bring an administrative lawsuit in accordance with the law.

Part VII Supplemental Provisions

This part is mainly to define the authority to interpret these Regulations and the entry-into-force time.

Article 44 These Regulations shall be interpreted by Maritime Safety Administration of the People's Republic of China.

Article 45 These Regulations shall enter into force on the date of publication.

Translator: LI Cun'an
Editor (English): Mary Frances Cappiello

The Legal System of Maritime Salvage and the Protection of Underwater Cultural Heritage: An Analysis of Relevant Provisions in the Convention on the Protection of Underwater Cultural Heritage

ZHAO Yajuan*

Abstract: Salvage regime, a time-honored legal regime for marine transport activities, aims to encourage the salvage of ships or cargo in danger. With the increasing discovery of age-old shipwrecks, however, some companies are recovering them in the name of salvage and are claiming their rights or even ownership of the salved objects. These bits and pieces of ships and cargos which submerged hundreds of years ago have now become underwater cultural heritage of significant historic and archaeological value. This fact, as a result, has given rise to a heated argument among archaeologists and salvors over whether the financial-benefits-oriented maritime salvage regime can be applied in such circumstances. The 2001 Convention on the Protection of Underwater Cultural Heritage, specifies that no commercial recovering or exploring, except in exceptional cases, of underwater cultural heritage should be allowed. This constitutes a valuable reference for China's protection and management of its underwater cultural heritage.

Key Words: Maritime salvage; Underwater cultural heritage; Principle of preservation in situ

I. Theories Relevant to the Traditional Maritime Salvage Regime

* ZHAO Yajuan, doctor of laws, a lecturer from Law School in South China University of Technology.

The maritime salvage regime constitutes a time-honored legal regime for marine transport activities. This regime is established out of realistic economic considerations, aiming at granting, through legal provisions, salvors rights to claim remunerations with a view to encouraging salvage and protection of ships and cargos that are at risk of loss or plunder, further to preserve the interests of owners of cargos and ships.[1] The act of salvage award can be found in the Ordinance for Maritime Affairs (Ordonnace de la Marine) enacted by Louis XIV in France.[2] Salvors are allowed to ask for compensation as long as they succeed in saving ships and cargo from ruin or help decrease damages to the ship or cargo owner as much as possible on the sea or in any navigable waters. Salvors, without exceeding the amount of claims for compensation, enjoy a maritime lien on the possessions of the saved ship owner (including ship, attachments, freight charges and other maritime claims) and are legally prioritized in getting compensation when the salvage is auctioned. This priority is acknowledged by many countries. Apart from this, salvors can hold salvaged objects until they are duly compensated.[3] In common law countries, a ship is a fictional legal entity and thus shall have both rights and obligations. As a result, salvors can institute an action *in rem* to the admiralty court to request for salvage remunerations.[4]

A. Constituent Elements of Salvage Remunerations[5]

Constituent elements of salvage remunerations include that: objects to be

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1 Zhang Xianglan et al eds., *Comments on Maritime Law*, Wuhan: Wuhan University Press, 2001, p. 59 (in Chinese); Huang Longfeng, *Legal Issues Involved in Salvage at Sea*, Taipei: Linking Publishing Company, 1986, pp. 12~14 (in Chinese); Si Yuzhuo ed., *Maritime Law*, Beijing: Law Press China, 2003, p. 260. (in Chinese)

2 Si Yuzhuo ed., *Maritime Law*, Beijing: Law Press China, 2003, p. 271. (in Chinese)

3 Huang Longfeng, *Legal Issues Involved in Salvage at Sea*, Taipei: Linking Publishing Company, 1986, pp. 60~61. (in Chinese)

4 Huang Longfeng, *Legal Issues Involved in Salvage at Sea*, Taipei: Linking Publishing Company, 1986, pp. 80~81 (in Chinese). See also John Reeder ed., *Brice on Maritime Law of Salvag*e, London: Sweet and Maxwell, 2003, p. 319.

5 Constituent elements for requesting rewards differ from those for maritime salvage. For example, though effect is required of salvorial acts when remuneration is on the table, a salvorial relation is still legally established if there is no effect to be seen. See Si Yuzhuo ed., *Maritime Law*, Beijing: Law Press China, 2003, p. 267 (in Chinese). However, still some scholars equate one with the other. See Huang Longfeng, *Legal Issues Involved in Salvage at Sea*, Taipei: Linking Publishing Company, 1986, pp. 30~37 (in Chinese). As to the protection of underwater cultural heritage, it is more useful to analyze the constituent elements for salvage reward.

salvaged should be recognized by law; objects to be salvaged should be in actual and unavoidable danger; it should be voluntary salvage; and the salvage should generate useful results.[6]

1. Objects to be salvaged should be recognized by law. This means that it is objects, instead of people, that are rescued and such objects must be recognized by law.[7]

2. Objects to be salvaged should be in actual and unavoidable danger. Salvage remunerations may be claimed provided that ships or other possessions are really in danger which goes beyond self-assistance. As to the types of danger recognized by law, there are no clarified specifications in international conventions or in national maritime laws.

3. It should be a voluntary salvage. This means when involved in legal relations, both the salvor and the salvaged act, instead of being forced to fulfill certain duties or legal or other contractual obligations, according to their own will and based on mutual agreement. No one is burdened with legal responsibilities to lend a helping hand at sea, however, the salvor is entitled to compensation if the endangered object is successfully saved.[8] The salvor may only request for salvage remuneration when its deed does not meet an explicitly justified rejection.[9] If a justified rejection is not explicitly expressed, the salvage will be assumed to be an implicit voluntary deed, and although no contract is signed, the salvor is entitled to compensation once its work is completed. Under such circumstances, a pure salvorial relation is legally established.[10] Salvorial acts are usually taken under various contracts with the most common of them guided by the principle of "no effect, no reward."

4. The salvage should generate useful results. "No effect, no reward" is a

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6 Nigel Messon, *Admiralty Jurisdiction and Practice*, 3rd Edition, Bodmin: MPG Books, 2003, p. 45; Si Yuzhuo ed., *Maritime Law*, Beijing: Law Press China, 2003, p. 263~267. (in Chinese)

7 As to rescue of human life, only British laws recognize its entitlement to compensation. International conventions, China's maritime law, Japanese law and German commercial law all discount this in principle, except that both human life and property are salvaged in the case. Si Yuzhuo ed., *Maritime Law*, Beijing: Law Press China, 2003, p. 263. (in Chinese)

8 For instance, the mutual salvorial obligation of ships in collision, the necessary salvage caused by the salvor's fault, salvage necessitated by the process of fulfilling towing contracts or other contracts on service at sea and salvage that are considered duties of pilots, lifeguards and firemen. Zhang Xianglan ed., *Comments on Maritime Law*, Wuhan: Wuhan University Press, 2001, p. 276. (in Chinese)

9 Si Yuzhuo ed., *Maritime Law*, Beijing: Law Press China, 2003, p. 265. (in Chinese)

10 Si Yuzhuo ed., *Maritime Law*, Beijing: Law Press China, 2003, pp. 260~266. (in Chinese)

general principle adopted by both international conventions and national maritime laws. A useful result requires complete or partial rescue of the endangered ships and property.

B. Factors Need Consideration When Determining the Amount of Salvage Remunerations

Determining the amount of salvage remunerations constitutes the most complicated issue in the maritime salvage regime, because it cannot be based exclusively on the quantum meruit of the salvor. Instead, apart from the physical effort and financial expenses on the part of the salvor, hosts of other factors should also be taken into consideration.[11] A prior agreement on salvage remunerations will reduce or avoid disputes between both parties, while not having a prior agreement can give rise to numerous problems. The *Blackwall Bill*, which was entertained by American court in 1869, lists the following elements advisable for consideration when deciding salvage remunerations with no prior agreement: (1) the effort on the part of salvors involved in the salvorial process; (2) the speed, skills and efforts involved on the part of salvors when providing service in preserving property; (3) the value of the tools involved in the salvorial process and the degree of risk those tools are put in; (4) the danger faced by salvors when saving property in emergent marine perils; (5) the value of salvaged property; and (6) the degree of danger faced by the salvaged property.[12] These rules, laid down by the *Blackwall Bill*, are frequently invoked by court trials of salvage cases.

British courts have similar considerations to their American counterparts in this respect. According to British legal precedents of the 19th century, the following factors are taken into account: (1) the courage showed by salvors when risking their lives in saving property under terrible weather; (2) the degree of danger faced by the salvaged property; (3) the efforts, skills and time involved in the process of salvage on the part of salvors; and (4) the value of the salvaged property.[13]

Maritime laws of many countries as well as international conventions in

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11 Huang Longfeng, *Legal Issues Involved in Salvage at Sea*, Taipei: Linking Publishing Company, 1986, p. 89. (in Chinese)

12 Huang Longfeng, *Legal Issues Involved in Salvage at Sea*, Taipei: Linking Publishing Company, 1986, p. 90. (in Chinese)

13 Huang Longfeng, *Legal Issues Involved in Salvage at Sea*, Taipei: Linking Publishing Company, 1986, p. 92. (in Chinese)

respect of salvage problems reached by the international community have adopted the consideration factors established by American and British legal precedents.[14] For instance, the International Convention on Salvage, 1989, lists the following criteria for fixing the reward: (a) the salved value of the vessel and other property; (b) the skill and efforts of the salvors in preventing or minimizing damage to the environment; (c) the measure of success obtained by the salvor; (d) the nature and degree of danger; (e) the skill and efforts of the salvors in salving the vessel, other property and life; (f) the time used and expenses and losses incurred by the salvors; (g) the risk of liability and other risks run by the salvors or their equipment; (h) the promptness of the services rendered; (i) the availability and use of vessels or other equipment intended for salvage operations; (j) the state of readiness and efficiency of the salvor's equipment and the value thereof.[15]

Therefore, according to the traditional legal regime of salvage, non-government vessels and properties on board are legally recognized objects to be salved, regardless of their age. Salvors may apply to the courts for a salvage reward if they succeed in their salvage operations.

II. Newly-Made Alteration to the Maritime Salvage Regime

With technological developments and increasing sea exploration, ships and other objects that sank hundreds of years ago are increasingly being discovered. Due to the lack of international and domestic legislation, some countries or regions, the United States and the UK in particular, have seen some salvage companies recovering these antiques in the name of "salvage at sea," for monetary gain or to acquire part of what is salvaged by requesting the court to judge according to the salvage contract entered into by and between such companies and shipowners or insurers. As a result, the application of maritime salvage laws extends to these age-old sunken objects. At present, however, some alterations are being made to maritime salvage laws. These alterations are reflected in the fact that the principles of laws of salvage and finds have been integrated without being detected in some American legal precedents.

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14 Huang Longfeng, *Legal Issues Involved in Salvage at Sea*, Taipei: Linking Publishing Company, 1986, p. 91. (in Chinese)

15 1989 International Convention on Salvage, Art. 13(1).

The law of finds is a principle under common law system that is based on the traditional idea that "the finders are the keepers."[16] Traditionally, the law of finds applies to anything that is not owned by anyone. Some courts (especially American courts) are now extending the concept of finds to shipwrecks and objects that are abandoned by their original owners.

Abandonment is an age-old concept originating from Roman law. It refers to a right-holder's voluntary renouncement of his or her property.[17] Determining an act of abandonment requires considering the nature of the property in question and certain behaviors of all parties involved. As for shipwrecks and objects, abandonment may be made by explicit announcement, by tacit consent from previous owners, or insurers who have paid for the damage. Therefore, the key to determining abandonment lies in the intention of previous owners, and specific

16 Eke Boesten, *Archaeological and/or Historic Valuable Shipwrecks in International Waters*, The Hague: T. M. C. Asser Press, 2002, p. 108.

17 Sandro Schipani ed., translated by Fan Huaijun, *Objects and Propriety*, Beijing: China University of Political Science and Law Press China, 1999. pp. 59~61 (in Chinese). The United States' Abandoned Shipwreck Act of 1987 is one of the pioneers in adopting the theory of abandonment towards shipwreck. The Act aims to protect abandoned sunken ships which are located on or buried in the sea bed in America's territory, especially those considered of historic value. According to it, the United States Congress can reclaim ownership of these shipwrecks and transfer it automatically to its states. Thus laws of salvage and finds cannot apply, preventing salvage companies from recovering these historic shipwrecks in the name of "salvage at sea". Purpose and effect of this legislation can be seen in Anne G. Giesecks, The Abandoned Shipwreck Act through the Eyes of Its Drafter, *Journal of Maritime Law and Commerce*, Vol. 30, 1999, p. 167; Ole Varmer and Caroline M. Blanco, United States of America, in Sarah Dromgoole ed., *Legal Protection of the Underwater Cultural Heritage: National and International Perspectives*, The Hague: Kluwer Law International, 1999, p. 207.

circumstances are referred to when only tacit consent is available.[18]

Once an object is defined as abandoned, finders of shipwrecks must show the court that they have actually taken control over the property. This may be proved by the fact that they are aware of the location, are capable of recovering shipwreck, and are in the process of recovering the shipwreck.[19] Usually, salvors of shipwrecks and objects, when having found and successfully pulled out part of such objects, will institute an action *in rem* to prove abandonment of these objects. They will request the court, in accordance with the maritime salvage laws, to release a ban which protects their rights as the first salvor. Therefore, if the salvor, in actual possession of part of the salved property, shows intention of further ownership and can prove or reasonably imply abandonment by previous owners, the court, according to the law of finds, should grant due ownership to him or her, instead of coming out of a verdict of a monetary compensation.[20] Since the law of finds requires actual possession of the salved property, salvors are most likely to carry out their salvage operation in secret. This can save them the trouble of potential ownership claims from other parties. Additionally, it prevents interventions from a third party, which include other salvors.[21] Moreover, calculating salvage

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18 For example, in the *Zych vs. The Lady Elgin* case, the court pointed out that "… abandonment is a voluntary act of renouncing propriety… it can be done explicitly or acquiescently such as leaving one's property with no intention to get it back… abandonment must consist of active intention of renouncement presented due to personal will, instead of being compelled by external pressure… To verify abandonment, one party has to prove that (1) it is an intentional abandonment and (2) behaviors of realizing such intention are observed… or deducted from external factors and situations… determination of abandonment needs to have powerful and convincing evidences… but it is allowed to, and often has to, be determined according to the case in question. Comments on this case can be seen in Paul N. Keller, Salvor – Sovereign Relations: How the State of Illinois Destroyed the Lady Elgin, *Journal of Maritime Law and Commerce*, Vol. 30, 1999, p. 245. In the *Columbus-America Discovery Group v. Atlantic Mutual Insurance Company* case, the court asserted that "…abandonment must be determined with clear and convincing evidences (such as an explicit renouncement claim on the part of previous owners). If the property in question involves age-old shipwreck, the court is supposed to determine abandonment unless the previous owner appears to claim his or her due rights. When this is the case, powerful and convincing evidences are needed to determine an act of abandonment. See Columbus-America Discovery Group v. Atlantic Mutual Insurance Company, (1992) 974 F. 2d. 450 (US Court of Appeals, 4th Circuit). But in practice, the word "abandonment" is explained differently by different parties, resulting in disparities between different legal precedents.

19 Eke Boesten, *Archaeological and/or Historic Valuable Shipwrecks in International Waters*, The Hague: T. M. C. Asser Press, 2002, p. 112.

20 John Reeder ed., *Brice on Maritime Law of Salvage*, London: Sweet and Maxwell, 2003, pp. 314~317.

21 Eke Boesten, *Archaeological and/or Historic Valuable Shipwrecks in International Waters*, The Hague: T. M. C. Asser Press, 2002, p. 109.

remuneration requires an assessment of the value of salved property, especially salved artifacts, which is quite difficult to accurately determine. However, once ownership is settled, the salvor can disregard others' ownership claims while at the same time saving the trouble of assessment. Hence, almost all salvors are in favor of applying the law of finds.[22]

III. Argument over Whether Maritime Salvage Regime Applies to Underwater Cultural Heritage

While the courts of some countries or regions have already applied maritime salvage regime to objects which sank hundreds of years ago, whether there is a difference between those antiques and ordinary shipwrecks still remains a problem. Should they apply to the same legal regime? And can those antiques, just as newly submerged ships and objects, be legally recognized as endangered objects in need of maritime rescue? Is the principle of "no effect, no rewards" instrumental to the protection and management of those shipwrecks and objects?

A. Are Shipwrecks and Objects Dating Back Several Hundred Years Different Enough to Require Different Legal Regime?

Shipwrecks and objects of several hundred years ago are considered "underwater cultural heritage" rather than ordinary shipwrecks and objects by historians and archeologists. As the name implies, the so-called "underwater cultural heritage" refers to cultural heritage that is buried at sea. The understanding of "cultural heritage" varies among countries, which has given rise to different definitions of "underwater cultural heritage."[23] According to the Convention on the Protection of the Underwater Cultural Heritage, 2001, underwater cultural heritage

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22 Eke Boesten, *Archaeological and/or Historic Valuable Shipwrecks in International Waters*, The Hague: T. M. C. Asser Press, 2002, p. 109. But different courts may present contrary attitudes. In the *Columbus-America Discovery Group v. Atlantic Mutual Insurance Company* case, the court pointed out that if the wreck is salvaged by a third party (excluding former owners), the court is inclined to apply the law of salvage, instead of the laws of finds. But if abandonment is defined, then the law of finds should be applied. See Columbus-America Discovery Group v. Atlantic Mutual Insurance Company, (1992) 974 F. 2d. 450(US Court of Appeals, 4th Circuit).

23 Craig J. S, Forrest, Defining "Underwater Cultural Heritage", *The International Journal of Nautical Archaeology*, Vol. 31, 2002, p. 1.

means all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years such as: sites, structures, buildings, artifacts and human remains, vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and objects of prehistoric character.[24]

It is obvious that underwater cultural heritage, compared with general wrecks, have significant value in terms of cultural, historic and archeological studies. It is also worth noting that some objects classified as underwater cultural heritage are also commodities loaded with economic worth when considered from an economic perspective. This value cannot be realized unless these objects are recovered from the water. A collateral problem, however, is how to deal with the archeological, historic, cultural and economic value of underwater cultural heritage and how to preserve it?

Even archeologists are arguing with each other. Some theory-oriented archeologists consider underwater cultural heritage's archeological value and economic potential unable to coexist and protection of such heritage should be done exclusively for the sake of archeology.[25] Preservation in situ has been their most favored suggestion.[26] A host of archeological groups are, in principle, against commercial explorations of historic shipwrecks and their members are often forbidden to get involved in such activities.[27] For example, there used to be a heated discussion over whether the wreck of "General I" in Penghu, Taiwan should be recovered. Many archeologists even rejected providing assistance to China

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24 2001 Convention on the Protection of Underwater Cultural Heritage, Art 1.

25 Carig J. Forrest, Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?, *Journal of Maritime Law and Commerce*, Vol. 34, 2003, p. 317.

26 Discussions on preservation in situ can be seen in Zhao Yajuan and Zhang Liang, Views on Improving China's Underwater Cultural Heritage Protection System Based on the "Nanhai One" Event, *The Science of Law*, No.1, 2007. (in Chinese)

27 See Ricardo J. Elia, The Ethics of Collaboration: Archaeologists and the Wydah Project, *Historical Archaeology*, Vol. 26, No. 4, 1992, p. 105. Quoted from Carig J. Forrest, Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?, *Journal of Maritime Law and Commerce*, Vol. 34, 2003, p. 317.

Taiwan's historical museum in pulling out this ship.[28] The editor's note for the term Nuestra Senora de Atocha in the *Encyclopaedia of Underwater and Maritime Archaeology* goes as follows: this relic is listed here for its household renown generated by extensive reports from massive media and newspapers. Relics like this, however, have always been the focus of business-oriented activities which lead to sales of the recovered artifacts to individuals, transfer of artifacts to private investors or sharing between governments and individual salvors. Although some archeological items were fished out with an archeologist in situ, a piece of artifact, which should have been collected as a whole to serve as a main information source of the relic, was shared by different holders. This partly deprives the relic's potential to provide valuable information in the long run. Besides, the sale of artifacts from shipwrecks gives credence to a thought that antiques of archeological value are commodities that are open to transactions in public markets. This has been proved to be detrimental to historic protection and research. Incorporating this definition of relic into our Encyclopedia does not mean any recognition or tolerance of such business-oriented activities.[29]

Other scholars, however, hold different views. They tend to agree that although different values of underwater cultural heritage are incompatible with one another, total ignorance of one value for the sake of another is also not more advisable. For instance, preservation in situ of the archeological value of underwater cultural heritage should not come at the expense of commercial salvage or due consideration of economic value. Instead, different interest holders should try their best to coordinate with one another.[30] Although underwater cultural heritage is publicly owned, attempts to elevate it to a level above commodity may give rise to conflicts between personal users who are interested in such heritage and those who are seeking its public uses. At present, transactions of international artworks and

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28 It is no doubt a pity that preservation in situ is not established as a legal principle neither in China Taiwan nor in China Mainland. See Kuen-chen Fu, Comments on UNESCO 2001 Convention on the Protection of Underwater Cultural Heritage, in Kuen-chen Fu, *Monographic Studies on Maritime Laws*, Xiamen: Xiamen University Press, 2004, p. 20. (in Chinese)

29 James P. Delgado, *Encyclopaedia of Underwater and Maritime Archaeology*, London: The British Museum Press, 1997, p. 299. The Nuestra Senora de Atocha is a Spanish ship which sank in Florida Keys due to a hurricane in 1622. It was found and recovered by a salvage company named Treasure Salvors.

30 Carig J. Forrest, Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?, *Journal of Maritime Law and Commerce*, Vol. 34, 2003, p. 317.

antiques are thriving, with transaction records broken from time to time by new-emerging special items. Pieces of cultural heritage, personally owned or not, are inevitably being evaluated from an economic view. Therefore, some scholars have advocated, from an economic perspective, that personal uses of cultural heritage should be combined with public utilities. For example, Porter Hoagland asserts that governments can cooperate with private salvage companies to profit together under an agreed proportion and the sale of duplicates can bring about many advantages.[31]

It should be acknowledged that the archaeological, cultural, historical and economic values of underwater cultural heritage are not perfectly consistent while they do enjoy a theoretical potential to coexist. Eliminating market transactions and its economic worth through legally valuing heritage more than commodities is unlikely to eradicate commercial salvage, while at the same time it might boost the development of a black market. Besides, many international documents aiming to preserve cultural heritage have to consider different interest holders. While attempting to protect cultural heritage, these documents need to take other factors into consideration, such as business protection (international artwork trade), military interests and economic development, into consideration. Take the Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works as an example. Issued by UNESCO in 1968, its aim is to settle the conflicts between economic development and cultural property protection. Although the Recommendation seeks a balance between competing interest holders, it clearly states that the cultural heritage's interest is only prioritized under exceptional circumstances.[32] Likewise, the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict admits that military interest is most important.[33] Preservation of cultural heritage, as mentioned above, sometimes have to give way to other considerations, and current-existing international documents have said nothing about the priority of archeological, cultural, scientific or educational value of cultural heritage nor banning economic utilization of cultural heritage. However, it is not easy to find a balance between the two. In practice, instances of realizing underwater cultural heritage's economic value at the

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31 Porter Hoagland, China, in Sarah Dromgoole ed., *Legal Protection of the Underwater Cultural Heritage*：*National and International Perspectives*, The Hague: Kluwer Law International, 1999, pp. 32~34.

32 An example can be seen in 1968 Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works, Arts. 3~12.

33 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, Art. 4.

expense of its archeological, historic and cultural worth can be found everywhere. In developing countries, endowed with rich cultural resources, protection of cultural heritage is highly undermined by the urge of developing economy. Making wise decisions is thus a dilemma faced by countries worldwide, especially developing ones. It is more reasonable to respect in principle the archeological, cultural and historic value of these heritages and consider realizing their economic value in exceptional cases.

B. Is the Maritime Salvage Regime Applicable to Recovery of Underwater Cultural Heritage?

While many archeologists and historians have been pursuing preservations in situ of underwater cultural heritage, it is undeniable that these heritages have to be pulled out of water under many circumstances. When this is the case, is the maritime salvage regime still applicable? Contrary answers are given by experts and practitioners in the archeological and historical field and those in the salvage filed from different perspectives. Some strongly oppose and others support the application of salvage laws.

1. Considering the aim, means and payment of salvage, more archeologists and historians say "no" to the application of salvage laws out of the following concerns.

First, the aim of maritime salvage laws is contrary to that of cultural heritage conservation. In many archeologists' eyes, the aim of setting up a legal system for marine salvage is to encourage salvors to help ships and cargo out of danger as quickly as possible, and to get them back to business, which is solely an economic concern. As long as the business interest is prioritized (e.g. the commodity of the highest worth is saved), salvors can ask for rewards, regardless of means used in the process of salvation. Even if all valuable things have already been destroyed before any action is taken, it is still viewed as minimizing the loss of the ship or cargo owners and salvors are entitled due compensation.[34] Exploration of underwater cultural heritage, however, is by itself a work of pity for the simple reason that the process of discovery is also one of destruction. To get as much archeological information as possible from a newly discovered relic, patient and

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34 Carig J. Forrest, Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?, *Journal of Maritime Law and Commerce*, Vol. 34, 2003, p. 317.

careful measuring, photographing, drawing and recording of the wreckage are necessary. Thus, the aim of maritime salvage laws is contrary to the preservation of underwater cultural heritage. If maritime salvage laws are applied in recovering underwater cultural heritage, salvors are likely to get out artifacts which are of the highest economic value through a process that is unacceptable in the archeological field, rendering other culturally valuable objects destroyed and archeological details lost. Examples of this kind abound.[35] Moreover, many archeologically valued antiques are of no economic worth and in most cases, an archeological exploration itself means no profit even if discoveries are liquidated.[36] Obviously, a healthy salvage industry can greatly help drifting, stranded or sinking ships, which benefits the whole international community. Therefore, maritime salvage laws should apply to these above mentioned cases, instead of to discoveries of hundreds-year-old underwater cultural heritage.

Second, even if conventional maritime salvage laws apply, salvage of underwater cultural heritage fails to fit all constitutive elements. In some archeologists' view, heritage found on the seabed cannot be considered "in danger." Those who are against application of maritime salvage laws tend to understand "in danger" in a narrow sense; they don't view those hundreds-year-old shipwrecks as being endangered underwater. As a matter of fact, archeologists have pointed out that those shipwrecks and cargoes, after a period of time, can reach an equilibrium state underwater and before they are recovered, the process of erosion is relatively slowed down. Once recovered from water, however, a new round of erosion starts, which may even cause their ruin. Therefore, unless relatively complicated technical treatment is applied as soon as these antiques are out of water, fishing them out may help in a counter-productive way in terms of preservation.[37] Thus recovering valuable antiques for commercial purposes, which is encouraged by the application

35 Shi Ding, Thieves of Antiques are Making Moves in China's Waters, Stealing Our Underwater Treasures, *Global Times*, 1 March 2004, p. A16. (in Chinese)

36 Patrick J. O'keefe, Protecting the Underwater Cultural Heritage: The International Law Association Draft Convention, *Marine Policy*, Vol. 20, 1996, p. 303.

37 Preliminary Study on the Advisability of Preparing an International Instrument for the Protection of the Underwater Cultural Heritage, UNESCO General Conference, Twenty-eighth Session, 4 October 1995, para. 31. Field archeology, of course, suffers from similar problems. See Zhou Shuanglin, Views on Preservation in situ in Archeological Exploration, *World of Antiquity*, No. 4, 1999. (in Chinese)

of maritime salvage laws, may cause more damage to them.[38]

Furthermore, voluntary salvage should not be applicable to underwater cultural heritage. To minimize loss, maritime salvage laws encourage salvors, in emergencies, to take actions without the prior permission of owners.[39] But ships which sank hundreds of years ago can hardly be considered "in emergency." If maritime salvage laws apply, salvors are more likely to carry out work before asking owners' permission, which may interfere with proprietorship as owners may want the salved things to stay put or only non-intrusive investigations done to them.

Salvage reward calculations and certain concepts, stipulated by conventional salvage laws, are detrimental to preservation and protection of underwater cultural heritage. For example, salvage laws encourage quick recovery because salvors have to prove that they have occupied the relic in order to get an injunction from a court, which prevents others' entrance. The most convenient way to prove occupation is to provide an already salvaged portion.[40] Thus, salvage laws do not encourage investigation prior to any physical disturbance, which is needed to get valuable archeological details. Salvors, as a result, may start working before realizing the relic's archeological value, rendering permanent loss of some important archaeological information. In fact, it is necessary that discoveries are reported to authorities before any action is taken so that archeologists can decide the importance of a relic in archeological terms. Rewards in material or other forms (such as bestowing tribute or involving the people interested in investigation and

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38 Different countries, however, show disparities in underwater cultural heritage protection practices. Courts in the United States tend to make explanations on a broader sense, believing that maritime danger include, but without limitation to, storms, fires or threats from pirates suffered by ships underway and that sunken ships are still in danger of loss affected by environment or robbery. Relevant legal precedents abound. See Platoro Ltd., Inc. v. The Unidentified Remains of a Vessel, 614 F. 2d 1051, 1055-56, 1981 AMC 1087, 1102-03 (5th Cir. 1980); Cobb Coin Co. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 549 F. Supp. 540 (S. D. Fla. 1982). There are, on the other hand, legal decisions that consider sunken ships of hundred years are not in danger. See Archaeology Ltd. v. Subacqueous Exploration & the Unidentified, Wrecked and Abandoned Vessels, 577 F. Supp. 597,611, 1983 AMC 913, 932 (D. Md. 1983). This shows that whether laws of salvage can be applied largely depends, in the absence of explicit specifications, on the attitudes of courts and the policy orientation of the involved country.

39 It is also called "pure salvage" which means salvage actions are taken by salvors without being asked by the endangered ship. Once succeed, salvors are allowed to claim compensation. Refusal from the endangered ship should be, if there is, given explicitly. Si Yuzhuo ed., *Maritime Law*, Beijing: Law Press China, 2003, p. 261. (in Chinese)

40 Eke Boesten, *Archaeological and/or Historic Valuable Shipwrecks in International Waters*, The Hague: T. M. C. Asser Press, 2002, p. 113.

salvage of the relic) can help encourage reports. One criterion adopted by American and British maritime courts when awarding handsome compensation to salvors is that important archeological discoveries are reported to authorities.[41] Salvage laws generally offer fiscal reward to individuals who report the artifacts they have discovered or salved, however, they will not award salvors if no artifacts are fished out. In other words, as salvage laws require actual occupation, discovery or intention of salvaging will not be enough to qualify a salvor. Instead, some artifacts must be provided as evidence of occupation.[42]

Furthermore, the principle of "no effect, no reward" adopted by conventional salvage laws encourages salvors to get the most expensive pieces out no matter what it takes. As a result, relics suffer grave damages. Examples in this regard are abundant.[43] Preserving archeological value of relics is not legally listed as a determining factor when calculating salvage reward. Even though under the 1989 International Convention on Salvage, Article 13(1)(e) "the skill and efforts of the salvors in salving the vessel, other property and life" and Article 13(1)(f) "the time used and expenses and losses incurred by the salvors" include, to some extent, consideration of salvors' effort made in preserving relic's archeological value, this falls far short of a powerful incentive for respecting and preserving such value for it is at best a determining factor in calculating salvage reward.

Additionally, remuneration often needs to be realized in the form of selling, which will inevitably lead to permanent loss of the salved articles, impeding further archeological studies. And in some cases, salvors will, instead of receiving a certain amount of payment, sell for profit after they have acquired the ownership over the salved articles, rendering those antiques scattered and lost.[44] This does not help in protecting and preserving underwater cultural heritage, and will add to the obstacle

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41 Rewards are ridiculously handsome for artifacts salvaged from historic shipwrecks: in Britain it is determined as the total sales income and in America it is often more than 75% of the total value. See Carig J. Forrest, Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?, *Journal of Maritime Law and Commerce*, Vol. 34, 2003, p. 332.

42 Norman Palmer & Ewan Mckendrick, *Interests in Goods*, 2nd ed., London: Lloyd's of London Press, 1998, pp. 189~194.

43 Shi Ding, Thieves of Antiques are Making Moves in China's Waters, Stealing Our Underwater Treasures, *Global Times*, 1 March 2004, p. A16. (in Chinese)

44 Guido Carducci, The Crucial Compromise on Salvage Law and the Law of Finds, in Roberta Garabello and Tuillo Scovazzi eds., *The Protection of the Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention*, Leiden: Brill Academic Publishers, 2003, pp. 198~200.

for future research.

Frankly speaking, the traditional maritime salvage regime encourages immature salvage operations prior to investigation, quick but unscientific excavating methods and selling, rather than preservation by public institutions as a whole, of salvaged articles for future studies. If this kind of legal rule is applied to salvaging cultural heritage which are of highly historic and archeological value, damage and ruin, instead of protection and preservation, will be the result.

Moreover, although some countries have witnessed a new trend of combining traditional salvage laws with respect paid to archeological values of underwater cultural heritage, this cannot guarantee full protection or preservation of such precious heritages. Some American legal decisions have given consideration to the archeological value of underwater cultural heritage, but it is only considered as a factor that may influence the amount of salvage reward.[45] What's worse, the court, in most cases, will decide reward on the evidence provided by salvors, who are unlikely to testify against themselves.[46] Even though it is thought that judges in some countries (such as the U.S.) may decline immature salvage requests or demand compliance with marine archeological rules according to specific conditions, neither the basis of such judgment nor the required standard can be ensured to meet marine archeological standards.[47] As a result, damage will still be done to archeological information, with a mere change in degree. Therefore, application of a revised marine salvage law will continue to encourage salvage operations and the historic and archeological value of underwater cultural heritage will hardly be preserved unless preservation of such values are listed as criteria of successful salvage operations.

Finally, in practice, countries including Canada, Cyprus, Denmark, Iran, Mexico, Morocco, Norway, Portugal and Tunisia have established national laws to

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45 Carig J. Forrest, Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?, *Journal of Maritime Law and Commerce,* Vol. 34, 2003, p. 334.

46 Patrick J. O'keefe, Protecting the Underwater Cultural Heritage: The International Law Association Draft Convention, *Marine Policy*, Vol. 20, 1996, p. 304.

47 David J. Bederman, The UNESCO Draft Convention on Underwater Cultural Heritage: A Critique and Counter-Proposal, *Journal of Maritime Law and Commerce*, Vol. 30, 1999, No. 345.

exclude application of salvage laws to recovery of underwater cultural heritage.[48] Although such application is still allowed in some countries, nearly all countries forbid salvage operations on its warship wrecks.[49]

2. Reasons have been presented by commercial salvage companies which are in favor of the application of maritime salvage laws to the recovery of underwater cultural heritage.

First, international conventions on maritime salvage show no exclusion of the application of salvage laws to underwater cultural heritage. The 1989 International Convention on Salvage defines subjects of salvage as "a vessel or any other property in danger in navigable waters or in any other waters whatsoever" with no limit prescribed to time of submergence.[50] Thus, subjects of salvage should include any ships and cargoes regardless of sinking time and historic or archeological value.[51] Moreover, according to Article 30(d) of the International Convention on Salvage, "when the property involved is maritime cultural property of prehistoric, archaeological or historic interest and is situated on the sea-bed," any State may, at the time of signature, ratification, acceptance, approval or accession, reserve the right not to apply the provisions of this Convention. Therefore, the International Convention on Salvage in principle applies salvage laws to underwater cultural heritage unless involved countries choose to make a reservation. Meanwhile, in the criteria for fixing the reward listed by this Convention put no emphasis on efforts

48 James A. R. Nafziger, Historic Salvage Law Revisited, *Ocean Development and International Law*, Vol. 31, 2000, p. 83. For example, the reason for the United States to pass the Abandoned Shipwreck Act of 1987 is that shipwrecks of hundreds years ago, which used to be transport means, have become time capsule which uncover our past to us. They are no longer the same ships defined by people who set up federal maritime courts. See Anne G. Giesecks, The Abandoned Shipwreck Act Through the Eyes of Its Drafter, *Journal of Maritime Law and Commerce*, Vol. 30, 1999, p. 171.

49 Preliminary Study on the Advisability of Preparing an International Instrument for the Protection of the Underwater Cultural Heritage, UNESCO General Conference, Twenty-eighth Session, 4 October 1995, para. 33.

50 The 1989 International Convention on Salvage, Art. 1. Vessel means any ship or craft, or any structure capable of navigation; Property means any property not permanently and intentionally attached to the shoreline and includes freight at risk.

51 Brice Q. C. Geoffrey, Salvage and the Underwater Cultural Heritage, *Marine Policy*, Vol. 20, 1996, p. 339.

made by salvors to protect underwater cultural heritage.[52]

Second, the 1982 United Nations Convention on the Law of the Sea (UNCLOS), states explicitly that application of maritime salvage laws is allowed.[53] According to Article 303 of the UNCLOS, contracting parties are obliged to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose. But its Article 303(3) prescribes that "Nothing in this article affects … the law of salvage or other rules of admiralty ..."[54] Therefore, the UUCLOS attempts to retain application of salvage laws to "objects of an archaeological and historical nature found at sea."

Third, some maritime powers, such as the UK and America, still apply salvage laws to underwater cultural heritage. Those who are in favor of such application tend to think that underwater cultural heritage is still "in danger." For example, under the British laws, ships or goods found at sea (including shipwrecks of ancient ages) are still considered immobilized, which is a kind of long-established danger in salvage laws. Unless found and recovered, such shipwrecks are of no

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52 The International Convention on Salvage, 1989, lists the following criteria for fixing the reward: (a) the salved value of the vessel and other property; (b) the skill and efforts of the salvors in preventing or minimizing damage to the environment; (c) the measure of success obtained by the salvor; (d) the nature and degree of danger; (e) the skill and efforts of the salvors in salving the vessel, other property and life; (f) the time used and expenses and losses incurred by the salvors; (g) the risk of liability and other risks run by the salvors or their equipment;; (h) the promptness of the services rendered; (i) the availability and use of vessels or other equipment intended for salvage operations; (j) the state of readiness and efficiency of the salvor's equipment and the value thereof.

53 From 1982 U.N. Convention on the Law of the Sea to the 1989 Convention on International Salvage and to the 2001 Convention on the Protection of Underwater Cultural Heritage, it is obvious that the international community has been strengthening its protection of underwater cultural heritage. As regards to the relations between these three conventions, see Kuen-chen FU, When the Salvaged Property Is an UCH – Relationship of Three Conventions, in Kuen-chen FU, *Essays on International Law of the Sea*, Xiamen: Xiamen University Press, 2004, pp. 47~56. Kuen-chen FU, Law of Salvage and Legal Framework Concerning the Salvage of Underwater Cultural Heritage – Relationship of Three Conventions, *Law Monthly*, Vol. 56, No. 1, 2005. (in Chinese)

54 1982 U.N. Convention on the Law of the Sea, Arts. 301(1) & (3). Article 301(3) reads: "Nothing in this article affects ... the law of salvage or other rules of admiralty…" The term law of salvage was translated into Chinese as " 打捞法 ", which seems to be less appropriate than " 救助法 ".

commercial value.[55] Similar legal decisions are also seen in America.[56]

Finally, though it is assumed that the application of traditional salvage laws will not facilitate the preservation of underwater cultural heritage, there appears to be some developments for the sake of heritage preservation. Those who agree to apply salvage regime to underwater cultural heritage believe that private laws as they are, salvage laws are not as strict as public ones. Thus it is possible for them to develop with the change of time to meet new requirements and deal with new problems such as preserving archeological value of underwater cultural heritage. Commentators have pointed out that salvage laws, regardless of origin, are showing new developments to meet the times' demand that the archeological and historic value of shipwrecks should be preserved. American maritime courts have already tried to combine the archeological value of underwater cultural heritage and the application of salvage laws when they, for the sake of future studies on the shipwreck and cargoes, request commercial salvage companies to comply with archeological rules set for related relics before conferring them exclusive rights. This has become a custom in American maritime legal cases. And some local courts have already declined some salvage applications for the reason that involved salvage companies showed no attempt at preserving archeological wholeness of the relic to be salvaged.[57] These American courts have explicitly stated that salvors' loyalty to archeological value is one of the factors considered in determining salvage reward. If proper precautionary measures are not taken to protect and preserve artifacts of historic or archeological value, the court can restrict or

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55 Brice Q. C. Geoffrey, Salvage and the Underwater Cultural Heritage, *Marine Policy*, Vol. 20, 1996, p. 339. John Reeder ed., *Brice on Maritime Law of Salvage*, London: Sweet and Maxwell, 2003, p. 268; Nigel Messon, *Admiralty Jurisdiction and Practice*, 3rd Edition, Bodmin: MPG Books, 2003, p. 45.

56 Different verdicts are seen in American federal maritime legal precedents. Judges, in several cases, respected suggestions and evidences provided by relevant experts, determining that the shipwreck was not in danger and should be preserved in situ. But in most cases, contrary verdicts were given and the law of salvage was applied. See Ole Varmer, The Case against the "Salvage" of the Cultural Heritage, *Journal of Maritime Law and Commerce*, Vol. 30, 1999, p. 286.

57 David J. Bederman, The UNESCO Draft Convention on Underwater Cultural Heritage: A Critique and Counter-Proposal, *Journal of Maritime Law and Commerce*, Vol. 30, 1999, p. 344. As regards to the case of *MDM Salvage Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, see Kuen-chen FU, Comments on UNESCO 2001 Convention on the Protection of Underwater Cultural Heritage, *Essays on International Law of the Sea*, Xiamen: Xiamen University Press, 2004, p. 16 (in Chinese); Kuen-chen FU, Law of Salvage and Legal Framework Concerning the Salvage of Underwater Cultural Heritage – Relationship of Three Conventions, *Law Monthly*, Vol. 56, No. 1, 2005. (in Chinese)

even decline the request for reward.[58] In short, both on the initial choosing and designating of salvors and the final grant of salvage rewards, judges in the United States enjoy great discretion. Federal courts in the United States have exercised this discretion to ensure preservation of historic value of the shipwrecks in the process of salvage operations.[59]

The author personally finds it hard to agree to all these reasons proposed by supporters of such application. For one thing, although the International Convention on Salvage, basically a private law, has come into effect since 1989 in the international community, this does not constitutes a contradiction to the conclusion of a public law – Convention on the Protection of Underwater Cultural Heritage or constitutes exclusion to application of salvage laws.[60] Further, although Article 303(3) of the UNCLOS states that it does not affect salvage laws, its Article 303(4) stipulate that "this article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature." This means that future conventions on the preservation of underwater cultural heritage (such as the 2001 Convention on the Protection of the Underwater Cultural Heritage) are free to exclude application of salvage laws. Furthermore, despite some alterations in favor of underwater cultural heritage made to traditional salvage laws, they can never ask salvors to perform patient archeological works such as surveying, painting and measuring. And objects salvaged are still more likely to be scattered, which fails to completely fulfill the goal of preserving underwater cultural heritage.

IV. Analysis and Evaluation of Relevant Stipulations in the 2001 Convention on the Protection of Underwater Cultural Heritage

Due to lack of relevant laws at both national and international levels, many

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58 James A. R. Nafziger, The Titanic Revisited, *Journal of Maritime Law and Commerce*, Vol. 30, 1999, p. 324.

59 David J. Bederman, The UNESCO Draft Convention on Underwater Cultural Heritage: A Critique and Counter-Proposal, *Journal of Maritime Law and Commerce*, Vol. 30, 1999, p. 344.

60 Kuen-chen FU, Comments on UNESCO 2001 Convention on the Protection of Underwater Cultural Heritage, *Essays on International Law of the Sea*, Xiamen: Xiamen University Press, 2004, p.17. (in Chinese)

shipwrecks are recovered, and relics sabotaged illegally, rendering an increasing number of underwater cultural heritage that is threatened by illegal salvage. For instance, as early as 1974, a research report provided by Turkish authorities indicated that no more typical shipwrecks could be found intact in its examined near-shore area.[61] Some scholars have claimed with gloom that if a solution is not found in time, there will be no shipwrecks worthy of preservation in the decades to come.[62] With the aim of strengthening preservation of underwater cultural heritage, the UNESCO, after years of negotiations, eventually passed the Convention on the Protection of Underwater Cultural Heritage in the year 2001 (hereinafter "2001 Convention"). It clearly defines subjects, content and methods of protection, establishes several important principles and different protection modes in accordance with the particular situation of the waters where the heritage is located, as well as formulates control measures for the sake of implementation of its provisions. Additionally, the 2001 Convention also sets a series of technical standards for exploring operations in its Annex – Rules Concerning Activities Directed at Underwater Cultural Heritage (hereinafter "Rules"), which casts a protective net for cultural heritage in all kinds of waters globally.[63]

The sole aim of the 2001 Convention is to protect underwater cultural

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61 Preliminary Study on the Advisability of Preparing an International Instrument for the Protection of the Underwater Cultural Heritage, UNESCO General Conference, Twenty-eighth Session, 4 October 1995, para. 4.

62 Gillian Hutchinson, Threats to Underwater Cultural Heritage: The Problems of Unprotected Archaeological and Historic Sites, Wrecks and Objects Found at Sea, *Marine Policy*, Vol. 20, 1996, p. 287.

63 It needs instruments of approval or accession from 20 countries for the Convention to come into effect. Until 1 March 2007, 14 countries (including Panama, Bulgaria, Croatia, Spain, the Libyan Arab Jamahiriya, Nigeria, Lithuania, Mexico, Paraguay, Portugal, Ecuador, Ukraine, Lebanon and Saint Lucia have ratified or acceded to the Convention. At http://portal.unesco.org/la/convention.asp? KO=13520&language=E, 1 March 2007. Comments on the Convention can be seen in Patrick J.O'keefe, Shipwrecked Heritage: *A Commentary on the UNESCO Convention on Underwater Cultural Heritage*, Leicester: Institute of Art and Law, 2002; Guido Carducci, New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage, *The American Journal of International Law*, Vol. 96, 2002; Kuen-chen FU, Comments on UNESCO 2001 Convention on the Protection of Underwater Cultural Heritage, *Essays on International Law of the Sea*, Xiamen: Xiamen University Press, 2004 (in Chinese); Guo Yujun & Xu Jintang, Studies on Legal Issues of International Underwater Cultural Heritage, *China Legal Science*, No.3, 2004 (in Chinese); Zhang Xianglan and Zhu Qiang, Comments on Convention on the Protection of Underwater Cultural Heritage, *China Oceans Law Review*, No. 1, 2006. (Chinese)

heritage.[64] But the question is how protection is defined? Broadly speaking, "protection" means preventing the subjects from damage or destruction, no matter where the risk is coming from (accident, nature or human behaviors). Considering that an equilibrium state has been reached by the underwater heritage with its surrounding environment, any interference will cause disorder, even if the objects are left to remain where they are. That is because any interference requires readjustment, which will result in additional damage.[65] Considering this, Article 2(5) of the 2001 Convention states clearly that "The preservation in situ of underwater cultural heritage shall be considered as the first option before allowing or engaging in any activities directed at this heritage." Sticking to preservation in situ as a basic principle, the 2001 Convention minimizes, at least in theory, the possibility of underwater cultural heritage recovery.

Even if, in exceptional cases, underwater cultural heritage needs to be explored and recovered, "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."[66] This is saying that laws of salvage and findings, in principle, do not to apply to underwater cultural heritage unless the listed three conditions are each met. Condition (a) ensures that all exploration and salvage operations meet the relevant standards set by authorities in charge of cultural heritage preservation and are approved by such authorities; condition (b) makes sure that all exploration and salvage operations are to preserve or to better understand and improve underwater cultural heritage; condition (c) indicates that the instrument of ratification issued by the competent authorities includes the prerequisites for any recovery of the underwater cultural heritage to achieve its maximum protection.[67] As mentioned above, in accordance with current law of salvage and finds, unless refusals sent by the owner of the wreck are reasonable and rational, salvors may take actions despite such refusals, however explicit. Compliance with archeological principles are only demanded by a few courts

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64 2001 Convention on the Protection of Underwater Cultural Heritage, Art. 2(1) and its annex Rules Concerning Activities Directed at Underwater Cultural Heritage, Art. 1.

65 Patrick J. O'keefe, Protecting the Underwater Cultural Heritage: The International Law Association Draft Convention, *Marine Policy*, Vol. 20, 1996, p. 49.

66 2001 Convention on the Protection of Underwater Cultural Heritage, Art. 4.

67 Patrick J. O'keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage*, Leicester: Institute of Art and Law, 2002, p. 63.

in the United States, and in most cases, salvors and finders are free to operate in ways they think appropriate and finders can dispose what they have found at will. Once the previously mentioned conditions are followed in practice, even if the laws of salvage and findings may be applied, the result is expected to be much less undesired.

Some commentators have pointed out that the 2001 Convention excludes application of salvage laws for the simple reason that instead of aiming at preserving the structure, content and archeological information of age-old wrecks, salvage laws are based exclusively on the concept that reward for salvors will be decided on the value of what is recovered and it is meaningless to recover things of no commercial value (such as decks of the shipwrecks). And calculation of reward is commenced only when the salvage work is done, when it is too late for any protection. The main reason for the 2001 Convention's exclusion of the law of findings is that it, especially in America, considers finders as keepers who have complete control over what is found and this is contrary to the aim of preserving underwater heritage's cultural and archeological value.[68] Further, as different countries make different decisions as to whether laws of salvage or findings can be applied to underwater cultural heritage, it is likely that law of salvage or findings, as salvors hope, applicable at home will be expected to apply to underwater heritage found in other countries. For example, a court in the United States once attempted to confer rights to salvors for their salvage of the wreck of Lusitania located in Ireland territorial waters.[69] Conditions listed in Article 4 of the 2001 Convention aims to end this disorder, exclude application of laws of salvage and findings, and establish a license system governing activities related to underwater cultural heritage. On the other hand, as the 2001 Convention is silent on the issue of ownership, total exclusion of the law of finding may leave the ownership undecided. For instance, age-old wrecks which were located on the deep sea bed will come out with no owner unless the relevant coastal State has laid down

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68 Patrick J. O'keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage*, Leicester: Institute of Art and Law, 2002, p. 62.

69 Patrick J. O'keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage*, Leicester: Institute of Art and Law, 2002, pp. 60~61; Lusitania was a British passenger liner which sank in Ireland territorial waters during the First World War. Norfolk local court in Virginia granted ownership and a part of salvage rights to a merchant from New Mexico, which was not admitted by the Irish government. See James P. Delgado, *Encyclopaedia of Underwater and Maritime Archaeology*, London: The British Museum Press, 1997, pp. 248~249.

relevant stipulations. The 2001 Convention has made reservations to the application of laws of salvage and findings, but these reservations have also eliminated the original meanings of these legal concepts.[70]

The author contends that two thresholds are set by the 2001 Convention for the sake of respecting and realizing the archeological value of underwater cultural heritage, namely Articles 2(5) & 4. Sticking to preservation in situ as a basic principle, the 2001 Convention minimizes, at least in theory, the possibility of underwater cultural heritage recovery. As for exceptions, Article 4 clearly excludes application of laws of salvage and findings unless three listed conditions are met. As pointed out by some commentators, even laws of salvage and findings can apply, the original meanings of these legal concepts have already been eliminated. Despite some scholars' appeal to combine cultural heritage's private uses with public ones in order to reach a balance among different interest holders, the 2001 Convention chooses to prioritize heritage's archeological value, respecting opinions of academic archeologists. Nevertheless, as mentioned above, it seems inappropriate to take for granted that eliminating the underwater cultural heritage's economic value will guarantee its archeological value. Although archeologists seem to be better grounded in a moral sense when voting against private ownership and selling of underwater cultural heritage, it is undeniable that making economic use of such heritage will also be supported by some walks in society. Considering the difficulty faced by maritime law enforcement and lesson learned from the black market of onshore cultural heritage, a more advisable decision seems to be establishing a protection system that take equal care of all values and the interest of all parties.

V. Conclusion

Traditional maritime salvage regime aims to encourage salvage of endangered ships and goods. And a healthy salvage industry will save drifting, stranded or sinking ships, which benefits the international community as a whole. However, undiscriminating application of this regime proves to be inappropriate, especially when it comes to centuries-old shipwrecks. In such cases the shipwrecks have become underwater cultural heritage of archeological and historic value, a kind

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70 Patrick J. O'keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage*, Leicester: Institute of Art and Law, 2002, p. 64.

of limited and precious cultural resource which should be, for the true sake of the international community, archeologically studied by professionals to promote self-knowledge of human beings. Although some underwater cultural heritage is highly valued in an economic sense, it is unfortunate that its economic value can hardly coexist with its archeological worth, leaving a balancing point serving as the key solution. Relevant stipulations in the Convention on the Protection of Underwater Cultural Heritage establish preservation in situ as a principle, forbidding, in principle, the application of laws of salvage or finds. This has set the tone for the protection of underwater cultural heritage, while at the same time allows exceptions for special situations.

As a country with time-honored history and culture, China boasts rich underwater cultural heritage resources. Relevant laws in China forbid private ownership of underwater cultural heritage and application of maritime salvage regime to underwater cultural heritage.[71] These stipulations are in line with spirit of the 2001 Convention, indicating that China is insightful and progressive in terms of its legislation about underwater cultural heritage. However, although the revised Law for the Preservation of Antiques establishes a guideline of "aiming at protection, prioritizing rescue, making rational use and strengthening management," relevant laws fail to set preservation in situ as a principle, which can be considered as nothing but a pity.[72] It is suggested that future revision of Regulations on the Preservation of Underwater Antiques should take this into consideration.

Translator: LIU Ying
Editor (English): Katie Annette Roth

71 Law for the Preservation of Antiques, Arts. 2, 3 & 13; Regulations on the Preservation of Underwater Antiques, Arts. 2 & 3; Administrative Measures for Involving Foreign Investors in Salvaging Shipwrecks along Coastal Waters in China, Arts. 3 & 8. (in Chinese)

72 Law for the Preservation of Antiques, Art. 4. Comments on relevant legislation in China, see Kuen-Chen Fu, Convention on the Protection of Underwater Cultural Heritage – the Urgent Need of Legal Revision in both China Taiwan and China Mainland, *Essays on International Law of the Sea*, Xiamen: Xiamen University Press, 2004. (in Chinese)

The Evolution of the Precautionary Principle

CHU Xiaolin*

Abstract: The precautionary principle originated in the domestic legislation of Germany and Switzerland involving environmental hazards. With the development of the precautionary principle, other countries like the Netherlands and the United States also incorporated it into their laws on the protection of their environments and resources as a fundamental principle. At the international level, the norm has evolved from a "permissible emissions" approach to a "precautionary" approach. The precautionary principle has been recognized by many international conventions and become an important point of reference for international judicial bodies. The domestic environmental laws of many countries as well as a great number of international treaties and judicial precedents under international law show that the precautionary principle is by now a basic principle in environmental law and the law of the sea.

Key Words: Precautionary principle; United Nations Convention on the Law of the Sea; International Court of Justice

The 20th century witnessed the profound impact of technological innovations on nature and human societies. Although many people now enjoy remarkable material prosperity, they have also encountered the adverse effects of industrialization. Natural resources like forests and mineral reserves are being depleted at an alarming rate. The wide use of chemicals inflicts harms on the environment and human health that are far graver than expected. Burgeoning cities erode once-fertile soil and create prodigious amounts of waste. Resources essential to human life, such as air and water, are being irreparably polluted.[1] Thus, environmental protection and the sustainable use of resources have become an important common

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* CHU Xiaolin, PhD Candidate in International Law, Xiamen University School of Law. Research interest: the international law of the sea.

1 Wybe Theodorus Douma, *The Precautionary Principle – Its Application in International European and Dutch Law*, Groningen: University of Groningen, 2003, p. 59.

regional and international goal.

The precautionary principle is the most innovative, influential, and important concept to have emerged in environmental law in the past 20 years. The theoretical basis for the idea is that, due to scientific uncertainty, health and environmental risks should be better and more prudently managed. It is impossible to reach a point of sufficient scientific information or complete scientific certainty about any particular risk; therefore, the precautionary principle should be introduced into risk management.[2]

In the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, a judge of the International Court of Justice (ICJ) wrote, "[i]n recent years, people have often disturbed the natural equilibrium for economic gain and other reasons, with no consideration of the impact of their activities on the environment." Scientific progress has led to a clearer understanding of environmental hazards. In the past 20 years, a number of treaties and conventions have recognized many new environmental models and standards. When countries plan new activities or continue existing activities, they should keep these new models and standards in mind.[3] The precautionary principle, which can effectively prevent environmental hazards, deserves further investigation.

I. The Birth of the Precautionary Principle

A. The Establishment of the Precautionary Idea

The precautionary principle is an important principle in international environmental law. Essentially, it means that limits should not be imposed on the ways available to prevent environmental hazards simply because there is a lack of scientific certainty for such an actual or imminent hazard.[4]

The introduction of the precautionary principle into environmental law stems from the recognition of uncertainties in environmental hazards and the imperfect

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2 Gary E. Marchant and Kenneth L. Mossman, *Arbitrary and Capricious – The Precautionary Principle in the European Courts*, Washington D.C.: The AEI Press Publisher for the American Enterprise Institute, 2004, p. 1.

3 Arie Teouwborst, *Evolution and Status of the Precautionary Principle in International Law*, The Hague/London/Boston: Kluwer Law International, 2002, p. 1.

4 Niu Huei-Chih, The Precautionary Principle: Efforts and Controversies in Establishing and Implementing Rules for Environmental Risks with Scientific Uncertainty in International Environmental Law, *Taiwan University Law Journal*, No. 3, 2005. (in Chinese)

capabilities of science to assess the impact of human activities. In other words, although human beings have attained a high level of scientific and technological achievement and have a certain grasp on environmental hazards, nature is much too complex to lend itself to a complete understanding. In the face of myriad uncertainties, a cautious attitude ought to guide human beings in their quest to prevent environmental hazards and protect the environment. As early as 1966, a scholar recognized that "a manageable principle should be one in compliance with which human beings will not passively wait for and be at the mercy of danger before the nature and impact of changed natural phenomenon can be reasonably determined through studies yet in violation of which there will be disastrous consequences."[5]

The precautionary principle differs from the traditional model for making decisions with regards to the environment.[6] The traditional model assumes that science can predict the full environmental impact of human activities and that environmental protection actions can be deemed legitimate only when there is conclusive evidence that these human activities will result in substantial damage. But when there are uncertainties in the hazards, the traditional model cannot effectively protect the environment because the model dictates that further actions cannot be taken until consequences of the hazards – which may be serious and irreparable – are ascertained. In contrast, under the precautionary principle, conclusive scientific evidence is no longer a requirement for environmental protection action, and scientific uncertainty is not an obstacle to environmental protection.

Both nature and human societies are full of uncertainties, which must be anticipated and met with caution. The advent of the precautionary principle is no coincidence; rather, it is an inevitable development in environmental law. It should be broadly applied. In the words of one Australian judge, "[t]he precautionary principle is a common-sense statement which some policy makers have been applied in certain cases. As an approach to preventing environmental hazards in case of scientific uncertainty, the precautionary principle is based on the premise that the nature or scope of related environmental hazards is uncertain or unknown

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5 Arie Teouwborst, *Evolution and Status of the Precautionary Principle in International Law*, The Hague/London/Boston: Kluwer Law International, 2002, pp. 10~11.

6 Arie Teouwborst, *Evolution and Status of the Precautionary Principle in International Law*, The Hague/London/Boston: Kluwer Law International, 2002, p. 11.

and thus should be dealt with caution by policy makers."[7]

B. The Birth of the Precautionary Principle

Rapid technological changes have had a huge impact on nature and human societies, but we are struggling to meet and adapt to these changes. Some of our existing development policies cannot effectively protect, or may even undermine, our future well-being, and make our long-term plans and the management of these plans unreliable. There are conflicts between national sovereignty, international security, ecological protection, and economic management. In addition, threats to the quality and even the survival of human life are growing day by day. A reactive approach no longer suffices to meet these challenges.

As the international legal order is facing increasingly complicated and treacherous challenges, international law should reposition itself with new, creative thinking. In contrast to existing analytical methods, which focus on the analysis of outcomes, the precautionary principle is designed to prevent an incident from becoming dangerous or ending in disaster by offering policy makers advice before an environmental hazard materializes.

The precautionary principle (*Vorsorgeprinzip*) first appeared in the 1970s and 80s in German and Swiss environmental law. The precautionary idea had emerged in German environmental policy in the 1970s,[8] and the principle was made explicit for the first time in a 1976 West German administrative regulation: "Environmental policies cannot be fully implemented by avoiding environmental hazards which are going to happen or have already happened. A precautionary environmental policy requires that a more cautious attitude be taken to realize requirements placed on them."[9] Shortly afterward, the precautionary principle became a basic principle in West German environmental law that anchors German policies on environmental problems like acid rain, global warming, and marine pollution.

At the international level, the precautionary principle has taken two forms. The first is the "permissible emissions" approach (also called the "accommodation

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7 Arie Teouwborst, *Evolution and Status of the Precautionary Principle in International Law*, The Hague/London/Boston: Kluwer Law International, 2002, p. 8.

8 The precautionary idea was first applied by German scientists and policy makers to respond to "the death of forests" and its corresponding consequences, as well as air pollution.

9 Arie Teouwborst, *Evolution and Status of the Precautionary Principle in International Law*, The Hague/London/Boston: Kluwer Law International, 2002, p. 17.

approach") found in some environmental regulations.[10] This approach can prevent predicted environmental harm, but protective action is postponed or not taken at all until there is sufficient scientific certainty. Some countries have used the permissible emissions approach as an excuse for refusing to take environmental protection action. For instance, some countries have postponed the reduction of fishing quotas until there is conclusive evidence on the consequences of overfishing.

The "permissible emissions" approach is a variant of the traditional model, also based on the idea that environmental hazards can be accurately assessed by science and that science can provide solutions to these hazards once accurate estimates are available. However, this approach eventually failed because science cannot accurately assess the environmental impact of human activities and scientific evidence on environmental hazards always surfaces too late. The failure led to a shift of emphasis from prediction to prevention. The 1991 Bamako Convention on the Ban of the Import to Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa instructs, "the Parties shall co-operate with each other in taking the appropriate measures to implement the precautionary principle to pollution prevention through the application of clean production methods, rather than the pursuit of a permissible emissions approach based on assimilative capacity assumptions."

The second form of the precautionary principle is the preventive approach. The spirit of this approach is consistent with that of the precautionary principle: because it is impossible to obtain precise and complete scientific data, human beings should be cautious in managing environmental hazards to prevent irreparable environmental harm.

The word "precautionary" first appeared in an international convention, the 1985 Vienna Convention for the Protection of the Ozone Layer (hereinafter "the Vienna Convention"). Parties to the Convention agreed that the precautionary approach should be adopted at both the national and international levels. The precautionary principle was also introduced into the Bergen Ministerial Declaration on Sustainable Development, issued by the United Nations Economic Commission for Europe. It provides: "In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must

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10 Arie Teouwborst, *Evolution and Status of the Precautionary Principle in International Law*, The Hague/London/Boston: Kluwer Law International, 2002, p. 18.

anticipate, prevent, and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation."

II. The Evolution of the Precautionary Principle

A. Background

To a certain extent, globalization has spurred the development of the precautionary principle. With globalization, the environment, especially transnational environmental and resource hazards, is no longer only the domestic affair of individual countries, but a question that concerns the common interests of many countries. Their joint efforts are required to tackle environmental issues.

In international law, countries bear responsibility for transnational environmental hazards that result from activities within their territories. In other words, activities within a country's territory must not cause loss of life or property of other countries. As provided in Article 194, Paragraph 2 of the United Nations Convention on the Law of the Sea (UNCLOS), "States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention."

In addition, liability for transnational environmental hazards has been recognized in the 1941 *Trail Smelter* case[11] in the Permanent Court of Arbitration and

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11 In this case, sulfur dioxide gas drifted into U.S. territory from a plant on the U.S.-Canadian border that specialized in the processing of lead and zinc. The Permanent Court of Arbitration ruled that Canada was responsible for restricting environmental hazards to the U.S. that originated from the sulfur dioxide gas produced within its territory. Judicial Decisions Involving Questions of International Law – Trail Smelter Arbital Tribunal, *American Journal of International Law*, Vol. 33, 1939, p. 182; Judicial Decisions Involving Questions of International Law – Trail Smelter Arbitral Tribunal, *American Journal of International Law*, Vol. 35, 1941, p. 684. See Niu Huei-Chih, The Precautionary Principle: Efforts and Controversies in Establishing and Implementing Rules for Environmental Risks with Scientific Uncertainty in International Environmental Law, *Taiwan University Law Journal*, No. 3, 2005. (in Chinese)

the 1949 *Corfu Channel* case[12] in the ICJ, *i.e.*, countries are liable for transnational environmental hazards resulting from activities conducted within their territories and must take the responsibility to prevent and handle foreseeable environmental hazards.

However, there are certain limiting conditions on a country's liability for transnational environmental hazards: a country will only be liable for compensation and be obliged to regulate the activities causing the hazards when there is evidence of the hazards' existence. In the famous *Trail Smelter* case, the Permanent Court of Arbitration imposed a condition that restricted the injuring country's liability for transnational environmental hazards: there must be clear evidence of the existence of the hazards. Therefore, where there was no sufficient scientific evidence on the cause of the hazards or if it was impossible to detect or foresee the hazards in reasonable conditions, international law could not require a country to regulate activities within its territory that had potential environmental risks or to undertake the obligation to prevent the hazards.[13]

Due to the complexity of the ecological environment and resources as well as limitations on current scientific knowledge, people can often predict certain hazards but do not know the causes, or they have reasonable suspicions but lack sufficient scientific evidence on the hazards. For example, although the hole in the ozone layer was discovered as early as 1930, its causes remained unknown until the 1980s and 1990s. Under the traditional model, where a country can only be held liable when the harms have actually occurred or if the cause and effect relationship has become clear, there is no way to prevent the harm.

With the increase in unpredictable environmental hazards, the existing principles governing liability for transnational environmental hazards can no longer effectively protect the environment or safeguard the immediate and long-term interests of humankind. The precautionary principle promises to prevent hazards

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12 In this case, Albania's failure to notify U.K. naval vessels passing through the Corfu Channel that it had planted torpedoes there resulted in damage to the vessels and crew casualties. The ICJ ruled that Albania should have notified passing vessels of foreseeable dangers. *ICJ Reports*, 1949, p. 22. See Niu Huei-Chih,T he Precautionary Principle: Efforts and Controversies in Establishing and Implementing Rules for Environmental Risks with Scientific Uncertainty in International Environmental Law, *Taiwan University Law Journal*, No. 3, 2005. (in Chinese)

13 Niu Huei-Chih,T he Precautionary Principle: Efforts and Controversies in Establishing and Implementing Rules for Environmental Risks with Scientific Uncertainty in International Environmental Law, *Taiwan University Law Journal*, No. 3, 2005. (in Chinese)

before they materialize and corrects the weaknesses of traditional practice. Thus, the precautionary principle is an inevitable development in international law as well as a choice that will benefit humanity.

B. The Development of the Precautionary Principle

1. In Domestic Law

The precautionary principle first appeared at the national level in the environmental law of Germany and Switzerland. For example, the 1970 West German Clean Air Act and a 1976 government decree both required the cautious handling of environmental hazards so that they could be predicted and prevented and their harms minimized. Since then, the precautionary principle has gradually become a basic principle in German environmental law. Other countries also came to adopt the precautionary principle as a foundation for the protection of their environments.

In the Netherlands, although the precautionary principle is less entrenched than in Germany, it is still reflected in some of its environmental regulations. For example, the word "precaution" did not appear in the Netherlands' 1998 Nature Protection Act, but the idea can be found in Article 6, Paragraph 3: in keeping with the goal of protecting the environment, if a project may have a grave impact on the surrounding environment, an evaluation should take place before it is implemented.[14]

In the United States, growing attention has been paid to the precautionary principle for two reasons: globalization and the frequent occurrence of trade disputes involving hormone-treated beef, food security, climate change, and other issues. Several years after the precautionary principle had come to the attention of European countries, discussions also began in the United States on the role of the precautionary principle in environmental policy. The precautionary principle became, in theory, an explicit part of American environmental policy after the United Nations Conference on Environment and Development in 1992. At this convention, the United States signed the Rio Declaration, and the U.S. Environmental Protection Agency acknowledged that the United States was bound by the Rio Declaration and recognized certain methods for implementing the precautionary principle. However, the United States has not articulated

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14 Tim O'Riordan and James Cameron, *Reinterpreting the Precautionary Principle*, London: Cameron May International Law & Policy, 2001, p. 163.

strategies that can actually incorporate the precautionary principle into its domestic environmental policy. In fact, the United States federal government is neutral on the precautionary principle, even though many supporters of the precautionary principle hope to mitigate pollution and other environmental problems, and resist the reductionist trend in American environmental policy, through this principle.[15]

Unlike the federal government, state governments have shown a positive attitude toward the precautionary principle and have implemented the principle in environmental policy reform in the past 30 years. Over 20 states have established voluntary or mandatory precautionary procedures on environmental pollution. Among them, California is representative of the states with tough environmental policies. For example, under Resolution No. 5, factories that may emit substances that may cause cancer or reproductive diseases are obligated to prove that these substances will not result in hazards specified in the regulations.[16]

2. International Applications

a. The Precautionary Principle in International Agreements

The 1958 Convention on the High Seas is the first international agreement that touches on the precautionary principle. The convention is concerned mainly with preventing pollution on the high seas and requires signatories to take precautionary action with respect to offshore oil pollution and marine pollution that results from the dumping of radioactive materials. Although the Convention does not explicitly refer to the precautionary principle, the idea shows up in some of its provisions.

The Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 (commonly called the "London Convention"),[17] drafted by the Intergovernmental Marine Consultative Organization (IMCO), applies the precautionary principle to the management of waste and hazardous substances. According to the convention and its guiding principles, high-level radioactive materials on the seabed should be treated with reasonable techniques to isolate them safely and effectively from the sea.

Whether the precautionary principle should be included in the London Convention was a point of debate at the preparatory meetings for the convention. A panel of experts discussed this issue during the preparations for 13th meeting of

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15 Tim O'Riordan and James Cameron, *Reinterpreting the Precautionary Principle*, London: Cameron May International Law & Policy, 2001, p. 183.

16 Tim O'Riordan and James Cameron, *Reinterpreting the Precautionary Principle*, London: Cameron May International Law & Policy, 2001, p. 190.

17 The London Dumping Convention was concluded in London on December 29, 1972.

the IMCO. The experts concluded that the London Convention had already applied the precautionary principle to the prevention and control of marine pollution and pointed out that the precautionary principle should be included in the convention and also have a reasonable definition. In addition, the experts unanimously agreed that the precautionary principle could help reduce the risk of environmental hazards in the dumping of radioactive materials, even if these hazards were only suspected or if there was still no evidence indicating a clear causal relationship between the possible causes and the hazards.

At the 14th meeting of the IMCO, a working group was established to study the precautionary principle in depth and draft a definition for it. In addition, signatories to the London Convention adopted a resolution stating that the precautionary principle should guide marine conservation and protection within the framework of the convention: "when there are reasonable grounds to believe that substances dumped into the sea may result in hazards to the marine environment, all State parties shall take appropriate precautionary measures under the guidance of precautionary methods even if there is no conclusive evidence on the causal relationship between the dumping and possible hazards."

The UNCLOS is the first global convention on the prevention, reduction, and control of marine pollution as well as the conservation and management of marine biological resources. Although it does not refer explicitly to the precautionary principle, it actually includes interpretations of the principle. For example, Article 116 provides for the right to fish on the high seas: all countries have the right to fish on the high seas, but the right is subject to their treaty obligations and the rights and duties of coastal countries. Article 119 provides for the conservation of the living resources of the high seas: States shall "take measures which are designed, on the best scientific evidence available to the States concerned, to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield."

Although the outcomes under Articles 116 and 119 are unclear when the "best scientific evidence available" is not sufficient or adequate for complex decision making, the precautionary idea is apparent in these two provisions. Further, Article 206 articulates main elements of the precautionary principle: "when States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment."

The standard for implementing the precautionary principle under the UNCLOS differs from that in the Rio Declaration. Principle 15 of the Rio Declaration states: "the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." First, under the UNCLOS, reasonable grounds are required for certain activities. Second, in contrast with strong language like "threats of serious or irreversible damage" in Principle 15, the UNCLOS merely says "may cause substantial pollution of or significant and harmful changes to the marine environment." Finally, while the Rio Declaration requires countries to take action to prevent hazards, the UNCLOS only requires them to assess the potential hazards or environmental changes in a practical manner, which make it easy for countries to circumvent the requirements. Therefore, on the whole, the precautionary provisions are weaker in the UNCLOS than in the Rio Declaration.

In 1982, the International Whaling Commission (IWC) amended Article V of the International Convention for the Regulation of Whaling (relating to the time table for commercial whaling) to prohibit any form of whaling for commercial purposes. This amendment, which was based on the belief that whaling may lead to many uncertain impacts on living marine resources, can be considered an application of the precautionary principle.

The 1985 Vienna Convention[18] is the first international convention that uses the term "precautionary measures." Its preamble states that, because of the "potentially harmful impact on human health and the environment through modification of the ozone layer," precautionary action must be taken at both the national and international levels.

Both the preamble and the body of the Vienna Convention point out that precautionary measures should be based on relevant scientific and technical considerations. In addition to expounding on the adverse effects of environmental changes,[19] the convention also provides that appropriate action should be taken to protect human health and the environment against the adverse effects resulting or likely to result from human activities that modify or are likely to modify the ozone

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18 The Vienna Convention for the Protection of the Ozone Layer was adopted on March 22, 1985 and went into effect on September 22, 1988.

19 Under the Vienna Convention for the Protection of the Ozone Layer, "adverse effects" means "significant deleterious effects caused by changes in the physical environment."

layer. Though the convention does not use the term "precautionary principle," the concept of "precautionary measures" appears in the preamble. In addition, the body defines the member States' obligations as well as the adverse effects of human activities. All these features show that the Vienna Convention not only recognizes the precautionary principle, but also explores possible ways to put the principle into practice. In particular, the convention's definition of "adverse effects" resulting from human activities is basically consistent with that of the Rio Declaration.

The Vienna Convention lays the foundation for the formulation of specialized agreements on the protection of the ozone layer. One of them is the 1987 Montreal Protocol on Substances That Deplete the Ozone Layer (hereinafter "the Montreal Protocol").[20] The Montreal Protocol's goal is to resolve the increasingly serious problem of holes in the ozone layer, which have been discovered in the early 1930s.

Like the Vienna Convention, the Montreal Protocol does not use the phrase "precautionary principle," but defines the obligations of signatories in a manner that reflects the precautionary idea and specific ways of implementing the principle. First, the preamble emphasizes that all signatories should take appropriate action to protect human health and the environment against the adverse effects caused by human-induced depletion of the ozone layer. Second, the Montreal Protocol clearly provides that precautionary measures should be taken to control the total global emission of ozone-depleting substances in accordance with scientific findings and relevant scientific and technical considerations. Third, and also consistent with the Vienna Convention, the Montreal Protocol's preamble directs that precautionary measures be taken at both the national and international levels to control the emission of ozone-depleting substances.

The significance of the Montreal Protocol lies in its attempt to control the production, manufacture, and use of ozone-depleting substances through international cooperation based on the precautionary principle and its specific requirements for signatories to gradually restrict and prohibit the manufacture and use of products that may result in the emission of ozone-depleting chlorofluorocarbons (CFCs). Therefore, the Montreal Protocol can be regarded as a pioneer in the application of the precautionary principle to the ozone layer problem with scientific uncertainty. Elizabeth Dowdeswell, Executive Director of the United Nations Environment Programme (UNEP) from 1992–1998, once identified

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20 The Montreal Agreement is mainly about the treatment of ozone-depleting substances like chlorofluorocarbons (CFCs).

the Montreal Protocol a special tool that protects the ozone layer based on the precautionary principle.[21]

The 1992 Convention on the Protection of the Marine Environment of the Baltic Sea Area (hereinafter "the Helsinki Convention") is a good example of a regional convention on the protection of marine environment that is based on the precautionary principle.

In 1990, the European Community and some other European countries signed the Baltic Sea Declaration, which incorporated the precautionary principle. But Baltic coastal States, with growing knowledge of marine pollution, felt it was necessary to come up with a new binding treaty aimed at protecting the Baltic marine environment. In addition, the 1974 Helsinki Convention, which was the predecessor of the 1992 Helsinki Convention, had failed to prevent the contamination of large areas in the Baltic Sea, with 100,000 square kilometers of sea area considered "totally dead" by that time.

In contrast with the 1974 Helsinki Convention, the 1992 Helsinki Convention not only incorporates the prevention principle, but also the precautionary principle. First, the Helsinki Convention provides that signatories are responsible for preventing and eliminating pollution to help restore and protect the ecological balance of the Baltic Sea. Second, the Helsinki Convention applies the precautionary principle to the protection of the marine environment. Under Article 3, "[t]he Contracting Parties shall apply the precautionary principle, *i.e.*, to take preventive measures when there is reason to assume that substances or energy introduced, directly or indirectly, into the marine environment may create hazards to human health, harm living resources and marine ecosystems, damage amenities or interfere with other legitimate uses of the sea even when there is no conclusive evidence of a causal relationship between inputs and their alleged effects."

When compared with the 1990 Baltic Sea Declaration, we can see that the 1992 Helsinki Convention expands the concept of "pollution" from pollution stemming from the disposal of substances to including pollution from the disposal of energy into the sea as well. In addition, while the purpose of the 1990 Baltic Sea Declaration was to protect only marine ecosystems, the 1992 Helsinki Convention intends to also protect human health, biological resources, and the reasonable use of the sea.

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21 Wybe Theodorus Douma, *The Precautionary Principle – Its Application in International European and Dutch Law*, Groningen: University of Groningen, 2003, p. 109.

At the 1992 Rio de Janeiro UN Conference on Environment and Development (UNCED), five environmental conventions were adopted. Two of them were binding: the United Nations Framework Convention on Climate Change (FCCC) and the Convention on Biological Diversity.[22] This conference was an important signal for the general recognition of the precautionary principle by the international community. After this conference, the precautionary principle began to appear in many international treaties and conventions as well as the resolutions of international organizations.

Before the FCCC, some national organizations had already begun to pay attention to climate change and its serious threat to human survival and the global environment. In 1988, the UNEP and the World Health Organization established the Intergovernmental Panel on Climate Change (IPCC) for the purpose of providing scientific guidance on counteracting climate change that was resulting from the emission of carbon dioxide and other greenhouse gases. In August 1992, the IPCC released its first report, the results of which were confirmed in 1992. According to the report, the global temperature will rise by 2°C by 2025 and 4°C by 2030, which would lead to a 20 cm rise in global sea levels by 2030.

The FCCC requires States parties to take appropriate action to reduce greenhouse gas emissions and protect the environment against the hazards of climate change. It incorporates the precautionary principle into its framework. Specifically, Article 3, Paragraph 3 provides that "[t]he Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effect." It also reaffirmed Principle 15 of the Rio Declaration: "[w]here there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost."

Although the words "precautionary principle" are not mentioned in the Convention on Biological Diversity, the idea is apparent in its preamble: "where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat."

The Convention on the Protection and Use of Transboundary Watercourses and

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22 The other three non-binding international declarations adopted at the 1992 UNCED were discussed in Section 2.2 ("The Development of the Precautionary Principle") of this article.

International Lakes (hereinafter "the Transboundary Watercourses Convention") is the first and probably the only currently-effective international convention that has codified the precautionary principle. The convention aims to prevent and control possible pollution to transnational watercourses and international lakes and the adverse effects on transnational watercourses resulting from human activities, such as the discharge of waste water and underground water.

Article 2, Paragraph 5(a) of the Transboundary Watercourses Convention states, "[t]he precautionary principle, by virtue of which action to avoid the potential transboundary impact of the release of hazardous substances shall not be postponed on the ground that scientific research has not fully proved a causal link between those substances, on the one hand, and the potential transboundary impact, on the other hand." In the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Hungary proposed to the ICJ that the precautionary principle in the Transboundary Watercourses Convention should be followed. Although the ICJ recognized new developments in international environmental law to a certain degree, it did not speak directly on whether the precautionary principle should be deemed part of these new developments. Neither did the court rule on the status of the precautionary principle in international law.

Article 3, Paragraph 1 of the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (hereinafter "the 1996 Protocol to the London Convention") states, "Contracting Parties shall apply a precautionary approach to environmental protection from dumping of wastes or other matter whereby appropriate preventative measures are taken when there is reason to believe that wastes or other matter introduced into the marine environment are likely to cause harm even when there is no conclusive evidence to prove a causal relation between inputs and their effects."

An IMCO senior technical officer has noted that the precautionary principle in the 1996 Protocol to the London Convention is more direct and explicit than the 1972 London Convention. The former provides that "Contracting Parties shall apply a precautionary approach to environmental protection," while the latter states that the convention "shall be guided by a precautionary approach."

With time, the scope of application for the precautionary principle expanded from simply environmental protection to the conservation and management of living marine resources. For example, the 1995 Agreement for the Implementation of the Provision of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservationand Management of Straddling

Fish Stocks and Highly Migratory Stocks (hereinafter "the 1995 Fish Stocks Agreement") deals with controversies about the conservation and management of straddling fish stocks and highly migratory stocks. It is guided by the sustainable development and precautionary principles through mechanisms such as the sharing and collection of relevant data, continuing or assessing the impact of activities on the ecology, and adopting a precautionary approach.[23]

Article 6 of the 1995 Fish Stocks Agreement provides, "States shall apply the precautionary approach widely to conservation, management and exploitation of straddling fish stocks and highly migratory fish stocks" and emphasizes that "States shall be more cautious when information is uncertain, unreliable or inadequate. The absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures, and that in order to improve techniques for dealing with risk and uncertainty States shall enhance their abilities for data collection and research." By providing for the obligations of States parties, the 1995 Fish Stocks Agreement prescribes concrete ways to implement the precautionary principle and sets the direction for the principle's future development.

Finally, World Trade Organization (WTO) agreements also have a close relationship with the precautionary principle. The relationships between trade and the environment have been one of the most controversial issues within the WTO. As the world's largest trade organization aimed at removing national tariff barriers and promoting trade liberalization, the WTO is also paying attention to environmental problems and has included environmental protection among its list of development goals. The preamble to the WTO Agreement also mentions sustainable development as a goal that requires the reasonable use of natural resources.

The precautionary principle is very important to achieving sustainable development. It requires countries to be cautious in their actions relating to the environment and natural resources because the uncertain and gradational nature of scientific discovery makes it impossible for people to have perfect foresight of the impact of their activities on the environment and their health. Rash and arbitrary action would cause irreversible harm to people and nature. It can be said that the precautionary principle is based on the long-term interests of both, requiring human

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23 Niu Huei-Chih, The Precautionary Principle: Efforts and Controversies in Establishing and Implementing Rules for Environmental Risks with Scientific Uncertainty in International Environmental Law, *Taiwan University Law Journal*, No. 3, 2005. (in Chinese)

beings to act with caution to better protect their health and the environment.

Although the members of the WTO should take action to protect the environment in accordance with WTO agreements even if it would restrain free trade to an extent, the WTO believes that such measures should be predicated on necessity and also be proportional. For example, Article XX ("General Exceptions") of the 1994 General Agreement on Tariffs and Trade (GATT) cautions that this type of action should not be "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." However, this and similar restrictive language actually hinders the implementation of the precautionary principle. Paragraph (g) uses the words "relating to" in discussing the conservation of exhaustible natural resources. "Relating to" refers to the existence of a close and genuine relationship of ends and means.[24] This provision can hinder the application of the precautionary principle because, under the principle, the prerequisite for preventive measures is only a scintilla of a causal relationship between the behavior and the damage. In other words, with incomplete scientific knowledge, planned behavior can be considered possibly damaging. If environmental protection measures can be taken only when there is "a close and genuine relationship of ends and means," it is impossible to apply the precautionary principle.

Further, paragraph (b) has made the application of the precautionary principle even more difficult. It uses the phrase "… necessary to protect human, animal or plant life or health." "Necessary" is not defined, and its interpretation can be arbitrary. Its meaning is mainly in the discretion of WTO dispute settlement bodies that adjudicates each case.

We can see from the above that international agreements had not paid much attention to the precautionary principle before the 1980s, but its ideas began to appear in some agreements in the early 1980s. These ideas actually took the form of applications. For example, the UNCLOS requires States parties to assess the potential impact of human activities on the marine environment. The concept of "preventive measures" is introduced into the Preambles of both the International Convention for the Regulation of Whaling and the Vienna Convention. The Preamble of the Montreal Protocol also provides that precautionary measures

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24 Wybe Theodorus Douma, *The Precautionary Principle – Its Application in International European and Dutch Law*, Groningen: University of Groningen, 2003, p. 131.

should be taken at both the national and international levels to control the emission of ozone-depleting substances.

Since the 1992 UNCED's adoption of the Rio Declaration, the precautionary principle has appeared in more and more international agreements. For example, compared with the 1972 London Convention, the 1996 Protocol to the London Convention has more direct provisions on precautionary measures and clearer expressions of the precautionary principle. The 1996 Protocol is the next step after the 1972 London Convention and shows greater acceptance of the precautionary principle in line with international environmental protection trends. The 1995 Fish Stocks Agreement also explicitly refers to the precautionary principle. Thus, 20 years after the adoption of the Rio Declaration, the precautionary principle has become entrenched in international environmental law and international law of the sea.

In addition, the scope of application for the precautionary principle has gradually expanded from environmental protection to the conservation and management of natural resources. For instance, the 1995 Fish Stocks Agreement instructs that the precautionary approach should be applied widely to the conservation, management and exploitation of straddling fish stocks and highly migratory fish stocks so as to better protect the marine biological resources.

b. The Precautionary Principle in the Resolutions of International Organizations

The Stockholm Declaration was adopted by the United Nations Conference on Human Environment held in Stockholm, Sweden, in 1972. The Declaration includes 26 principles on environmental protection and, in its preamble, defines its goalas to "inspire and guide the peoples of the world in the preservation and enhancement of the human environment." Principle 6 states that "[t]he discharge of toxic substances or of other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted in order to ensure that serious or irreversible damage is not inflicted upon ecosystems." To some degree, this principle expresses the precautionary idea which means to take appropriate measures to prevent hazards and provides for the appearance of the precautionary principle.

The 1982 World Charter for Nature is the annex to Resolution 37/7 of the United Nations General Assembly (UNGA). Although the Charter does not use the words "precautionary principle," it includes some of the principle's important components. Article 11 directs that "[a]ctivities which are likely to

cause irreversible damage to nature shall be avoided" and that "[a]ctivities which are likely to pose a significant risk to nature shall be preceded by an exhaustive examination; their proponents shall demonstrate that expected benefits outweigh potential damage to nature, and where potential adverse effects are not fully understood, the activities should not proceed."

It can be seen that, under the World Charter for Nature, activities that may harm nature must be kept to a minimum. In addition, the Charter is innovative in that it provides for the implementation of the precautionary principle: it states that the principle "shall be reflected in the law and practice of each State, as well as at the international level."

The term "precautionary principle", along with its components such as possible damage to environment and proof of harmful effects, first appeared in the Bremen Declaration which was adopted at the first International North Sea Conference in Bremen, Germany in 1984. Its preamble recognizes that "the environment is best protected against pollution through timely preventive measures" and "damage to the marine environment can be irreversible ... therefore, coastal States and the EEC must not wait for proof of harmful effects before taking action."

The 1987 London Declaration from the second International North Sea Conference also mentioned the precautionary principle. Paragraph VII provides, "in order to protect the North Sea from possibly damaging effects of the most dangerous substances, a precautionary approach is necessary which may require action to control inputs of such substances even before a causal link has been established by absolutely clear scientific evidence." It should be noted that the precautionary principle in the 1987 London Declaration applies only to the protection of the North Sea marine environment and is restricted only to the handling of the most dangerous and persistently toxic substances that can accumulate in the body.

The Hague Declaration, which was adopted at the third International North Sea Conference in the Hague in 1990, states in its preamble that participants "will continue to apply the precautionary principle, that is to take action to avoid potentially damaging impacts of substances that are persistent, toxic and liable to bioaccumulate even where there is no scientific evidence to prove a causal link between emissions and effects." This third conference basically followed the second conference on the issue of the precautionary principle and continued to emphasize the consistent application of the principle.

In 1989, the Governing Council of the United Nations Environment Pro-

gramme (UNEP) released Decision 15/27 (Precautionary Approach to Marine Pollution, Including Waste-Dumping at Sea). Aiming to protect the marine environment from irreparable harm and harm to human beings that results from the lack of scientific proof of harm from dumping waste into the sea, the Decision recommends that "all Governments adopt the 'principle of precautionary action' as the basis of their policy with regard to the prevention and elimination of marine pollution." The precautionary principle was introduced at the regional level in the two International North Sea Conferences in 1984 and 1987 and appeared at the global level in the UNEP's Decision 15/27.

In 1990, the UN's Economic Commission for Europe (ECE) held a conference themed "Act for our Common Future," which adopted what became known as the 1990 Bergen Ministerial Declaration on Sustainable Development (hereinafter "the Bergen Declaration"). According to the Bergen Declaration, the precautionary principle should be applied only when there is a risk of grave or irreparable harm. In addition, compared with other legal instruments like the Rio Declaration, the Bergen Declaration does not require that precautionary measures be taken in a cost-effective manner.

The 1990 Baltic Sea Declaration[25] shows the decision of the European Community and some other European countries to apply the precautionary principle. The Declaration also specifies the scope of application for the principle, which is basically consistent with the London Declaration from the second International North Sea Conference. In addition, the words "effective action" replaced "cost-effectiveness criterion."

The Earth Summit held by the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro in 1992 produced five environmental conventions. Three of them are non-binding: the Agenda 21, the Rio Declaration on Environment and Development, and the Statement of Forest Principles. The participating States and the President of the summit[26] included a general definition of the precautionary principle in the Rio Declaration, and the definition came to be used often in other international documents and agreements. Principle 15 of the Rio Declaration states, "[w]here there are threats of serious or irreversible damage,

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25 The 1990 Baltic Sea Declaration is aimed at maintaining the ecological balance of the Baltic Sea. It was adopted by Sweden in September 1990.

26 At the 1992 United Nations Conference on Environment and Development, Canada, Colombia, the United States and some other countries shared their views on the precautionary principle.

lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." The precautionary principle reflected in the provision differs from its prior iterations in that its scope of application is no longer restricted to one or several aspects of environmental protection, but has been expanded to include the global prevention of the deterioration of the environment.

After the Rio Declaration, international instruments continued to include provisions that reflected the precautionary principle. The 1993 Ministerial Declaration on the Protection of the Black Sea, adopted in Odessa, Ukraine requires signatories to take immediate action to combat pollution in the Black Sea. At this conference, ministers for the environment agreed to build their environmental policies on the precautionary principle.[27]

The Washington Declaration on Protection of Marine Environment was adopted in Washington D.C. in 1995 at the UNEP Intergovernmental Conference on Protection of the Marine Environment From Land-Based Activities. The provisions related to the precautionary principle under the Washington Declaration are basically consistent with those in the Rio Declaration, but differ in their scope of application: the Washington Declaration is limited to the protection of the marine environment, while the Rio Declaration applies to the global environment.

The precautionary principle came to be applied not only to the protection of the marine environment, but also living marine resources. For example, in 1989, the United Nations General Assembly adopted Resolution 44/225 (Large-Scale Pelagic Driftnet Fishing and Its Impact on theLiving Marine Resources of the World's Oceans and Seas).[28] The resolution asserts that regulations for the conservation and management of living marine resources should take into account the best available scientific data and analysis and that large-scale pelagic driftnet fishing should be prohibited in the absence of scientific evidence about possible harm. This resolution

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27 In the Odessa Declaration, the environmental ministers of Bulgaria, Georgia, Romania, and Russia and other countries acknowledged the important role of the precautionary principle in their environmental policies.

28 On December 22, 1989, the UN General Assembly unanimously adopted the Large-scale pelagic driftnet fishing and its impact on the living marine resources of the world's oceans and seas (Resolution 44/225). On December 21, 1990, the UN General Assembly adopted Resolution 45/197, which reaffirmed the necessity of the precautionary principle and pointed out that some States reviewed relevant available scientific data on driftnet fishing in accordance with Resolution 44/225 of the UN General Assembly, but failed to come to the conclusion that driftnet fishing was harmless to the conservation and continuity management of living marine resources.

was extremely important to the sustainable use of living marine resources, but it was opposed by some in the fishing industry and major fishing countries.[29]

In 1995, the United Nations Food and Agriculture Organization (FAO) issued the Code of Conduct for Responsible Fisheries, in which the precautionary principle was listed among the General Principles. Article 6, paragraph 5 of the Code provides, "States and subregional and regional fisheries management organizations should apply a precautionary approach widely to conservation, management and exploitation of living aquatic resources in order to protect them and preserve the aquatic environment, taking account of the best scientific evidence available. The absence of adequate scientific information should not be used as a reason for postponing or failing to take measures to conserve target species, associated or dependent species and non-target species and their environment."

From the above discussion of resolutions from international organizations, we can draw a few conclusions. First, the scope of application of the precautionary principle has expanded from the prevention of one or several types of environmental hazards under the London Declaration to the prevention of all types of environmental hazards under the Rio Declaration. Second, the precautionary principle has gone from a regionally-recognized principle to a global precept. Between the time of the first and second North Sea Conferences, the Baltic Declaration, and the 1992 Earth Summit, the precautionary principle has grown from a regional idea to an environmental protection strategy that all countries are obliged to pay attention to. In addition, the precautionary principle has also come to play an important role in the conservation and management of living marine resources.

c. The Precautionary Principle in International Case Law

To date, six major cases have involved the international application of the precautionary principle. Among them are the *Nuclear Tests II Case (New Zealand*

29 Some scholars opine that, if the United Nations General Assembly resolution to prohibit large-scale pelagic drift-net fishing is generally accepted, few fishing activities can be conducted on the high seas in the absence of expensive and complex preliminary investigations.

v. France)[30] heard by the ICJ in 1995, the 1997 *Gabčíkovo-Nagymaros Project*[31] *(Hungary/Slovakia)*, the *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*[32] heard by the International Tribunal for the Law of the Sea (ITLOS) in 1999, and the 2001 *MOX Plant Case (Ireland v. United Kingdom)*.[33]

Some of these cases involve the status or legal effects of the precautionary principle in international law, others concern the relationships between the principle and certain conventions or agreements, and still others relate to the principle as a basis for judgment. These cases can provide guidance and points of reference for the legal status and legal effects of the precautionary principle, as well as for each country's environmental protection efforts.

The *Nuclear Test II Case (New Zealand v. France)* (ICJ)

The history of the *Nuclear Test II Case* goes back to the 1974 *Nuclear Tests I Case*.[34] In 1973, France conducted a series of atmospheric nuclear tests in the South Pacific, which angered Australia and New Zealand. Australia claimed that its sovereignty had been violated, and New Zealand claimed that its marine ecosystem and even the atmosphere had been contaminated by radioactive materials. The ICJ decided that France's nuclear tests resulted in the accumulation of radioactive dust on the territories of Australia and New Zealand and were a violation of international law. On June 22, 1973, the ICJ prescribed provisional measures according to Article 41 of the Statute to order France to stop the radioactive materials from contaminating Australia and New Zealand.

In 1995, the French prime minister announced that France would conduct the last series of underground nuclear tests. New Zealand asserted that this was against France's 1974 pledge to stop atmospheric nuclear tests and that these tests, which had begun before their safety had been confirmed by environmental impact assessments conducted in compliance with international standards, might lead to

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30 Request for Examination of the Situation in Accordance with Paragragh 63 of the Judgement of 20 December 1974 in Nuclear Tests (New Zealand v. France), Order of 22 September 1995, *ICJ Reports*, 1995, pp. 288~426.

31 Case Concerning the the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), *ICJ Reports*, 1997, pp. 1~241.

32 Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), Order on Provisional Measures (ITLOS Cases Nos. 3 and 4). International Tribunal for the Law of the Sea, at http://www.itlos.org, 27 August 1999.

33 MOX Plant Case, Request for Provisional Measures (Ireland v. United Kingdom) (ITLOS Cases No. 10). International Tribunal for the Law of the Sea, at http://www.itlos.org, 3 December 2001.

34 Nuclear Test case (Australia and New Zealand v. France), *ICJ Reports*, 1974, p. 253.

the spread of radioactive substances into the marine environment and thus was a violation of international law under the precautionary principle. France claimed that the status of the precautionary principle in international law was unsettled and so it had no obligation to comply with it.

The ICJ dismissed the lawsuit brought by New Zealand, holding that its decision on the 1974 *Nuclear Test I Case* involved only atmospheric nuclear tests and did not apply to a case that involved underground nuclear tests. Although the ICJ did not resolve the question of the status of the precautionary principle in international law, its opinions included some important insights into the principle. Judge Weeramantry acknowledged that the precautionary principle had gradually gained wide support in international environmental law. He also wrote that, with regards to the burden of proof, New Zealand had provided *prima facie* evidence that radioactive materials had spread to the ocean and that France was obligated to provide counter vailing evidence.[35] Judge Koroma also held the same view: France should bear the burden of proof. In addition, when such risks could be reasonably avoided, France should be obligated to minimize or neutralize them.[36] Judge Palmer also thought that, when an activity might have a significant impact on the environment, the precautionary principle should be applied and the environmental impact of the activity should be assessed to eliminate or reduce the possibility of environmental disaster. He recommended that this practice be made part of customary international law on environmental issues.[37]

The *Gabčíkovo-Nagymaros Case (Hungary/Slovakia)* (ICJ, 1997)

In 1958, Czechoslovakia and Hungary decided after negotiations to build a hydroelectric power plant on their shared waterway on the Danube. In 1977, they signed an agreement on the joint construction and operation of the plant. However, with time, Hungary began to have doubts on the project's environmental impact. The construction of a dam might draw down the water table of the only wetlands on the southern bank of the Danube and make the wetlands vulnerable to pollution. The dam might pollute the ground water south of Budapest. Finally, the construction of an underground reservoir on the upstream side of the dam might lead to the infiltration of sediment and cause pollution in the Danube.

With these concerns, the Hungarian Academy of Sciences formed a special

35 Dissenting Opinion of Judge Weeramantry, *ICJ Reports*, 1995, pp. 288, 345.
36 Dissenting Opinion of Judge Koroma, *ICJ Reports*, 1995, pp. 288, 378.
37 Dissenting Opinion of Judge ad hoc Sir Geoffery Palmer, *ICJ Reports*, 1995, pp. 288, 412.

committee to investigate the environmental safety of the project in 1981. The committee recommended that the dam project be postponed or canceled. Under strong domestic pressure, Hungary suspended part of the project in 1989 and declared that the rest of the project could not begin until an environmental impact assessment had been completed. In response, Czechoslovakia proposed temporary solutions in 1991. One of the proposals was that Czechoslovakia would continue building reservoirs within its own territory. Hungary rejected the proposals and announced that, if Czechoslovakia continued the dam construction project, Hungary would terminate the1977 treaty. They could not reach an agreement through negotiations and submitted their dispute to the ICJ in 1993.

Hungary argued that its postponement of the dam project was based on the precautionary principle, under which countries had the obligation to prevent possible hazards. It cited Principle 15 of Rio Declaration: "Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." Hungary also quoted provisions on the precautionary principle in the 1992 Transboundary Watercourses Convention to support the legality of its postponement.

The ICJ ruled that, if new developments in international environmental law were relevant to the implementation of the treaty in this case, both parties could incorporate these developments into the treaty as long as they agreed. In other words, although the ICJ recognized that new developments in international environmental law could be a basis for the performance or non-performance of controversial treaties, the prerequisite for this solution was a consensus between the parties. However, the ICJ did not take a position on whether countries could use the precautionary principle to justify steps to protect transnational resources and sidestepped the question of whether the precautionary principle should be part of customary international law.

The *Southern Bluefin Tuna Cases* (ITLOS, 1999)

In 1993, Australia, New Zealand, and Japan signed the trilateral Convention for the Conservation of Southern Bluefin Tuna (hereinafter "the CSBT Convention"), aimed at the joint conservation and management of southern bluefin tuna (SBT) and the control of overfishing. SBT was a migratory fish species of significant economic value that was very popular in Japan. However, Japan implemented an experimental fishing program (EFP), which caused it to exceed the catch quota under the CSBT Convention. Australia and New Zealand believed that Japan's EFP

might undermine the CSBT Conservation efforts.

After negotiations failed, Australia and New Zealand began arbitration procedures against Japan in accordance with provisions under Annex VII of the UNCLOS. In response to Australia and New Zealand's joint request, the ITLOS ordered provisional measures under Article 290 of the UNCLOS in August 1999. Some scholars regarded this ruling as "a particularly illuminating example of the established status of the precautionary principle under international law." Although it is apparent that the ITLOS's order of provisional measures was based on the precautionary principle, the ruling was not sufficient to cement the status of the precautionary principle in customary international law.

Australia and New Zealand claimed that, under the UNCLOS and the CSBT Convention, parties to a treaty should comply with the precautionary principle when they were considering an activity that might cause serious or irreparable damage to the environment and that they should exercise caution when making decisions or taking actions related to the decision if there were scientific uncertainties in the links between actions and consequences. In addition, they demanded that Japan should fish SBT in compliance with the precautionary principle before the final ruling was issued. However, Japan questioned whether the precautionary principle was actually part of customary international law.

The ITLOS held that the parties to the treaty should exercise caution when taking action to ensure the effective implementation of conservation measures and prevent possible hazards to the SBT population. They should also take emergency measures to safeguard the interests of all parties and prevent the reduction of the SBT population. Japan's unilateral implementation of the EFP[38] was a clear violation of the relevant provisions under the UNCLOS that interpreted the precautionary principle, such as Articles 64, 116, and 119 related to the right to fish on the high seas and the conservation of the living resources of the high seas, as well as the relevant provisions of the CSBT Convention. The ITLOS ordered Japan to halt the EFP and suggested that Australia, New Zealand, Japan, and other countries or fishing organizations negotiate an agreement to better conserve and manage SBT.

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38 Some scholars call the ITLOS's approval of provisional measures in the *Southern Bluefin Tuna Cases* as "a particularly illuminating example of the established status of the precautionary principle under international law." See Tim O'Riordan and James Cameron, *Reinterpreting the Precautionary Principle*, London: Cameron May International Law & Policy, 2001, pp. 113~142.

Although the ITLOS did not resolve the status of the precautionary principle in international law, some judges expressed their support for the precautionary approach in their separate opinions and thus promoted the expansion of the precautionary principle. Judge Laing identified the provisional measures taken in this case as reflective of the precautionary approach and the precautionary approach as more flexible than the precautionary principle. Judge Shearer also believed that the precautionary approach was more flexible than the precautionary principle and that it would be consistent with Article 6, Paragraph 1 of the 1995 Fish Stocks Agreement, which stated that "States shall apply the precautionary approach widely to conservation, management and exploitation of straddling fish stocks and highly migratory fish stocks." Judge Treves proposed that the issue of the precautionary principle's status in customary international law be shelved temporarily and the precautionary approach be applied in the case.

The *MOX Plant Case* (ITLOS, 2001)

The Irish government was worried that environmental pollution would result from the nuclear waste and radioactive materials used in the MOX Plant in the United Kingdom, which were being transported in the watercourses between the two countries. Based on Article 290 of the UNCLOS, Ireland submitted a request to the ITLOS for the implementation of provisional measures, asking for the UK to be required to close the MOX Plant immediately and stop the transport of nuclear waste and radioactive materials through the waterways between the two countries.

Ireland claimed that the UK had not taken any steps that were necessary to prevent, reduce, or control the intentional or accidental discharge of the MOX plant nuclear waste or radioactive materials or the discharge during their transport in the waterways between the two countries, and so the plant could pollute the Irish marine environment. According to Ireland, the UKwas also obliged to prove that the MOX nuclear plant would not be a threat to its surrounding environment.

The UK had actually taken strict security measures to ensure the safety of the environment around the MOX plant and planned to stop the cross-border transport of nuclear waste and radioactive materials from the plant. Therefore, the ITLOS turned down the Irish request for provisional measures and suggested that the two countries exchange information on the MOX plant in a cooperative spirit and monitor the plant together.

In his opinion, Judge Wolfrum acknowledged that there was as yet no consensus in the international community on many issues related to the precautionary principle. But under the principle, the country whose action might cause

environmental pollution should bear the burden of proof of the safety of its action. In his view, Ireland had not provided sufficient evidence that the risks from the UK's actions were serious, especially when compared with the evidence offered by the UK. Judge Treves thought that Ireland's evidence did not show a need for urgent provisional measures. Judge *ad hoc* Szekely also shared this view and supported the ITLOS's suggestion that the two countries cooperate in accordance with the precautionary principle.

Although the ITLOS rejected Ireland's request for provisional measures, it assigned the burden of proof in environmental hazard cases to the country taking the actions that might cause the hazards. In other words, the country must prove that its actions were harmless or the precautionary principle would apply. The ruling shows that the precautionary principle should not be abused and should apply only when certain conditions have been met, *i.e.*, after the country claiming injury has provided sufficient evidence showing that the other country's actions may harm the environment.

In these cases involving the application of the precautionary principle in international law, the international judicial bodies did not speak definitively on the legal status and effects of the precautionary principle. However, their rulings offer interpretations of the principle that may lead to the confirmation of its legal status. The understanding of the precautionary principle will deepen as interpretations accrue, such as discussions in the above cases on the burden of proof regarding environmental hazards in the absence of scientific certainty and the prerequisites for implementing the principle.

Some WTO cases have also involved the precautionary principle. In the 1996 US gasoline case, the WTO Appellate Body explained the meaning of "relating to" in "relating to the conservation of exhaustible natural resources" under Article XX, Paragraph (g) of the GATT and "primarily aimed at." It decided that a special measure could be considered to not be based on the goal of protecting the environment or resources only when it had no positive significance to the protection of the environment or resources under any circumstance. The Appellate Body also noted that national governments had some degree of discretion in the protection of the environment or resources. Although the Appellate Body did not mention the precautionary principle, its ruling was consistent with the basic ideas of the principle, *i.e.,* balancing the interests of environmental protection against those of trade when affirming measures aimed at protecting the environment and resources that included measures to prevent activities that could harm the environment and

resources. In the 1998 *Beef Hormones* dispute, the Appellate Body did not comment on the status of the precautionary principle in international law, but mentioned the principle in its ruling. The Appellate Body held that trade-related laws and regulations could be interpreted with the precautionary principle. For example, the Appellate Body noted that "hazards" in the provision on risk assessment under Article 5.1 of the SPS Agreement should be those that actually existed and could be determined in a laboratory environment, *i.e.*, hazards that could damage human health in the real world.

Although these cases did not give the precautionary principle the status of binding customary international law or a general principle of international law, both experts and the WTO Appellate Body attached great importance to the principle. Both thought that the precautionary principle, as well as the principle of sustainable development, could be used to interpret the WTO's laws and regulations.

III. Conclusion

Due to the current uncertainties and limitations in science, and for the benefit of future generations, human beings should take a cautious attitude toward environmental protection and the use of resources to prevent irreparable harm and irrecoverable losses. These ideas first prompted the use of the precautionary principle in the environmental laws of Germany and Switzerland. Since then, the precautionary principle has been adopted by other countries, such as the Netherlands and the United States, as an important principle in the protection of the environment and resources. At the international level, the precautionary principle has been cited and interpreted in international conventions and the resolutions of international organizations as an important basis for international environmental protection. In addition, the precautionary principle has become an important basis for rulings by international judicial bodies and for countries and the international community when assessing the impact of human activities on the environment and resources and in taking steps to protect them.

Translator: ZHANG Zhiyun
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Attempts of Returning to Freedom of Contract in the Public Transport Field: Comment on Regulation on Maritime Service Contracts by the UNCITRAL Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea]

WEI Jingjian* YAO Ying**

Abstract: Maritime service contracts in the public transport field feature a demonstration of freedom of contract and play a significant role in the current international liner trade. The main order value of the existing unified law on maritime transport lies in restricting common carriers' freedom of contract and hence cannot provide effective regulation on maritime service contracts. The Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea] currently being drafted establishes a framework of rules that is applicable to volume contracts, which is in the nature of maritime service contracts. This, however, contradicts the tradition of restricting the common carrier's freedom of contract established by the unified law on maritime transport, and is based on the appeal to value of a new round of calls for the unification of laws on carriage of goods by sea that represents an attempt to return to freedom of contract in the public transport field.

Key Words: Public transport; Freedom of contract; Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea]; Maritime service contract

In the current international liner shipping environment, the number of maritime service contracts is rapidly increasing. In some industries, 80% to 90% of

* WEI Jingjian, Professor of Jilin University School of Law.
** YAO Ying, Lecturer of Jilin University School of Law, doctoral candidate in civil and commercial law.

liner shipping is carried out under such contracts. Any decision on how to handle such contracts may influence deliberations regarding regulations under the compensation liability substantial law.[1]The proposal of including maritime service contracts into the Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea] (hereinafter referred to as the "Draft Convention") was officially put on the agenda of the 2003 and 2004 conferences for preparation of the Draft Convention held by the Working Group on Transport Law of United Nations Commission on International Trade Law (UNCITRAL). Should the Convention on Carriage of Goods to be drafted carry on the tradition of the "Hague-Visby Rules System"? That is to say, should the Convention on Carriage of Goods exclude the application of any maritime contract embodying the spirit of freedom of contract in a more prominent way such as charter party or maritime service contract? Furthermore, if maritime service contracts are to be regulated, does this mean that all types of maritime service contracts should follow? Or merely those volume contracts that present certain characteristics such as volume contracts in liner shipping? If only volume contracts in liner shipping are to be regulated, should the mandatory provisions concerning the common carrier liability system are wholly or partly applicable to such contracts? These questions have always been the focus of debate among representatives of various countries at the meetings held by the Working Group on Transport Law. The discussion in this paper is based on the same argument.

I. Clues: Maritime Service Contracts Struggling to Take Form under the Restriction of Freedom of Contract in the Field of Public Transport

Liner shipping has evolved in accordance with the development of the world economy and international trade. At the beginning of the 19th Century, international trade had developed to a considerable scale, and the transport volume of general cargo consisting of industrial finished products, semi-finished products, food and other high-value commodities increased tremendously. Only by providing fast, regular and uninterrupted service of carriage of goods by sea can the extensive needs of the world consumption markets be met. In response to it, a liner shipping

1 Comments from the UNCTAD Secretariat on freedom of contract, at http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport/, 18 April 2005.

market emerged, which also became the foremost characteristic of liner shipping. Another characteristic of liner shipping is that the transported goods are of a relatively high value. "In recent years, although liner shipping volume has taken up only around 20% of the world's total, its goods value is equivalent to 80% of that of world maritime transport. Since industrial goods trade in developed countries accounts for over 80% of global industrial goods trade, liners transporting goods are on the go frequently among developed countries as well".[2]

With respect to the nature of liner shipping, the status of freedom of contract in liner contractual relationships, the role of Freight Conference in the liner shipping market, the background for the creation of maritime service contracts and their breakthrough of the limitations of the freedom of contract, this paper will move the discussion forward by considering the following points:

1. According to common law tradition, liner shipping falls under the category of public transport and hence has some of the following basic characteristics: (1) the common carrier transports the general public's goods from a designated location to a designated destination as per a designated time; (2) the shipper pays freight accordingly as the consideration under the contract; (3) the common carrier indicates explicitly or by action that the purpose of goods transport is to earn freight; (4) the common carrier shall accept goods for delivery from anyone as long as these are not restricted or illegal goods; and (5) transport is not incidental or irregular or affiliated to the carrier's main business.[3] It demonstrates that in spite of certain restrictions imposed on the freedom of contract in the public transport field, the most important field of compensation liability has not yet been involved. As a result, originating from the United Kingdom, common carriers started to evade restrictions on freedom of contract by including provisions on exemption of its compensation liability in the liner bill of lading. Starting from the middle of the 19th Century, liner carriers' practice of "abusing freedom of contract" was prevalent, and bills of lading, serving as liner shipping contracts, contained a great number of provisions on exempting the carrier's compensation liability for goods lost and damaged, to the extent that "the recipient or holder of the bill of lading had no guaranteed rights and interests, the circulation effect of bills of lading were severely obstructed, banks refused to cash and remit and insurance companies

2 Li Qinchang ed., *International Cargo Transport*, Dalian: Dongbei University of Finance and Economics Press Co., Ltd., 2005, p. 11. (in Chinese)

3 William Tetley, translated by Zhang Yongjian, et al., *International Maritime and Admiralty Law*, Beijing: Law Press China, 2005, p. 35. (in Chinese)

refused to underwrite goods' transport risks".[4]

2. The unified mandatory regulation system with its core the common carrier liability system founded on the Hague Rules of 1924 is originally designed to restrict the common carrier's abuse of freedom of contract by providing a standard bill of lading clause on the one hand and to allow the carrier to enjoy certain privileges by establishing compensation liability quota or liability exemption system on the other hand. In this way the interests of both the carrier and the shipper will be roughly balanced and an orderly development of the international liner industry will be facilitated. Regardless of the Hague-Visby Rules of 1968 or the Hamburg Rules of 1978, although both have readjusted the rights and obligations of the carrier and the shipper in liner shipping, particularly the fairly complete adjustment in the latter, the above-mentioned legislative intention of the international unified law on maritime transport has not been changed as a whole. As such, restricting the common carrier's freedom of contract to some extent so as to keep a balance between the carrier's and the shipper's interests is still an established principle of the international liner shipping uniform law which is currently effective.

3. During most of the 20th Century, liner routes in North America and Europe were almost entirely controlled by the Freight Conference based on its unified freight rate set at the time. On the one hand, such a monopolistic alliance made it difficult for a ship owner that was not a member of the Freight Conference to engage in fair competition against a member on such routes. On the other hand, the relationship between the ship owner (the carrier) and the cargo owner (the shipper) usually remained relatively stable. However, during the past 20 years, owing to the considerable globalization of production, free trade and investment convenience, increasing maturity of container transport and the corresponding shipping technology, as well as multinational companies' extensive dependence on global sourcing and logistics service, the relationships between the carrier and the shipper and between the carrier and the Freight Conference in the U.S. have changed dramatically. A particular manifestation of the preceding point is that such commercial relationships on U.S. inter-port routes have transformed from a strict regulation mode to a flexible one, and the shipper and the carrier can enter

4 Si Yuzhuo ed., *Maritime Law*, Beijing: Law Press China, 2003, p. 149. (in Chinese)

into an agreement to establish the most suitable commercial relationship.[5] In the past 20 years, as the shipping policies of the EU and the U.S. became increasingly liberalized, the monopoly space of the Freight Conference was gradually restricted up to a point in which its members were gradually losing maritime transport market share.

4. In their attempt to escape the monopolistic regulatory role of the Freight Conference and regain maritime transport market share, some large ship owners in the U.S. start to enter into long-term contracts of affreightment or volume contracts with large cargo owners (usually multinational companies). Such contracts are collectively referred to as the Ocean Liner Service Agreement. According to U.S. laws, a transport agreement is generally deemed as a type of service contract. Therefore, in the United States' shipping industry and trade circles, the Ocean Liner Service Agreement is also referred to as the "maritime service contract". These contracts allow all parties to clearly understand obligations such as transport time and amount as well as compensations for breaching contracts. Meanwhile, the shipper usually has access to a stable favorable freight rate committed and filed with the Federal Maritime Commission by the ship owner under the contract, which places other cargo owners in a disadvantaged position in terms of marginal cost of trade as they do not have access to such favorable treatment on routes of the Freight Conference. As such, ever since the U.S. reformed the ocean liner industry management system in 1984 and 1998 to allow for the execution of maritime service contracts through negotiation in a competitive manner, the usage of maritime service contracts in multiple international trades has largely developed.[6] However, the subjects that use maritime service contracts have gradually expanded through a natural development process. For instance, some non-vessel operating common carriers (NVOCCs)[7] or independent ship owners (non-members of the

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5 Donald F. Wood, Anthony Barone, Paul Murphy and Daniel L. Wardlow, *International Logistics*, 2nd Edition, New York: AMACOM, 2002, p. 141.

6 Transport Law: Preparation of a draft instrument on the carriage of goods [by sea], Proposal by the United States of America (A/CN.9/WG.III/WP.34), UNCITRAL Working Group III 12th session, Vienna, 6–17 October 2003, at http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html, 14 May 2006.

7 The Shipping Act of 1984 of the U.S. defines NVOCC as a common carrier not operating and providing vessels required for maritime transport. In terms of its relationship with the maritime transport common carrier, it can be equivalently deemed a shipper. It is reasonable to say that "one of the greatest accomplishments of the Shipping Act of 1984 is the reform of the NVOCC system." Quoted from Chen Xianmin, *Maritime Law Theories and Judicial Practices*, Beijing: Peking University Press, 2006, p. 48. (in Chinese)

Freight Conference) also started to provide maritime transport service on the basis of such contracts along with the increasing concentration of the liner shipping industry and the emergence of various alliances in the global freight forwarding industry. The usage of maritime service contracts has become increasingly universal.

5. As a party to the liner shipping contract and having the legal status of a common carrier, the carrier is restricted by the statutory minimum liability which is not effective against the freedom of contract under the restraint of mandatory regulations. As a result, it owns a limited range of freedom of contract. On the other hand, in spite of its status as a common carrier, there are some exemptions under domestic laws where the carrier under a service contract can exclude the application of mandatory regulations. In other words, it can to some extent evade the restriction of mandatory regulations by virtue of freedom of contract, thereby benefiting a lot from freedom of contract. Perhaps this is the most important reason why maritime service contracts have managed to emerge and develop in the liner shipping industry.

II. Analysis: Characteristics of Maritime Service Contracts in the Arena of Public Transport

In public transport, maritime service contract is just one type of a contract, and the concept was first introduced in the Shipping Act of 1984 of the U.S. and hence only applies to liner shipping. Article 3(19) of the Act stipulates that: "Service contract means a written agreement, other than a bill of lading or a cargo receipt, between one or more shippers and an individual ocean common carrier or two or more ocean common carriers in which the shipper or shippers make a commitment to provide a certain volume or a minimum quantity of cargo or guarantee certain freight income in a fixed time period, and the ocean common carrier or carriers commit to a certain freight rate or rate schedule as well as a defined service level, such as assured space, transit time, port rotation, or similar service features."[8] Article 2(10) of Carriage of Goods by Sea Act of 1999 (Draft) of the U.S. confirms the definition of service contract under the Shipping Act of 1984, providing that "service contract" has the same meaning as is defined in Article 3(19) of the

8 Shipping Act of 1984, Article 3(19).

Shipping Act of 1984.[9]

Since a maritime service contract in the public transport field can be entered into by and between the shipper or shipper association and the common carrier or Freight Conference, each party's obligations, breach liabilities and compensation method will be clearly specified thereunder. Laws require that such contracts shall reflect a truthful declaration of intentions and specifications such as voyage duration, minimum load of goods, freight rate, list of transported commodities, departure and destination ports and restrictive service expectations shall be clearly stated in the contracts. There shall also be provisions on goods damage in order to prevent the shipper from failing to perform its obligations, e.g. loss arising from overseas sales (which is a common problem during economic depression).[10] To sum up, it is reasonable to conclude that a maritime service contract in the public transport field has the following characteristics:

1. Referring to the subjects of maritime service contracts, it can be observed that they can be either members of the Freight Conference or an organization constituted by one or several non-member ocean common carriers. It can even apply to several independent shippers without mutual association, i.e., they can participate in a maritime service contract without having to become members of a cargo owner association.

2. From the perspective of applicable transport means, a maritime service contract only applies to liner shipping and does not apply to non-liner shipping,[11] e.g. voyage charter transport, container transport, barge line system, etc., even though bills of lading or similar shipping documents will also be issued under such transport means and the remuneration paid to the lessor in the shipping business as agreed in the contract is also called "freight". Furthermore, the Maritime Law of the People's Republic of China directly provides that liner shipping is a type of international carriage of goods by sea. In general, all maritime transport means, other than liner shipping, falls under the category of private transport, where

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9 Han Lixin et al. ed., *Compilation of Maritime Laws in Various Countries (Regions) (Volume I)*, Dalian: Dalian Maritime University Press, 2003, p. 388. (in Chinese)

10 Donald F. Wood, Anthony Barone, Paul Murphy and Daniel L. Wardlow, *International Logistics*, 2nd Edition, New York: AMACOM, 2002, p. 163.

11 According to Article 1(c) of the Draft Convention, "non-liner transportation" refers to any transportation that is not liner transportation. In this paragraph, "liner transportation" refers to (1) a transportation service that is offered to the public through publication or similar means and (2) includes transportation by ships operating on a regular schedule between specified ports in accordance with publicly available timetables of sailing dates.

relatively fewer national interventions and legal restrictions exist and the parties enjoy broader freedom of contract.

3. The period of the carrier's responsibility generally extends from the moment the goods are received and lasts until the delivery process has been completed. The start and termination of the period of responsibility are not necessarily restricted by the Hague Rules or in accord with the loading and unloading port locations specified in the Harter Act of the U.S. or the Carriage of Goods by Sea Act of 1936 established with reference to the Hague Rules. In this connection, it belongs to the "door-to-door" transport mode. In this sense, the regular lot-size cargo transport mode under the maritime service contract can better meet the global production and resource allocation requirements of multinational companies.

4. A maritime service contract usually provides that the ship owner and the cargo owner can enter into a written or electronic contract for consignment of lot-size cargo where necessary and can include details such as price lists, bill of lading or cargo receipt and other documents as contents of the contract. As such, it is a special contractual form between general cargo transport contract and modern logistics contract.

5. From the perspective of the shipping documents used, a maritime service contract serves the purpose of transporting lot-size cargo, and therefore, in practice, most commonly used are shipping documents such as sea waybill or electronic bill of lading. Such documents, as part of the contract, can confirm the existence of the contract itself and the carrier's receipt of cargos recorded in the documents. However, they do not have the effect of negotiable documents and hence cannot be circulated as documents of title.

6. In terms of jurisdiction clause, the parties to a maritime service contract can reach a written consensus with respect to arbitration or court jurisdiction, including consensus on arbitration jurisdiction or court jurisdiction over disputes arising from the agreement, and consensus on jurisdiction by any designated arbitral institution or court. However, according to the provisions of the Carriage of Goods by Sea Act of 1999 (Draft) of the U.S., the foreign jurisdiction clause under U.S.-related carriage of goods by sea contracts (including service contracts) does not absolutely exclude jurisdiction of U.S. courts. If any party to a dispute files claims in the U.S., and one or several relevant factors, such as the loading, unloading or delivery places, the respondent's main place of business or domicile, or the contract signing

place, involve the U.S., the U.S. still has jurisdiction over such dispute.[12]

7. From the perspective of filing systems, according to the regulations of the Shipping Act of 1984 of the U.S., with the exception of service contracts of cargo in bulk, forestry products, recycled metal and waste paper, all other service contracts shall be filed with the U.S. Federal Maritime Commission (FMC), with the core terms of such contracts attached and entered into the freight tariff for public inquiry. The said core terms include departure port, destination port, product name, minimum container volume, freight rate, contract duration, service commitment, damages, etc. This article is revised in the reformed Shipping Act of 1998, i.e. service contracts still need to be filed with FMC, but the core terms which are required to be entered into the Freight Tariff for public inquiry only include departure port, destination port, product name, minimum container volume and contract duration, while the rest of the terms can be withheld. Since freight rate and other core terms are no longer subject to public inquiry, service contracts have become "secret contracts" for the public, and the original filing system has become a "secret filing system". [13]

III. Comparison: Relationship between Maritime Service Contracts and Other Contracts of Carriage of Goods by Sea

Maritime service contracts, bills of lading, and other types of transport contracts such as general cargo transport contracts, volume contracts and loyalty contracts are both related and different. The following part of this paper will discuss their correlations by means of comparison.

A. Relationship between Maritime Service Contracts and General Cargo Transport Contracts

Under a general cargo transport contract, the carrier is responsible for transporting general cargo from one port to another, and the shipper or the consignee shall pay freight. A general cargo transport contract is usually adopted in

12 Carriage of Goods by Sea Act of 1999, Article 7(9).

13 Donald F. Wood, Anthony Barone, Paul Murphy and Daniel L. Wardlow, *International Logistics*, 2nd Edition, New York: AMACOM, 2002, p. 162.

case of liner shipping (also referred to as regular shipping liner) and hence is also customarily referred to as liner shipping contract. The main feature of such contract is that "the carrier accepts the consignment of numerous shippers, loads batches of goods owned by different shippers on the same vessel and transports goods as per the specified sail schedule, the fixed shipping route and the specified port rotation."[14] A general cargo transport contract usually does not have the general format of a contract but tends to consist of a set of correlative legal documents such as booking notes and bills of lading. Judicial practices in various countries generally confirm that the transport contract is established as soon as the carrier and the shipper have appropriately handled booking formalities, and it is generally unnecessary to judge whether the contract is established or not by checking the existence of offer and commitment that can be definitely divided, the existence of a written contract on which both parties' signatures and official seals are affixed, or the fulfillment of other additional conditions. Even though a general cargo transport contract and a maritime service contract are both fixed-period transport contracts applicable to liner shipping, the two are different in the following aspects:

First of all, a maritime service contract is a written contract other than a bill of lading or a cargo receipt entered into by and between the carrier and the shipper, with provisions on both parties' rights and obligations. In contrast, a general cargo transport contract comprises a set of relevant legal documents such as bills of lading and sea waybills without the general format of a contract.

Secondly, where the cargo under a maritime service contract is lot-size cargo, there can be multiple contracting carriers with one of them actually performing the responsibility of consigning a specific batch of cargo and thereby becoming the performing carrier (actual carrier) responsible for consignment of the batch of cargo. On the contrary, under a general cargo transport contract, despite having multiple shippers, there is usually only one contracting carrier, which is responsible for consigning the cargos of all shippers. Besides, unless otherwise agreed for transshipment, the contracting carrier is also the only performing carrier.

Thirdly, the period of responsibility of the carrier under a maritime service contract is longer than that of the carrier under a traditional general cargo transport contract; the carrier's responsibility of keeping custody of the cargo is expanded to "starting from receipt and lasting until delivery" from "starting from loading and lasting until unloading" as specified under the Hague Rules or the Carriage of

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14 Si Yuzhuo ed., *Maritime Law*, Beijing: Law Press China, 2003, p. 101. (in Chinese)

Goods by Sea Act of 1936 of the U.S., thereby making the responsibility of keeping custody of the cargo applicable to the whole period of "door-to-door" transport. Taking the Maritime Law of the People's Republic of China as an example, it is regulated in Article 46 that with respect to the carrier's period of responsibility during international carriage of goods by sea including general cargo transport, in the case of container cargos, it refers to the whole period when the cargo is under the carrier's custody starting from cargo pickup at the loading port and lasting until cargo delivery at the unloading port, which is identical with the Hamburg Rules; in the event of non-container cargos, it refers to the entire period lasting from the loading of cargo on the ship to the unloading, which is consistent with the Hague Rules. Therefore, under a general cargo transport contract, regardless of which means of loading are adopted, the commencement and termination of the carrier's period of responsibility are both related to the locations of the loading and unloading ports and hence it constitutes "port-to-port" transport.

Lastly, the freight under a maritime service contract can be agreed upon by the parties; in contrast, the freight under a general cargo transport contract is calculated as per the fixed freight rate unilaterally determined by the carrier ahead of time.

B. Relationships between Maritime Service Contracts and Volume Contracts

A volume contract refers to a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range.[15] A volume contract can be performed in either liner shipping or non-liner shipping. The concept of volume contract has long been established in bulk dry cargo and petroleum trade, and in both fields the volume contract is often described as contract of affreightment or tonnage contract. For instance, free on board (FOB) buyers who wish to guarantee their tonnage requirements and manage freight risks usually jointly use a volume contract under a long-term

15 Transport Law: Draft convention on the carriage of goods [wholly or partly] [by sea] (A/CN.9/WG.III/WP81), UNCITRAL Working Group III 19th session, New York, 16–27 April 2007, at http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html, 14 May 2007.

sales contract.[16] In 1982, the Baltic and International Maritime Council published the Standard Volume Contract of Affreightment coded VOLCOA for bulk dry cargo transport (revised and republished as Bulk Dry Cargo Standard Contract of Affreightment coded GENCOA in 2004), which contains frequently used terms in international trade. This format lays out the agreed period, the total quantity of cargo and the quantity of each shipment under the contract. It also provides that each voyage under the said contract shall follow the attached standard format and abide by the terms and conditions of the voyage charter party. The International Association of Independent Tanker Owners (INTERTANKO) issued the Standard Format Contract of Affreightment for Tankers, INTERCOA80, in 1980 (adopted by the Baltic and International Maritime Council), under which the agreed contractual period, the total quantity of shipment each year and the quantity of each shipment are provided. Each voyage shall be subject to terms of the charter party in the format of INTERTANKVOY 76.[17]

Different legal systems have considerable differences with respect to the specific concept of volume contract, the relationship between a volume contract and a maritime service contract, the means of adjustment of a volume contract under laws of various countries, etc. The Hague Rules does not directly adjust maritime service contract relationships concerning carriage of cargos in a series of shipments and hence does not apply to volume contracts. According to the regulations of Paragraph 4, Article 2 of the Hamburg Rules, if future carriage of goods is completed in a series of shipments during an agreed period, the provisions of the Rules apply to each shipment. As such, the Hamburg Rules is actually indirectly enforceable to volume contracts. As a result, if the carrier's obligations and compensation liabilities specified under a volume contract is lower than the standard specified in the Hamburg Rules, such provision shall be null. Representatives of some countries pointed out at a Working Group on Transport Law meeting that: a maritime service contract "could be defined broadly as volume contracts for the future carriage of a certain quantity of goods over a certain period

16 UNCITRAL, Volume Contracts: Document presented for the information of the Working Group by the Comité Maritime International, Working Group III (Transport Law) 17th session New York, 3–13 April 2006, at http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html, 25 June 2006.

17 UNCITRAL, Volume Contracts: Document presented for the information of the Working Group by the Comité Maritime International, Working Group III (Transport Law) 17th session New York, 3–13 April 2006, at http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html, 25 June 2006.

of time in a series of shipments in the liner trade, a well-known feature of the industry."[18] Therefore, a volume contract has the nature and characteristic of a maritime service contract. It is also without doubt that it is a main type of maritime service contract.

C. Relationship between Maritime Service Contracts and Loyalty Contracts

A loyalty contract is an agreement of affreightment signed by and between the shipper (cargo owner) and the carrier or the Freight Conference. "According to the agreement, the cargo owner obtains relatively lower freight rate or deferred rebate by consigning all or a fixed part of his cargoes to the carrier or the Freight Conference. If the cargo owner breaches the loyalty obligation, he will be liable for a penalty or fine."[19] A loyalty contract mainly adopts two forms, i.e., contractual rate system and deferred rebate system. Since the loyalty contract restricts the cargo owner's freedom of contract of choosing other carriers, it constitutes a trade restrictive agreement. It is agreed under some loyalty contracts that the shipper shall consign all of its cargoes to the same carrier or the Freight Conference, thereby actually giving the carrier having acquired the royalty commitment the status of exclusive service provider. On the one hand, such a type of loyalty contract has the effect of preventing other carriers from obtaining competition opportunities. Besides, as small cargo owners can provide a limited cargo carriage service, they find it difficult to exploit trade opportunities of signing loyalty contracts with the Freight Conference. Hence, small cargo owners suffer from competition discrimination. On the other hand, the extensive application of loyalty contracts has positive effects on facilitating the development of the international maritime transport industry, e.g. strengthening the carrier's ability to collect cargoes, so as to satisfy the demands of bulk cargo transport under a globalized production system. Moreover, marginal costs can be reduced by utilizing flexible freight rates, thereby improving the comprehensive competitiveness of large shipping companies. It is out of such considerations that the Convention on a Code

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18 Report of Working Group III (Transport Law) (A/CN.9/572), UNCITRAL Working Group III 14th session, Vienna, 29 November–10 December 2004, at http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html, 25 June 2006.

19 Si Yuzhuo ed., *Research on International Maritime Legislative Tendency and Countermeasures*, Beijing: Law Press China, 2002, p. 110. (in Chinese)

of Conduct for Liner Conferences has confirmed the legality of loyalty contracts. The shipping laws of certain countries, e.g. the Shipping Act of 1998 of the U.S., on the other hand, confirm the effectiveness of loyalty contracts by setting out the exemption conditions applicable to such contracts.

The effects and objectives of both maritime service contracts and loyalty contracts are identical. They both agree on favorable freight rates by adopting the contractual freight rate system and apply basically identical exemption conditions under the competition law. Their main difference is as follows: a loyalty contract is usually based on a liner contract, with corresponding provisions of favorable freight rate or deferred rebate added to the loyalty contract. The carrier shall give favorable treatment such as favorable freight rate or deferred rebate to the shipper who has loyally performed the obligation of consignment, but the carrier's liability under traditional liner shipping mode is not increased. Contrarily, a maritime service contract is an independent contract other than the common general cargo transport contract. In addition to provisions on giving the shipper certain freight discount, provisions requiring higher service commitment are also included, thereby increasing the carrier's liability. Moreover, no rebate is adopted. Therefore, a loyalty contract is still based on a liner contract. It is very difficult to consider it a type of maritime service contract even in a broad sense. However, it emphasizes favorable freight rate or freight rebate, rather than highlighting service commitment and service quality like in the case of service contracts such as a volume contract.

IV. Introspection: Necessity and Rationality for the Draft Convention to Regulate Maritime Service Contracts

The development of the global economy gives rise to the replacement of traditional cargo transport means by new ones. Additionally, multiple conventions on the carriage of goods by sea have existed in the current field: the Hague Rules, the Hague-Visby Rules, the Hamburg Rules, etc. However, progress towards the formulation of an international uniform transport law has been slow.[20] Conflicts regarding the application of different laws have resulted in obstacles in the free flow of goods carried by sea and increased transaction costs of international trade.

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20 Robert H. Ballantyne, The Ultimate Cargo Regime?, in *The Shipper Advocate*, Ottawa: Canadian Industrial Transportation Association, Spring 2005, p. 11.

As such, it is necessary for unified legal regulations to integrate the existing order of international carriage of goods by sea. Furthermore, it is also necessary to enable the universal application of the law anywhere international maritime transport trade is present.[21] In 1996, the United Nations Commission on International Trade Law (UNCITRAL) started to reexamine legal regime of international carriage of goods by sea. Learning from the failure of the Hamburg Rules, it focused on considering the opinions of the international shipping and trade circles, and entrusted the Comité Maritime International to develop the Draft Convention. The Comité Maritime International submitted the Draft Convention to UNCITRAL in 2001 and had convened 18 sessions by November 2006. Various interests, including the Maritime Law Association of the United States, the National Industrial Transportation League (representing U.S. shippers), and the World Shipping Council, have been working to negotiate elements of the Draft Convention in an effort to make it amenable to adoption in the U.S.[22] It can be said that the above special interest groups of the U.S. are more concerned than any other country as to whether or not the Draft Convention applies to the maritime service contract, since multinational companies controlling greater cargo carrying capacity and shipping companies with powerful liner transport capacity are relatively concentrated in the U.S., and maritime service contracts have always been their main contractual means. According to a survey of the Federal Maritime Commission, in 2001 about 8% of the service contracts signed by shippers were global. This percentage rose to 45% at the end of 2004. As a result, as a Convention on Carriage of Goods primarily aiming at unifying the legal order of carriage of goods by sea, the Draft Convention should include this type of contract which plays an important role in the international liner shipping system.

In addition, albeit a maritime service contract has the above-mentioned positive effects, its negative effects cannot be ignored. For instance, in practice, the majority of maritime service contracts are entered into according to standard contracts developed by the carrier or according to standard terms preset in the contract. Therefore, the carrier has greater initiative in controlling freight rate and surcharge, adjusting service standards, etc. Accordingly, the shipper will often be subject to uncertain commercial risks. Furthermore, cargo owners from developing

21 Patrick J. S. Griggs, Obstacles to Uniformity of Maritime Law, *Journal of Maritime Law & Commerce*, Vol. 34, 2003, p. 192.

22 Constantine G. Papavizas and Lawrence I. Kiern, 2001-2002 U.S. Maritime Legislative Developments, *Journal of Maritime Law & Commerce*, Vol. 34, 2003, p. 477.

countries are often placed in disadvantaged positions when they enter into maritime service contracts with ship owners from developed countries. The survey of the Federal Maritime Commission indicates that, except for domestic trade in the United States and the North America – Europe trade routes, a considerable number of maritime service contracts are in use on many international trade routes, such as the United States – Asia Pacific, the United States – Middle East, the United States – Caribbean and South America routes. The carrier and large maritime transport companies in developed countries operating on these North-South trade routes have the opportunity to make use of their strong commercial influence and to avoid their own commercial and legal risks by relying on the exemptions under domestic laws, exclusion application under foreign laws, "long-arm jurisdiction" of their domestic courts and other legislative and judicial policies. They do this also by taking advantage of freedom of contract under the "agreed" maritime service contracts such as paramount clause, compensation liability clause and jurisdiction clause. It can be said that if there is no relevant international unified law on maritime transport to regulate the system, the common carrier who is in control of abundant liner shipping capacity and shipping route resources will make use of the above advantageous factors and cultivate and consolidate its dominant position in the maritime transport market by legal means under the disguise of freedom of contract, which will inevitably result in the distortion of the North-South maritime service trade. As a consequence, not only the progress of service trade unification will be obstructed but also the unified order of cargo trade will be jeopardized. Hence, it is necessary and rational to include maritime service contracts into the Draft Convention.

The United States Delegation initially put forward a proposal regarding the definition of the "maritime service contract" at the 14th Session of Working Group on Transport Law, intending to include maritime service contracts into the jurisdictional scope of the Convention. The United States' definition of maritime service contract is a revision of the definition of service contract under the Shipping Act of 1984. A maritime service contract refers to a contract that is mutually negotiated and agreed to in writing or electronically between one or more carriers and one or more shippers and that provides for the liner carriage of goods by sea in a series of shipments over a specified period of time. The carrier's service obligation shall include ocean carriage (including inland transport and relevant business). The carrier shall be obligated to carry a minimum volume of cargo in a series of shipments by vessels commonly used in ocean liner service.

The carrier's service obligation may also include carriage by other modes of transport, warehousing, or logistics services, as required by the shipper. And the shipper shall tender a minimum volume of cargo and to pay the rate(s) set forth in the contract.[23] According to the United States' proposal, the maritime service contract shall become a contractual form applicable to "door-to-door" transport. Driven by commercial needs, the parties shall freely arrange transport in ways deemed suitable by them, which also includes that the parties to a maritime service contract have the right to enter into contractual terms wholly or partially deviating from the Draft Convention. The United States' proposal suggests that an independent provision be established in the Draft Convention to specifically regulate the maritime service contract in a non-mandatory manner. In other words, the Draft Convention shall not be totally inapplicable to the maritime service contract; however, it cannot be mandatorily applied to such contract. It means that when cargo is transported according to the maritime service contract, the liability system under the Draft Convention shall be automatically applicable, provided that certain compensation liability restrictions therein may be exempted or modified through a contract. It is thus clear that the United States' proposal mainly aims to give relatively sufficient freedom of contract to the parties to a maritime service contract, which is a breakthrough of the common carrier liability system as represented by the Hague Rules. In this sense, the strict restriction on the common carrier's freedom of contract since the Hague Rules is somewhat relieved. On the contrary, some contend that the establishment of an independent provision will result in non-mandatory application of the liability system under the Convention to maritime service contracts, which just like opening a Pandora's box, will once again give the common carrier the advantageous position it had before the Hague Rules were developed and the phenomenon of freedom of contract "abuse" will recur, thereby adversely affecting the whole international trade. The above viewpoint is typically embodied in the review opinions of the European Shippers' Council at Working Group on Transport Law 17th Session. The Council emphasizes that under any circumstance, it is not allowed to reduce material contents of the transport contract, particularly using provisions which will reduce

23 Transport Law: Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea], Proposal by the United States of America (A/CN.9/WG.III/WP.42),UNCITRAL Working Group III 14th session, Vienna, 29 November–10 December 2004, at http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html, 14 May 2006.

or even remove the carrier's compensation liability.[24] The Council requires that the scope of reduction be explicitly defined and limited to the circumstances regulated in the Draft Convention. Just like "service contracts", the "volume contracts" defined under the Draft Convention have not reached these standards to any extent. Moreover, the standards used to define these contracts cover almost all commercial relationships between the shipper and the carrier, and hence there exist no special circumstance as required by the derogation of contractual provisions.

The Working Group on Transport Law asserts that since a volume contract is a cargo transport contract, if such a type of contract is performed under the circumstance of liner shipping, it shall be regulated by the Convention; on the other hand, any volume contract not performed under the circumstance of liner shipping shall be excluded from the application scope of the Draft Convention. As such, the Working Group on Transport Law has reached the following conclusions. First, maritime service agreements should be included within the scope of application of the Draft Convention as volume contracts, the inclusion of which would be determined by the character of the individual shipments thereunder; second, certain conditions concerning volume contracts in liner transportation were laid down for derogation from the mandatory provisions to take place, and the derogation scheme could form the basis for further discussions, however, taking into consideration the specific requirements of clarity, sufficient differentiation and non-abuse. Third, in view of volume contracts in liner transportation, the seaworthiness obligation, and liability arising from unseaworthiness could nevertheless not be derogated from…[25]

The author contends that even though regulation in such a way cannot make the regulations on maritime service contract under the Draft Convention more specific and logical, it does balance the interests of the parties to the maritime service contract within the framework of the Convention and takes into account the different stances of various legal systems and delegations of various countries, thereby featuring greater flexibility and rationality.

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24 Article 14(2) and Article 95 of the Draft Convention.

25 Transport Law: Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea], Proposal by Finland on scope of application, freedom of contract and related provisions (A/CN. 9/WG.III/WP. 61), UNCITRAL Working Group III 17th session, New York, 3–13 April 2006, at http://www. uncitral. org/uncitral/en/commission/working_ groups/3Transport. html, 25 June 2007.

V. Conclusion: Framework of Rules under the Draft Convention Concerning Volume Contracts

From the Working Group on Transport Law 13th Session to 18th Session, the parties have reached the following common understanding with respect to the framework of rules regulating volume contracts under the Draft Convention:

1. The Convention does not entirely regulate the so-called maritime service contracts (usually referred to as "ocean liner service contract" at meetings) but rather volume contracts under liner shipping which have the nature and certain characteristics of this type of contracts. Therefore, a volume contract is defined as a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range.[26]

2. A volume contract to which the Convention applies shall contain provisions conforming to Article 6 of the Draft Convention. This article includes the circumstances where the Convention should not apply. Article 6(1) of the Convention states: "The Convention does not apply to: (1) charter parties; and (2) contracts for the use of a ship or of any space thereon, whether or not they are charter parties." Therefore, it can be said that a volume contract is covered by the Convention and its specific contents shall be interpreted according to Article 89.

3. Article 89 of the Draft Convention established special rules for volume contracts, mainly including: (1) Notwithstanding Article 88,[27] as between the carrier and the shipper, a volume contract to which this Convention applies may provide for greater or lesser rights, obligations, and liabilities than those set forth in this Convention provided that the volume contract contains a prominent statement that it derogates from this Convention, and: (a) is individually negotiated; or (b) prominently specifies the sections of the volume contract containing the derogations. 2. A derogation pursuant to Paragraph 1 of this Article shall be set

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26 Transport Law: Draft convention on the carriage of goods [wholly or partly] [by sea](A/CN.9/WG.III/WP81)，UNCITRAL Working Group III 19th session, New York, 16–27 April 2007, at http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html, 25 June 2007.

27 According to Article 88 of the Draft Convention, any term in a contract of carriage is void to the extent that it directly or indirectly excludes or limits the obligations of the carrier or a maritime performing party under this Convention; or directly or indirectly excludes or limits the liability of the carrier or a maritime performing party for breach of an obligation under this Convention.

forth in the volume contract and may not be incorporated by reference from another document. 3. A carrier's public schedule of prices and services, transport document, electronic transport record, or similar document is not a volume contract pursuant to Paragraph 1 of this Article, but a volume contract may incorporate such documents by reference as terms of the contract. (4). Paragraph 1 of this Article does not apply to rights and obligations provided in Articles 16, Subparagraphs (1) (a) and (b),[28] 29[29] and 32[30] or to liability arising from the breach thereof, nor does paragraph 1 of this article apply to any liability arising from an act or omission referred to in Article 64 [31]; (5) The terms of the volume contract that derogate from this Convention, if the volume contract satisfies the requirements of Paragraph 1 of this Article, apply between the carrier and any person other than the shipper provided that: (a) Such person received information that prominently states that the volume contract derogates from this Convention and gives its express consent to be bound by such derogations; and (b) Such consent is not solely set forth in a carrier's public schedule of prices and services, transport document, or electronic transport record. (6). The party claiming the benefit of the derogation bears the burden of proof that the conditions for derogation have been fulfilled.

To sum up, the Draft Convention regulates maritime service contracts in a compromising manner: neither entirely excluding its application to such contracts nor entirely including them into the regulations. Moreover, the Draft Convention generally follows the tradition established since the Hague Rules, the Hague-Visby Rules and the Hamburg Rules, i.e. directly regulate liner shipping contractual relationships in the public transport field and indirectly regulate charter party relationships in the private transport field by firstly regulating maritime bills of lading and other shipping documents. What is different is that based on the current unified rules and as required by the development and transformation of international trade and maritime transport service, the Draft Convention also

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28 Article 16 of the Draft Convention states the specific obligations applicable to the voyage by sea. It involves the statutory minimum seaworthiness obligations applicable to the common carrier which have been established since the Hague Rules, constituting the most fundamental part of the common carrier liability system. However, the period of seaworthiness obligations specified in this Article has been much longer than that in the Hague Rules.

29 Article 29 of the Draft Convention prescribes the shipper's obligation to provide information, instructions and documents.

30 Article 32 of the Draft Convention specifies the special rules on dangerous goods.

31 Article 64 of the Draft Convention discusses the carrier's loss of the benefit of limitation of liability.

attempts to directly regulate certain maritime service contract relationships, i.e. volume contract relationships in the public transport field, apart from directly regulating liner shipping contractual relationships and indirectly regulating charter party relationships.

However, the volume contract is a customary mode developed through nearly 20 years of shipping practice, acquiring its legality under domestic law and rationality in maritime customs mainly relying on the exemption of the common carrier's obligations under the competition law in individual trade and domestic laws of major shipping countries (such as the United States). It also established and developed itself in the severely competitive international shipping market. It can be inferred that it is an inevitable trend for the Draft Convention to include volume contracts which have the characteristics of maritime service contracts into its scope of application, for the reason that the progress of economic globalization has not only constructed a unified international trade order but also will surely facilitate the unification of laws on carriage of goods by sea. Yet, the goal and claim of such unification cannot be realized if the constraint of the concurrently effective and yet mutually conflicting the "Hague-Visby Rules System" and the "Hamburg Rules System" is not removed. Maritime service contracts including volume contracts establish transport contractual relationships based on extensive practice. If legal grounds proving their legality and rationality merely relies on domestic law and maritime customs, and they still stay outside the framework and system of the unified convention on transport law, they will not only deviate from the purpose of unifying the laws on carriage of goods by sea in the public transport field, but also affect the normal international trade order. Therefore, it is a must to include volume contracts into the legal regime of the Draft Convention.

It is undeniable that maritime service contracts including volume contracts demonstrate the feature of freedom of contract even in the public transport field and play a significant role in the current international liner trade. The existing unified law on maritime transport, with one of its values lies in restricting freedom of contract, cannot provide effective regulation on maritime service contracts. On the other hand, the Convention on Carriage of Goods being drafted establishes a framework of rules applicable to volume contracts with the nature of maritime service contracts and completely breaks through the tradition of restricting the common carrier's freedom of contract carried on by unified law on maritime transport in the public transport field. In this connection, after objectively observing the Draft Convention's framework of rules regarding volume contracts, this paper

concludes that: the Draft Convention's regulation on maritime service contracts is based on the appeal to value of a new round of calls for the unification of laws on carriage of goods by sea that represents an attempt to return to freedom of contract in the public transport field.

Translator: HUANG Weizhen
Editor (English): Vasile Gadinceanu

An Analysis of Coastal State Jurisdiction on Preventing Vessel-Source Pollution

XU Weili *

Abstract: To solve the issue of jurisdiction distribution over marine damage caused by vessel-source pollution, the United Nations Convention on the Law of the Sea (UNCLOS) creates a parallel jurisdiction principle to administer distribution among coastal States, flag States and port States. This article provides an analysis of the vessel-source pollution provisions of the UNCLOS, expanding on the coastal State jurisdiction over marine vessel-source pollution.

Key Words: Coastal State jurisdiction on preventing pollution; United Nations Convention on the Law of the Sea; Vessel-source pollution

The jurisdiction on preventing marine pollution has always been a highly debated issue in the international society and has had at its core the question of whether or not the traditional flag State jurisdiction and the costal State jurisdiction can co-exist. Under the principle of freedom of the high seas, the coastal State jurisdiction only extends to its territorial seas. As for vessels on the high seas, aside from complying with international law, they are only subject to the law of its flag State; it is the so-called flag State jurisdiction.[1] After the progressive development of coastal State jurisdiction, this is gradually being recognized by the international community.

I. The Coastal State Jurisdiction on Preventing Pollution: A Brief Introduction

* XU Weili, Mater Candidate of International Law, Grade 2004, Law and Politics School of Ocean University of China.

1 Ou Yangxin and Dou Yuzhen, International Marine Environment Protection Law, Beijing: China Ocean Press, 1994, p. 50. (in Chinese)

A vessel, as a legal object of special character, used to be regarded for a long time as the "floating territory" or the "floating island" of its flag State. When it finds itself within waters under the jurisdiction of another State, it becomes a legal "enclave". Since coastal States have territorial jurisdiction over foreign vessels to a certain extent, the aforementioned statement has its limits. In the contiguous zones, exclusive economic zones and continental shelf, the coastal State is exercising a quasi-territorial jurisdiction. However, for a vessel on the high seas, most scholars recognize its independence and believe that the flag State is exercising personal jurisdiction over its vessels. Therefore, jurisdiction at sea is being exercised by different States based on the different sea area in which the "moving" vessel is located.

The problem of jurisdiction over preventing vessel-source pollution is rather complicated as it involves jurisdiction distribution over various vessel-source pollutants and pollution behaviors in various sea zones among flag States, coastal States and port States. This type of jurisdiction mainly refers to the right to legislate and execute laws and regulations on vessels in different sea areas by coastal States, flag States and port States, in order to prevent, reduce and control marine vessel-source pollution. There are two aspects to consider regarding this problem: firstly, referring to the scope of jurisdiction, the current international law provides States with jurisdiction of preventing marine pollution in internal waters, territorial seas, exclusive economic zones and high seas; Secondly, which State has jurisdiction and to what extent can it exercise its jurisdiction.[2] This article focuses on coastal State jurisdiction over preventing vessel-source pollution, and thus the remaining part of this paper mainly elaborates on the jurisdiction of a coastal State over foreign vessels in different sea areas.

II. Provisions regarding Coastal State Jurisdiction over Preventing Vessel-Source Pollution under the United Nations Convention on the Law of the Seas

A. Coastal State Jurisdiction in Different Sea Areas

In the international law of the sea, the issue of jurisdiction is rather broad and

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2 Duan Aibin, *A Legal Study on the Jurisdiction of Preventing Marine Vessel-Source Pollution* (Master's Thesis), Dalian: Dalian Maritime University, 2005. (in Chinese)

it involves internal waters, territorial seas and archipelagic waters that are under the sovereign control of coastal States or archipelagic States. Furthermore, it also includes the high seas that are not under the jurisdiction or control of any State, and extends to contiguous zones, exclusive economic zones and continental shelf areas which do not form part of a State's territory but are still under its jurisdiction. Coastal States do not enjoy complete or exclusive sovereignty in these areas, but only limited sovereign rights and jurisdiction over particular issues.

1. Jurisdiction in Internal Waters

Internal waters refer to rivers, lakes, canals, internal seas, internal straits, internal bays, mouths of rivers and ports, etc. Internal waters constitute an inseparable part of a State's territory and that State has the right to exercise complete and exclusive sovereignty over such waters. Domestic vessels can certainly navigate on the aforementioned waters. As for foreign vessels, they cannot navigate in a State's internal waters without permission, except in case of distress. A State has the right to refuse entry into its internal waters of any foreign vessels. Those that obtained permission to enter should observe any regulations and rules that the coastal State has in place and cannot engage in trade, fishing or any other acts that jeopardize the coastal State's interests.[3]

2. Jurisdiction within Territorial Seas

The exercise of sovereignty by a coastal State over its territorial seas is restricted by customary international law. In other words, foreign vessels enjoy the right of innocent passage in territorial seas, provided that: the passage is innocent; the foreign vessel obeys the rules of the coastal States, such as customs, sanitary, navigational safety and environment protection laws and regulations; save in exceptional cases, the passage shall be continuous and expeditious. While exercising jurisdiction over foreign vessels in their territorial seas, coastal States shall not impede the innocent passage of foreign vessels.

3. Jurisdiction within Exclusive Economic Zones

An exclusive economic zone is neither a part of the high seas nor a component of territorial waters. It is an independent sea area with a special legal status, where coastal States may only exercise limited jurisdiction. Within its exclusive economic zones, the coastal State has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources. Furthermore, it has

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3 Zhou Hongjun ed., *International Law*, Beijing: China University of Political Science and Law Press, 1999, p. 153. (in Chinese)

(exclusive) jurisdiction with regard to artificial islands, marine scientific research and the protection and preservation of the marine environment. According to the United Nations Convention on the Law of the Sea (UNCLOS), foreign vessels sailing in this area and enjoying the freedom of navigation shall comply with the coastal States' laws and regulations relating to exclusive economic zone, generally accepted international regulations, procedures and practices for safety at sea and the prevention, reduction and control of pollution from ships.

4. Jurisdiction within Contiguous Zones

Contiguous zones are different from territorial seas or exclusive economic zones. This is an area adjacent to territorial seas, and the coastal State may exercise the control necessary to prevent infringement of its customs, fiscal, sanitary or immigration laws and regulations. Moreover, the coastal State may punish infringement of the aforementioned laws and regulations committed within its territory or territorial sea. According to international conventions and rules, the hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. The pursuit may commence from the contiguous zone, regardless of whether the ship is sailing inwards or outwards. These provisions reveal that the customs, fiscal, sanitary or immigration laws and regulations of a coastal State are applicable in its contiguous zones. Therefore, when there is a violation of a coastal State's regulations and rules within its contiguous zones, the coastal State has the right to take necessary measures, including arrest.

5. Jurisdiction over Vessel-Source Pollution on the High Seas

The high seas, which are the common wealth of all humankind, are open to all States and can be used equally. As the high sea is not part of the territory of any State, no State may exercise sovereignty or jurisdiction over any part of it. The freedom of the high seas is regarded as the foundation of the high seas legal regime.

Normally, considering the principle of freedom of the high seas, coastal States do not have jurisdiction over pollution on the high seas. However, due to the fact that most of the navigational incidents occur in waters adjacent to coasts, the leakage of oil or other hazardous substances may lead to catastrophic pollution in the coastal States' sea areas. Following the *Torrey Canyon* oil spill in 1967, the international community finally admitted that the coastal States may take and enforce necessary measures against foreign merchant vessels to prevent, reduce or control the pollution or threat of pollution following a navigational incident, which

may result in harmful consequences to the protection of their coastline or relevant interests. At the same time, there are some limits on the coastal States' intervention. For example, if the measures are not proportionate to the actual or threatened damage, the coastal States shall be liable for damage or loss attributable to them.

The jurisdictions regarding the vessel-source pollution in territorial seas and exclusive economic zones are highly complicated and will be further illustrated in Part B and Part C of this Section, centering on the specific provisions of the UNCLOS.

B. UNCLOS Provisions regarding Coastal State Jurisdiction on Preventing Pollution in Territorial Seas

Under the rules of international law, the territorial sea, where the sovereignty of a coastal State extends, is a belt of sea adjacent to that State's land territory and internal waters. According to established principles of international law, coastal State enjoys sovereignty over its territorial seas which are a part of the State's territory. Normally, coastal States have jurisdiction over crimes committed in territorial seas, including those committed on board a foreign ship. However, this type of jurisdiction is subject to customary international law, which provides innocent passage to foreign vessels. To better expound the complexities of jurisdiction in territorial seas, this part focuses on a comparison between innocent passage and non-innocent passage.

1. Innocent Passage and Non-innocent Passage

Innocent passage means navigation through the territorial sea for the purpose of traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or proceeding to or from internal waters or a call at such roadstead or port facility.[4] The UNCLOS has officially recognized the right of innocent passage for ships of all States. Therefore, coastal States may adopt laws and regulations, in conformity with the generally accepted international regulations, relating to innocent passage through territorial seas, to prevent non-innocent passage. Passage of a foreign ship may be considered as non-innocent if it endangers the marine environment or the general interests of coastal States.

Coastal States may also take necessary steps in their territorial seas to prevent passage which is not innocent, including asking ships to provide certain

4 Article 18 of the UNCLOS.

information, performing physical inspections of ships or taking detention and deportation measures. What is really difficult for coastal States is not to decide which measure is appropriate, but how to correctly determine whether a passage is innocent or not. If the determination goes wrong, the coastal State shall bear responsibility or liability for any damage arising out of its wrongful act, such as compensating for any loss or damage to ships. Therefore, when taking measures against non-innocent passage, the conducts of coastal States are subject to the law.

2. Coastal State's Rights in Terms of Foreign Vessels Exercising Innocent Passage in Territorial Seas

a. The Right to Legislate

Coastal States shall comply with Articles 21, 22, 23 and 24 of the UNCLOS whenever it takes actions relating to innocent passage. For the purpose of navigational safety and assistance protection, the preservation of marine resources, the protection of marine environment and the reduction and control of pollution, the coastal States may prescribe more stringent national discharge standards than the Maritime Agreement Regarding Oil Pollution (MARPOL). As for the construction, design, manning or equipment of foreign ships, the coastal States must comply with generally accepted international rules and standards. Foreign ships exercising the right of innocent passage shall comply with relevant laws and regulations of coastal States and all generally accepted international regulations relating to the prevention of collisions at sea. The International Maritime Organization recommends that coastal States may designate or prescribe sea lanes and traffic separation schemes in their territorial seas to regulate the passage of foreign ships. When it comes to foreign nuclear-powered ships and ships carrying nuclear substances, they shall carry documents and observe special precautionary measures established for such ships by international agreements. The laws and regulations shall not hamper the innocent passage of foreign ships through territorial seas except when the ships intentionally or actually cause major harmful pollution.

b. The Right to Enforce Measures in Territorial Seas

Article 27 of the UNCLOS provides general rules regarding the criminal jurisdiction of coastal States, supplemented by Article 220 which is concerned with specific rules of protective measures over the marine environment against vessel-source pollution in territorial seas and exclusive economic zones. It is generally accepted that when two articles of a legal code have a similar content, the special provision shall prevail the general provision. Article 220(2) states that where there are clear grounds for believing that a vessel navigating in the territorial sea of a

State has, during its passage therein, violated laws and regulations of that State or applicable international rules and standards for the prevention, reduction and control of vessel-source pollution, that State may undertake physical inspection of the vessel relating to the violation and may, where the evidence so warrants, institute proceedings in accordance with its law. When the pollution caused by the foreign vessels is intentional and significant, the passage is no longer innocent, and thus the coastal State enjoys the right to enforce its rules and regulations, including prohibiting the foreign ship from entering its territorial sea. In other words, although the situation provided in Article 220 is less severe than intentional and significant pollution as provided in Article 27, the situation still needs to be severe enough to exercise the right of enforcement.[5]

Article 220(2) is concerned with a situation when a foreign ship sailing in territorial seas violates the coastal State's laws and regulations relating to vessel-source pollution. The ship still enjoys the right of innocent passage, however, it is subject to enforcement of special measures from the coastal State, including physical inspection of the ship, institute proceedings and detention of the vessel. Nevertheless, a ship must be assumed to be innocent until warranted evidence is found, which means the most urgent question is how to define the criteria for enforcing these measures. To tackle this, Article 220(2) lists four criteria as follows:1) the coastal State shall have valid evidence of a violation of applicable rules; 2) the applicable rules consist of the UNCLOS and the international rules and standards for the prevention, reduction and control of vessel-source pollution; 3) the measures undertaken by coastal States shall not prejudice the application of the relevant provisions of Part II, Section 3 of the UNCLOS; 4) the institution of proceedings, including detention of the vessel, shall comply with the safeguards provisions of Part XII, Section 7 of the UNCLOS. To conclude, if the exercise of the innocent passage is suspected of violating laws and regulations concerning navigation, control of pollution or construction, design, manning or equipment of ships, the coastal State has the right to interfere with the passage of the foreign ship after reasonable examination. In other words, coastal States may not intervene in the innocent passage of foreign ships legally unless there is clear objective evidence of enough serious illegal acts. At the same time, the interference is subject to procedural protective measures. The four requirements as listed in Article 220(2)

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5 Kuen-Chen Fu, *Essays on International Law of the Sea*, Xiamen: Xiamen University Press, 2004, p. 64. (in Chinese)

of the UNCLOS are factors in the evidence inspection, which will determine the legality of the actions taken by coastal States.[6]

c. Measures Adopted by Coastal States Shall Not Violate the Relevant Provisions of Part II, Section 3 of the UNCLOS

As aforementioned, Article 27 of the UNCLOS provides general rules regarding the criminal jurisdiction of coastal States. This provision distinguishes two situations. Firstly, if the foreign ship sailing in territorial seas violates applicable rules therein, the coastal State has criminal jurisdiction in the following cases: 1) if the consequences of the crime extend to the coastal State; 2) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; 3) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or 4) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances. If a ship exercising the right of innocent passage violates the coastal State's rules, yet the criminal behavior does not fall into the scope of the aforementioned cases, the coastal State shall not have any jurisdiction. Secondly, if the foreign ship sailing in territorial seas violated applicable rules when it was in internal water, there shall be no restriction on the coastal State jurisdiction. Besides, Article 27(4) requires that in considering enforcing those measures, the local authorities shall have due regard to the interests of navigation. To conclude, a coastal State has the right to control innocent passage, but the measures adopted must be reasonable, which guarantees that no excessive interference is imposed on the exercise of the right of innocent passage.

C. Provisions of the UNCLOS with Regard to Coastal State Jurisdiction on Preventing Pollution in Exclusive Economic Zones

If the marine contamination accident or pollution behavior is reasonably expected to result in major harmful consequences, the coastal State has the right to take and enforce measures proportionate to the actual or threatened damage to protect their coastline or relevant interests, including natural resources, from pollution or threat of pollution. The applicable scope of Article 221 of the UNCLOS extends beyond territorial seas. Therefore, this article also involves exclusive

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6 Benedicte Sage, Precautionary Coastal States' Jurisdiction, Ocean Development and International Law,Vol. 37, Issues 3~4, 2006, p. 35.

economic zones which are located between territorial seas and the high seas. The International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (hereinafter "the 1969 Intervention Convention") had recognized the right of coastal States, albeit the scope of its application is limited to the high seas. Article 221 of the UNCLOS has a wider scope of application than the 1969 Intervention Convention, where coastal States have enlarged jurisdiction over their exclusive economic zones as well as sovereign rights with regard to the natural resources in these areas.

1. Legislative Jurisdiction of Coastal States in Exclusive Economic Zones

The most significant innovation of the UNCLOS is the establishment of a 200 nautical mile exclusive economic zone. In this special sea area, coastal States have jurisdiction to prevent and control marine pollution. In the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case, the International Court of Justice considered that the institution of the exclusive economic zone, with its rule on entitlement by reason of distance, is shown by the practice of States to have become a part of customary international law.[7] Therefore, apart from the fact that States have various demands in the zones beyond their territorial seas, the rules relating to the right of coastal States therein have become a part of international law. The UNCLOS provides coastal States with legislative jurisdiction on pollution in their exclusive economic zones. For the purpose of enforcement, the coastal State may legislate to prevent, reduce and control pollution from ships, but such legislations must comply with generally accepted international regulations and standards.

Moreover, where international rules and standards are inadequate to meet special circumstances and coastal States have reasonable grounds for believing that a particular, clearly defined area of their respective exclusive economic zones is an area where the adoption of special mandatory measures for the prevention of vessel-source pollution is required for recognized technical reasons in relation to its oceanographical and ecological conditions, as well as its utilization or the protection of its resources and the particular character of its traffic, the coastal State, after appropriate consultations through the competent international organization with any other States concerned, may, for that area, direct a communication to that organization, submitting scientific and technical evidence in support and

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7 Liu Jiachen, *Case Study on International Law*, Beijing: Law Press China, 1998, p. 156. (in Chinese)

information on necessary reception facilities. [8] This article as provided in the UNCLOS is a restatement of provisions of MARPOL 73/78 in relation to Special Areas, and it does not grant coastal States the freedom to take unilateral actions in exclusive economic zones.

Article 234, which is the outcome of mutual compromises between Canada and the Soviet Union for the protection of their interests in the Arctic Ocean, is an exception. It applies to ice-covered areas in exclusive economic zones. When the coastal State reasonably respects the freedom of navigation and treats ships without discrimination, this article provides for a broad right to adopt and enforce generally accepted international regulations and standards as well as domestic standards for the control of marine vessel-source pollution. It is highly important to use provisions regarding the control of pollution in the UNCLOS as the foundation for the enforcement of the MARPOL 73/78 and other international standards. Meanwhile, these provisions do not recognize an extension of jurisdiction on the high seas.[9]

2. Right to Enforcement of Coastal States in Exclusive Economic Zones

According to Article 220 of the UNCLOS, the right to enforcement of a coastal State consists of the right to require a foreign vessel navigating in its exclusive economic zone to give information, and to undertake physical inspections or institute proceedings, including detention of the vessel. Nevertheless, the legality of these measures shall be determined by the severity of the illegal acts and the damages they brought to the coastal State and its marine environment in the exclusive economic zone or the territorial sea.

Where there are clear grounds for believing that a vessel navigating in the exclusive economic zone or the territorial sea of a State has committed a violation of applicable international rules and standards or domestic laws and regulations consistent with generally accepted international rules and standards, that coastal State may require the vessel to give information regarding its identity and port of registry, its last and next port of call and other relevant information required to establish whether a violation has occurred. Where there are clear grounds for believing that a vessel navigating in the exclusive economic zone or the territorial sea of a State has, committed a violation resulting in a substantial discharge causing

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8 Article 211(6) of the UNCLOS.

9 Fakistan Zia-Mansoor, International Regime and the EU Developments for Prevention and Controlling Vessel-Source Oil Pollution, at http://web.ebscohost.com/ehost/results?vid=2&hid=3&sid=896bf533-3328-408c-a69e-f6a854c60fff%40sessionmgr7, 12 March 2007.

or threatening significant pollution of the marine environment, that State may undertake physical inspection of the vessel for matters relating to the violation if the vessel has refused to give information or if the information supplied by the vessel is manifestly at variance with the evident factual situation. Where there is clear objective evidence that a vessel navigating in the exclusive economic zone or the territorial sea of a State has committed a violation of rules resulting in a discharge causing major damage or threat of major damage to the coastline or related interest of the coastal State, or to any resources of its territorial sea or exclusive economic zone, that State may, provided that the evidence so warrants, institute proceedings, including detention of the vessel. As prescribed in the aforementioned articles, coastal States may take measures against foreign ships in their territorial seas or their exclusive economic zones. In fact, while granting coastal States with the right to enforcement, these articles enable the States to exercise such right in their exclusive economic zones against the violations committed in their internal waters or territorial seas.[10]

III. Legislative Recommendations on the Current Laws and Regulations in China for the Prevention of Vessel-Source Pollution

In China, the current legal system of preventing marine pollution consists of the Marine Environment Protection Law, which is the basic law for the protection of marine environments, and other ocean-related administrative regulations and ministerial rules. The laws and regulations relating to the prevention of vessel-source pollution include: the General Rules Governing Joint Inspection of Incoming and Outgoing Ships (1961), Rules for the Control of Non-Military Vessels of Foreign Origin Passing through the Qiongzhou Strait (1964), Interim Provisions on the Prevention of Pollution in Coastal Waters (1974), Regulations Governing Supervision and Control of Foreign Vessels by the People's Republic of China (1979), Marine Environment Protection Law of the People's Republic of China (1999 Revision), Regulations Governing Supervision and Control of Vessels of Foreign Registry Sailing in the Yangtze River (1983), Maritime Traffic Safety Law of the People's Republic of China (1983), Regulations of the People's Republic of

10 Kuen-Chen Fu, *Essays on International Law of the Sea*, Xiamen: Xiamen University Press, 2004, p. 75. (in Chinese)

China on the Control over Prevention of Pollution by Vessels in Sea Waters (1983), Regulations for the Prevention of Collision at Inland Rivers (1991), Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone (1992), Regulations on the Marine Navigational Warnings and Notices (1992), Regulations of the People's Republic of China Governing Survey of Ships and Offshore Installations (1993), Procedures for Inspection of International Navigation Ships Entering and Exiting Ports of the People's Republic of China (1995), Ships Safety Inspection Rules (1997), Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China (1998), Law of the People's Republic of China on the Administration of Sea Areas (2001), Provisions of the People's Republic of China on Safety Supervision and Administration of Carriage of Dangerous Goods by Vessels (2003), Provisions of the People's Republic of China on the Prevention and Control of Vessel Pollution of the Inland Water Environment (2005), Regulations of the People's Republic of China for Investigating and Handling of Traffic Accidents on Inland Rivers (2006), etc.

China has developed a basic legal framework for preventing pollution from vessels, yet there are some deficiencies. For instance, some of the regulations are not in line with international conventions, failing to internalize rules provided in those conventions. Also, the current legal system lacks special laws in relation to vessel-source pollution and prevention of vessel-source pollution in inland waters, etc. For the purpose of strengthening management, protection and improvement of the marine environment and preserving the ecological balance, China should focus on the following issues when legislating prevention of vessel-source pollution:

1. To Crystallize and Internalize International Conventions and Act on International Standards; to Perfect Laws on the Prevention and Control of Vessel-Source Pollution and Enact National Laws on Preventing and Controlling Vessel-Source Pollution in Inland Waters and Local Comprehensive Laws and Regulations

In China, the quality of laws and regulations regarding the prevention and control of vessel-source pollution varies, manifesting an unbalanced development among laws in different fields. The relevant conventions to which China is a party have been fully developed, basically covering every aspect of preventing and controlling vessel-source pollution, and is being developed and improved constantly. However, the current legal system of China lacks special laws and regulations to tackle the problem of vessel-source pollution, and the relevant provisions can only be found in scattered rules.

Although China revised the Marine Environment Protection Law in 1999, improving many aspects of relevant provisions, there are still some issues in preventing pollution. For example, punishment for discharge of pollutant on the high seas or at seas under jurisdiction of a foreign State is not provided for in the Marine Environment Protection Law, resulting in great difficulties for the State maritime administrative department to tackle such cases.

At present, a number laws and regulations, which were legislated before China became a party to the UNCLOS, do not address the problem of integrating with the international law of the sea, such as Maritime Traffic Safety Law, Regulations on the Control over Prevention of Pollution by Vessels in Sea Waters, etc. These laws and regulations are clearly out of line with the development of times, which goes against the purpose of enhancing the prevention and control of foreign vessel-source pollution of the marine areas of China.

Meanwhile, effort should be made to improve local comprehensive laws and regulations. Currently, the number of local comprehensive rules related to oceans is relatively low. Provisions of the existing laws and regulations are backward, and there are no corresponding measures and enforcement regulations. The inadequacy and imperfection of current comprehensive marine laws and regulations have seriously hampered the comprehensive work of marine management and directly affected the result of law enforcement by local law-enforcing departments.

2. To Develop Comprehensive Multi-Faceted Laws and Regulations for the Prevention and Control of Vessel-Source Pollution and to Consider Joining Corresponding International Conventions

In regard to oil pollution, China's current legislation is substantial. Nevertheless, when it comes to toxic substances, ship waste water, garbage, etc., the modest articles in the Provisions on the Prevention and Control of Vessel Pollution of the Inland Water Environment are far from sufficient. Moreover, China has not participated in corresponding conventions (such as the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea), and the Maritime Law has no relevant provisions on compensation for damage caused by hazardous and noxious substances.[11]

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11 Jiang Ping, China's Legislative Status Quo regarding the Prevention and Control of Vessel-Source Pollution and Some Recommendations, at http://www.7265.cn, 15 March 2007. (in Chinese)

3. To Develop and Perfecta Vessel-Source Pollution Emergency Response System and to Ensure the Effective Implementation of Contingency Plans

Compared with the operational discharge of the ship, pollution caused by accidental releases has a more negative impact on the marine environment. Accidental pollution, especially caused by collisions, groundings, standings, explosions, fires or hull damage of oil tankers and chemical tankers, usually results in catastrophic damages to the marine environment. For accidental emissions, the priority is to maximize the control and reduction of damages to the ocean. To develop and consummate a vessel-source pollution emergency response system and to ensure the effective implementation of the plans, are the most effective measures and an important guarantee for the prevention and control of vessel-source pollution.

Articles 18 and 69 of the Marine Environment Protection Law, Article 26 of the Annex I of MARPOL 73/78 and the 1990 International Convention on Oil Pollution Preparedness, Response and Co-operation stipulate that, to effectively control and reduce vessel-source oil pollution, all ships, docks, ports, areas, regions and countries should develop appropriate emergency response plans. These multi-level plans, along with international collaboration, will make up a complete emergency response system, which will definitely provide effective protection for the marine environment.

The above provisions, in terms of preparedness and response in vessel-source pollution incidents, clearly point out the organizing, directing and coordinating position of the maritime administrative department. They also form the legal basis for the maritime administrative department in strengthening its management. Although the provisions only refer to oil pollution, the successful experience can be used for reference in the establishment of an emergency response system for bulk liquid chemicals pollution from ships. These efforts will help protect offshore marine environments.

4. To Strengthen the Legislative Work of Prevention and Control of Pollution in Inland Waters

In China, although there is sufficient legislation to regulate vessel-source pollution in inland waters, the legal system is not perfect, especially when it comes to the prevention and control of pollution from foreign vessels.

In contrast, Germany's inland waterway safety management is highly advanced and can serve as an example for China to follow. Firstly, the German legal system for inland shipping safety management was firmly established. It is important

to note that in Germany inland shipping management and maritime transport management are two completely different legal branches that have developed over a hundred years, with a special legal system for the former. Furthermore, apart from the Inland Water Transport Law, Germany also developed special laws for each river. However, The Rhine, as a cross-border river in Europe, is subject to the 1865 Mannheim Convention, in which relevant countries aligned new relationships on the river. Secondly, as a consequence of the existing legal basis for waterborne traffic safety and the prevention of pollution, the responsibilities of different departments are clear, and the law enforcement is efficient. The German government tries to utilize both the water resources and channel resources, so it has attached great importance to the construction of an inland waterway infrastructure, which did not cause sudden decrease in inland water transportation. This shows that the development of the shipping industry increases water safety management, and vice versa.

IV. The Direction of China's Administrative System for Preventing Vessel-Source Pollution

China's current administrative system of preventing vessel-source pollution has been formed progressively, following the development of marine industries. Since the 1970s, the sea area under the jurisdiction of China has been expanded from territorial seas to continental shelf and other sea areas. The maritime environment pollution is getting worse and the conflict between different sections and industries is expanding. In order to adapt this new situation, some departments have extended their administrative power into sea areas and undertaken responsibilities relating to the protection of maritime environment. This is good, but it also raises certain problems that need to be addressed.

Firstly, institutions and teams that administer vessel pollution under different departments work separately and the coordination work is rather difficult. Secondly, there are too many law-enforcement departments involved and their responsibilities and authority are not clearly distributed. Thirdly, law-enforcement departments cannot coordinate with each other. Fourthly, the equipment of law-enforcement teams is outdated, resulting in inefficient protection of maritime rights and interests; and finally, local administrative departments do not enforce the law to a sufficient extent.

In order to solve the aforementioned problems, based on foreign experience,

the following work should be completed with respect to China's administrative system of preventing vessel-source pollution.

1. To Incorporate the Protection of Marine Environment into the Comprehensive Maritime Management; Due Consideration Should Be Given to the Protection of the Marine Environment When Coordinating the Exploitation of Maritime Resources and Spaces

Based on domestic and foreign experience, the two sides have to be clearly divided and should cooperate with each other at the same time. Specific suggestions could be given as follows: comprehensive maritime management should exercise unified supervision and regulation over the protection of the marine environment, but it should implement the overall policies, plans and objectives at different periods of environmental work, and should closely cooperate with environmental protecting departments in controlling pollutants from land and managing the pollutants into the sea well. Environmental protection departments should instruct and inspect the maritime environment protection work based on the overall policies and objectives of environment protection. However, the particularity of seas must be noted and also it should be recognized that the maritime environment forms part of the maritime management. The instruction from environmental departments to marine environment management is macroscopic control and guidance. Regarding specific administrative activities, including the supervision and management of environmental impact of all the industry sections, it should be conducted by ocean administrative departments. Following this principle to deal with the relationship between maritime and environmental departments will help reduce conflicts and enhance working efficiency.[12]

2. To Establish a Multi-function Team of Maritime Law-Enforcement

What can be learned from examining foreign experiences is that by establishing multi-function teams of maritime law-enforcement one can effectively protect maritime interests and rights and protect maritime resources and maritime environment.[13] Multi-function police teams have many advantages. Firstly, making full use of vessels and flights by undertaking multiple tasks can reduce human, financial and material costs. Secondly, by using these teams as army reserves, it maintains a small army and at the same time provides army personnel during

12 Lu Shouben, *General Theories of Marine Management*, Beijing: Ocean Press China, 1997, p. 379. (in Chinese)

13 Li Yaozhen and Xu Xiangmin eds., *A Study on Marine Century and Chinese Marine Development Strategies*, Qingdao: China Ocean University Press, 2006, p. 90. (in Chinese)

war. Besides, such law-enforcement forces deal with executive matters more conveniently in comparison to armies. Generally speaking, it is inappropriate for armies to deal with domestic administrative law violations or common illegal acts of foreign vessels.[14]

3. To Enhance Equipment for the Prevention of Vessel-Source Pollution

Most modern work on preventing vessel-source pollution is largely dealing with foreign-related issues. Chinese management must follow common international practice and use advanced technological equipment. For example, supervising oily sewage discharged from foreign vessels employs methods such as sample inspections, and supervising and photographing by remote sensing technology. Simultaneously, modernized maritime management, law-enforcement work, as well as search and rescue work require advanced information assurance system and security management system with radar and computer as main technological means. The protection of marine environment cannot be achieved without modern technological means and methods to prevent vessel-source pollution.[15]

China has always attached importance to preventing vessel-source pollution. For example, a vessel traffic management system (VTS) has been established; a large amount of advanced law-enforcement cars have been replenished and a series of high-speed kiloton vessels have been built. Such facilities have greatly promoted the modernization of maritime work. However, with the rapid development of China's shipping economy and the public's rising voice regarding marine environment protection, the equipment for preventing vessel-source pollution needs to be further developed.[16]

4. To Enhance Law-Enforcement Powers of Local Administrative Departments

Advancements in training law-enforcement officers should be valued, as this will help them not only know the sea fully, but also understand the sea and become proficient in sea activities; the local administrative system should be perfected and equipment, technology and managing methods should be improved; at a local

14 Duan Aibin, *A Legal Study on the Jurisdiction of Preventing Marine Vessel-Source Pollution* (Master's Thesis), Dalian: Dalian Maritime University, 2005. (in Chinese)

15 Duan Aibin, *A Legal Study on the Jurisdiction of Preventing Marine Vessel-Source Pollution* (Master's Thesis), Dalian: Dalian Maritime University, 2005. (in Chinese)

16 Duan Aibin, *A Legal Study on the Jurisdiction of Preventing Marine Vessel-Source Pollution* (Master's Thesis), Dalian: Dalian Maritime University, 2005. (in Chinese)

level, the comprehensive legal system of maritime issues should be completed and perfected; the responsibilities of local law-enforcement departments should be clearly divided, which will build a corresponding and cooperative system between local and central level.

5. To Enhance Cooperation with Relevant Departments and Countries

It is not enough to simply rely on maritime administrative departments to take measures to prevent and control vessel-source pollution. Firstly, maritime administrative departments should enhance cooperation with State ocean administrative departments, local environmental protection departments and fishery departments, in order to engage in information exchanges, discover and clear vessel-source pollution timely and prevent and control vessel pollution jointly. Secondly, for the purpose of responding to marine environment pollution incidents, including vessel-source pollution, and for the better protection of surrounding marine environment, China should enhance cooperation with neighboring countries under the UNCLOS guidance, exchange information of threatening damage or actual damage caused by pollution, as well as develop and promote various emergency response plans.

V. Conclusion

Currently, the global situation of marine pollution is extremely serious. Among the causes, vessel-source pollution is a major factor. The prevention of vessel-source pollution and the protection of marine environment have significant strategic importance to every country, especially coastal States.

China, as a coastal State in the exercise of its jurisdiction over vessel-source pollution, has made progress in the development of its legislation and law enforcement practices. Nevertheless, more efforts are needed for the continuous improvement of these practices. From the perspective of safeguarding China's rights and interests in coastal areas, both the legislative work and law enforcement should be geared to international standards. Furthermore, during this development process China should seek more sea rights that would allow it to better maintain China's coastal interests.

Translator: LI Zongyao
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An Analysis on the Jurisdiction over Provisional Measures of the ITLOS

GUAN Jing*

Abstract: The International Tribunal for the Law of the Sea is an international permanent judicial organ established in accordance with the United Nations Convention on the Law of the Sea. Since its establishment in 1996, a considerable number of its cases have involved provisional measures, which cannot be separated from the Tribunal's unique compulsory jurisdiction over provisional measures. Given the significance of provisional measures for the jurisdiction of the Tribunal, the ambiguity regarding the regulations of this type of jurisdiction by the Convention, and the wide-ranging theoretical discussion triggered by the practice of the Tribunal with regard to provisional measures, this article aims at an in-depth exploration of the jurisdiction of the Tribunal over provisional measures, suggesting that China should better research and pay attention to its rules and practice, and seek help from a court to settle maritime disputes with neighboring countries when appropriate.

Key Words: United Nations Convention on the Law of the Sea; International Tribunal for the Law of the Sea; Provisional measures; International Court of Justice

The International Tribunal for the Law of the Sea (hereinafter "ITLOS" or "the Tribunal") is an international permanent judicial organ established by the United Nations Convention on the Law of the Sea (hereinafter "UNCLOS" or "the Convention"), which was adopted in 1982 and came into effect in 1994. The Tribunal was set up in October 1996 and has its seat in the Free and Hanseatic City of Hamburg in the Federal Republic of Germany. The Convention currently has 157 signatory States and 152 States parties. China formally became a party to the

* GUAN Jing, Master Candidate of International Law, School of Law, Xiamen University.

Convention on June 7, 1996. Since its establishment on August 1, 1996, the ITLOS has only dealt with 12 cases, with four of them involving provisional measures[1] and seven involving prompt release. This cannot be viewed separately from its unique compulsory jurisdiction over provisional measures and prompt release,[2] and also demonstrates the current importance of the Tribunal to these particular kinds of cases.

The ITLOS's jurisdiction over provisional measures originates from Article 290 of the UNCLOS and Article 25 of the Statute of the International Tribunal for the Law of the Sea (hereinafter "ITLOS Statute"). Article 290(5) of the UNCLOS even grants the power of compulsory jurisdiction over provisional measures under certain circumstances. Given the significance of provisional measures in maritime legal disputes, especially in emergent and urgent situations; the ambiguity of the regulations of jurisdiction over provisional measures by the UNCLOS, the ITLOS Statute, and the Rules of the International Tribunal for the Law of the Sea (hereinafter "ITLOS Rules"); and the wide-ranging theoretical discussion triggered by the practice of the Tribunal with regard to provisional measures, this article aims at an in-depth exploration of the jurisdiction of the Tribunal over provisional measures, including their binding force, purpose, procedures, and the provisional measures requested by the Court beyond the provisions of rights and other issues. Since the ITLOS Statute and the ITLOS Rules are both based on the Statute of the International Court of Justice (hereinafter "ICJ Statute") and the Rules of the International Court of Justice (hereinafter "ICJ Rules"),[3] this article makes several comparisons with relevant provisions of the International Court of Justice (hereinafter "ICJ") in analyzing the jurisdiction over provisional measures of the ITLOS.

I. The Problem of the Binding Force of Provisional Measures

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1 Which are: M/V "SAIGA" (No. 2) (Saint Vincent and Grenadines v. Guinea) in 1998, Southern Bluefin Tunas (New Zealand v. Japan; Australia v. Japan), MOX Plant (Ireland v. United Kingdom) in 2001, and Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore) in 2003. All the judgments of the cases are available on the official website of the ITLOS.

2 The Seabed Disputes Chamber of the ITLOS also has compulsory jurisdiction over seabed disputes, but this has not yet been put into practice.

3 Shabtai Rosenne, International Tribunal for the Law of the Sea: 1996~1997 Survey, *The International Journal of Marine and Coastal Law*, Vol. 13, No. 4, 1998, p. 487.

Although the binding force of provisional measures was once fiercely debated by scholars, the ICJ confirmed the binding character of its provisional measures in the 2001 *LaGrand* case, and thus ended any uncertainty surrounding the issue.[4] Compared with the ambiguous term "indicate" in Article 41(1) of the ICJ Statute,[5] the term "prescribe" used in Article 290(1) of the UNCLOS has unequivocally endowed provisional measures with binding force. Such binding force is also evidenced by Article 290(6) of the UNCLOS, which stipulates that "[t]he parties to the dispute shall comply promptly with any provisional measures prescribed under this article." It is further reflected in Article 95 of the ITLOS Rules with regard to the execution of provisional measures. Article 95 requires that disputing parties inform the ITLOS of the steps it has taken or plans to take in order to comply with the provisional measures,[6] which goes beyond Article 78 of the ICJ Rules, which simply gives the ICJ the right to request information from the parties.[7] In the first case involving provisional measures, M/V "SAIGA" (No. 2), the ITLOS not only "prescribed" provisional measures, but also "advised" the disputing parties to reach an arrangement before the final verdict to avoid the worsening or extending of the dispute.[8] This verdict has given rise to the following disputes among a number of judges of the Tribunal: does the right of adopting suggestions on provisional measures of which the binding force is lower than those "prescribed" fall into the scope of the rights endowed by Article 290 of the UNCLOS? One former judge of the Tribunal, Judge Vukas (of Croatian nationality), has pointed out in his declaration that provisional measures granted by the Tribunal can only be those that are "prescribed." He opined that, under all the rules concerning provisional measures under the UNCLOS, the ITLOS Statute, and the ITLOS Rules, the Tribunal is not entitled to make any other decision, make suggestions or recommendations, or

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4 LaGrand (Germany v. U.S.A.), Judgment, *ICJ Reports*, 2001, p. 466, para. 128(5).

5 Article 41(1) of the ICJ Statute provides: "The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party."

6 Article 95(1) of the ITLOS Rules provides: "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."

7 Article 78 of the ICJ Rules prescribes: "The Court may request information from the parties on any matter connected with the implementation of any provisional measures it has indicated."

8 M/V "Saiga" No. 2 Case (Saint Vincent and the Grenadines v. Guinea), Provisional Measures, ITLOS Case No. 2, 11 March 1998, para. 52(2).

even express any wish, etc. Its only task is limited to "prescrib[ing] provisional measures" that it considers appropriate under the circumstances of the dispute.[9] Interestingly, the Tribunal continued to take this approach in the *Southern Bluefin Tuna Cases*, without any judge issuing comments on the provisional measures with advisory nature of the Tribunal.[10] In fact, if the ITLOS uses certain words regarding the advisory nature in its provisional measures, this itself makes the provisional measures advisory, and not absolutely binding upon the disputing parties. However, if the ITLOS believes one particular provisional measure is necessary, it will naturally adopt the approach of "prescribing." From another perspective, as the Tribunal has the right of "prescribing" provisional measures, making it binding based on the UNCLOS, it seems unreasonable to deny the right of "suggesting" some provisional measures, as it is not as strong a term as "prescribing."

II. The Purpose of Provisional Measures

With respect to the purpose of provisional measures, the Tribunal could prescribe provisional measures not only for the purpose of "preserving the respective rights of the parties to the dispute" but also "preventing serious harm to the marine environment" (Article 290 of the UNCLOS). This would seem to indicate that one party of the dispute could request provisional measures in a position of an environmental guardian, even if it has no direct interest in the dispute.[11] More importantly, it reflects the transformation of the function of the mechanism of international law from adjusting States' conduct to recognizing and maintaining common values that the whole world shares.[12]

One relevant problem is the discussion among scholars of "irreparable damage" and the "precautionary principle" in the *Southern Bluefin Tuna Cases*. In this case, the ITLOS deviated from the traditional practice confirmed by the

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9 M/V "Saiga" No. 2 Case (Saint Vincent and the Grenadines v. Guinea), Provisional Measures, ITLOS Case No. 2, 11 March 1998, Declaration of Judge Vukas, para. 3.

10 Barbara Kwiatkowska, The Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan) Cases, *The International Journal of Marine and Coastal Law*, Vol. 15, No. 1, 2000, pp. 1~36.

11 Tullio Treves, The Procedure before the International Tribunal for the Law of the Sea: The Rules of the Tribunal and Related Documents, *Leiden Journal of International Law*, Vol. 11, No. 3, 1995, p. 565~594.

12 P. Chandrasekhara Rao and Rahmatullah Khan eds., *The International Tribunal for the Law of the Sea: Law and Practice*, The Hague: Kluwer Law International, 2001, p. 176.

ICJ in the test of prescribing provisional measures, i.e. proving there would be "irreparable damage" if the provisional measures were not granted,[13] and instead followed the "precautionary principle." Although the ITLOS deliberately restrained itself from exploring the legal status of the "precautionary principle," it evidently supported the rationale behind the principle by listing the preservation of marine biological resources as one of the criteria for protecting and preserving the marine environment. Moreover, the late Judge Laing (of Belizean nationality) pointed out in his separate opinion that irreparable damage "is inapt for application in the wide and varied range of cases that, pursuant to UNCLOS, are likely to come before this Tribunal. In the author's view, this confirms what the author regards as the Tribunal's position that irreparablity is not the sole required criterion. This is consistent with the practice on similar forms of remedy in a substantial number of national legal systems."[14] Hayashi, a Japanese scholar, thus concluded that, despite the fact that the separate opinion of Judge Laing did not represent the opinion of the ITLOS as a whole, if his opinion prevailed in subsequent maritime legal cases, the legal rationale of the ITLOS would develop independently from that of the ICJ, since States would probably not refrain from submitting maritime legal cases to the ICJ.[15]

However, this scholar ignores that the requirement of the "precautionary principle" cannot fall into the scope of the universal standard of "irreparable damage" adopted by the ICJ and the development of the legal rationale of the ICJ itself. For one thing, notwithstanding the fact that the debate regarding whether the "precautionary principle" has acquired the status of customary international law is continuing and a considerable number of scholars have criticized the abstract nature and lack of feasibility of this principle,[16] it cannot be neglected that the this principle has been developed quickly with respect to the protection of international environmental and natural resources. For another, the rationale

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13 Quoted from Moritaka Hayashi, The Southern Bluefin Tuna Cases: Prescription of Provisional Measures by the International Tribunal for the Law of the Sea, *Tulane Environmental Law Journal*, Vol. 13, 2000, p. 361.

14 Southern Bluefin Tuna Case (Australia and New Zealand v. Japan, Provisional Measures, ITLOS Case Nos. 3 & 4, 27 August 1999, Separate Opinion of Judge Liang, para. 3.

15 Moritaka Hayashi, The Southern Bluefin Tuna Cases: Prescription of Provisional Measures by the International Tribunal for the Law of the Sea, *Tulane Environmental Law Journal*, Vol. 13, 2000, p. 361.

16 Alan Boyle and David Freestone eds., *International Law and Sustainable Development: Past Achievements and Future Challenges*, Oxford: Oxford University Press, 1999, pp. 135~136.

of "irreparable damage" of the ICJ does not always remain the same. In fact, the Court has already expanded the definition of "irreparable damage" to cover the protection of human lives in the *Land and Maritime Boundary Dispute*, which was delivered as early as 1996.[17] Therefore, it can be assumed that the current meaning of "irreparable damage" would evolve along with the "precautionary principle" in marine environmental cases. Based on the enormous contribution of the ICJ to the codification and progressive development of international environmental law in the 1997 *Gabčikovo-Nagymaros Project* case, the scholar Barbara Kwiatkowska also believes that it would not be impossible for the ICJ to further expand the meaning of "irreparable damage" in regard to environmental affairs in the future application of Article 290 of the UNCLOS.[18] Some scholars who focused on the WTO dispute settlement system even highly praised the precedent of the application of the "precautionary principle" in the *Southern Bluefin Tuna Cases* of the Tribunal.[19] They believed that the principle would also be adopted under the provisional measures of the WTO.[20] Therefore, it cannot be assumed that the ICJ and the ITLOS would not follow in the same positive direction with respect to maritime environmental cases. What's more, this is what the ITLOS, the ICJ, WTO, and even other mechanisms of international dispute settlement should pursue, for the better universal development of the law of the sea and to avoid "forum shopping" and fragmentation of such law.

III. Summary Procedure

According to Article 25(2) of the ITLOS Statute, if the Tribunal is not in session or a sufficient number of its members is not available to constitute a quorum, at the request of any party to the dispute, the provisional measures shall be prescribed by the Chamber of Summary Procedure formed under Article 15(3) of the Statue. This is an exception to Article 15(4) of the ITLOS Statute, which requires disputes to be heard and determined by the Chamber only when

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17 Land and Maritime Boundary Dispute (Cameroon v. Nigeria), Provisional Measures, *ICJ Reports*, 1996, pp. 22~23.

18 Barbara Kwiatkowska, The Saint Vincent and the Grenadines v. Guinea M/V Saiga Cases, *Leiden Journal of International Law*, Vol. 11, No. 3, 1998, p. 564.

19 Brian K. Myers, Trade Measures and the Environment: Can the WTO and UNCLOS Be Reconciled?, *UCLA Journal of Environmental Law and Policy*, Vol. 23, No. 1, 2005, p. 37.

20 Raj Bhala and David A. Gantz, WTO Case Review 2001, *Arizona Journal of International and Comparative Law*, Vol. 19, No. 1, 2002, p. 516.

all the parties request to do so. However, the provisional measures prescribed by the Chamber are subject to review and revision by the Tribunal. Moreover, in accordance with Article 91(2) of the ITLOS Rules, 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 request for the measures. The Tribunal may also at any time decide *proprio motu* to review or revise the measures. This kind of summary procedure, which allows provisional measures to be prescribed by the Chamber and reviewed or revised by the Tribunal, constitutes a major innovation in the procedures of provisional measures of the ICJ. It also makes the procedures faster and more efficient, and benefits the disputing parties.[21]

Notably, this particular kind of summary procedure initiated at the request of any disputing party does not apply to the cases of prompt release. The latter shall strictly follow the provision of Article 15(4) of the ITLOS Statute, i.e., disputes can only be heard and determined by the chambers if all the parties so request. Article 112(2) of the ITLOS Rules also provides that if the applicant has so requested, 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. In the *M/V SAIGA No. 2 Case*, the applicant requested the summary procedure; nevertheless, the respondent did not concur within the time limit.[22]

There is one more thing worth noting about the relationship between provisional measures and prompt release. Following Article 90(1) of the ITLOS Rules, a request for the prescription of provisional measures has priority over all other proceedings, except those of prompt release, before the Tribunal. (Of course, according to Article 294 of the UNCLOS, if preliminary proceedings are initiated, they prevail over any other proceedings of the Tribunal.) Consequently, if the Tribunal receives at the same time an application for prompt release of a vessel or its crew and 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 (Article 112(1) of the ITLOS Rules). This guarantees the efficiency of the Tribunal in dealing with these types of cases and achieves the goal of the judges when formulating the ITLOS Rules, i.e., handling the cases

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21 P. Chandrasekhara Rao and Rahmatullah Khan eds., *The International Tribunal for the Law of the Sea: Law and Practice*, The Hague: Kluwer Law International, 2001, p. 186.

22 M/V "Saiga" No. 2 Case (Saint Vincent and the Grenadines v. Guinea), Provisional Measures, ITLOS Case No. 2, 11 March 1998.

submitted to it with the "high efficiency of popular concern with the least delay and expense."[23]

IV. The Right of the ITLOS to Prescribe Provisional Measures Exceeding the Request

The issue of whether the ITLOS has the right to prescribe certain provisional measures not requested by the parties was raised in the *MOX Plant Case* in 2001. In that case, the Tribunal refused Ireland's request for provisional measures due to its not fulfilling the criterion of "the urgency of the situation" in Article 290(5) of the UNCLOS. However, it further prescribed provisional measures of its own despite Ireland's not fulfilling the criterion of "the urgency of the situation."[24] This evidently self-contradictory finding was questioned in the separate opinions of several Judges[25] and was criticized by many scholars.

The discretion of the Tribunal to prescribe provisional measures beyond the scope requested by the disputing parties originates from Article 290(1) of the UNCLOS, which provides that the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances, pending the final decision. Article 89(5) of the ITLOS Rules also provides this discretion, stating that the Tribunal may prescribe measures different in whole or in part from those requested and indicated by the parties. (This article is identical to Article 75(2) of the ICJ Rules.) Despite all this, provisional measures may be prescribed only at the request of a party to the dispute (Article 290(3) of the UNCLOS). The ITLOS does not enjoy the right of the ICJ under Article 75(1) of its Rules that it may decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures. The sitting judge of the ITLOS, Judge Treves (of Italian nationality) therefore opined, as the formulation of the ITLOS Rules

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23 Quoted from Wu Hui, Analyzing the Status and Effects of the International Tribunal for the Law of the Sea Based on the "Monte Confurco" Case, *Journal of the University of International Relations*, No. 1, 2002. (in Chinese)

24 Although neither the ICJ Statute nor the ICJ Rules explicitly indicates that provisional measures may only be requested when the situation is urgent, the ICJ has confirmed the requirement of this criterion in a considerable number of cases, *inter alia*, the *Land and Maritime Boundary Dispute* in 1996, the *Passage through the Great Belt Case* in 1991 and the *Aegean Sea Continental Shelf* case in 1976.

25 MOX Plant Case (Ireland v. U.K.), Provisional Measures, ITLOS Case No. 10, 3 December 2001, Separate Opinions of Judge Mensah, Judge Treves, Judge *ad hoc* Szekely.

has deliberately ignored Article 75(1) of the ICJ Rules and at the same time has followed Article 75(2) of the ICJ Rules, that it seems to suggest that the ITLOS is not entitled to prescribe provisional measures *proprio motu*. However, once the Tribunal has been requested to prescribe provisional measures, it may, at its discretion, prescribe provisional measures different from those being requested.[26] The incumbent President of the Tribunal, Judge Wolfrum (of German nationality), believed that the right of modifying provisional measures, which deviated from the well-established judicial principle of "not exceeding what is being requested," if applied properly, could be an important method to protect the marine environment.[27] Judge Yankov (of Bulgarian nationality), one of the sitting judges of the Tribunal, also indicated that the right to prescribe provisional measures of the ITLOS is rather broad.[28]

However, due to the intrinsic exceptional nature of provisional measures,[29] the exercise of the right of modification should be limited. As a matter of fact, former Judge Warioba of the Tribunal (of Tanzanian nationality) described this problem as early as in the *M/V "SAIGA" No. 2 Case*. In his declaration, he maintained that even if the Tribunal may obtain the right to modify provisional measures at its discretion based on Article 89(5) of its Rules, this right cannot be exercised simply because it exists. It cannot be exercised rashly or spontaneously, but only when there is strong reason based on factual evidence.[30] In the S*outhern Bluefin Tuna Cases*, Judge *ad hoc* Shearer (of Australian nationality) even argued that the right to prescribe provisional measures beyond what was being requested is invalid. Article 290(3) of the UNCLOS states that "[p]rovisional measures may be prescribed, modified, or revoked under this article only at the request of a party to the dispute and after the parties have been given an opportunity to be heard." Judge *ad hoc* Shearer thus concluded that, when there is no request from the parties

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26 Tullio Treves, The Procedure before the International Tribunal for the Law of the Sea: The Rules of the Tribunal and Related Documents, *Leiden Journal of International Law*, Vol. 11, No. 3, 1995, p. 565~594.

27 P. ChandrasekharaRao and Rahmatullah Khan eds., *The International Tribunal for the Law of the Sea: Law and Practice*, The Hague: Kluwer Law International, 2001. p. 181.

28 Quoted from Donald L. Morgan, Focus: Emerging Fora for International Litigation (Part 1): Implications of the Proliferation of International Legal Fora: The Example of the Southern Bluefin Tuna Cases, *Harvard International Law Journal*, Vol. 43, 2002, p. 541.

29 Quoted from Chester Brown, Provisional Measures before the ITLOS: The MOX Plant, *The International Journal of Marine and Coastal Law*, Vol. 17, No. 1, 2002, p. 267.

30 M/V "Saiga" No. 2 Case (Saint Vincent and the Grenadines v. Guinea), Provisional Measures, ITLOS Case No. 2, 11 March 1998, Declaration of Judge Warioba.

to the dispute, or the Tribunal does not allow the concerned parties to have the opportunity to state their opinions on the provisional measures modified by the Tribunal, the Tribunal has no right to prescribe provisional measures. If Article 89(5) of the ITLOS Rules claims to render the right of prescribing provisional measures beyond what is requested, then the Article itself is not duly authorized (i.e., it is overstepping its authority) by the UNCLOS and is thus invalid. However, if this Article is only interpreted properly to mean that the Tribunal, besides either completely approving the provisional measures requested by the applicant or completely denying them, also has the right to prescribe certain provisional measures – i.e, partial approval of the applicant's request or a modified version of the request – then the Article is within the limits of its power.[31] As far as the *MOX Plant Case* is concerned, the problem was further transformed: when the criteria of the jurisdiction of prescribing provisional measures are not fulfilled (in that case the criterion of "the urgency of the situation"), does the Tribunal have the right to prescribe provisional measures different from what is requested? According to the explicit enumeration of Article 290 of the UNCLOS, the answer seems to be no. How, then, to explain the provisional measures prescribed by the ITLOS in the *MOX Plant Case*? One possible explanation could be, although the urgency of the situation as argued by Ireland did not exist, the situation in that case was sufficiently urgent for the Tribunal to prescribe provisional measures that were considered necessary by the Tribunal. Judge Treves offered another explanation, that the Tribunal drew a distinction between the substantive right invoked by Ireland not to be polluted or exposed to a risk of pollution, and rights of a procedural character relating to cooperation and information. While the Tribunal did not find the requirement of urgency to be satisfied as far as the substantive right was concerned, it implicitly considered the requirements regarding procedural rights to be satisfied.[32] The incumbent President of the ITLOS, Judge Wolfrum, also suggested a similar view in his separate opinion. On the one hand, he insisted, it would not have been within the mandate of the Tribunal to address the prescription of provisional measures either for the protection of substantive rights invoked by Ireland or for the prevention of serious harm to the marine environment. On the other hand, he pointed out that the obligation to cooperate is the overriding

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31 Southern Bluefin Tuna Cases (Australia and New Zealand v. Japan), Provisional Measures, ITLOS Nos. 3 & 4, 27 August 1999, Separate Opinion of Judge *ad hoc* Shearer.

32 MOX Plant Case (Ireland v. U.K.), Provisional Measures, ITLOS Case No. 10, 3 December 2001, Separate Opinion of Judge Treves, para. 7.

principle of international environmental law, in particular when the interests of neighboring States are at stake. The duty to cooperate denotes an important shift in the general orientation of the international legal order. It balances the principle of the sovereignty of States and thus ensures that community interests are taken into account *vis-à-vis* individual State interests.[33] Regrettably, the ITLOS did not give any explicit explanation with regard to this problem.

V. Influence on China

The Standing Committee of the National People's Congress of China ratified the UNCLOS on May 15, 1996 and the Tribunal has had a judge of Chinese nationality since August 1, 1996.[34] However, China has not yet participated in the Tribunal.

China is a marine powers adjacent to the Bohai, Yellow, East China, and South China Seas, with more than 4.73 million square kilometers of sea area. China has a long coast and in many of the sea areas we have boundary disputes with other countries. Especially in the South China Sea, some countries occupy our islands and frequently arrest our fishing vessels and fishermen. Moreover, because of the increase of China's maritime trade and the rapid development of offshore fishing industry and oceanic fishing, our fishing vessels have been detained by other countries in their EEZs over the past few years. How to deal with such disputes should be the concern of our government's relevant departments. Under appropriate circumstances, they can submit a dispute to the ITLOS. Therefore, monitoring the ITLOS's practices regarding provisional measures and prompt release and researching the ITLOS Statute and the ITLOS Rules are very important for China, whether we find ourselves in the active position of applicant or passive position of respondent.

Translator: LI Zongyao
Editor (English): Sarah Jenny Stern

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33 MOX Plant Case (Ireland v. U.K.), Provisional Measures, ITLOS Case No. 10, 3 December 2001, Separate Opinion of Judge Wolfrum.

34 The famous expert on the law of the sea of our country, Zhao Lihai, made his solemn declaration of being a judge of the ITLOS on October 18, 1996; he passed away due to illness on October 10, 2001; Xu Guangjian succeeded as a judge of the Tribunal on September 17, 2001, whose term will end on September 30, 2011.

Review of the UNCLOS Dispute Settlement System during the Past Decade: Achievements, Disadvantages, and Developments – From the Perspective of Comparative Empirical Analysis among ITLOS, PCA and ICJ

XU Zengcang* LU Jianxiang**

Abstract: From 1996 to 2005, The International Tribunal for the Law of the Sea (ITLOS) played a role in maritime dispute-related cases. Based on a comparative empirical analysis of the settlement of maritime dispute-related cases between the ITLOS, Permanent Court of Arbitration (PCA), and International Court of Justice (ICJ) during this decade, we conclude in this paper that the ITLOS has compulsory jurisdiction over procedural disputes in relation to requests for "provisional measures" and "prompt release of vessels and crews," and has made remarkable progress in this regard. Annex VII (Arbitration) of the UNCLOS acts as a "surplus standby," bridging the UNCLOS and the PCA. Considering the statutory and agreed exceptions in compulsory jurisdiction by the ITLOS over maritime disputes, settlement of substantial issues has become the most obvious gap. Since the resources in the international seabed area (hereinafter "the Area") are still under exploration, the Seabed Disputes Chamber has not accepted any cases, despite its advantages in "compulsory jurisdiction," "parties to a case," and "applicable law" when settling such disputes. As substantial large-scale exploitation of seabed resources develops in the Area, the Seabed Disputes Chamber will demonstrate

* XU Zengcang, Guangzhou Maritime Court judge and doctoral candidate of international law, East China University of Political Science and Law.
** LU Jianxiang, Doctoral candidate of international law, East China University of Political Science and Law.

great potential for resolving seabed disputes.

Key Words: United Nations Convention on the Law of the Sea; Dispute settlement system; International Tribunal for the Law of the Sea; Seabed Disputes Chamber

I. Introduction

The United Nations Convention on the Law of the Sea (UNCLOS), which came into effect in 1994, is the most comprehensive and most influential international maritime relationship adjusting convention. It is recognized as a milestone for establishing a new international maritime order. The dispute settlement system is established under Part XV (Settlement of Disputes), other relevant provisions in the main text and Annexes V (Conciliation), VI (Statute of the International Tribunal for the Law of the Sea), VII (Arbitration) and VIII (Special Arbitration), which constitute the core part of the UNCLOS. The International Tribunal for the Law of the Sea (ITLOS),[1] established under the UNCLOS, has been performing its duties ever since the first set of judges was elected on 1 August 1996.[2] The dispute settlement system of the UNCLOS has been operating formally for the past 10 years. As revealed by a comparative empirical analysis of the settlement circumstances and characteristics of maritime dispute-related cases heard by the ITLOS, the Permanent Court of Arbitration (PCA), and the International Court of Justice (ICJ) ever since its establishment, the ITLOS has made remarkable achievements in procedural disputes in relation to requests for "provisional measures" and "prompt release of vessels and crews;" Annex VII (Arbitration) has become a bridge between the UNCLOS and the PCA; the settlement of substantial

1 ITLOS as referred to in this article also includes the Seabed Disputes Chamber. On one hand, the relatively independent Chamber is significantly different from the ITLOS in terms of jurisdiction, parties to a case, and applicable law; but on the other hand, both the Chamber and the ITLOS are adjusted under the Statute of the International Tribunal for the Law of the Sea and the Rules of the International Tribunal for the Law of the Sea, absorbing the former into the latter.

2 Jurist and Prof. Zhao Lihai was elected as one of the first judges for the International Tribunal for the Law of the Sea. After Prof. Zhao passed away of illness in October of 2000, the former Chief of the Department of Treaty and Law under the Ministry of Foreign Affairs of the PRC Xu Guangjian took over and later was elected for a second term.

issues in maritime disputes has become the "Achilles Heel";[3] and the Seabed Disputes Chamber (hereinafter "the Chamber") demonstrates great potential for resolving seabed disputes.

II. Comparative Analysis of Maritime Dispute-Related Cases Heard by Three Major International Institutions during the Past Decade

Maritime disputes are mainly referred to three permanent international institutions, namely the ITLOS, the PCA and the ICJ. In the following sections, we will review the maritime dispute-related cases heard by these three institutions since the establishment of the ITLOS:

A. ITLOS

The ITLOS has accepted 13 cases so far, as listed in Table 1.[4]

Table 1 ITLOS Cases

S.N.	Case Name	Parties	Cause
1	The *M/V "Saiga"* Case	St. Vincent & the Grenadines v. Guinea	Prompt release
2	The *M/V "Saiga"* (No. 2) Case	St. Vincent & the Grenadines v. Guinea	Substantial issue
3	South Bluefin Tuna Case	New Zealand v. Japan	Provisional measures
4	South Bluefin Tuna Case[5]	Australia v. Japan	Provisional measures
5	The "*Camouco*" Case	Panama v. France	Prompt release

3 Achilles Heel is a metaphor for weak points or shortcomings. In Greek mythology, when Achilles was a baby, his mother was foretold that he would die young in a war. To prevent his death, his mother, Thetis, took Achilles to the River Styx, which was believed to offer powers of invulnerability, and dipped his body into the water. But as Thetis held Achilles by the heel, his heel was not touched by the water of the magical river, so, his heel became the single weak point of his entire body.

4 Table 1 is compiled by the authors based on the data available on the official website of the ITLOS (up to December 31, 2006).

5 The New Zealand v. Japan case and the Australia v. Japan case were consolidated, thus the ITLOS considered them as one case

(Continued from the previous page)

6	The "*Monte Confurco*" Case	Seychelles v. France	Prompt release
7	Case concerning the conservation and sustainable exploration of swordfish stocks in the South-Eastern Pacific Ocean	Chile v. European Union	Substantial issue
8	The "*Grand Princ*e" Case	Belize v. France	Prompt release
9	The "*Chaisiri Reefer 2*" Case	Panama v. Yemen	Prompt release
10	The MOX Plant Case	Ireland v. U.K.	Provisional measures
11	The "*Volga*" Case	Russia v. Australia	Prompt release
12	Case concerning land reclamation by Singapore in and around the Straits of Johor	Malaysia v. Singapore	Provisional measures
13	The "*Juno Trader*" Case	St. Vincent & the Grenadines v. Guinea-Bissau	Prompt release

As shown in Table 1, the ITLOS has decided 13 cases so far, including 7 cases related to prompt release of vessels and crews and 4 cases arising from requests for provisional measures, accounting for 84.6% of all cases. The only 2 cases concerning substantial issues, namely *The M/V "Saiga" (No. 2) Case* and the *Case concerning the Conservation and Sustainable Exploration of Swordfish Stocks in the South-Eastern Pacific Ocean*, accounted for only 15.4% of the cases decided by the ITLOS.

B. PCA

Based on the Convention for Peaceful Settlement of International Conflicts concluded at the first Hague Peace Conference in 1899, the PCA was established in 1900. Following a long silence, a series of reforms renewed and revived the

PCA,[6] resulting in a sharp increase in the number of cases it received. Since the establishment of the ITLOS, the PCA has decided 5 maritime dispute-related cases, as shown in Table 2:[7]

Table 2 Maritime Dispute-Related Cases Decided by the PCA

S.N.	Acceptance Time	Parties	Cause	Arbitration Basis
1	November 1999	Eritrea v. Yemen	Island sovereignty and maritime delimitation dispute	Intergovernmental arbitration agreement
2	June 2003	Ireland v. U.K.	Maritime environment dispute	Part XV and Annex VII of the UNCLOS
3	July 2003	Malaysia v. Singapore	Land reclamation by Singapore in and around the Straits of Johor	Part XV and Annex VII of the UNCLOS
4	February 2004	Guyana v. Suriname	Maritime delimitation dispute	Part XV and Annex VII of the UNCLOS
5	August 2004	Barbados v. Trinidad	Maritime delimitation dispute	Part XV and Annex VII of the UNCLOS

As shown in Table 2, (a) from the perspective of cause of action, all five of the cases accepted by the PCA were concerned with substantial issues, including four cases concerning maritime delimitation disputes and one case concerning a marine environment dispute; (b) regarding arbitration basis, all cases except the

6 The PCA had heard a series of inter-State dispute-related cases during the several decades following its establishment. However, with establishment of the International Court of Justice and its predecessor, the Permanent Court of International Justice, the PCA became overshadowed and was hardly referred to by international society, so that it was believed by not a few jurisprudents that the PCA was merely a "historical note in literature of international law." However, the PCA has since adopted a series of measures beginning in 1990 that has led international society to recognize it as an effective and modern dispute settlement institution.

7 Table 2 is compiled by the authors based on the data available on the official website of the PCA (up to December 31, 2006).

case concerning island sovereignty and maritime delimitation between Eritrea and Yemen were submitted in accordance with the provisions under Part XV and Annex VII of the UNCLOS; and (c) before the PCA accepted the *MOX Plant Case (Ireland v. U.K.)* and the *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, the ITLOS had adopted provisional measures.

C. ICJ

The ICJ was established on April 3, 1946 as a judicial organ, one of the six major U.N. organs. According to the Charter of the United Nations and the Statute of the International Court of Justice, the jurisdiction of the ICJ may be divided into two categories, namely contentious cases and advisory opinion. Ever since the ITLOS was established, the ICJ has not provided any advisory opinions on maritime disputes. Maritime dispute-related cases accepted by the ICJ are listed in Table 3:[8]

Table 3 Maritime Dispute-Related Cases Accepted by the ICJ

S.N.	Acceptance Time	Cause	Parties	Hearing Time
1	1999	Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea	Nicaragua v. Honduras	1999–
2	2001	Territorial and Maritime Dispute	Nicaragua v. Colombia	2001–
3	2002	Application for Revision of the Judgment of 11 September 1992 in the Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)	El Salvador vs. Honduras	2002–2003
4	2004	Maritime delimitation in the Black Sea	Romania v. Ukraine	2004–

8 Table 3 is compiled by the authors based on the data available on the official website of the ICJ (up to December. 31, 2006).

As indicated in Table 3, all 4 of the cases accepted by the ICJ involved substantial issues concerning maritime delimitation disputes and none of them were in relation to requests for provisional measures[9] or prompt release of vessels and crews.

III. Dealing with Procedural Cases in Relation to Requests for Provisional Measures or Prompt Release of Vessels and Crews: The ITLOS Has Made Remarkable Achievements

As indicated in Tables 1~3, the ITLOS has decided 10 cases in regard to requests for provisional measures and prompt release of vessels and crews, while the PCA and the ICJ have not received any such cases. Therefore, the ITLOS is obviously advantageous in this connection, because it has compulsory jurisdiction over cases requesting provisional measures and prompt release of vessels and crews under the UNCLOS, unlike the PCA, which lacks jurisdiction over these areas, and the ICJ, which lacks explicit provisions on jurisdiction over requests for prompt release of vessels and crews, and has not exercised jurisdiction over provisional measures since the establishment of the ITLOS due to its prudent attitude toward this issue, despite its even greater authority in this area.

A. The ITLOS Has Compulsory Jurisdiction over Requests for Provisional Measures and Prompt Release of Vessels and Crews

1. Provisional Measures

"Provisional Measures" (as referred to in the Statute of the International Tribunal for the Law of the Sea), also known as Provisional Protection (as referred to in the Statute of the International Court of Justice), means the parties to a dispute may file an application for or the court itself may on its own initiate the protection of property or rights and interests in urgent situations when such rights and interests are being damaged or threatened before or after litigation or arbitration procedures

9 The ICJ adopted provisional measures in the case concerning *Passage through the Great Belt (Finland v. Denmark)* dated in 1991 (before the ITLOS commenced its operations).

are initiated. According to the provisions in Article 290 of the UNCLOS, the ITLOS is entitled to prescribe such provisional measures. Pending the constitution of an arbitral tribunal to which a dispute is being submitted, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the ITLOS or, with respect to the activities in the Area, the Chamber, may prescribe provisional measures in accordance with the provisions under the UNCLOS; once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures.

2. Prompt Release of Vessels and Crews

Where the authorities of a State Party have detained a vessel flying the flag of another State Party, it may cause adverse effects on the normal operations of the detained vessel and personal harm to the crew. Therefore, Article 292 of the UNCLOS provides that the ITLOS shall be entitled to prescribe prompt release of vessels and crews. Upon the posting of a reasonable bond or other financial security, the flag State Party of the detained vessel, failing to reach an agreement on the question of release from detention with the detaining State within 10 days from the time of detention, may directly file an application with the ITLOS for release, without being bound by the selection of court or tribunal in accordance with Article 287 of the UNCLOS.

B. The PCA Does Not Have Jurisdiction over Requests for Provisional Measures or Prompt Release of Vessels and Crews

Like ordinary arbitration institutions, the PCA shall not be entitled to prescribe provisional measures in the cases submitted to it or deal with requests for prompt release of vessels and crews. The applicant can only apply to a competent court for provisional measures or a competent tribunal for prompt release of vessels and crews when the circumstances require so. For example, in the *MOX Plant Case (Ireland v. U.K.)* heard by the PCA, Ireland applied to the ITLOS for provisional measures, which was finally realized on December 3, 2001.

C. The ICJ Has Been Holding a Prudent Attitude in Prescribing Provisional Measures and a Vacancy in Terms of Explicit Provisions on Its Jurisdiction over Prompt Release of Vessels and Crews

According to the Rules of the ICJ, it may at any time prescribe provisional

measures on one or both parties to a dispute on its own initiative, as the case may be, which means the ICJ is competent to adopt provisional measures even before litigation procedures are initiated, going even further than the ITLOS which is supposed to only do so upon application by the applicant during the litigation or arbitration process. However, prudent as it is in this regard, the ICJ has never really prescribed provisional measures in maritime dispute-related cases ever since the establishment of the ITLOS. Furthermore, the ICJ has also never dealt with any request for prompt release of vessels and crews, considering the vacancy of explicit provisions on its jurisdiction over such matters.

VI. Annex VII of the UNCLOS: A Bridge between the UNCLOS and the PCA

According to Article 287 of the UNCLOS, arbitration provided for in Annex VII may act as a standby and shall be based on when the parties to a dispute submit maritime disputes to the PCA for arbitration. Obviously, it has become a bridge between the UNCLOS and the PCA.

A. "Standby Applicability" of Annex VII of the UNCLOS

According to Article 287 of the UNCLOS (Choice of Procedure), arbitration provided for in Annex VII shall have "standby applicability." As provided for in Paragraph 1, when signing, ratifying or acceding to the UNCLOS 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 ITLOS established in accordance with Annex VI; (b) the ICJ, (c) an arbitral tribunal constituted in accordance with Annex VII, and (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein. Paragraph 3 provides that 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. According to the provisions in Paragraph 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. And as stipulated in Paragraph 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. Therefore, in case of any contradiction between State Parties in choosing the manners of dispute settlement, or should one party have a choice while the other has not, or neither party choose one of the four options given in Article 287(1), the arbitration provided for in Annex VII shall automatically apply.

B. Submission to the PCA in Accordance with Annex VII of the UNCLOS

Although provided for in Annex VII, the arbitration procedure has never been practiced or publicized since the UNCLOS became effective. However, all PCA cases concerning maritime disputes were decided based on Annex VII of the UNCLOS. Take the *MOX Plant Case (Ireland v. U.K.)* as an example. Ireland first filed a request for provisional measures with the ITLOS, which were adopted on December 3, 2001, and then it submitted the case to the PCA in accordance with Annex VII. In such a way, an organic link between Annex VII and the PCA can be seen, as the arbitration provided for in the former becomes a bridge between the UNCLOS and the PCA.

The authors find there are three reasons entailing a submission of arbitration to the PCA in accordance with Annex VII of the UNCLOS, rather than to an arbitral tribunal constituted in accordance with Annex VII. Firstly, it is still inadequate to initiate the arbitration procedures provided for in Annex VII. As revealed by an analysis of the ITLOS cases, 11 cases concerned provisional measures or prompt release of vessels and crews, which are all procedural matters under its compulsory jurisdiction; only 2 cases concerned substantial disputes, which, based on the settlement method selected by the parties thereto, are also inadequate to initiate the arbitration procedure provided for in Annex VII. Secondly, it is not provided under the UNCLOS that other international juridical or arbitration institutions shall not accept submission of disputes beyond compulsory jurisdiction. The ITLOS having compulsory jurisdiction over provisional measures and prompt release of vessels and crews does not exclude other competent international juridical or arbitration institutions to accept submission of maritime disputes, creating the conditions for submission of maritime delimitation and environment disputes to the PCA. Thirdly, the reputation and characteristics of the PCA regarding arbitration are also contributive. Some sovereign States prefer the PCA arbitration as it enjoys a good reputation for international arbitration – especially inter-State arbitration. Furthermore, it fully respects the autonomy of the parties to the case and allows

them to choose or determine the arbitration procedure by agreement. Therefore, it is no surprise that the parties to a maritime dispute submitted to the PCA choose the arbitration procedures in Annex VII of the UNCLOS.

V. Dealing with Substantial Issues in Maritime Disputes: The "Achilles Heel" of the ITLOS

As shown in Table 1, of the 13 cases decided by the ITLOS, only 2 cases dealt with substantial issues, and the other 11 all concerned provisional measures and prompt release of vessels and crews that involve procedural issues. The settlement of substantial issues in cases concerning maritime disputes has become the most obvious gap for the ITLOS, and the main reason is that the compulsory nature of jurisdiction by the ITLOS is impaired by statutory and agreed exceptions under the UNCLOS. By contrast, most PCA and ICJ maritime cases arise from maritime delimitation disputes, falling into the category of matters that may be excluded by agreement under the UNCLOS.

A. Compulsory Jurisdiction Exceptions of the ITLOS

1. Statutory Exceptions

Statutory exceptions refer to matters explicitly excluded from compulsory jurisdiction under the UNCLOS, including:

a. Disputes concerning Marine Scientific Research

According to the provisions in Article 297(2)(a) of the UNCLOS, the coastal State shall not be obliged to accept the submission to such settlement of any dispute arising out of: (i) the exercise by the coastal State of a right or discretion in accordance with Article 246 (Marine scientific research in the exclusive economic zone and on the continental shelf); or (ii) a decision by the coastal State to order suspension or cessation of a research project in accordance with Article 253 (Suspension or cessation of marine scientific research activities).

b. Fishery Disputes

As provided in Article 297(3)(a) of the UNCLOS, the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the

terms and conditions established in its conservation and management laws and regulations.

2. Optional Exceptions

What is meant by optional exceptions is that a State Party may exclude certain disputes from jurisdiction by means of a written declaration. According to the provisions of Article 298 of the UNCLOS, a State Party may declare that it does not accept compulsory jurisdiction over the following three categories of disputes:

a. Sea Boundary Disputes

Disputes concerning the interpretation or application of Articles 15 (Delimitation of the territorial sea between States with opposite or adjacent coasts), 74 (Delimitation of the exclusive economic zone between States with opposite or adjacent coasts) and 83 (Delimitation of the continental shelf between States with opposite or adjacent coasts) relating to sea boundary delimitations, or those involving historic bays or titles.

b. Military Activities

Military activities include disputes concerning military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under Article 297(2)~(3).

c. Activities of the Security Council of the United Nations

Disputes arise when the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations.

B. The PCA's and the ICJ's Unrestricted Maritime Dispute Jurisdiction

Based on the PCA arbitration procedure rules, the Statute and Rules of the ICJ, the restrictions stipulated on the ITLOS do not apply to the PCA and the ICJ, which indicates that the PCA and the ICJ have the right to handle the cases which can be excluded from the jurisdiction of the ITLOS, overcoming the deficiency of the ITLOS. In fact, the cases concerning maritime disputes heard by the PCA and the ICJ mainly arise from delimitation disputes and environment disputes that fall into the category of optional exceptions stipulated in the UNCLOS.

VI. Settlement of Seabed Disputes: The Chamber Has Huge Potential

Part XI of the UNCLOS provides the exploration and exploitation activities of resources in the Area. According to Article 1 (Use of terms and scope) of the UNCLOS, the "Area" means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction, and "activities in the Area" means all activities of exploration for, and exploitation of, the resources of the Area. Since the resources in the Area are still under exploration and large-scale substantial exploitation activities have not been initiated, few of seabed disputes have occurred, leading to a vacancy in submitting such disputes to the Chamber. However, more and more seabed disputes have arisen as resource exploitation activities in the Area increase in both depth and scope, which is an opportunity for realizing the advantages of the Chamber in terms of compulsory jurisdiction, parties, and applicable laws.

A. Why Has the Chamber Not Accepted Any Such Cases?

As revealed by an analysis of the actual operations of the UNCLOS dispute settlement system, the Chamber has not heard any cases concerning seabed disputes in the Area, which is closely related to the seabed resource exploitation practices in the Area. The principle of common heritage of mankind and parallel system of seabed resource exploitation, and institutions such as the International Seabed Authority and the Enterprise, etc. are established under the UNCLOS in order to guarantee orderly resource exploitation activities in the Area. So far, the Authority has developed the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and concluded a 15-year exploitation contract with pioneer investors. It is now ready to develop regulations on prospecting and exploration for polymetallic sulphides, cobalt-rich crust, and other resources so as to promote a new round of competition in deep-sea resource exploration and exploitation. According to statistics, by the end of 2004, the Authority had awarded six contracts to pioneer investors for polymetallic nodule resource exploration in the Area, and an additional contract will be awarded in the near future.[10] However, resources in

10 Symposium for the Seminar Commemorating the 20th Anniversary of the United Nations Convention on the Law of the Sea, *Communications of Members of Chinese Society for the Law of the Sea*, No. 2, 2002. (in Chinese)

the Area are still under exploration, large-scale substantial exploitation has not been initiated, and so there have been few seabed disputes at this stage. Therefore, it is understandable why the Chamber has not yet received any cases concerning seabed disputes.

B. The Chamber Has Huge Potential for Settling Seabed Disputes

As demand for seabed resources rises, new technologies and enhanced exploitation capabilities will lead to an increase in both the scale and frequency of seabed resource exploitation, which in turn will lead to more seabed disputes. Therefore, the huge potential of the Chamber for settling seabed disputes, which is mainly embodied in its compulsory jurisdiction, parties to a case, and applicable law, will be gradually demonstrated by settling more and more relevant cases.

1. Compulsory Jurisdiction

As stipulated under the UNCLOS, the Chamber shall have compulsory jurisdiction over seabed disputes. As provided in Article 287(2) of the UNCLOS, "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." Therefore, the Chamber shall have compulsory jurisdiction over seabed disputes in the Area. According to Article 187 of the UNCLOS, the disputes with respect to activities in the Area include the following:

(1) disputes between States Parties concerning the interpretation or application of this Part and the Annexes in relation thereto;

(2) disputes between a State Party and the Authority concerning: (i) acts or omissions of the Authority or a State Party alleged to be in violation of this Part or the Annexes relating thereto or of rules, regulations and procedures of the Authority adopted in accordance therewith, or (ii) acts of the Authority alleged to be in excess of jurisdiction or a misuse of power;

(3) disputes between parties to a contract, being State Parties, the Authority or the Enterprise, State enterprises and natural or juridical persons, concerning: (i) the interpretation or application of a relevant contract or a plan of work; or (ii) acts or omissions of a party to the contract relating to activities in the Area and directed to the other party or directly affecting its legitimate interests;

(4) disputes between the Authority and a protective contractor concerning the refusal of a contract or a legal issue arising in the negotiation of the contract;

(5) disputes between the Authority and a State Party, a State enterprise or a natural or juridical person sponsored by a State Party, where it is alleged that the Authority has incurred liability; and

(6) any other disputes for which the jurisdiction of the Chamber is specifically provided in this Convention.

Compared with the ITLOS, the compulsory jurisdiction of the ITLOS, flexible as it may be, is subject to statutory and optional exceptions and should more appropriately be referred to as "quasi-compulsory jurisdiction," while the compulsory jurisdiction of the Chamber is rigid and spared from such exceptions.

Compared with the ICJ, it shall obtain consent by the sovereign State prior to exercising jurisdiction. This important international rule was determined by the Permanent Court of International Justice (PCIJ) as early as 1923. In the *Status of Eastern Karelia* case, the PCIJ declared that "no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement." This is also a principle that the ICJ has been following in exercising its jurisdiction.

2. Parties to a Case

Article 37 (Access) of the Statute of the ITLOS provides that the Chamber shall be open to the State Parties, the Authority and the other entities referred to in Part XI, section 5. And according to the provisions of Article 20 (Access to the Tribunal) thereunder, (1) the Tribunal shall be open to State Parties, and (2) the Tribunal shall be open to entities other than States Parties in any case expressly provided for in Part XI or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case. Therefore, parties to a case before the Chamber may include:

a. State

The State Parties to the UNCLOS may be parties in cases.

b. Self-governing Associated States or self-governing Territories

According to Article 305(1)(c)~(e) of the UNCLOS, self-governing associated States and territories which enjoy full internal self-government may be parties in cases before the ITLOS.

c. Intergovernmental International Organizations Referred to in Annex IX of the UNCLOS

According to the provisions in Article 305 of the UNCLOS, it shall be open for signature by international organizations in accordance with Annex IX, which provides that an intergovernmental organization constituted by States to

which its member States have transferred competence over matters governed by the UNCLOS, including the competence to enter into treaties in respect of those matters. An international organization may sign the UNCLOS if a majority of its member States are signatories of the UNCLOS. At the time of signature an international organization shall make a declaration specifying the matters governed by the UNCLOS in respect of which competence has been transferred to that organization by its member States which are signatories, and the nature and extent of that competence. The European Community is a such intergovernmental organization, and juridical practices may be tracked back to 2001 in the *Case concerning the Conservation and Sustainable Exploration of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile v. European Union)*.

d. Authority and Enterprise

The International Seabed Authority and the Enterprise, which are executing institutions established in accordance with the provisions under the UNCLOS, shall be competent to be parties in cases.

e. State Enterprise

The rights and obligations of State enterprises under the international law may be exercised and performed by the State that owns such enterprises.

f. State Sponsoring a Natural or Juridical Person as a Party to the Dispute

In order to avoid inequality between the parties to a dispute in proceedings arising from the fact that a natural or juridical person is a party to the dispute, Article 190 of the UNCLOS provides for the system of "participation and appearance of sponsoring State Parties in proceedings": (i) If a natural or juridical person is a party to a dispute, the sponsoring State shall be given notice thereof and shall have the right to participate in the proceeding by submitting written or oral statements, and (ii) If an action is brought against a State Party by a natural or juridical person sponsored by another State Party in a dispute, the respondent State may request the State sponsoring that person to appear in the proceedings on behalf of that person. Failing such appearance, the respondent State may arrange to be represented by a juridical person of its nationality.

By contrast, Article 34(1) of the Statute of the ICJ provides that only States may be parties in cases before the Court.

3. Applicable Law

According to the provisions of Article 38 (Applicable Law) of the Statute of the ITLOS, in addition to the provisions of Article 293, the Chamber shall apply

(i) the rules, regulations and procedures of the Authority adopted in accordance with this Convention and (ii) the terms of contracts concerning activities in the Area in matters relating to those contracts. As provided in Article 293 (Applicable Law) of the UNCLOS, "1. a court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention. 2. Paragraph 1 does not prejudice the power of the court or tribunal having jurisdiction under this section to decide a case *ex aequo et bono*, if the parties so agree." Therefore, the Chamber shall apply; (a) the UNCLOS; (b) other rules of international law not incompatible with the UNCLOS, (c) principle of *ex aequo et bono*; (d) rules, regulations and procedures of the Authority adopted in accordance with the UNCLOS; and (e) terms of contracts.

Different from the Statute of the ITLOS, Article 38 of the Statute of the ICJ provides that (1) the Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall 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; and (d) subject to the provisions of Article 59, 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. (2) This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto. It indicates that the ICJ shall only apply international law.

Translator: TAN Shuangpeng
Editor (English): Anthony Circharo

Review of Xiamen-Kinmen Sea Area Management Seminar

RUAN Zhenyan* DONG Lin**

On April 21, 2007, the Xiamen-Kinmen Sea Area Management Seminar was held in Xiamen University and co-hosted by Xiamen University Center for Oceans Law and Policy and Xiamen Ocean and Fisheries Bureau. As is well-known, marine resources and environment are both impetus and constraint to the economic and social development in the coastal regions. The people in Xiamen (a coastal city) and Kinmen (an island county) have very limited living space per capita in terms of terrestrial area and have terrestrial natural resources per capita far less than the international average level. But their sea areas boast significant resources for economic and social development in these regions. Xiamen-Kinmen sea area and its surrounding marine resources are of vital strategic importance to the economic growth and social progress in Xiamen and Kinmen. Therefore, strengthening the protection and management of Xiamen-Kinmen sea area, would be of great significance to building Xiamen as a harbor city, establishing a Xiamen-Kinmen co-development zone and promoting the sustainable development of marine economy. Although there are abundant works on management of the use of sea areas or coastal zones both at home and abroad, systematic research on Xiamen & Kinmen sea area can be hardly found because of its particular geographical position and relevant political factors. In view of this, the seminar revolved around the management of the use of Xiamen-Kinmen sea area and the relevant issues.

The participants were from Taiwan Affairs Office of Xiamen Municipal People's Government, the Government of Kinmen County, Kinmen Administration of Port Affairs, Kinmen County Marine Laboratory, members of Marine Advisory

* RUAN Zhenyan, postgraduate majoring in environmental sciences, College of Oceanography and Environmental Science, Xiamen University.
** DONG Lin, postgraduate majoring in environmental management, College of Oceanography and Environmental Science, Xiamen University.

Group of Xiamen City, experts and scholars from School of Law at Xiamen University, Coastal and Ocean Management Institute at Xiamen University, as well as ocean & fisheries bureaus and the departments of environmental protection, ocean surveillance, port administrative and maritime affairs in Xiamen City, Zhangzhou City and Quanzhou City. With the concerted efforts of the participating officials, experts and scholars, quite a few constructive opinions and suggestions have been proposed on the management of Xiamen-Kinmen sea area. The seminar mainly covered the following issues:

1. Current conditions of the use and management of Xiamen-Kinmen sea area;
2. Problems existing in the management of Xiamen-Kinmen sea area; and
3. Suggestions and visions on the management of Xiamen-Kinmen sea area.

The participants from China Mainland and China Taiwan probed into the foregoing issues through themed speeches and discussions. The main opinions of the seminar can be summarized as follows.

I. A Brief Introduction to Xiamen-Kinmen Sea Area

Kinmen County is located in Xiamen Bay and at the mouth of Jiulong River. A water channel, measuring 5.18-nautiacal-mile wide and 20-meter deep, separates Xiamen City from Lesser Kinmen, leaving a spindle-shaped shoal and a variety of islets lying between them. Measuring from the nearest point, the Great Kinmen is only 1.25 nautical miles away from Jiaoyu Island in China Mainland. Located at the same latitude, Kinmen and Xiamen stand opposite each other at a distance, sharing subtropical marine climate. In both places, precipitation is mainly intensive from April to August and typhoon occurs frequently in July and August; the wind advance eastward for eight months throughout the year and southeastward and southward from May to August every year.

Covering an approximate area of 1,088 square kilometers, Xiamen-Kinmen sea area is comprised of Xiamen Bay, Weitou Bay, Kinmen Bay (Kinmen), Hekou Bay at Jiulong River. It is dotted with a variety of islands and islets, among which Xiamen Island and Kinmen Island are the largest ones. In terms of topographic feature, the sea area is a large bay and the straight-line distance of the bay's two ends is about 51 kilometers. As regards to administrative jurisdiction, the sea area is mostly under the jurisdiction of Xiamen City and Kinmen County, among which the area under the jurisdiction of Xiamen City covers 390 square kilometers and part of which is administered by Quanzhou City and Zhangzhou City. It is named

as Xiamen-Kinmen sea area because of the following facts: 1) it has not been denominated as bay; 2) Xiamen Island and Kinmen Island cover a large area and boast higher reputation; 3) the sea area is mostly under the jurisdiction of Xiamen City and Kinmen County.

Zheng Maoshi, Director of Ocean & Fisheries Bureau of Xiamen City believed that Xiamen and Kinmen are the "two gates" to China Taiwan and China Mainland; Xiamen-Kinmen sea area is the most immediate bridge for cross-straits cooperation and exchange; the management of Xiamen-Kinmen sea area is more interactive and the sea area can be used both for the economy and ecological tourism & navigation. Lin Xiao, Deputy Chief of Taiwan Affairs Office of Xiamen Municipal People's Government, introduced the cooperation and exchange between China Taiwan and China Mainland in economy & trade, medical care, transportation & tourism and other industries in the past six years after the opening of Xiamen-Kinmen sailing route; up to late March, 2007, the number of voyages made through Xiamen-Kinmen sailing route has reached 13,864 and the number of passengers reached 1,937,103 person times, which was really marvelous. She also added that the opening of the "two gates" to each other, has turned a new leaf to the history of cross-straits relations; it would pose great significance to enhance the exchange and cooperation between Xiamen and Kinmen, improve Taiwanese's understanding of and affections to China Mainland, maintain the stability of the situations in Taiwan Straits, promote the development of cross-straits relations and the direct and both-way "opening of postal, aviation and navigational services and commercial interflow" as early as possible. But due to various reasons in history and in reality, many issues in relation to the management and use of Xiamen-Kinmen sea area are still pending.

II. The Use and Management of Xiamen-Kinmen Sea Area

A. Management of Xiamen Sea Area

Xiamen boasts the sea as its most significant resources and advantage. It has about 390 square kilometers of sea area, 234-kilometer coastline, and 17 uninhabited islands. With 31.7-kilometer deep water shoreline, it enjoys a variety of rare species, including Chinese white dolphins, which is under class I State special protection, and Branchiostoma balcheri Gray. Though in small quantities, the marine resources in Xiamen City are of fine quality.

Since 1990s, Xiamen City has been attaching importance to the sustainable utilization of marine resources and strengthening holistic management of the sea, which is manifested in the following aspects: 1) a holistic maritime management model, which is featured by "legislation taking the lead, centralized coordination, support from science and technology, concerted law enforcement and public participation" has been preliminarily established. In other words, a local legal framework for the sea under the national legal system has been set up. Within this framework, the code for the sustainable development of coastal zones and oceans has been clearly defined, which provides the legal guarantee for the holistic management of oceans; 2) mechanisms of holistic management and decision-making coordination for the sea has been built up and developed, so that possible disputes among different uses of the sea would be resolved before the development and solutions would be sought for existing disputes through interdepartmental and cross-sectoral consultations; 3) a mechanism to support the holistic management of the sea by science and technology has been formed, opening the channels for science to serve for the management, and ensuring that decision-making is conducted in scientific and forward-looking way, so that errors could be reduced and working efficiency and effectiveness improved; 4) a model for concerted law enforcement under the current regime of administrative law enforcement for the sea has been found out, with a view to effectively assemble the forces for administrative law enforcement; 5) sound public opinions with love and care for the sea has been fostered, which helps to build an interactive platform for the public to participate in maritime affairs and develop a training mechanism for coastal zone. By successively formulating a series of plans with respect to the sea such as Functional Zoning for the Sea in Xiamen City, Planning of the Xiamen City for the Use of the Sea, Planning for the Protection and Utilization of Uninhabited Islands etc., the government of Xiamen City has built up a relatively integrated system of planning for the sea, which has laid foundations for holistic management of the sea in a scientific and regulated way and met the requirements for developing Xiamen as a harbor eco-city. With the power to formulate local rules and regulations granted by the National People's Congress, Xiamen has established on a gradual basis its local legal framework for the sea under the national legal system. In 1997, it issued a governmental regulation Provisions on the Management of the Use of the Sea in Xiamen City, the first local regulation on the management of the sea in China, which was revised in 2003. In 2002, the Xiamen government issued a governmental regulation Management Measures of Xiamen City for the Protection and Utilization

of Uninhabited Islands. In November, 2004, Xiamen Municipal People's Congress updated this regulation as the first local regulation on the management of uninhabited islands in China. Moreover, Xiamen has also issued over a dozen of rules & regulations and regulatory documents on the sea, which helps to form the local legal framework for the sea. In this way, Xiamen's management of the sea has been on the track of observing "the rule of law": "legislating on the management of the sea, and utilizing & managing the sea according to laws and regulations".

Since the establishment of the marine management regime, especially the implementation of the Law of the People's Republic of China on the Management of the Sea, Xiamen has built up and improved local laws & regulations and auxiliary regimes for the sea, strengthened the management on the use of the sea in strict accordance with laws, made all-round treatment and control of the sea, put great efforts to adjust the structure in the use of the sea, proactively sought for the ways of market-oriented allocation of marine resources, and enhanced capacity building in management of the sea. Thereby, Xiamen has been awarded as "National Outstanding Unit for the Management of the Use of the Sea" for five consecutive years since 2002.

B. Management of Kinmen Sea Area

Kinmen's restricted waters are identified in accordance with China Taiwan's Act Governing Relations between the People of the Taiwan Area and the Mainland Area, under which the vessels and other means of transport from China Mainland, shall not enter into restricted or prohibited waters in Taiwan Area without the permission of the China Taiwan authorities.

Kinmen sea area is confronted with the following issues: removal of mines, wastes (mainly those floating from the coastal cities of Fujian Province to Kinmen and unable to be cleared in the mine fields), sharing of water quality monitoring data, ways of communication in emergencies (in Kinmen, electricity is produced by heat power and oil transported by sea; in Xiamen, which is an international port, transportation by sea is more frequent. In case of any accident on the sea, how they should report and deal with it.), sea sand dredging (because it is prohibited to dredge sea sand in Fujian Province, some sand dredgers come to the median line for the operation, which has great impact on Kinmen).

The control, prohibition and restriction on the controlled zones of the fortresses such as Houyu Islet, Caoyu Island, Beiding Island, Dongding Island, Dadan Island,

Er'dan Island, Menghu Islet, Fuxing Islet and Shi Islet, shall be conducted in accordance with Vital Area Regulations. Such activities as surveying & mapping, photography and fishing are prohibited in these areas without the authorization of "Department of Defense".[1]

Kinmen is confronted with the following problems in its management of the sea: the acts that would jeopardize coastal and ocean resources such as illegal immigration, smuggling, illegal fishing beyond the limit, and illegal dredging of sand; issues affecting marine environmental protection such as oil pollution and solid waste; and vessels occupying sea routes and affecting the safety of the sea routes. The management of the sea in Kinmen County involves such departments such as "Department of Defense"; Transport and Tourism Bureau of Kinmen County, Port and Harbor Bureau of Kinmen County under "Transport Department"; Construction Bureau of Kinmen County under "Department of Economic Affairs"; "Finance Department"; "Internal Affairs Department"; and other departments under "Executive Yuan" such as Mainland Affairs Council, Coast Guard Administration, Kinmen County Environmental Protection Bureau of Environmental Protection Administration, Kinmen County Government Construction Bureau of the Council of Agriculture. Coast Guard Administration of "Executive Yuan" takes charges of maritime law enforcement, such as maritime guarding, prevention and detection of maritime crimes, searching for and arresting smuggling and illegal immigration, and also assists in such work as environmental protection, resources conservation, fishing patrol, salvage at sea, covering the maritime affairs under the administration of these competent departments. But up to now, Kinmen County still has not developed a holistic management regime for the sea.

C. Management of Zhangzhou City Sea Area

Zhangzhou City is one of the most important coastal cities of Fujian Province. It has 18.6 thousand square-kilometer of adjacent sea area, 112.3 thousand hectare of shallow beach area, and 680-kilometer coastline. The survey on the use of the sea in 2002 shows that, Zhangzhou City uses 328 thousand mu (a unit of area, 1 mu = 0.0667 hectares), including 252 thousand mu for fishery industry, 11.3

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1 It is hereby noted that Kinmen's maritime management departments referred to in this paper, such as "department" and "council" are administrative and legislative organs of China Taiwan. We would no longer indicate this in the following parts of the paper.

thousand mu for marine transportation, 36.5 thousand mu for protective zones, 19.3 thousand mu for sea reclamation, and 8.9 thousand mu for other purposes. Up to December 31, 2006, altogether 2,417 cases of rights related to the use of the sea have been determined, which involved an area of 16.6 thousand hectares, and RMB 20.65 million Yuan has been collected for the use of the sea.

Zhangzhou City has done the following work for the use of the sea and for the integrated management of the sea: 1. Attaching importance to and strengthening fundamental work by preparing and conducting functional zoning at city and county levels for the sea, delimitating the boundary for the sea and the rivers, and also revising results of the survey of coastline; 2. Building up the network for the management of the sea and improving on a continuous basis the management regime for the use of the sea. Zhangzhou Leadership Group for the Development & Management of the Sea, Zhangzhou Branch of China Marine Surveillance and Zhangzhou Marine & Fishery Law Enforcement Team have been established to enhance the network development for marine and fishery management at village and town levels. 3. Enhancing the organization and leadership by proactively promoting the implementation of the two regimes – the marine usage permit and the compensated use of the sea, and checking and examining the use of the sea for some projects and for the fisheries industry. 4. Improving the supervision to ensure that the marine management could be conducted in a comprehensive and in-depth way; strengthening the cruise and surveillance on the sea area under its administration; and enhancing the law enforcement by the relevant ocean surveillance department; 5. Strengthening the surveillance and monitoring on marine environment by attaching importance to the development of marine protected zones and undertaking holistic improvements of marine environment, so as to do a good job in marine environmental protection.

D. Management of Quanzhou City Sea Area

Located at the middle section of the west bank to the Taiwan Straits, Quanzhou City has an oceanic subtropical monsoon climate. The city enjoys 11,360 square meters of sea areas, and winding and tortuous coastlines, among which the mainland coastlines have a length of 541 kilometers. It boasts 180 islands and islets and 72 kilometers of island coastlines. Meizhou Bay, Dagang Bay, Quanzhou Bay, Shenhu Bay, Weitu Bay and other bays lie along the coast of Quanzhou City. It also boasts abundant resources in fisheries, ports, seashore, salt production, placer,

granite and mangrove.

Quanzhou is a newly-emerging modern city with rapid economic development. Thanks to the Greater Quanzhou Strategy (to develop Quanzhou into a modern, industrial and commercial port city in Western Taiwan Straits Economic Zone), it is undergoing rapid economic development, and an upsurge in marine development; its marine industry is increasingly becoming a new engine of economic growth. In 2006, the total value of output produced by the marine sector in Quanzhou reached RMB 36.5 billion Yuan, with an increase of RMB 17.7 billion Yuan, and showing a growth of 14% (YoY) and 12% (MoM).

Since the Law of the People's Republic of China on the Management of the Sea became effective in 2002, Quanzhou has been proactively improving its holistic management of the sea by rationally developing marine resources, and protecting marine ecological environment. As a result, its marine economy has achieved continuous, stable and harmonious development, which has positive impacts on developing Quanzhou into a modern, industrial and commercial port city in Western Taiwan Straits Economic Zone. In 2005, Quanzhou become a demonstration zone under Partnerships in Environmental Management for the Seas of East Asia.

With regards to its holistic management of the sea, Quanzhou City pays due regard to both speed and efficiency, and development and protection. It has been restructuring its marine economy in a scientific way, and safeguarding the overall maritime interests by making holistic plans and taking relevant factors into full consideration. It has made prominent achievements in the following aspects: 1. promoting the development of maritime legal system by improving the legal awareness of maritime management departments and the departments and individuals utilizing the sea, and changing the traditional concepts in the use of the sea; 2. establishing a regime for the integrated management of the sea featured by the Ocean & Fisheries Bureau as the principal administrative agency, and the participation and cooperation of Development & Reform Commission and departments in charge of land & resources, environmental protection, planning, science & technology, transport, port administrative affairs, maritime affairs, public security & border defense, water conservancy and forestry; 3. setting up a marine development & management leadership group, coastline management agencies at the levels of villages and towns, marine management office at town level, the regime of "emergency response plans for major and exceptional pollution accidents in Quanzhou City", and law enforcement team for the sea and fisheries industry; 4. working out a series of plans related to marine functional zoning and

marine development & protection etc., and improving the basic work in marine management, so as to provide scientific support to the holistic marine management; 5. implementing the basic regimes of the Law of the People's Republic of China on the Management of the use of the Sea, and enhancing the government's functions in management and services; 6. enhancing research & development of marine science & technology to accelerate the industrialization of the sea, and increase the overall benefits arising from the sea.

III. Problems Existing in Xiamen-Kinmen Sea Area Management

Although Xiamen and Kinmen have communicated a lot with each other on the issues related to the management of Xiamen-Kinmen sea area, they have only reached a common understanding and some profound issues remain to be solved, due to their differences in politics and laws. The experts & scholars and the delegates of the governmental departments from China Mainland (Xiamen, Zhangzhou and Quanzhou) and China Taiwan (Kinmen County), made hot discussions on existing problems in Xiamen-Kinmen sea areas management. Such problems are mainly reflected in the following five aspects: consultative mechanism for Xiamen-Kinmen sea area management, joint conservation and protection of ecology and resources, marine environmental protection, cooperation in fisheries industry and marine scientific research.

A. Consultative Mechanism for Xiamen-Kinmen Sea Area Management

This part is mainly concerned with liaison and interaction for maritime law enforcement, and marine safety cooperation.

Zheng Maoshi, Director of Ocean & Fisheries Bureau of Xiamen City, argues that Xiamen-Kinmen sea area involves several cities along Jiulong River such as Xiamen, Kinmen, Zhangzhou, Quanzhou and Longyan; since its management is undertaken by a variety of administrative departments, the consultation and interaction between these departments are of great significance. Yang Chenguo, Chief of Kinmen Marine Laboratory, believed that although Xiamen and Kinmen own joint waters, the consultative mechanism for the management of the sea area has not been established yet.

The problems in maritime law enforcement are mainly as follows: 1) the

ships from China Mainland undertaking illegal operations, frequently cross the "median line"[2] and enter the prohibited sea area of Kinmen to elude the pursuit, arrest and law enforcement by the enforcement departments of China Mainland. Some of these ships even continue their illegal operations and the law enforcement departments of China Mainland are unable to cross the "median line" to conduct law enforcement activities. 2) The difficulty in evidence collection, for example, illegal fishing with electricity. Once found by the law enforcement personnel, the offenders will plunge the electric cable and fishing gears into the sea to destroy the evidence. The deep-root causes would be the fact that Xiamen and Kinmen independently implement marine management regimes in Xiamen-Kinmen sea area, resulting in the lack of a consultative mechanism for the management of the sea, insufficient interaction and cooperation in terms of solving management issues. Consequently, it is difficult to collect the evidence in connection with such illegal acts and to arrest the offenders, and these legal violations occur frequently despite repeated prohibitions.

Zhang Xurong, deputy captain of Xiamen General Maritime Administration and Law Enforcement Team, said that maritime law enforcement in Xiamen and Kinmen should focus on fishing vessels from China Mainland and the ways of their operations. Quite a few illegal behaviors have been discovered in Xiamen and Quanzhou; it is difficult to enforce laws on the offenders who have crossed the median line, because the law enforcement personnel are unable to cross the line and it is infeasible for them to wait around the median line for the return of those vessels that have undertaken illegal operations. Therefore, under most circumstances, it is impossible to arrest those vessels in a timely manner. Mr. Zhong Xiangqian, from Legal Affairs Department, Ocean & Fisheries Bureau of Xiamen City, indicated that because Xiamen law enforcement departments are unable to cross the median line in their missions, illegal sand dredgers and vessels that undertake fishing with electricity usually cross the median line and elude the investigation of the law enforcement personnel, or undertake illegal sand dredging, and fishing with electricity or bombs in the sea area under Kinmen's control.

In terms of marine safety cooperation, Mr. Zhong Xiangqian contends that the rapid increase of seaborne trade and exchange between Xiamen and Kinmen has led to the positive development of cross-straits relations, but improper handling

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2 The median line is artificially drawn for Xiamen-Kinmen sea area; the two sides of the line are under the jurisdictions of Xiamen and Kinmen respectively.

of the marine safety issues existing in Xiamen-Kinmen sea area would jeopardize the seaborne trade and exchange and also give rise to conflicts, endangering the peaceful environment necessary for the development of cross-straits relations. The problems in marine safety are mainly as follows: 1) in terms of economic security, illegal ships threaten the security of marine transport routes. For example, the fishing vessels occupy the shipping routes and threaten other ships' security; placing the fishing gear in the shipping routes and poor cooperation between both sides across the Taiwan Straits also impose negative impact on and jeopardize the security of the shipping. 2) In terms of ecological safety, environmental pollution causes damages to marine ecology. For example, over-exploitation has led to the decline of marine resources like sea sand and fishes; population explosion and the development of industry and agriculture have resulted in the great increase of wastes and sewage into the sea; oily ballast water, tank washings, bilge water discharged from sightseeing vessels, cargo ships and other kinds of ships, have seriously affected the quality of water in the ports and sea area; hydraulic structures and sea reclamation in the sea area have caused sedimentation and affected the ecology. 3) In terms of social security, public health and public security incidents such as maritime accidents or disputes and conflicts, influence cross-straits exchanges. Mr. Zhong also viewed that the foregoing problems in marine safety are caused by separated administration by China Mainland and China Taiwan, who independently undertake their respective marine management in the sea area divided by the "median line"; China Mainland and China Taiwan have their own regimes for marine management and lack a mechanism for cooperation and consultation on marine safety issues.

B. Conservation and Protection of Ecology and Resources

The discussions on conservation and protection of ecology and resources in the seminar revolved around sea sand dredging, fisheries resources and protection of rare species.

Illegal exploitations of sea sand include exploitations without permits, exploitations beyond the boundary or overdue exploitations. These illegal exploitations would have serious impacts on the water quality and subsoil of Xiamen-Kinmen sea area and over-exploitation would result in the decline of sea sand resources. Zhang Yunyu, counselor to the Administration of Kinmen County, stated that as illegal exploitation of sea sand is forbidden in Fujian Province, sand

dredgers tend to exploit sand near the median line, so as to conveniently cross the line to avoid the law enforcement personnel.

Wang Hansheng, researcher of Fujian Institute of Oceanography, analyzed the conservation and protection of fisheries resources on the basis of the research on the rehabilitation and proliferation of groupers on artificial reefs. He said that in the past two decades, the intensity in catching fisheries resources has exceeded exponentially the tolerance of these resources in the sea area. Moreover, the increasingly serious environmental pollution in coastal areas has led to the gradual decline of fisheries resources and the decrease of high-grade fishes in the catch. It is hard for the traditional fish stocks in coastal waters to form a fishing season. And fingerlings and low-value fishes amount to 80% in the catch. The high-grade fish resources such as groupers almost die out. He also analyzed that some outlaws even caught the groupers by bombing near rocks, coral reefs and sites of shipwrecks; their misdeeds caused the death of fishes and other marine life and severely damaged the natural landscape and ecological system such as rocks and coral reefs; they would also lead to the collapse of habitat and spawning site for groupers, and possibly thereafter, the natural resources of the groupers would never be rehabilitated. Kinmen County Marine Laboratory and Fisheries Administration have regularly place artificial fishing reefs in the sea in order to protect fisheries resources. Nevertheless, Mr. Fan Dezheng, a technician from Kinmen County Government, claimed that Kinmen failed to carry out effective management on the area where artificial fishing reefs are placed, the fishing gear owned by fishing ships from China Mainland usually get stuck in such fishing reefs, making these reefs futile. Besides, in the harvest season for eel fingerlings, these fingerlings are caught by the fishermen in groups. The period that the fishermen catch the eel fingerlings coincides with the days when several commercial fishes are breeding. And the fishing nets used for catching eel fingerlings are relatively tighter. Therefore, the mixed catching would result in the death of a variety of commercial fishes.

With regards to the protection of rare species, Fan Dezheng noted that amphioxus and limuloid are under special protection in China Mainland, but they are not protected wildlife in China Taiwan; the Mainland fishermen thus cross the median line to catch amphioxus and limuloid in Kinmen sea areas, resulting in the decrease of the number of these rare species. The specially-protected rare species are not confined in the artificially-defined protected zones but move around the whole Xiamen-Kinmen sea area. Then cross-line catching has affected the protection of rare species in the whole sea area.

C. Marine Environmental Protection

Problems concerning marine environmental protection in Xiamen-Kinmen sea area mainly include the discharge of land-sourced pollutants, pollution of marine environment caused by coastal or marine engineering such as sea reclamation.

The discharge of wastes and sewage into the sea is one of the main problems related to the discharge of land-sourced pollutants that are needed to be solved for the protection of marine environment in these waters. The improper placement of wastes in the upper reaches of Jiulong River, and large quantities of silts brought by Jiulong River basin, have led to the increase of waste floats in Xiamen-Kinmen sea area and the lower reaches of Jiulong River, as well as the problems in the management of the floats in the beaches. Moreover, the volume of sewage discharged into Xiamen-Kinmen sea area increases with the expansion of the population and the development of agriculture and industry. Oily ballast water, tank washings, bilge water discharged from sightseeing vessels, cargo ships and other ships have seriously affected the quality of water in the ports and waters.

Guo Yunmou, researcher of Fujian Institute of Oceanography, on the basis of research on total area control of the Xiamen semi-closed bay, analyzed that sea reclamation has resulted in the decrease of sea area and tidal prism, and led to the sedimentation in the shipping routes, the environmental deterioration, and other issues in connection with marine environmental protection. Mr. Zhong Xiangqian also proposed that hydraulic structures in the sea area, sea reclamation, among others, have caused sedimentation and affected the ecological environment for mangrove and other flora and fauna.

With respect to the impacts of coastal and marine engineering on marine environment, Zhu Xiaoqin, associate professor of Xiamen University, asserts that China is confronted with the pressure of nearly 400 new marine engineering projects every year; and the promulgation of Management Regulations on the Prevention and Control of the Pollution Damages to Marine Environment Caused by Marine Engineering Projects (hereinafter referred to as the “Regulation”) has improved the pre-engineering environmental impact assessment regime. The Regulation has enhanced the supervision and management of the pollution damages during the construction and operation of marine engineering. Besides, it specifies post-engineering supervision and management of pollutants discharge. And it also describes how to prevent and handle pollution accidents in marine engineering

and provides that the relevant party should assume strict legal responsibilities. The Regulation includes a series of measures on pre-engineering control and environmental assessment, supervision and management during the engineering and post-engineering assessment etc., which would probably mitigate the pollution to marine environment caused by marine engineering. The Regulation indicates that China has further strengthened the management on prevention and control of damages to the sea caused by marine engineering. Meanwhile, Associate Professor Zhu Xiaoqin remarked that marine engineering and coastal engineering are not clearly defined in the laws; and in practice, it is rather difficult to tell fairly that a maritime engineering project should be categorized as coastal or marine engineering. These two categories of engineering are managed respectively by environmental protection department and maritime department. These two departments are under divisional and independent management, and may encounter conflicts over power in their management of maritime projects; there are also some functional overlaps between them. The environmental impact assessment regime for marine engineering is considered to be a "soft" regime. Some marine engineering projects have been launched before the environmental impact assessment is reviewed and approved. It goes against the laws and regulations but is not punished, since there is no competent department to enforce the penalty. The prescriptions on holding hearings for environmental impact assessment are relatively simple; and it still remains unexplained how the delegates' opinions in the hearings are taken into consideration or how their opinions would influence the final decision. In this sense, the hearing is often a formality and can't play its role in terms of public participation and supervision. Lastly, she believed that ecological damages have not been clearly defined in China's legislation, and that marine pollution assessment and the ways of the assessment including ecological damage assessment, are still underdeveloped in China.

D. Cooperation in Fisheries Industry

Currently, cooperation in fisheries industry is mainly concerned with fishing trade and aquaculture. Xiamen and Kinmen have similar climates and ecological environments, thus the fisheries products from China Taiwan, by way of "Mini-three-links" (limited postal, transportation, and trade links between China Mainland and China Taiwan), are sold in the distribution centers in Kinmen and Xiamen. Additionally, thanks to Xiamen's advantageous location and convenient transport

conditions, Taiwan's high-grade fisheries products - fishes with high economic value such as groupers are popular in Mainland's market; they have lower costs and higher market competitiveness. Yang Chenguo, Chief of Kinmen Marine Laboratory, said that the success of "mini-three-links" is more prominent in passenger transportation, however, logistics transportation, especially the trading of fish products which have high economic value, is less frequent. With Kinmen as the terminus, Taiwan's aquatic products especially fishes with high economic value such as groupers, are confronted with high customs barriers. Moreover, Kinmen has undertaken the reproduction and releasing of fingerlings such as limuloid and Taiwan portunid. Notwithstanding that Kinmen and Xiamen are located in the same sea area, the reproduction and releasing would be futile if the lack of coordination and cooperation between these two regions continues.

E. Marine Scientific Research

Marine scientific research offers scientific and technological support to Xiamen-Kinmen sea area management. The scientific research institutions in Xiamen and Kinmen have accumulated a large quantity of scientific data and materials during their research. The experts and scholars conduct research, and provide advice and argumentation for maritime planning and management, so as to reduce the adverse impacts on the environment and ecology caused by marine development and utilization. They provide scientific bases for marine development and utilization. Their scientific suggestions and opinions are offered to the government and maritime administrative departments for decision-making. But due to a variety of reasons, the following problems mainly exist in marine scientific research on Xiamen-Kinmen sea area: 1) insufficient funding for scientific research has led to fewer marine water quality monitoring stations in Kinmen than in Xiamen, and less scientific research data from Kinmen. 2) Since it is more difficult to collect samples for scientific research near the median line, China Mainland and China Taiwan have respectively established their own monitoring stations and conducted the research. 3) Cooperation on scientific research between the regions along the Xiamen-Kinmen sea area is insufficient and their failure to share their scientific research data has caused the discontinuity and incompleteness of marine scientific research on Xiamen-Kinmen sea area.

IV. Management Suggestions and Ideas

As to the foregoing problems identified in the management of Kinmen-Xiamen sea area, the experts and scholars from Xiamen, Kinmen, Zhangzhou and Quanzhou have proposed the following advice and ideas, in order to further work out the problems.

A. To Establish a Consultative and Interactive Mechanism for Management

Mr. Zhong Xiangqian proposed to establish a cooperative mechanism for marine safety in Xiamen-Kinmen sea area, indicating the principles, organization, contents and norms for the cooperation. The cooperative mechanism should be built up on the basis of the principles such as mutual trust and benefit, practicability and equality, and coordination and unity. Firstly, China Mainland and China Taiwan may designate their respective administrative agencies with high coordinative capacity to take charge of the routines, so that the operations of the departments within one's own jurisdiction could be coordinated in a holistic way and the agencies could also serve for regular contacts to conduct equal communications across the Taiwan Straits. Secondly, China Mainland and China Taiwan may establish non-governmental societies to negotiate on the issues which the governments are not appropriate to officially deal with. Thirdly, a think-tank can be founded, which would include experts and scholars in the fields of law, oceanography, port, fisheries, and tourism from both China Mainland and China Taiwan. He also noted that the agencies in China Mainland and China Taiwan should, for their cooperation, firstly, identify the issues through regular or irregular contacts; secondly, enhance the exchange of information and report in a timely manner the information on routines and emergencies. He contended that the following aspects should be focused on for the agencies' cooperation: 1) with regard to shipping safety, they should cooperate to improve the management of stand-on vessel companies, excursion vessels and crewmen; enhance the navigation environment control, and avoid any gaps in the management of navigable waters; collaborate to fight against the vessels that go against the laws and regulations and that cross the median line, so as to eliminate the hidden dangers in the safety of shipping routes. 2) with regard to ecological safety, they should make concerted efforts to supervise marine environment, protect rare marine species,

and clean wastes in the sea; control land-based and vessel-sourced pollution, crack down on illegal sand dredgers, etc. 3) in respect of social security, they should establish a cooperation mechanism for disaster prevention and response, including meteorological cooperation, shelter for vessels, and search & rescue in marine perils; cooperate in information and technological exchange, and educating and training of professionals, in the fields of prevention & control of diseases and security of aquatic products.

In terms of the concerted efforts to crack down on illegal sand dredging and illegal catching of marine life under protection, the participating experts and scholars proposed to make beforehand deployment and collaborate in the crack-down on illegal activities simultaneously in the same waters; on this basis, a cooperative and liaison mechanism could be established.

As to the difficulties in the collection of evidence for law enforcement, Professor Kuen-chen Fu, from Xiamen University, suggested to reduce the limits on the burden of proof by revising the laws, punish those who commit preparatory crime as principle offenders and increase the penalty on them. Moreover, China Mainland only imposes monetary penalty on illegal acts such as catching the fishes by electricity, while China Taiwan imposes imprisonment and other punishments against freedom additional to monetary penalty; therefore, the laws should be revised to make the legal regime on marine management in Fujian Province consistent with that in Taiwan. He also argues that illegal acts should be punished in strict accordance with legal procedures in Xiamen and Kinmen, in the case that the evidence is clear and is kept complete; the provisions on and enforcement of the punishment in these two regions should be harmonized.

B. Joint Conservation and Protection of Ecology and Resources

The ecology and resources in Xiamen-Kinmen sea area should be jointly conserved and protected by both parties. With respect to conservation and protection of fisheries resources, some experts said that the development of artificial fish reefs, as a rehabilitation project of marine ecological environment, could help to improve offshore environment, so that the silt substrate environment, previously with low productivity and few fish stocks, could become rock and reef with higher productivity and more fish stocks. The reefs could serve to be a shelter for advanced fry, and for perch, forage and oviposition by the fishes. They could help to prevent bottom trawling, reproduce and protect fisheries resources, supplement

the insufficient resources in nearby fishing grounds, and improve the quality of catch. Meanwhile, the open-type fish reefs would also help to integrate the fisheries industry with tourism, promote the development of sightseeing & tourism of marine ecology by way of leisure fishery, and contribute to the restructuring of fisheries industry and the provision of job opportunities. Therefore, the experts advised to construct artificial fish reefs in proper waters, and release fingerlings for the purpose of rehabilitating and reproducing fisheries resources, which would be of vital importance to prevent the marine environment and resources from further deteriorating and to develop marine ecological systems with virtuous cycles. When it comes to the management of artificial fish reefs, the experts suggested adopting a diversified investment mechanism for the funding of the reefs' construction, and the policy of "those who invest would gain benefits". The investors' operations and management should be well coordinated with the government's macro-management in the area; and relevant regulations and managerial policies should be formulated, so that the ecological system in the area could be effectively protected and the investors could make profits from their investment. Rules and regulations should be laid down to improve the management of these reefs, imposing serious punishments on the catching of fishes by electricity, bombs or poisons and prohibiting destructive capturing. Buoys visible both at days and nights should be placed around the reefs, so as to prevent unintentional entry into and catching fishes in the area or any accidents.

In respect of the protection of rare species, the experts proposed to conduct surveys on the habitats of the species under protection before designating a rare species protected zone, and take into particular consideration the designating of their original habitats as the protected zone. Besides, the scientific research cooperation should be improved across the Taiwan Straits to protect the rare species in Xiamen-Kinmen sea area, and the data acquired from the surveys on these species should be shared. In terms of the conservation and protection of sea sand resources, the regions across the Taiwan Straits in Xiamen-Kinmen sea area should speed up their efforts to lay down relevant laws. They should also enhance the cruises in the sea area, improve the law enforcement and crack-down on illegal acts, strengthen their cooperation, and establish a coordinative mechanism.

C. Marine Environmental Protection

Just drawing the median line can not suffice to meet the requirements to

manage Xiamen-Kinmen sea area any longer. For the marine environmental protection, the experts advised to refer to the research and practices of "large marine ecosystems".

Zhu Xiaoqin, Associate Professor of Xiamen University, suggested that local regulations and planning system should be improved for the protection of marine environment; we should also enhance the research on and practices in the technologies or methodologies of marine pollution assessment, drawing on the experiences of Xiamen as a demonstration zone under the Partnerships in Environmental Management for the Seas of East Asia; we should strengthen the technological support to ecological damage compensation mechanism and to the rehabilitation. She advised to pay due consideration in the legislation to the protection and development of important marine ecosystems such as mangroves, sea grass beds, coral reefs and salt marshes. She also noted that abiding by the laws and punishing law breakers would actually bring into full play the environmental assessment regime.

Guo Yunmou, a researcher, after research and analysis of sea reclamation in the western Xiamen sea area and Tong'an Bay, suggested determining the reasonable size and scope in total area control of the waters, and the bottom line for the management of the area control, so that the environmental and ecological risks would be minimized. He argued that controlling sea area above the bottom line of its management would help to limit the environmental and ecological risks within bearable scope, if there are any of such risks.

In terms of the management on discharge of wastes and sewage, the experts proposed to conduct integrated governance on Jiulong River basin, hold up the floating wastes section by section and enhance the control on those wastes. The land wastes in the upper reaches of Jiulong River could be collected and placed at designated time and location. As to sewage discharge into the sea, the tertiary treatment method through artificial wetlands may be adopted, and Xiamen's experiences in the establishment of artificial wetlands could be drawn on. And with regards to sewage discharge into the deep sea, Professor Kuen-chen Fu suggested that the sewage discharge pipes could be extended to the vicinity of Xiamen-Kinmen median line and then Kinmen may extend the pipes to its deep sea area which has higher dynamic power.

D. Cooperation in Fisheries Industry

There is much room for China Mainland and China Taiwan to cooperate in fisheries industry, due to the increasing production costs in recent years, lack of fisheries resources in Taiwan, and the Mainland's great sincerity in promoting cross-straits cooperation in fisheries industry. The two sides may cooperate in import & export of fisheries products, aquiculture, processing of aquatic products, development of leisure fishery industry, R & D and reproduction & breeding of fingerlings, etc.

In terms of fishing trading, the experts advised that Kinmen could serve as Taiwan's storage and transportation center for the trading of aquatic products with high economic values; the aquatic products could be transported from Kinmen to Xiamen and the relevant taxes could be negotiated by competent departments. Pilot operations could take place in Xiamen and Kinmen, so as to promote and expand the trading and cooperation in fisheries industry between China Mainland and China Taiwan.

In respect of fishing and aquiculture, the experts proposed to introduce in Taiwan's quality aquatic products, and fishing & breeding technologies. Since Xiamen is making integrated governance and closing down aquatic farms in Pan-East China Sea, delegates from Kinmen suggested to engage in cage aquaculture as planned in the sea area near Lesser Kinmen within Kinmen's jurisdiction and to draw on Mainland's experiences in aquaculture; Kinmen and China Mainland can cooperate in aquaculture. The experts also advised to make well-conceived plans and coordination on the aquaculture and the sales of aquatic products.

E. Cooperation in Scientific Research

Enhancing the cooperation in scientific research between China Mainland and China Taiwan is of great significance to environmental protection, and to the protection & conservation of ecological resources and rare species in Xiamen-Kinmen sea area. The experts advised to improve exchange and cooperation between academic research institutions in Taiwan and Xiamen and establish scientific research union. The academic research institutions can provide scientific suggestions for the management of Xiamen-Kinmen sea area in the following ways: to jointly conduct themed research on issues of common concern, join in the data systems of the parties involved, cooperate in data integration and information sharing, and make concerted efforts to enrich and update basic data of the sea. Scientific research cooperation plays an important role in marine scientific research,

including water quality monitoring, underground technology research, and rare species protection, and in marine ecological conservation and sustainable use of the sea.

F. Fostering of a Marine Culture

The participating experts and scholars envisaged establishment of a marine culture for Xiamen-Kinmen sea area. Yang Chenguo, Chief of Kinmen Marine Laboratory, said that Xiamen-Kinmen sea area was a treasure for creating the culture of the mountains and the sea, and also lifeline for the sustainable survival of the people in the area. He also added that Taiwan's marine culture was mainly based on leisure fishery and maritime entertainment, and advised to improve the public awareness of marine culture by literature & arts videos and first-hand experiences. Professor Kuen-chen Fu believed that the public involvement in maritime activities would lay a good foundation for the establishment of marine culture. The experts also suggested that establishing a marine culture festival or holding marine leisure & entertainment competitions (such as sailing contests and yacht events) would also be a good way to promote marine culture and for the public to know about this culture. The participating experts and scholars unanimously believed that the establishment and development of marine culture should be integrated with the improvement of marine economy, development of marine resources and protection of marine environment.

Attachments: Maps Related to Xiamen-Kinmen Sea Area

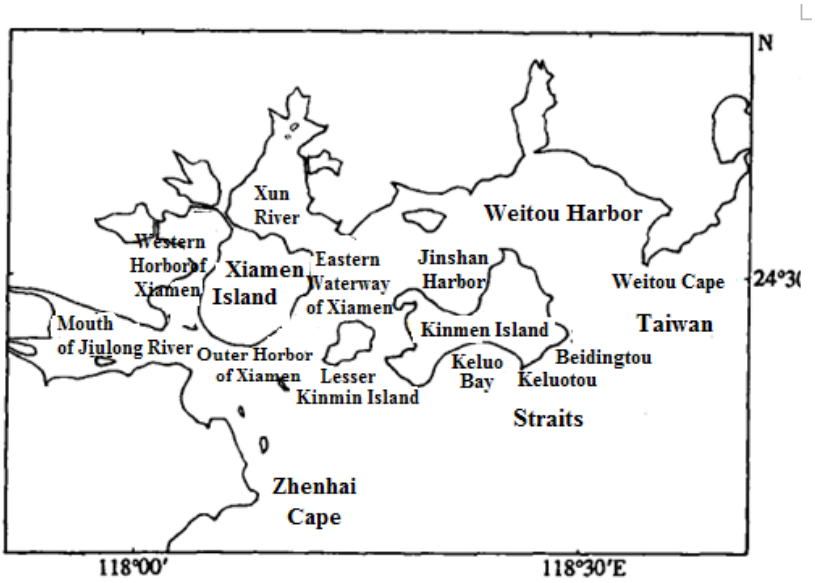

Fig. 1 Map of Xiamen-Kinmen Sea Area[3]

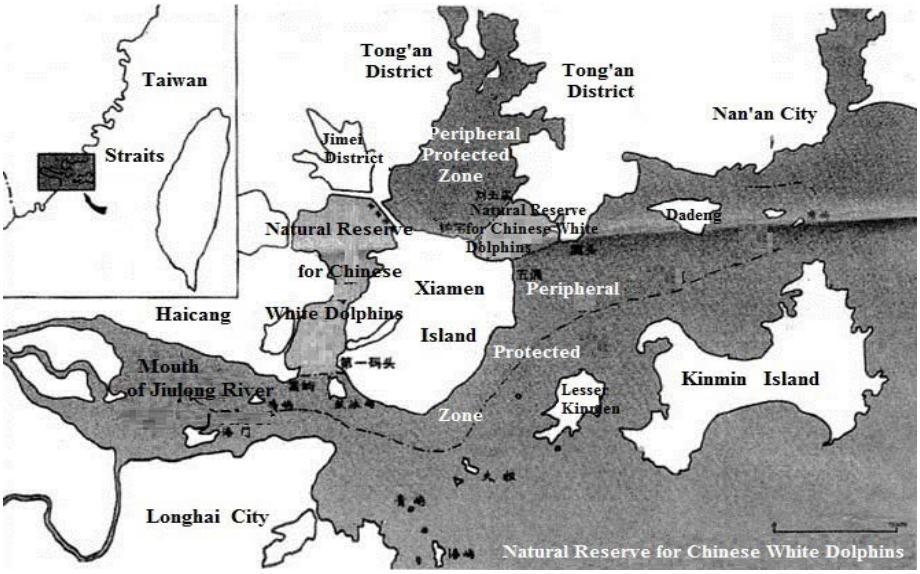

Fig. 2 Map of Xiamen Natural Reserve for Chinese White Dolphins[4]

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3 Zhang Shisan et al., Discussion of the Holistic Environmental Management Mechanism for Xiamen-Kinmen Sea Area, *Journal of Oceanography in Taiwan Strait*, No. 4, Vol. 22, 2003. (in Chinese)

4 *Annals of Fujian Province - the Sea*, at http://www.fjsq.gov.cn/showtext.asp?ToBook=75&index=147, 11 May 2007. (in Chinese)

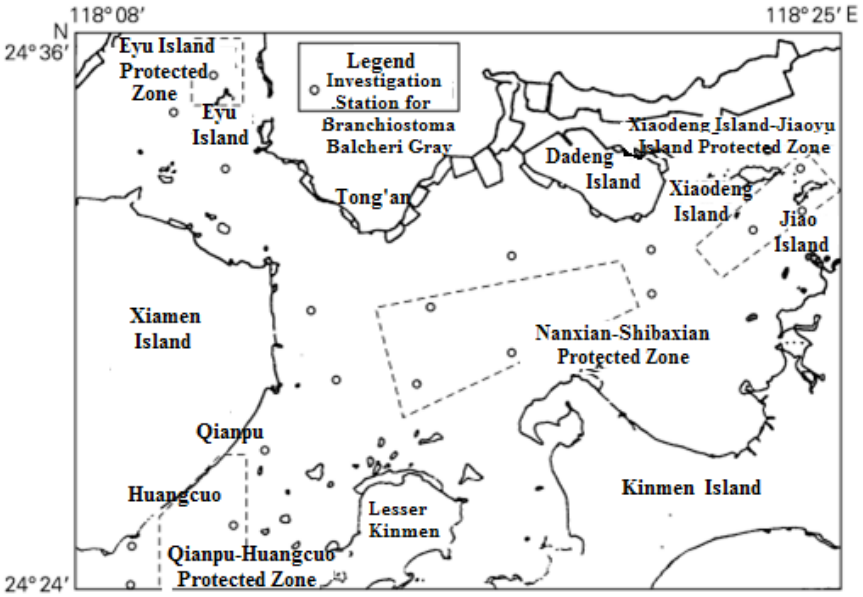

Fig. 3 Map of Natural Reserve for Branchiostoma Balcheri Gray [5] (The part surrounded by dotted lines refers to the natural reserve for Branchiostoma balcheri Gray)

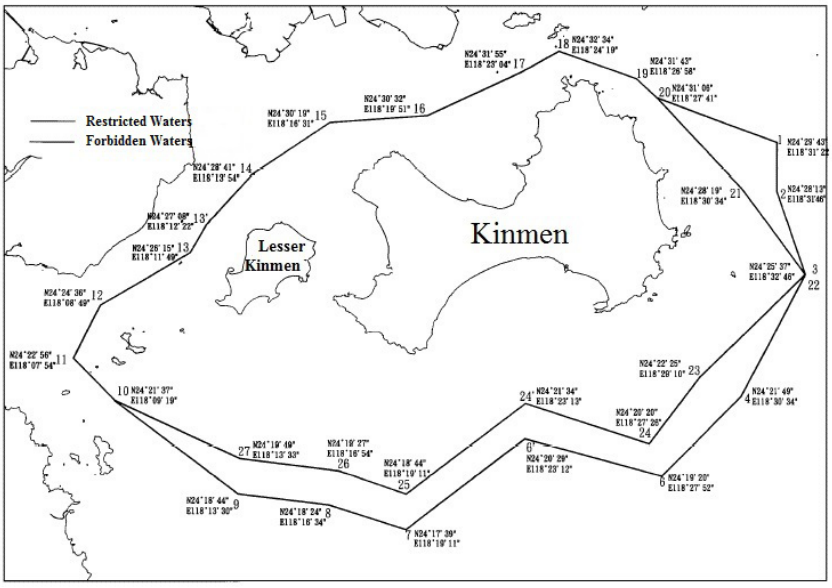

Fig. 4 Map of Restricted Waters in Kinmen[6]

5 Lyu Xiaomei, et al, Ecological Environment in Xiamen Amphioxus Natural Reserve, *Marine Sciences*, No. 10, 2005. (in Chinese)

6 Map 4 and Map 5 are provided by Kinmen County Government Construction Bureau. We hereby extend our sincere gratitude to the Bureau.

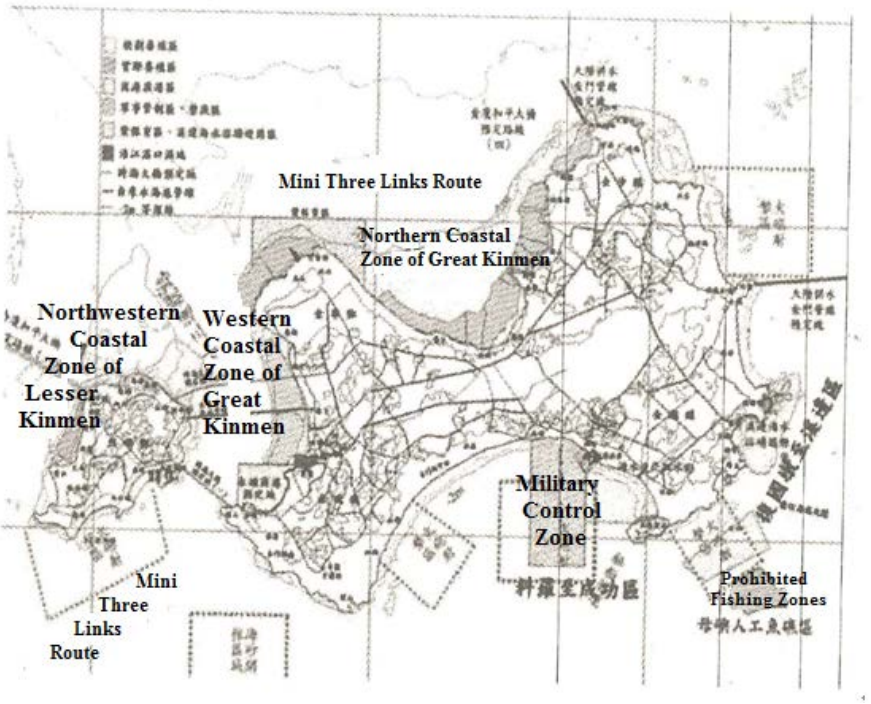

Fig. 5 The Use of Water in Kinmen County

Translator: YE Lin

The Success of Japan's Law concerning Special Measures for the Conservation of the Environment of the Seto Inland Sea and Lessons We Can Apply to the Management of China's Bohai Sea

XU Xiangmin* KONG Xiaoming**

Abstract: The Seto Inland Sea suffered from serious and unmanageable pollution due to its special geography and environment. The Law concerning Special Measures for the Conservation of the Environment of the Seto Inland Sea, tailored to the specific situation, successfully brought back a clean Seto Inland Sea with a series of special measures. Valuable experience can be drawn from this case for the management of China's Bohai Sea.

Key Words: Seto Inland Sea; Law concerning Special Measures; Management; Bohai Sea

I. Introduction

The Seto Inland Sea is an important inland sea of Japan. It boasts not only beautiful scenery but also rich natural resources.[1] It enjoys developed industries, and "the coastal area of the Seto Inland Sea constitutes the largest newly developed

* XU Xiangmin, Professor, Doctoral supervisor and Dean of the Law and Politics School of Ocean University of China

** KONG Xiaoming, PhD Candidate in grade 2005 at the Law and Politics School of Ocean University of China.

1 "The Seto Inland Sea is, not only in Japan, but also around the world, famous for its uniquely beautiful and magnificent landscape. Boasting rich fishery resources, the Seto Inland Sea is a gift from nature that should be taken care by future generations, for our people undoubtedly benefit greatly from it."—from Article 3 of the Law concerning Special Measures for the Conservation of the Environment of the Seto Inland Sea.

industrial zone in Japan and has been listed as one of the five top industrial zones in Japan."[2] The enclosed nature of the Seto Inland Sea has resulted in relatively slow circulation and exchange of seawater, poor self-purification capacity, and low environmental carrying capacity. Extremely low pollution carrying capacity, combined with intense pollution sources from surrounding factories, led to the drastic deterioration of the environmental conditions of the Seto Inland Sea, including decreased water quality and substrate quality, severe pollution, declining aquatic resources, and frequent occurrences of ecological disasters such as red tides. All these, together with unchecked land reclamation and constant oil pollution, brought the Seto Inland Sea the nickname of "the dying sea."[3]

The management of the Seto Inland Sea attracted attention from people all over Japan. Previous management practices of the Sea showed that general maritime environmental laws were inadequate. Japan's traditional laws concerning the protection of the marine environment, such as the Landfill in Public Waters Law of 1921, the Law of the Coast of 1956, and the Water Pollution Prevention Law and the Law on Prevention of Marine Pollution and Disasters of 1970, proved to be ineffective in solving the environmental problems of the Seto Inland Sea and were unable even to prevent its further deterioration.[4] The Law concerning Tentative Measures for the Conservation of the Environment of the Seto Inland Sea, which came into effect in 1973, turned out to be highly effective in solving the environmental problems of the Seto Inland Sea when it successfully brought the Sea back from the edge of "dying." Given its clear success, Japan retitled it as the Law concerning Special Measures for the Conservation of the Environment of the Seto Inland Sea (hereinafter "the Law concerning Special Measures") in 1978 to make it permanent in guiding the work of protecting the environment of the Seto Inland Sea. So what is so special about this law that it can bring a sea back from dying? And what can be learned from this case for China's marine management? This paper attempts to answer these two questions.

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2 Zhang Shu, The Industrial Layout and Structure of Japan's Seto Inland Sea Industrial Zone, *Studies on Japan*, No. 2, 2004. (in Chinese)

3 The outburst of Minamata disease in Japan, which shocked the world, was caused by highly poisonous seafood from the Seto Inland Sea. Residents of the Minamata bay in Kumamoto prefecture suffered dementia, paralysis, and psychiatric disorders after they ate this seafood, which was polluted by mercury.

4 For example, red tides were still frequently seen in the Seto Inland Sea. They appeared five times in 1955, 44 times in 1965, and in 1971 the number increased to 136 times. Red tides cause great damage, and one in 1972 alone cost Japan 7 billion yen.

II. Special Laws for Special Circumstances

The Law concerning Special Measures, a regional law aimed specifically at solving the environmental problems of the Seto Inland Sea, is by nature a special law.[5] Compared with general laws, it is narrowly tailored to local conditions. The special needs for the management of the Seto Inland Sea demand a special law.

The fundamental reason for the ineffectiveness of Japan's general maritime laws in environmental management is that they fail to take the environmental characteristics of the Seto Inland Sea into consideration. As mentioned above, the Seto Inland Sea has an extremely low environmental pollution carrying capacity due to its enclosed nature. As a result, general maritime laws, designed for seas with relatively high self-purification and environmental carrying capacities, cannot meet the Seto Inland Sea's special management needs. It was precisely this ineffectiveness that gave Japan no choice but to create the Law concerning Special Measures, which is aimed exclusively at the management of the Seto Inland Sea.

It has been proved that special laws are highly effective in dealing with seas in special conditions.[6] Since the issuing of the Law concerning Special Measures, the environment of the Seto Inland Sea has improved dramatically. The land reclamation resulted in a drastic reduction in the area of land reclaimed – from 2000~3700 hectares in 1973 to around 100 hectares in 2000. The current frequency of the red tides is only about 1/3 of that in the 1970s, which is a direct and telling result of the management of the Seto Inland Sea acknowledged by the people concerned with the marine environmental protection around the world. The frequency of the oil pollution has also shown to be in decline, with the occurrence of the oil leakage decreasing significantly, from 874 incidents in 1972 to 115 incidents in 1995. The once-polluted tourist beaches were restored, and in 1995 a total of 51 major tourist beaches received more than 7,730,000 people. The quantity and area of the natural reserves increased, from 792 total and 471,000 hectares in

5 Mr. Xu Kelu maintains that special laws are different from general ones because they only apply to certain people or issues in a certain area during a certain period of time. At http://freelaw.diy.myrice.com/lunwen/029.htm, 30 April 2007. (in Chinese)

6 The authors do not mean to repudiate general laws dealing with water pollutions and disasters when we emphasize the effectiveness of the Law concerning Special Measures for the Conservation of the Environment of the Seto Inland Sea. We are merely stating that they seem to be ineffective in practice.

1985, to 834 total and 528,000 hectares in 2000.

It is not only Japan in managing closed seas through special laws. Among the six closed seas governed by a single sovereignty, except Canada's Hudson Bay, which is exempt from special laws due to its relatively large area and low pollution level. The United States established a series of special legal documents such as a protocol for its Chesapeake Bay and a bill for its San Francisco Bay. Although California Bay does not yet have a special protection law, there has been an eager demand to pass one.

Therefore, the basic experience drawn from the success of the Law concerning Special Measures is that special conditions should be handled with specific laws. China's Bohai Sea, sharing similar geographic characteristics with the Seto Inland Sea, has also been suffering from serious pollutions. Although public voice for initiating its management has been highly increased, no specialized legal document has been established to comprehensively improve the environment of the sea, which is certainly regrettable. The Marine Environmental Protection Law of the People's Republic of China has been issued by the Chinese government to lay down the general and principle rules in terms of preventing sea pollutions. Far from covering all aspects and sources of sea pollution, in managing the Bohai Sea, it cannot handle the difficulties brought about by the sea's specific natural attributes, such as low self-purification capacity, slow circulation and exchange of seawater, and low environmental carrying capacity.

III. Counterpoising the Relationship between Special and General Laws

Despite the fact that special situations demand special laws, no problem can be solved with these special laws alone. In certain regions, general laws are useless without the assistance of special legislations, and the latter also need the former as their existential foundation. The successful implementation of a special law depends greatly on whether it can coexist harmoniously with certain general law to bring about better and coordinated management. The Law concerning Special Measures is very effective at doing this.

Apart from the Law concerning Special Measures, the Water Pollution Prevention Law and the Law on Prevention of Maritime Pollution and Disaster also address the environmental issues of the Seto Inland Sea. Instead of nullifying all the previous general laws concerning water pollution prevention with the new special

law, the Japanese government employed both kinds of laws on the legal principle of "putting special laws before general laws" in the management of its Seto Inland Sea with a comprehensive method, defining that special laws on the first level and general laws on the second level.

On the one hand, the Japanese government attached great importance to the connection between the Law concerning Special Measures and general laws in terms of the contents of the former. For example, the "public water area" stipulated by the Law concerning Special Measures refers to exactly the same thing specified by the Water Pollution Prevention Law (Law No. 138, 1970) in Article 2, Paragraph 1.[7] And the "particular facilities" in the Law concerning Special Measures also refer to the same thing stated in Paragraph 2[8] of the same Article in the Water Pollution Prevention Law.[9] Reading the Law concerning Special Measures in the whole, eapecially in Chapter III "special measures concerning environmental protections of the Seto Inland Sea" which involves the core concepts, one can see that almost every statement in it gives consideration to application matters between the stipulations and general laws, even devoting a large chunk to specifying its relationship with those general laws in terms of application.[10]

On the other hand, in the area of application, all measures designed to manage the Seto Inland Sea should follow the Law concerning Special Measures first and only refer to general laws when no relevant statements can be found in the special law. This practice not only complies with major regulations of general environment laws, but also gives due regard to the highly targeted special law. While managing the Seto Inland Sea according to the general laws of a State, the Japanese government also heavily relies upon the Law concerning Special Measures for comprehensive management. This strategy has proved to be essential

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7 The Water Pollution Prevention Law states, in Article 2, Paragraph 1, that the so-called "public water area" refers to rivers, lakes, bays, coastal areas, and other water areas that are for public use. They also include related public irrigation canals and ditches that are meant for public use.

8 The Water Pollution Prevention Law states, in Article 2, Paragraph 2, that the so-called "specific facilities" refer to facilities that discharge sewage or waste liquids which are officially listed as follows: 1. Facilities that discharge the government-prohibited cadmium and other health-threatening substances; 2. Facilities that discharge the government-prohibited COD and other items (including thermal pollution except those prescribed in the foregoing item) that may pollute water and the environment.

9 Law concerning Special Measures for the Conservation of the Environment of the Seto Inland Sea, Article 5.

10 Law concerning Special Measures for the Conservation of the Environment of the Seto Inland Sea, Article 12(1).

in the management of the Seto Inland Sea.

IV. Special Problems and Special Measures

Three targeted special measures specified in the law brought it the name of the Law concerning Special Measures. These measures are control of setting up certain facility, preventing damage from nutrient enrichment, and protection of natural beaches.[11] These three measures, giving due consideration to the special environmental problems of the Seto Inland Sea, constitute the main part of the Law. First, the control of certain facilities means controlling and cutting down on the amount of pollutants from land. For example, it specifies approval standards for setting up certain facilities, transitional measures related to certain facilities, the alteration and maintenance of the construction of certain facilities, and relationship with the Water Pollution Prevention Law. It also stipulates that the basic policies of reducing total pollution load signified by the chemical oxygen demand (COD) should be formulated by the Prime Minister.[12] Second, the prevention of damage caused by nutrient enrichment aims mainly at reducing phosphorus and other specified substances[13] and formulating general objectives, annual plans, guidelines, and strategies for this reduction.[14] Third, the protection of natural beaches includes the preservation of the natural and tourist resources of the Seto Inland Sea, which requires that natural coastal reserves should be set up in areas such as sand beaches, reefs, bathing beaches, and beach combing areas. It also provides that formal application is necessary when intended activities involve constructing new buildings in natural reserves, altering the current land usage situation, excavating minerals, or extracting rocks, among others.[15]

Targeted and specific, these special measures are very powerful. For example,

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11 Law concerning Special Measures for the Conservation of the Environment of the Seto Inland Sea, Chapter III.

12 Law concerning Special Measures for the Conservation of the Environment of the Seto Inland Sea, Chapter III, Section A.

13 Eutrophication means that algae and other plankton grow explosively due to the abundance of phosphorus and nitrogen in the water. As a result, the amount of soluble oxygen in the water decreases and the water quality deteriorates, causing mass deaths of fish and other creatures.

14 Law concerning Special Measures for the Conservation of the Environment of the Seto Inland Sea, Chapter III, Section B.

15 Law concerning Special Measures for the Conservation of the Environment of the Seto Inland Sea, Chapter III, Section C.

in terms of preventing damage caused by nutrient enrichment, the Law, along with laying down rules for reducing phosphorus and other specified substances, specifies in detail general objectives, annual plans, and other guidelines for such reduction, making its statements highly implementable. At the same time, the Law explicitly covers responsibility distribution to ensure that these measures can be implemented soundly and effectively.

The Law concerning Special Measures constitutes another representative of the legislative idea of "considering local conditions and taking targeted measures." The natural environment of the Seto Inland Sea is complicated. The entirety of it has unique natural attributes and consists of several bays and a number of sea areas with varying functional characteristics. These bays and sea areas differ in both natural conditions and pollution sources. The Law concerning Special Measures is suited to local conditions and takes specific and targeted standards and measures according to natural attributes and pollution circumstances to achieve its aims. Because it lacks specialized laws, however, China's Bohai Bay, along with other open seas and various sea areas in it, are governed by general laws and rules which fall far short from "proper remedy to the specific illness."

V. Strict Control over the Land Pollution

The principal theory of Seto Inland Sea management is to exert strict control over land pollution and to begin working at the pollution source, as laid out under the general principle of coastal and terrestrial integration. Pollution of the Seto Inland Sea comes mainly from the surrounding land, especially from large and middle-sized industries around the coastal region.[16] Given this situation, the Law sets up a strict control system of businesses' sewage disposal facilities, and is entitled to make adjustments to any kind of on-land production or operating activities that have an impact on the ecological environment of the Seto Inland Sea. These adjustments include three main tenets: (1) Pollution sources should be cut off by relocating highly contaminative chemical factories, and landfills should be reduced greatly, making room for national parks. Today, more than 800 wildlife

16 70% of Japan's steel industries, 63% of its copper industries, and 76% of its lead industries are located here. Together, these factories can generate more products than the same industries in the UK combined. See Song Deling, Management of Japan's Seto Inland Sea in the 1970s to 1980s, *Forum of Japanese Studies*, No. 4, 1999. (in Chinese)

reserves have been set up.[17] (2) Strict control should be exerted on businesses' sewage disposal facilities. Enterprises need to go through three steps before disposing sewage into the Seto Inland Sea. To start with, according to the premier ordinance, they have to apply to the prefecture governor, and their applications should describe in detail the classification, structure, and usage of their sewage disposal facilities; methods of processing sewage discharged through specialized facilities; calculation of the flow of sewage; and degree of sewage contamination. An attachment of written material about evaluations and surveys of the impact that the intended facilities will have on the environment is also required.[18] Second, the application should be displayed in public for three weeks once it has been received by the relevant prefecture governor. During this time, people who have a stake in the establishment of such sewage disposal facilities can hand in written comments and suggestions to the governor. Finally, the prefecture governor should, during the required period, consult with governors of the cities, towns, and villages that are involved in setting up those facilities.[19] (3) The enterprises that fall into the governance of the Law concerning Special Measures are of a wide range, from businesses located around the coast of the Seto Inland Sea to any organizations whose discharge will eventually flow into the Seto Inland Sea.

Pollutants from the land constitute one of the main sources of marine pollution. Thus, solving marine environmental problems without a comprehensive plan for addressing all kinds of pollution can never achieve desired results. Instead, special attention should be given to reducing land pollutants. The Law concerning Special Measures has done a great job in this respect by specifying rules and providing a code of conduct for land pollution control. China's Marine Environment Protection Law, on the contrary, is a general law that includes only general provisions for preventing land pollution, with no specified provisions for conduct. It is thus unable to deal with marine environmental problems with the thought of coastal and terrestrial integration, which constitutes one of the main reasons for its failure in handling China's Bohai Sea's environmental concerns.

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17 At http://gb.magzine.sina.com/nfcmag/200616/2006-08-28/003417688.shtml, 10 February 2007. (in Chinese)

18 Law concerning Special Measures for the Conservation of the Environment of the Seto Inland Sea, Article 5.

19 Law concerning Special Measures for the Conservation of the Environment of the Seto Inland Sea, Article 5.

VI. Government Planning Supplements Legislations

The Japanese government formulated the Law concerning Special Measures to address the environmental problems of the Seto Inland Sea. At the same time, the Basic Planning for Seto Inland Sea Environmental Protection which was formulated by the Japanese Prime Minister, and specific environmental protection plans on the level of coastal prefectures and counties, also came into existence.[20] These help greatly in enhancing the efficiency and effectiveness of the Law concerning Special Measures.

The Basic Planning for Seto Inland Sea Environmental Protection is made and implemented according to the Law concerning Special Measures. Legal systems play a leading and essential role in managing the environmental problems of the Seto Inland Sea, and the Basic Planning serves as a major means of accomplishing the desired legislative aims. Although it can by no means replace the law, the Basic Planning, specific and detailed as it is, is an effective tool for law enforcement. There are as many as 19 detailed measures in the Basic Planning for Seto Inland Sea Environmental Protection, including prevention of water pollution and preservation of natural landscapes and shoal areas. Each measure is specially designed with a clear goal, and the planning covers future development, goals and measures to be taken involving the whole area. Supplementing the Law concerning Special Measures with the Basic Planning for Seto Inland Sea Environmental Protection helps transform legal principles into practical measures and quantify qualitative indices.[21]

Prefectures and counties surrounding the Seto Inland Sea are required, according to the Basic Planning for Seto Inland Sea Environmental Protection, to draw up more specific plans based on the particular condition of the sea area in their governance.[22] In accordance with the Law concerning Special Measures and the Basic Planning, governors of these prefectures and counties should adjust their measures to local conditions, tackle different problems in different ways, and make full use of their abundant knowledge of their own jurisdictional areas to improve

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20 Law concerning Special Measures for the Conservation of the Environment of the Seto Inland Sea, Chapter II.

21 Zhang Xiangbing, What Legislation Can Bring to the Bohai Sea, C*hina Ocean News*, No. 1346. (in Chinese)

22 Law concerning Special Measures for the Conservation of the Environment of the Seto Inland Sea, Article 4(1).

the efficiency of the implementation of the Law concerning Special Measures.

Together with the government's basic planning and plans on the level of prefectures and counties, the Law concerning Special Measures constitutes a comprehensive ocean management system that goes from higher governance levels to lower ones and from a focused aim to inclusive and extensive measures. By contrast, although the Chinese government has made and implemented some plans in managing its Bohai Sea, such as the Action Plan of Management of Bohai Sea Coastal Resources, the Comprehensive Management Plan of the Bohai Sea, and the Bohai Sea Environmental Management Strategies in 2000, along with 2001's Clean Ocean Action Plan for the Bohai Sea, among others, no desired result has so far been achieved. This is because China's Marine Environmental Protection Law is not aimed specifically at the management of the Bohai Sea, and thus its general legal principles for marine environment management do not sufficiently address the problem. Consequently, these plans, lacking powerful legal protection, become useless, which partly explains the fact that pollution in the Bohai Sea worsened even after these plans came into effect.[23]

VII. Efficient Administration Guarantees Effective Implementation

Administrating the enforcement of environmental laws in Japan is the responsibility of both the central and local governments. All levels of administration, from the central government to local authorities, are clear on their responsibilities, and each performs its own functions, ensuring timely discovery, prevention and treatment of pollution as well as smooth implementation of legal terms. In managing the Seto Inland Sea, various departments of the Japanese government, with reasonable labor and responsibility distribution, exhibited high efficiency. The Prime Minister and the Ministry of the Environment are in the charge of the central level, while governors of the 13 coastal prefectures[24] are responsible for the local level and should report directly to the Prime Minister and

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23 Bohai Sea marine monitoring in 2004 showed that the area of severely polluted water increased by 1000 square kilometers since 2001, and the area with mid-level pollution increased by 2300 square kilometers. *China's Marine Environment Bulletin*, Vol. 2004. (in Chinese)

24 Governors of prefectures in Japan are roughly equal to executive governors of China's provinces.

the director of the Ministry of the Environment. This helps reduce the number of administrative bodies involved in managing the Seto Inland Sea, and thus prevents the undesired situation of fragmented administration.

The Law concerning Special Measures specially sets up a Seto Inland Sea environmental protection council, which reports directly to the Prime Minister and the director of the Ministry of the Environment. It takes the responsibility of surveying and reviewing important matters related to the Seto Inland Sea environmental protection.[25] The council centers its work on protecting the Seto Inland Sea and solving its environmental problems and has played a leading role in drawing up the Basic Planning for Seto Inland Sea Environmental Protection. It also supervises the formulation of prefecture plans to make sure the local environmental protection guidelines are in accordance with the central ones.

In order to carry out the work of protecting the Seto Inland Sea and managing its environmental problems more effectively and efficiently, the Japanese government also establishes a meeting system for county magistrates and mayors from thirteen prefectures and five cities along the Seto Inland Sea coast. This system organizes regular joint-conferences of county magistrates and mayors, and after years of practice has proven to be an effective and productive measure in terms of preventing marine pollution.

The administrative system of the environmental protection of the Seto Inland Sea, based on well-established executive organizations and local government joint-meeting systems, constitutes a guarantee for the effective implementation of the Law concerning Special Measures. This is a useful reference for China in managing its own marine environmental problems. China's current marine environmental management system is extensive and disorganized, with multiple leading bodies. Many authorities, including the administrative department for environmental protection under the State Council, the national oceanic administrative department, the national administrative department for marine affairs, the national administrative department for fishery management, and the military environmental protection department, exercise a certain degree of administrative and supervisory authority upon the marine environment. On the local level, any people's government above the county level is responsible for supervising and managing its marine environment as long as it is located along the sea. This unclear division

25 Law concerning Special Measures for the Conservation of the Environment of the Seto Inland Sea, Article 23.

of responsibility makes executive departments uncertain of their own duties, and consequently they frequently evade responsibility when environmental problems arise. These administrative bodies are fragmented and isolated, rendering the work of managing the Bohai Sea more poorly organized than ever.

VIII. Giving Full Play to the Public's Initiatives

The Law concerning Special Measures attaches great importance to the role played by the public in managing the Seto Inland Sea, and a series of measures are taken to guarantee their information and participation. The Law concerning Special Measures states clearly that any alterations or augmentations made to the Basic Planning by the Prime Minister or to local plans made by prefectures should be made public.[26] Moreover, applications and various relevant written materials for setting up pollution discharge facilities for businesses should be displayed in public for three weeks, during which time any interested parties can report their opinions in written form to the prefecture in charge.[27] Relevant prefecture governors should keep the public informed of the making or altering of guidelines for reducing certain substances.[28] The Law concerning Special Measures ensures the public's rights to know and to participate through specific legal regulations, providing legal basis for their effective participation in protecting the Seto Inland Sea environment. As a result, the general public is highly motivated to make its own contributions in the protection and management of the environment.

At the same time, the Law concerning Special Measures places emphasis on giving full play to conservation associations. The 21st Century Agenda, approved at the United Nations' Environment and Development Conference in June 1992, underlines the important role played by such associations in preserving the environment. It considers the effective involvement of these associations one of the most essential factors in securing sustainable development.[29] The Law concerning Special Measures refers to conservation associations twice, conferring upon them

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26 Law concerning Special Measures for the Conservation of the Environment of the Seto Inland Sea, Chapter II.

27 Law concerning Special Measures for the Conservation of the Environment of the Seto Inland Sea, Article 5.

28 Law concerning Special Measures for the Conservation of the Environment of the Seto Inland Sea, Article 12(4).

29 Cai Shouqiu, *Studies of European Union Environmental Policies and Laws*, Wuhan: Wuhan University Press, 2002, p. 148. (in Chinese)

legal rights to participate in managing the Seto Inland Sea. For example, in Article 4, Paragraph 2, the Law concerning Special Measures states clearly that national and local public associations should take necessary measures to implement the "Basic Planning" and plans made by prefectures and counties. Article 14 declares that national and local public associations, considering the contaminated situation of the Seto Inland Sea, should work to improve sewage and waste processing facilities, enhance silt dredging, improve facilities for supervising or determining water quality, and develop other essential undertakings aimed at protecting the water quality of the Seto Inland Sea. It is not common to establish conservation associations' status and recognize their important role in protecting environment through legislation. In Japan, however, with support from national legislation and central authorities, conservation associations are constantly forming, so much so that Japan ranks first in the world in the number and scale of such associations. Among them, the most famous one is the Seto Inland Sea Conservation Association, which plays a critical role in the whole process of managing the Seto Inland Sea.

By contrast, China's environmental protection work only calls for public participation or establishes general principles in a few environmental protection laws, with no concrete guarantee of the public's right to know and to participate.[30] Conservation associations should receive more attention; they currently are absent from both the Marine Environment Protection Law and the Law on Prevention and Control of Water Pollution.[31] This, of course, is detrimental to the development of China's environmental protection work.

IX. Popularizing and Increasing Environmental Awareness

30 Many scholars analyzed the current level of public participation in China and reached similar conclusions that the public's knowledge and participation rights should be guaranteed by legislation. For example, Mr. Li Zhiping pointed out that environmental rights and a series of other rights involving the environment should be established, such as the right to know environmental information and the right to participate in making environment-related decisions. See Li Zhiping, Several Thoughts on Revising the Environmental Protection Law, in Wang Shuyi ed., *Sustainable Development and China's Legislation concerning Environmental Protection*, Beijing: Science Press, 2005, p. 20. (in Chinese)

31 China is not short on environment-preserving associations. According to the newly published *Blue Book on the Development of China's Non-Government Conservation Associations*, there are nearly 3,000 conservation associations in China. They are carrying out their work with difficulty now, but if the government gives them more attention and support, they will play a major role in protecting the environment.

Public awareness of the importance of the Seto Inland Sea environmental protection, along with the public's strong support for the Law concerning Special Measures, has contributed most greatly to the effective implementation of the Law concerning Special Measures. The Japanese government deserves credit for both popularizing environmental protection principles and raising the public's environmental awareness.

The Japanese government is fully aware that the public's environmental awareness is an integral part of its marine environmental protection work. It thus worked to popularize the idea that the Seto Inland Sea would become a public health threat – a "dead" sea – if timely actions were not taken to save its environment. Consequently, the Japanese people bought into the idea and greatly assisted the government in its environmental protection work. The fact that people from all rungs of society in Japan were promoting the importance and necessity of protecting the Seto Inland Sea laid a sound foundation for and contributed greatly to the final success of the work of managing the Seto Inland Sea. The Japanese government adopted several measures to raise environmental awareness and encourage public participation. First, it concentrated on a public awareness campaign. All sorts of seminars, lectures, and environmental awareness activities were organized along the coastal area of the Seto Inland Sea, with promotional materials widely distributed. Second, the government strengthened investigation and research. Based on coastal residents' knowledge of the Seto Inland Sea environment, scientists researched typical cases to determine future measures and methods for promoting environmental education and work. Third, it provided guidance on marine environmental protection. Various marine environmental protection efforts were supplied with both technical instructions and financial aid. Activities such as lectures, seminars, printing and distributing awareness posters, and cleaning up coastal areas were organized. Fourth, public-benefit legal entities were established. For example, the Seto Inland Sea environmental protection association, which came into being in 1976, aims to carry out all kinds of investigations and other activities through raising people's awareness of protecting the Seto Inland Sea environment, in the hope that environmental protection work will be increased.

By contrast, in China, the responsibility of managing the Bohai Sea falls exclusively on the executive departments. The contaminated condition of the Bohai Sea is little known among the general public, and so it would be useless to ask them

to contribute personally to its cleanup. The inefficiency in managing the Bohai Sea seems to be a natural result of the lack of interaction and mutual support between the government and the public.

X. Striking a Balance between Protecting the Environment and Developing the Economy

In handling the environmental problems of the Seto Inland Sea, the Law concerning Special Measures succeeds in finding the ideal balance between protecting the environment, preserving natural resources, and developing the economy. Protecting the environment is often in obvious conflict with pursuing economic development. Exercising control over certain facilities or cutting back on the total amount of discharge, to some degree, have a negative effect on the economic interests of businesses and the nation as a whole. The Law concerning Special Measures, however, chooses to pursue long-term and comprehensive benefits at the expense of such immediate interests. By recognizing such future long-term benefits, the Japanese government was able to manage the Seto Inland Sea successfully. Although some coastal businesses suffered moderate financial losses, the tourism revenue brought in by the rich fishery resources and scenic landscapes more than offset these losses. More than ten years' management of the Seto Inland Sea has brought it an annual fish catching of 800,000 tons, exceeding even that of the 1950s. In 1995 alone, 650,000 tons of fish were caught in the Seto Inland Sea, and the total amount of mariculture exceeded that of marine fishing. In addition, as one of Japan's most beautiful natural scenic spots, the successfully managed Seto Inland Sea has restored its once damaged bathing beaches, the number of which reached 51 in 1995, now receiving more than 7,730,000 visitors each year.

XI. Conclusion: Experience and Inspiration

The success of the Law concerning Special Measures is remarkable. Among the six enclosed seas that are in the exclusive charge of one sovereign State, the Seto Inland Sea is currently the best managed, with the Law concerning Special Measures significantly contributing to this. Of course, success is not achieved by mere luck. As described above, we can find that the Law concerning Special

Measures has done a lot of work. Its success, perhaps, can be summarized as follows: adjust measures according to local conditions, and ensure comprehensive and specific legislation.

China's Bohai Sea is endowed with similar natural attributes as the Seto Inland Sea is. It is also similarly contaminated and threatened by the possibility of turning into a "dead" sea.[32] Therefore, the work of managing the Seto Inland Sea serves as an important lesson for us. On the one hand, in the case of managing the Seto Inland Sea, remedies and measures were taken after the environment had already been polluted, which proved to be both expensive and time-consuming. This fact reminds us that it is better to start managing and cleaning up the Bohai Sea before it is too late. On the other hand, the brilliant success of the Seto Inland Sea management plan provides us both hope and methods for managing our Bohai Sea. It is clear that a comprehensive administration approach supported by specially enacted regional legislation in accordance with national laws can reduce financial loss, and save time as well as efforts. Generally speaking, although it is heavily polluted, China's Bohai Sea is currently in a better situation than the Seto Inland Sea used to be.[33] Among the various general laws providing managing principles for the Bohai Sea, there do exist four environmental action plans designed exclusively for the Bohai Sea.[34] What is still lacking is a regional law established specifically for the management of the Bohai Sea. What we can learn from Japan's experience is that plans, important as they are, can by no means take the fundamental place of laws, and general laws seriously lack the precision, specificity, and effectiveness of special laws. Whether the temporary Law concerning Tentative Measures for the Conservation of the Environment of the Seto Inland Sea or the permanent Law concerning Special Measures are considered an integral part of legislation, combining both deterrence and coercive force. In conclusion, if we, just as Japan did, formulate special regional laws for the environmental protection of the Bohai Sea drawing upon the experience from the success of the Law concerning Special

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32 Comments that the Bohai Sea is going to become a dead sea can be found everywhere. For example, Mu Yi, Will the Bohai Sea Become Dead?, *China Economic Weekly*, No. 37, 2004 (in Chinese); Xin Wen, Will the Bohai Sea Become Dead or Empty?, *News Weekly*, 11 May 2004. (in Chinese)

33 Japan industrialized much earlier than China did and thus had environmental problems earlier.

34 The four plans include the Action Plan of Management of Bohai Sea Coastal Resources, the Comprehensive Management Plan for the Bohai Sea, the Clean Ocean Action Plan for the Bohai Sea, and the Bohai Sea Environmental Management Strategies.

Measures, and start working as soon as possible, we can look forward to a clean Bohai Sea in the near future, without consuming too much time or money.[35]

Translator: LIU Ying
Editor (English): Sarah Jenny Stern

35 China has learned an expensive lesson from the failure of managing the Huaihe River, on which it spent 60 billion yuan with no positive results.

A Study on the Legal Status of the Commission on the Limits of the Continental Shelf

FAN Yunpeng*

Abstract: This article summarizes the fundamental work of the Commission on the Limits of the Continental Shelf (CLCS) since its inception, and, based on the United Nations Convention on the Law of the Sea (UNCLOS) and the documents formulated by the CLCS, believes that the CLCS is an expert organization that monitors the implementation of the UNCLOS. In accordance with the general principles of international laws, suggestions made by the CLCS should not be legally binding on the State parties, though such binding force does exist in terms of UNCLOS texts and practices. The work undertaken by the CLCS concerns the balance of interest of various parties, including the international community, coastal States that make submissions, and interested nations. For this sake, the CLCS should improve its working manner and increase its transparency and accessibility as soon as possible.

Key Words: Commission on the Limits of the Continental Shelf; Legal status; Reformation

I. The Establishment of the Commission on the Limits of the Continental Shelf and Its Work Progress

A. The Establishment of the Commission on the Limits of the Continental Shelf and Its Functions

The entry into force of the United Nations Convention on the Law of the Sea

* FAN Yunpeng, Master degree candidate of International Law, Law School, Peking University.

(UNCLOS) is a milestone in the development of the law of the sea. For the first time in history, the UNCLOS lays down the rights and obligations that every State has in territorial sea, contiguous zone, exclusive economic zone, high seas, continental shelf, international seabed area and other regions, and becomes a comprehensive code governing the relationship of rights and obligations that each State has in ocean space. More importantly, the UNCLOS specifies the legal status of each part of the seas and seabed and plays a role in settling disputes between States over ocean sovereignty. Entitlements to all water areas shall be claimed according to the rules of the UNCLOS, including territorial sea which a State has sovereignty over, exclusive economic zone that a State has sovereign rights in, or the international seabed area that is common heritage of mankind. The UNCLOS also stretches out the last shred of hope for ocean enclosure movement to the coastal States. In line with Article 76 of the UNCLOS, the coastal State may establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, and also extend its entitlement up to 350 nautical miles from the baselines on some conditions. Quite different from the coastal State that has inherent entitlement to the continental shelf within 200 nautical miles, the State with a broad continental shelf should submit its application in accordance with the provisions of the UNCLOS and obtain the entitlement with approval. Hence, Article 76 of the UNCLOS and Annex II provide the establishment of the Commission on the Limits of the Continental Shelf (hereinafter "the Commission"), and confer upon the Commission the power over affairs concerning the extended continental shelf. During June 16-20, 1997, the 21 elected members of the Commission held the first session of the Commission, and elected Mr. Yuri Borisovitch Kazmin (Russian Federation) by acclamation as its Chairman.[1] Since then, the Commission officially came into operation and performed its important duties conferred by the UNCLOS.

According to Article 3, Annex II of the UNCLOS, the Commission has two functions: first, to consider the data and other material submitted by coastal States concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nautical miles, and to make recommendations in accordance with article 76 and the Statement of Understanding adopted on 29 August 1980 by the Third United Nations Conference on the Law of the Sea; second, to provide

1 UN Doc. CLCS/1.

scientific and technical advice, if requested by the coastal State concerned during the preparation of the data said above. These two functions work as an organic whole and neither of them can be underestimated. The first function represents the substantive work of the Commission as it directly concerns whether the entitlement claimed by the coastal State to the outer continental shelf can be realized and, on the other hand, also decides whether benefits enjoyed by the international community can be effectively guaranteed. The second function, to a certain extent, can be regarded as the obligations borne by the Commission to the State Parties. The scientific and technical advice not only is an assistance to relevant coastal States, but also reflects the legal status of the Commission from a side view.

Considering the importance of its status and functions, the birth of the Commission attracted great attention and expectation in the international community. At the same time, the legal regime on which it was established is brand-new and the scientific and technical difficulties that it is confronted with are very complicated. Both the Commission itself and the work on outer continental shelf that it deals with will continuously develop and reform in practices.

B. Work Situation of the Commission

So far, the Commission has held 19 sessions and put various works on track. In the past decade, the Commission kept strengthening its construction on one hand, working to provide clear guidelines for the conduct of sundry work and the participation of State Parties; and on the other hand, the Commission actively performed the two important functions it shoulders, accumulating precious experience through constant explorations.

1. Formulate and Perfect Code of Conduct

Since its first session, at which it considered the Draft Rules of Procedure prepared by the Secretariat, the Commission has attached great importance to the formulation of rules of procedure. During its second session, the Commission adopted the Rules of Procedure of the Commission (CLCS/3) and Modus Operandi of the Commission (CLCS/L.3). By its ninth session, the Commission formulated the Internal Procedure of the Subcommission of the Commission. These three documents, as amended or revised afterwards, became the procedural standards guiding the work of the Commission and the Subcommission. During the 11th session, the Commission was aware of the necessity to undertake a review of the

three basic documents and propose editorial amendments to make them consistent.[2] The currently existing Rules of Procedure of the Commission (CLCS/40) embodies amendments and additions adopted by the Commission as of April 30, 2004. Annex III to the present Rules replaced the Modus Operandi of the Commission and the Internal Procedure of the Subcommission of the Commission. Moreover, the Commission adopted the Internal Code of Conduct for Members of the Commission (CLCS/47) at its 16th session, setting ethical standards expected of the members of the Commission, which include the duty to preserve integrity, independence and impartiality, confidentiality, the duty to avoid conflict of interest, the duty to act independently, and disclaimer.

2. Accept and Consider the Submissions Made by State Parties

The legal regime concerning the outer continental shelf established in the UNCLOS is new both to the Commission and to the coastal States ready to submit applications. Additionally, relevant provisions in the UNCLOS are too obscure to provide scientific and technical guidelines at length. Therefore, the foundation of the Commission did not immediately unveil the applications of the coastal States on the outer continental shelf, while the Commission also took the opportunity at this stage to formulate sophisticated scientific and technical guidelines to assist coastal States in preparing their submissions and provide an important scientific and technical reference for the consideration of these submissions and the preparation of the Commission's own recommendations. Since 1997, the Commission conducted the preparation in two stages – background research along disciplinary and interdisciplinary lines and the preparation of draft guidelines. At the fifth session held in 1999, the Scientific and Technical Guidelines of the Commission (CLCS/11) (hereinafter "the Guidelines") were eventually adopted. Considering the importance of the Guidelines to coastal States in preparing their submissions, it was decided at the 10th session of State Parties that, in the case of a State Party for which the UNCLOS entered into force before 13 May 1999, it is understood that the ten-year time period referred to in Article 4 of Annex II to the UNCLOS shall be taken to have commenced on 13 May 1999. Due to this decision, the first deadline for coastal States to submit their applications was extended from 2004 to 2009.[3]

On December 20, 2001, the Russian Federation made a submission to the

2 UN Doc. CLCS/34.
3 UN Doc. SPLOS/72.

Commission. This was the first submission received by the Commission since its establishment. The submission contains the data and other information on the proposed outer limits of the continental shelf of the Russian Federation beyond 200 nautical miles in Barents Sea, the Sea of Okhotsk and the Central Arctic Ocean. The Secretary-General of the United Nations sent a note verbale to all member States regarding the coordinates of the outer limits of the continental shelf proposed by Russian, and received the communications in respect hereof from Canada, Denmark, Japan, Norway and the United States of America. The Commission took an emphatic review over the Russian submission at its tenth session and established a subcommission chaired by Galo Carrera Hurtado. After discussions, the subcommission submitted recommendations to the eleventh session of the Commission. The Commission made several amendments and adopted the recommendations by consensus. These recommendations were submitted to the Russian Federation and to the Secretary-General of the United Nations.[4] The recommendations contain the results of the examination of the data and information submitted by the Russian Federation, with particular reference to the question of the entitlement of the Russian Federation to the continental shelf beyond 200 nautical miles, as well as whether the formulae and the constraints had been applied as required by Article 76 of the UNCLOS. The Commission presented its recommendations to the Russian Federation regarding the four areas relating to the continental shelf extending beyond 200 nautical miles contained in the submission.[5] The Deputy Minister for Natural Resources of the Russian Federation transmitted a letter to the Chairman of the Commission on June 3, 2003, giving questions and comments relating to the Commission's recommendations with regard to the submission by the Russian Federation. The Commission agreed with the draft response prepared by the members of the subcommission and transmitted the response to the Deputy Minister for Natural Resources of the Russian Federation.[6]

Currently, the submissions under the consideration or to be reviewed by the Commission are from Brazil (2004), Australia (2004), Ireland (2005), New Zealand (2006), joint submission by France, Ireland, Spain and the United Kingdom of

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4 At http://www.un.org/Depts/los/clcs_new/submissions_files/submission_rus.htm, 11June 2007.

5 UN Doc. A/57/57/Add. 1.

6 UN Doc. CLCS/39.

Great Britain and Northern Ireland (2006), Norway (2007), and France (2007).[7] On January 16 and July 9, 2004, the Division of Ocean Affairs and the Law of the Sea of the United Nations, respectively, sent a note verbale, requesting coastal States to indicate the projected timing of their potential submissions to the Commission. According to the responses it received, the Commission would receive at least ten submissions prior to 2009.[8] We can see that the Commission will be confronted with increasingly heavy and sophisticated work to consider and make recommendations for submissions from coastal States in the coming period.

II. Legal Status of the Commission

A. Status of the Commission in International Law

1. The Commission Is Not an International Organization

After World War II, international organizations became an important player in international communities and produced profound influence on the development of international law and the construction of international order. The status of international organizations has become a more complicated issue along with changes in international situation and diversification of multilateral cooperation among countries. Scholars and international institutions, however, both particularly emphasize that independent legal personality is the fundamental attribute of an international organization. Professor Schermers believes that, "international organizations are defined as forms of cooperation founded on an international agreement, having at least one organ with a will of its own and established under international law."[9] During the ongoing preparation of the Draft Articles on the Responsibility of International Organizations, the International Law Commission also points out that "'international organization' means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality."[10] In this view, the Commission, though established by a treaty and governed under international laws, cannot be regarded as an international organization due to the lack of independent legal personality. This

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7 At http://www.un.org/Depts/los/clcs_new/clcs_home.htm, 13 June 2007.
8 UN Doc. CLCS/39, CLCS/42.
9 H. G. Schermers and N. M. Blokker, *International Institutional Law: Unity within Diversity*, Leiden: Martinus Nijhoff Publishers, 2003, p. 26.
10 UN Doc. A/58/10.

is not only to pinpoint the definition, but also to place emphasis on how to regard the power and authority the Commission may have. An international organization may have the implicit power necessary to perform functions specified in its charter, and interpret the charter serving as its cornerstone more purposefully.[11] Therefore, the Commission, because it is not an international organization, lacks freedom and flexibility since it must conduct its work strictly in accordance with the clear authorization of the UNCLOS.

2. The Commission Is a Treaty Body Established by the UNCLOS

The Commission is established pursuant to Article 76 of the UNCLOS and has the function to supervise the implementation of Article 76(8). While the Commission has no independent legal personality, it has a will of its own. It urges State Parties to implement relevant provisions of the UNCLOS through recommendations as its own working methods. Similar to other treaty bodies, the Commission does not have its own secretariat and separate financial source, and largely relies on the UN's Secretariat and financial allotments. Generally speaking, either the charter of some international organization or the organ under an international organization establishes a treaty body. The Commission is obviously an exception. The Commission was established by the General Assembly of the State Parties of the UNCLOS and an organ with the assistance from UN Secretariat and particularly the Division of Ocean Affairs and the Law of the Sea. Different from the other two organs (International Tribunal for the Law of the Sea and the International Seabed Authority) established by the UNCLOS at the same time, the Commission is more like a steadfast guardian of the UNCLOS instead of a positive practitioner. This is partly because the other two organs are international organizations with independent legal personality having more sufficient resources and higher initiative in their work, and partly because provisions of the UNCLOS in the charge of the Commission are voluntarily introduced by interested State Parties and the Commission merely plays a role of judgment and supervision from the perspective of the UNCLOS. Again, this proves that the Commission need not and should not voluntarily involve itself in the process of implementation of the UNCLOS by State Parties. Instead, it should comment and supervise in strict accordance with the authorization of the UNCLOS.

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11 J. Klabbers, *An Introduction to International Institutional Law*, Cambridge: Cambridge University Press, 2002, pp. 67, 98.

3. The Commission Is an Expert Organization Established by the UNCLOS

There are generally two types of treaty bodies: the first type includes those consisting of governmental officials of State Parties, represented by the general assembly of multilateral environmental agreements, for example, the United Nations Framework Convention on Climate Change; the second type includes those consisting of experts from fields concerned, represented by the treaty body of international human rights, for example, the Committee on the Elimination of Racial Discrimination. Comparatively speaking, the Commission is the second type because its members are experts with independent identities and do not speak for any governments.[12] The first type of treaty bodies reflects to a greater extent intergovernmental wills as its members are from governments of State Parties. It is a form of intergovernmental, international, and multilateral cooperation in a broad sense. Their task is usually to elaborate on the basic framework established by a multilateral treaty and carry out the principled consensus previously reached by State Parties via regular meetings. As a result, this type of organization can more easily and directly reflect the wills of State Parties in view of its staff composition, thus facilitating the formation of new consensus. On the other hand, their tasks also require them to continue efforts to achieve goals provided in the treaty. As an expert organization, the Commission has more independence. While broad representativeness is considered to the greatest extent during the selection of the Commission's members, all members of the Commission hold their positions individually. They neither represent any government nor receive instructions from any government. They express their opinions with their expertise and review whether the act of a State Party claiming outer continental shelf is consistent with the Convention.[13]

B. Force of Recommendations Made by the Commission

1. Due Force of the Commission's Recommendations

Of the two functions undertaken by the Commission, making recommen-

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12 Discussion on the nature of different types of treaty bodies, please see Rao Geping and Hu Qian, Organizational Types of Multilateral Cooperation among Countries in the Era of Globalization, in Rao Geping ed., *International Organizations in the Process of Globalization*, Beijing: Peking University Press, 2003, pp.70~80. (in Chinese)

13 UN Doc. CLCS/1.

dations to a State Party concerning its submissions is a task that can reflect the Commission's will and generate substantial influence. Because of their external force, it is particularly important to determinate the nature of these recommendations in international laws. Let's carry out a preliminary analysis to find the due force of such recommendations based on the status of the Commission. First, according to interpretation of the UNCLOS's text, a "recommendation" does not contain any legally binding force. It is merely an expert comment given by the Commission to the submission of a coastal State, and it will be totally up to the coastal State's discretion and choice as to how much influence it will eventually produce. Second, the Commission, as an expert organization, undertakes the responsibility to supervise the implementation of the UNCLOS, but it is neither a reflection of the will of any State Party, nor the product of consistent will of State Parties. Therefore, any recommendation made by it should not have any compulsory binding force over the State Party making the submission. The Commission's recommendations may be deemed a way to facilitate the effective implementation of the UNCLOS instead of a measure with binding force. The recommendations are authoritative expert opinions from third parties provided to States making submissions and other State Parties. Third, in view of current practice of other expert treaty bodies, it will be very difficult to gain the general recognition of the international community to the binding force of the Commission's recommendations. For example, the treaty body on international human rights may give general recommendations or comments based on the review of the report submitted by a State Party. These recommendations or comments have no legally binding force. They are drafted to enhance the communication between the treaty body and its State Parties, give domestic interested groups of the State Parties access to know and improve issues on human rights, and mobilize the power of the international community, including expert organizations, to urge and help State Parties to effectively perform their obligations under human rights treaty. In conclusion, recommendations of expert treaty bodies are a "soft" supervision mechanism and are not statutorily compulsory and punitive. They rely on their expert authority and the respect of the international community to boost the effective implementation of the treaty. Thus it can be seen that the Commission is an organization consisting of experts in the field of geology, geophysics or hydrography and having no due status and capability to force State Parties to involuntarily accept its recommendations.

2. Actual Force of the Commission's Recommendations

After the analysis from theoretical perspective, we should now examine the actual force of the Commission's recommendations with reference to specific provisions of the UNCLOS and the practices of the Commission. First, the Convention does not directly define the force of the Commission's recommendations. Instead, it states that "[t]he limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding." This provision does not explain the force of the recommendations, but says the limits of shelf established with the adoption of these recommendations by a coastal State shall be binding. Presumably, the targets "bound" hereby include not only coastal States but also other State Parties. In other words, a delimitation decision made according to the Commission's recommendations should be recognized and respected by other State Parties. This shows that the Commission's recommendations are critical as to whether the international community can recognize the delimitation of a coastal State. We should also note that the UNCLOS does not require coastal States to delimitate completely in accordance with the Commission's recommendations, and merely requires coastal States to delimitate on the basis of these recommendations. Herein lies the problem about how to understand the phrase "on the basis of these recommendations." In the *Beef Hormone Dispute (the United States and Canada v. European Communities)* lodged to the WTO dispute settlement system, the appellate body disagreed with the Panel's interpretation that "based on" meant the same thing as "conform to," explaining that the animal and plant inspection and quarantine measures which are based on a given international standards do not require the achievement of the same level of sanitary protection for two parties.[14] Similarly, the UNCLOS does not require coastal States to use the Commission's recommendations as their delimitation standards and allows coastal States to exercise discretion. Additionally, no other people other than State applicants and the Secretary-General of the United Nations know about the specific content of the Commission's recommendations. They don't know if the recommendations contain clear-cut delimitation methods or propose improvements in principles. If the Commission's recommendations provide some factors that a coastal State should consider in revising its submissions, as the Secretary-General said in the report of Oceans and the Law of the Sea,[15] these

14 WT/DS26/AB/R, WT/DS48/AB/R.
15 UN Doc. A/57/57/Add.1.

recommendations accordingly cannot be the delimitation submission. On the basis of the preceding analysis, we believe that the UNCLOS confers quite high authority upon the Commission's recommendations, making them the basis that coastal States use to establish binding outer limits of the continental shelf beyond 200 nautical miles. Meanwhile, the UNCLOS doesn't completely deprive the coastal States of their right to make final decisions based on the Commission's recommendations.

Second, judging by the rules of procedure of submission to the Commission, the Rules of Procedure of the Commission,[16] the Commission always has effective supervision over whether or not a coastal State has adopted its recommendations, making these recommendations too important to be ignored. When a coastal State makes a submission, the Commission would usually give recommendations for revision to the coastal State unless the Commission totally agrees with the submission. The coastal State, whether or not it expresses its intention to adopt the recommendations, must make a revised or new submission to the Commission and then go through the consideration of the Commission again. In the case that the Commission approves the revised or new submission, the coastal State may establish outer limits thereunder. The Commission will make further recommendations for revision if it thinks the revised or new submission does not completely adopt previous recommendations. For this sake, the Commission actually has the final power to judge if a coastal State has accepted its recommendations. We can say that the Commission uses its power of giving recommendations to continuously increase the *de facto* binding force of its recommendations.

Third, judging by the considerations of the Commission on the submission of the Russian Federation, the Commission's recommendations have an actual impact on the success of a coastal State's delimitation. At present, the Commission completed only the first consideration of the first submission it received and gave recommendations. According to the summary of recommendations disclosed by the UN Secretary-General in his report, we can see that the Commission required the Russian Federation to submit additional information on certain elements of its submission and consider the examination results mentioned in the Commission's recommendations.[17] Put simply, the first submission of the Russian Federation did not obtain the final approval of the Commission and needed to be further improved

16 UN Doc. CLCS/40.
17 UN Doc. A/57/57/Add. 1.

and revised. In fact, Russia seriously took the Commission's recommendations after receiving them and submitted to the Commission its comments and requested advice through governmental channels. The Commission's preliminary practices show that the coastal States give due respect and attention to the Commission's recommendations and make amendments to their submissions with reference to these recommendations. We must wait until Russia makes a new submission or the Commission makes further recommendations to see to what extent Russia has accepted the Commission's recommendations.

In conclusion, the Commission's recommendations are the indispensable reference to determine whether the submission of a coastal State is final and binding, though they are not the final judgment on whether the submission is appropriate.

III. Reform on Working Method of the Commission

The Commission is a very young organization, facing all-new tasks. A lot of different voices from the international community have been heard on how the Commission will effectively carry out its work since its inception. Particularly when there are increasing coastal States claiming their entitlements in outer continental shelf, voices speaking for different interest groups have had bitter arguments over the positioning and transparency of the Commission.

A. Active Investigation and Neutral Judgment

1. Whose Interest Will the Commission Represent?

As an organization established by the UNLCOS, whose interest will the Commission represent? The answer to this question will directly affect the perspective from which the Commission will be viewed. There are primarily three interest groups concerning the delimitation of the outer continental shelf. The first group consists of coastal States claiming entitlements in the outer continental shelf. If the entitlements in the outer continental shelf of the States with a broad continental shelf can be admitted, these States then may extend their sovereign rights to the area of continental shelf beyond the baseline of their territorial sea not exceeding 350 nautical miles. The second group is comprised of interested States that have statutory or historical rights in areas of the outer continental shelf claimed by any other country. These States have sovereignty or sovereign rights over certain

areas, which will overlap with other States' claiming area of outer continental shelf. The scope of these sovereignty or sovereign rights will inevitably be affected once the entitlement of the other State has been recognized. The third interest group is the international community, also the subject of rights in international seabed areas as the common heritage of mankind. If the area of outer continental shelf in which a coastal State makes a submission does not overlap with any area under the jurisdiction of another State, such area is a part of international seabed area beyond the jurisdiction of any State. In this case, the extension of the outer continental shelf of a coastal State means the reduction of the international seabed area, thus affecting the gain or loss of the overall interest of the international community. While the interests of each group are clear, it is still difficult to determine whose interest the Commission represents. First, one of the Commission's functions is to supervise whether the coastal States make submissions pursuant to the requirements of the UNCLOS. For this reason, it is definitely not the active player driving the expansion of the outer continental shelf but, on the contrary, a loyal guardian of the UNCLOS. Second, the Commission does not represent the interests of those States affected by claims of outer continental shelf. Article 76(10) of the UNCLOS provides that: "The provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts". The Commission judges whether the submission of an applicant meets certain criteria, and does not question if the result conflicts with the interests of any other State. Such conflict of interest should be settled between the concerned parties only. Finally, the Commission cannot completely represent the interests of the international community in international seabedareas. To some degree, the Commission's recommendations with respect to the submission of a coastal State can be deemed a safeguard to the due scope of the international seabed areas. However, this is just the objective effect of the Commission's work and not incorporated into objectives of the system design. The standards in Article 76 of the UNCLOS for the establishment of the outer continental shelf are obscure and ambiguous. The Commission adopted the Guidelines to make it more operable. Though the content of the Guidelines is not a powerful interpretation of the UNCLOS and cannot change the true intention of the UNCLOS, it is actually a gauge measuring the judgment. It remains unknown whether effective protection of the international seabed areas is taken into consideration during the preparation of these Guidelines. Moreover, the Commission did not arrange bodies that can represent interests of the international community, such as the International Seabed

Authority, to participate in the consideration process. The Commission currently notifies the International Seabed Authority only when the submission of a coastal State is final and binding. This means the bodies representing the interests in international seabed areas have no channel to influence the Commission's decision.

2. How to Position: Administrative or Judicial?

Since the Commission does not positively represent the interests of any interest group, the ideal position for it will be a judicial organization. As a judicial organization, it can impartially consider the disputes among different interest groups and settle these disputes by certain standards. At the same time, if the Commission has the authority of a judicial organization, it surely can get the ability to make binding recommendations and hence eliminate the distance from its *de facto* force. However, it is totally up to the will of the State Parties as to whether the Commission will be given the position of a judicial organization. Currently, major international judicial organizations gain their jurisdiction based on the agreement of disputing parties. Consequently, the upgrade of the Commission to a judicial organization will certainly affect its jurisdiction. Furthermore, the fact that the UNCLOS establishes the International Tribunal for the Law of the Sea, a judicial organization accepting extensive cases, at the same time when establishing the Commission indicates that the State Parties are not willing to render issues concerning the outer continental shelf completely to judicial settlement, or they believe these disputes have involved technical issues too complicated to be settled merely through judicial judgment. Ideally, the Commission would be positioned as a judicial organization but the reality of the international community does not allow such fundamental reform. As such, will it be appropriate to position the Commission as an administrative organization? A coastal State makes a submission to the Commission and the latter gives recommendations after consideration. These practices are quite similar to the operation of an administrative organization. It conforms to the basic principle for the setup of an administrative organization that the Commission, established by the UNCLOS reflecting the will of State Parties, handles the submissions of coastal States. However, there are some shortcomings. First, the application of a coastal State is closely connected to its interest and will also produce influence on other interested parties. The Commission should actively access information for comprehensive consideration rather than simply being restrained by the information provided by the coastal State. Second, the success or failure of the application of a coastal State will directly lead to gain or loss of its interest. From the perspective of modern rule of law, rights of parties concerned

to have judicial relief, or at least the right to express opinion in administrative review, should be guaranteed. In conclusion, since it is not yet practical to position the Commission as a judicial organization, the Commission should increase its transparency and involvement in its current administrative position, making it into a quasi-judicial organization step by step.[18]

B. Strict Confidentiality and Proper Publicity

1. Continuous Attention to Confidentiality

The Commission has paid great attention to confidentiality since its establishment. In the Commission's work, confidentiality usually is required for two types of targets: 1) the information noted as confidential in the submission made by a coastal State; and 2) the content of the Commission's meetings. The confidentiality of information submitted by a coastal State should conform to the rules of confidentiality in Annex II of the Rules of Procedure. A coastal State has the right to determine any information submitted by it as confidential and the final power to decide on the release of confidentiality. The Commission should perform its obligation of confidentiality in its access to and review of relevant confidential information, and warrant it will not disclose such information during and after its term of office. In the application, a coastal State should submit relevant data to the UN Secretary-General and the Commission, and the UN Secretary-General shall send a note verbale to State Parties notifying them of the summary of the submission. Given that the Commission attaches great importance to the confidentiality of coastal States' information, it desires to obtain immunity against any potential liability arising from the breach of confidentiality. After the study in this issue, the Commission consulted with the legal counsel and the deputy secretary-general in charge of legal affairs of the United Nations, and finally decided that in dealing with such classified material and in the exercise of all their other functions, the members of the Commission shall enjoy the privileges and immunities as experts on mission for the United Nations in accordance with Article VI of the Convention on the Privileges and Immunities of the United Nations.[19] As to confidentiality of the Commission's meetings, Article 23 of the Rules of

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18 Ron Macnab, The Case for Transparency in the Delimitation of the Outer Continental Shelf in Accordance with UNCLOS Article 76, *Ocean Development and International Law*, Vol. 35, 2004, pp. 1~17.

19 UN Doc. CLCS/5.

Procedure provides that, "[t]he meetings of the Commission, its subcommission and subsidiary bodies shall be held in private, unless the Commission decides otherwise." To date, the Commission held only one open meeting on May 1, 2000 with the purpose to address the most important and challenging issues related to the delineation of the continental shelf pursuant to Article 76 of the UNCLOS and related laws and regulations.[20] Therefore, other meetings of the Commission are held in private, and the public can have a rough idea of the meeting via the statement by the Chairman published after each meeting. In addition, the coastal State which has made a submission to the Commission may send its representatives to participate in the relevant proceedings. However, the Rules of Procedure defines the "relevant proceedings" in a limited manner. That is, representatives of the submitting coastal State have no right to participate in meetings at which the Commission reviews and makes recommendations. In this regard, members of the Commission held different opinions at the eleventh session. Mr. Kazmin thought that representatives of coastal States have the right to participate in all proceedings, while the Chairman disagreed. Finally, the disagreement could not be settled through negotiation and at last the conclusion that coastal States have no right to participate in the final review meetings of the Commission was maintained by a vote of 15:3. Mr. Kazmin still insisted on his opinion and hoped that his opinion could be recorded and filed because he thought the Commission's decision went against the UNCLOS.

2. State Parties' Craving for Publicity

The practice of confidentiality upheld by the Commission has caused many accusations and complaints. As said above, the delimitation of outer continental shelf involves the interests of many parties, and the Commission desires to maintain a balance among those interests and win the trust of these parties, which requires more openness and transparency. Despite this, the existing emphasis on absolute confidentiality does allow adequate protection over the submitting coastal States, and leave the determination of confidential scope to them. At the same time, the confidentiality of the Commission's meetings gives a dual insurance for the interest of submitting coastal States. Consequently, however, the interests of other interested States and the international community cannot be sufficiently guaranteed. They have no ordinary channel to participate in the Commission's review or find adequate evidence from scarce published information to evaluate

20 UN Doc. CLCS/26.

the reasonableness of the submission and legitimacy of the Commission's recommendations. In the shortage of participation and information, though the Commission has a high professional reputation, stakeholders cannot trust the reasonableness of the Commission's decisions and continuously challenge the authority built by the UNCLOS for the Commission.[21] In fact, it is very beneficial to increase the awareness of State Parties in the Commission's work to some degree. While a coastal State learns about the practices of a submitting coastal State and the attitude of the Commission, it may on one hand accumulate experience, follow customary practices to draw up its own submission and thus ensure the consistency and predictability of the Commission's decisions. On the other hand, the State Party may have access to adequate information to evaluate the legitimacy of the submission and recommendation, conducive to supervise the Commission in making improvements and strengthen the Commission's credibility. In addition to the information in submissions that needs to be kept confidential, the Commission may open quite a lot of information to other State Parties. The Commission should build a positive communication mechanism among interested parties, achieving resource sharing and mutual trust. Facing the international community in a more open manner, the Commission will more easily learn and adopt the latest technical achievements, preventing hesitation in making recommendations due to limited technical information.[22]

3. More Extensive Participation

Among the interest groups mentioned above, only the submitting States and directly interested States may participate in the Commission's consideration at present. Pursuant to Annex II of the UNCLOS and the Rules of Procedure, the Commission will consider the communications from States other than the submitting State only when a dispute exists between States with opposite or adjacent coasts arises or there is a pending land or ocean dispute. This actually excludes other countries from expressing their opinion as joint owners of international seabed areas when there is no direct dispute. After Brazil made its submission, the United States expressed its opinion to the Commission in a letter.

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21 Donald R. Rothwell, Building on the Strengths and Addressing the Challenges: the Role of Law of the Sea Institutions, *Ocean Development and International law*, Vol. 35, 2004, p. 131.

22 Ron Macnab, The Case for Transparency in the Delimitation of the Outer Continental Shelf in Accordance with UNCLOS Article 76, *Ocean Development and International Law*, Vol. 35, 2004, pp. 1~17.

Nevertheless, the Commission believed that there was no pending ocean dispute between the United States and Brazil at the fourteenth and fifteenth sessions, and thus gave no consideration to the opinion of the United States. This conduct is not helpful to maintain the overall interest of the international community. A process can guarantee the reasonableness and legitimacy of a decision only when it sufficiently absorbs opinions of the interested parties.

IV. Conclusion

The Commission is a newly established international organization, and performs its functions in the face of dual challenges in scientific and technical aspect and international laws. The self-perfection of the Commission must be a gentle evolving process. However, as the delimitation made pursuant to the Commission's recommendations is final and binding, and these recommendations and delimitation decisions will not be changed through judicial review or other approaches recognized by international laws in the foreseeable future, State Parties of the UNCLOS and the Commission must cooperate closely to speed up the reform on the Commission's working method and thus have the ability to complete the consideration on delimitation of the outer continental shelf concerning the major interest of relevant parties, warranting the authority of relevant delimitation in the future.

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Issues in the Procedure for the Constitution of Limitation Fund for Maritime Claims and Their Settlement

XU Honglin* WANG Jianlan**

Abstract: The procedure for the constitution of limitation fund for maritime claims provided in the Special Maritime Procedure Law of the People's Republic of China has given rise to multiple disputes and confusions in practice. This is caused by the failure to handle the relationship between the procedure of limitation fund for claims and the procedure of action concerning the limitation of liability of claims in relevant legislation. After analyzing the purpose of the procedure for the constitution of a limitation fund, the authors conclude that the procedure for the constitution of a fund is only a link in the application procedure concerning the limitation of liability. On this basis, the authors propose that the procedure of application for action concerning the limitation of liability should come before the procedure of the constitution of a fund.

Key Words: Limitation of liability for maritime claims; Procedure for the constitution of a fund; Procedure for instituting an action

In maritime judicial practice, the procedure for the constitution of a limitation fund for maritime claims (hereinafter "the procedure of fund") provided in Chapter IX of the Special Maritime Procedure Law of the People's Republic of China has provoked more questions than answers, with a certain scholar suggesting in only one

* XU Honglin, master candidate majoring in maritime law of Dalian Maritime University.
** WANG Jianlan, master candidate majoring in maritime law of Dalian Maritime University.

article that there are as many as ten questions.[1] In this article, the authors claim that the most fundamental issue is whether or not a conclusion shall be made with respect to the applicant's entitlement to the right of limitation of liability for claims before the procedure for the constitution of a fund.

I. The Purpose of the Procedure for the Constitution of a Fund under the Special Maritime Procedure Law

During the process of drafting the Special Maritime Procedure Law, opinions varied as to whether Chapter IX should be provided as a procedure of limitation of liability for maritime claims or merely as a procedure for the constitution of a limitation fund for maritime claims.[2] This involves an issue as to whether or not a review should be conducted to determine an applicant's entitlement to a limitation of liability in the procedure provided in Chapter IX and whether a conclusion should be made in this regard. Upon repeated discussion, the Special Maritime Procedure Law adopted the latter opinion, as the legislators aimed to protect any ship or property owned by the person liable from being detained before the substantive responsibility was determined through the procedure for the constitution of a fund. Article 214 of the Maritime Law provides that: "Where a limitation fund has been constituted by a person liable, any person having made a claim against the person liable may not exercise any right against any assets of the person liable. Where any ship or other property belonging to the person constituting the fund has been arrested or attached, or, where a security has been provided by such person,

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1 Zhang Xianwei, Confusions Arising from Existing Procedures and Rules Concerning Limitation of Liability in Judicial Practice and Their Settlement, at http://www.cc-mt.org.cn/hs/explore/exploreDetial.php?sId=2004, 25 February 2007 (in Chinese). For instance, should the person liable constitute a fund provided that he is entitled to a limitation of liability? Does the person liable with a right to limit his liability have to constitute a fund? Can the person liable independently bring an action with the maritime court with respect to his entitlement to limitation of liability? Does the person liable with a right to limit his liability have to bring an action concerning limitation of liability? Can the person liable having constituted a fund achieve the anticipated purpose? If a fund has not been constituted, can the registration of creditor's rights and the action concerning claims be proceeded? If the nature of maritime creditor's rights is not yet clear, can the registration of creditor's rights be proceeded?

2 Jin Zhengjia ed., *Comment on the Maritime Procedure Law*, Dalian: Dalian Maritime University Publishing House, 2001, p. 406 (in Chinese). The rationality behind the first opinion is roughly as follows: First, conduct a substantive examination to determine whether the applicant is entitled to the limitation of liability. Only after the applicant has been allowed to limit his liability for claims can the limitation fund be constituted.

the court shall order without delay the release of the ship arrested or the property attached or the return of the security provided". The system of limitation of liability for maritime claims is specifically designed to protect the owner, operator, charterer, salvor and insurer of the ship and such special protection is procedurally guaranteed. In selecting the second opinion, the legislators have considered that the application for the limitation of liability is primarily procedural and a conclusion cannot be made without the participation of the creditor and the proceedings of the trial. However, a question will arise, i.e. during the substantive hearing concerning liability dispute, whether or not the issue of the limitation of liability of the person liable should still be under review. If a review is no longer underway, the previous procedure of limitation of liability will be equal to the substantive judgment. The judgment permitting the creation of a fund and the relevant substantive judgment will be made at approximately the same time, and because of this it will be difficult for the person liable to protect, by means of the constitution of a fund, his ship or other properties from being detained before liability is determined. Accordingly, it would be unlikely to realize the purpose of the Maritime Substantial Law of protecting the owner, operator, charterer, salvor and insurer of the ship, and the constitution of the fund would lose a large portion of its significance. However, if it is deemed that the limitation of liability shall be further tried, then the issue of the limitation of liability, as defined in the procedure of limitation of liability, may contradict the conclusion made during the substantive hearing and cause conflict. If a party to the procedure of limitation of liability appeals and a second ruling is made, it may be the case that the first-instance ruling could deny the second-instance ruling. As such, the procedure of the constitution of a fund and the substantive hearing, designed to determine whether the person liable is entitled to a limitation of liability, shall be separated, so as to conform to the regulations of the substantial law.[3]

In summary, the legislators of the Special Maritime Procedure Law have selected the mode of fund constitution coming before the procedure of limitation of liability primarily for the purpose of protecting the ship or other properties owned by the person liable from being detained before his liability is ascertained, which is the significance of the constitution of a fund.

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3 Jin Zhengjia ed., *Comment on the Maritime Procedure Law*, Dalian: Dalian Maritime University Publishing House, 2001, pp. 407~408. (in Chinese)

II. Confronting the Challenges in the Practice of the Procedure for the Constitution of a Fund

In accordance with Article 101(3) of the Special Maritime Procedure Law[4], cases involving the constitution of limitation funds for maritime claims can be divided into two categories: an application filed before an action is brought and an application filed during legal proceedings. However, filing an application for the constitution of a fund does not mean that the fund has been constituted. The Special Maritime Procedure Law and the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Special Maritime Procedure Law of the People's Republic of China stipulates that: "After a ruling allowing an applicant to constitute a limitation fund takes effect, the applicant shall constitute a limitation fund for maritime claims with the maritime court within three days".[5] In other words, the constitution of a fund shall proceed only after the ruling permitting the applicant to constitute a limitation fund has taken effect. In this regard, there are two different views: First, some may argue that the applicant ought to constitute a fund with the court immediately after the court has accepted the application and has passed the relevant formal examination. Second, others argue that the applicant may constitute a fund with the court only when stakeholders do not object or raise an invalid objection.[6] Ultimately, the second opinion became law, primarily to balance the interests of the ship owner and the claimant and in order to prevent the ship owner from improperly constituting a fund to avoid his liability.

According to regulation, the court must carry out the corresponding substantive examination before giving a ruling. Although this is the case, it often takes longer than two months from the filing of an application to the determination of a ruling.[7]

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4 Article 101(3) of the Special Maritime Procedure Law of the People's Republic of China: "An application for constitution of a limitation fund may be filed either before an action is brought or during the legal proceedings, but no later than the judgment of the first instance is given".

5 Article 84 of the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Special Maritime Procedure Law of the People's Republic of China states that: After a ruling allowing an applicant to constitute a limitation fund for maritime claims takes effect, the applicant shall constitute a limitation fund for maritime claims with the maritime court within 3 days.

6 Pan Yan and Yan Junmin, Procedure for the Constitution of a Limitation Fund for Maritime Claims in China, *Shipping Management*, No. 3, 2005. (in Chinese)

7 Guan Zhengyi, Relevant Issues Concerning the Procedure for the Constitution of a Limitation Fund for Maritime Claims, *Annual of China Maritime Law (Vol. 2002)*, Dalian: Dalian Maritime University Publishing House, 2003, p. 308. (in Chinese)

If a severe marine accident were to occur, the best method for protecting the rights of the victim is to apply to the maritime court for detaining the concerned ship. If the owner of the ship chooses to prevent the detainment of the ship and its related property or remove the detention by applying for the constitution of a limitation fund before an action is brought, then there are different results that could occur: First, if the ship has not been detained, then the ship has to hide itself without ever berthing on any harbor for at least two months from the date on which an application for the constitution of a fund was filed. The ship will face a restricted navigable area and schedule, especially if the ship is a coastal cargo ship or has been navigating a fixed route. Second, if the ship has been detained, then the ruling permitting the constitution of a fund will take more than two months, resulting in its detainment for at least two months. Therefore, no matter what the outcome, the result is unfavourable for the owner of the ship. In practice, the best method for the ship owner to reduce further loss caused by the detention of the ship is to provide adequate maritime security. Even though providing maritime security may be costly, the constitution of a fund is also rather costly. Furthermore, the constitution of a fund takes at least two months, and the procedure is much slower and more complicated than that needed to provide maritime security. Therefore, applying for a limitation fund before an action is brought cannot effectively prevent or remove the risk that the ship or other properties of the person liable from being detained. The most practical option is to provide maritime security while simultaneously applying for the constitution of a limitation fund. The provision of maritime security helps to release the detained ship in a timely manner, however in reality it is an impractical tool to prevent the ship and related properties of the person liable from being detained or to remove such detention through the application of a limitation fund before an action is brought.[8]

In a court action, the primary purpose of applying for the constitution of a limitation fund is to require the release of provided security exceeding the limitation of liability, however this is impractical. In practice, even if a fund has been constituted, some detained ships or security still will not be released or returned for the following reasons: First, in instances where the fund cannot cover all maritime claims and the nature of the creditor's maritime claim rights remains unclear, or in

8 Guan Zhengyi, Relevant Issues Concerning the Procedure for the Constitution of a Limitation Fund for Maritime Claims, *Annual of China Maritime Law (Vol. 2002)*, Dalian: Dalian Maritime University Publishing House, 2003, p. 308. (in Chinese)

instances where the creditor's right constitutes a non-restrictive right as regulated in Article 208 of the Maritime Law, the maritime court may not release the detained ships or security. Second, in instances where it has yet to be determined whether or not the person liable is entitled to a limitation of liability, the maritime court is subject to risks if it releases the ship and returns or reduces the security. If it is ruled that the person liable is not entitled to the limitation of liability upon hearing the case, and yet part of the security has been released, not only will it be difficult to execute the judgment but the result will prove to be imbalanced amongst the interests of the parties. As such, the court may refuse to release the security.

In practice, the person liable first applies for a limitation of liability and then considers applying for the constitution of a limitation fund; however the regulations of the Special Maritime Procedure Law are out of line with practice. In practice, a successful hearing for the release of a ship from detention to the successful constitution of a fund takes time, and the following three types of security should be provided throughout this process: (1) security for the removal of detention, (2) security for avoiding the erroneous constitution of a fund, (3) and security for the fund.[9] Since the application for the constitution of a fund takes time, energy and does not necessarily guarantee its constitution, it is inevitable that such cases become less common, which may cause the regulations of Chapter IX of the Special Maritime Procedure Law to exist in name only.

III. Issues Confronting the Procedure for the Constitution of a Limitation Fund for Maritime Claims

Chapter IX of the Special Maritime Procedure Law of China provides the procedure which the person liable must follow in order to apply for the constitution of a fund, but it does not include the procedure for instituting an action concerning the limitation of liability for maritime claims. Article 213 of the Maritime Law states that: "Any person liable claiming the limitation of liability under this Law may constitute a limitation fund with a court having jurisdiction". The use of the word "may" indicates that the constitution of a fund is not a mandatory procedure for the person liable to make claim to and acquire a limitation of liability according

9 Zhang Xianwei, Confusions Arising from Existing Procedures and Rules Concerning Limitation of Liability in Judicial Practice and Their Settlement, at http://www.cc-mt.org.cn/hs/explore/exploreDetial.php?sId=2004, 25 February 2007. (in Chinese)

to law (with the exception of compensation for the damage caused by oil from a ship). The person liable constituting a fund declares his intention to apply for a limitation of liability, they do not, however, prove their entitlement to a limitation of liability. If the person liable does not constitute a fund, they are still able to apply for a limitation of liability. Moreover, the provisions of the Maritime Law do not limit the subject of the constitution of a fund to those who are entitled to a limitation of liability, or provide other restrictions concerning the procedure for the constitution of a fund. In other words, as long as the person liable "claims" a limitation of liability, then he can constitute a fund. This shows that the constitution of a fund is separate from the substantive hearing aimed at determining whether the person liable is entitled to a limitation of liability.[10]

As a legal regime specifically provided by the Maritime Law, the limitation of liability for maritime claims is a legal privilege granted under Maritime Law to the owner, operator and charterer of the ship, so that they are able to limit their liability in the event of a severe maritime accident. The timely determination on whether the person liable is entitled to the limitation of liability directly influences the benefits of both the person liable and the claimant. If the person liable is not entitled to a limitation of liability, a series of procedures, including the procedure for the constitution of a fund, will be unnecessary. Therefore, determining such person's entitlement to the limitation of liability for maritime claims is a foundational part of the regime of the limitation of liability for maritime claims. The procedure for the constitution of a limitation fund for maritime claims under Chapter IX of the Special Maritime Procedure Law, is supposed to support the procedure regarding the limitation of liability for maritime claims under Chapter XI of the Maritime Law, however this is not the case in practice. In reality, the procedure for constituting a fund is only one link within the procedure regarding the limitation of liability and, with the exception of cases regarding damages caused by oil from a ship, the constitution of a fund is not a mandatory step in the procedure regarding the limitation of liability.[11] Chapter IX of the Special Maritime Procedure Law provides the "procedure of fund" which does not impose influence upon a person's entitlement to the limitation of liability, however it does not mention the procedure of action concerning the limitation of liability for maritime claims which affects

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10 Jin Zhengjia ed., *Comment on the Maritime Procedure Law*, Dalian: Dalian Maritime University Publishing House, 2001, p. 408. (in Chinese)

11 Si Yuzhuo ed, *Maritime Law Case Course*, Beijing: Intellectual Property Publishing House, 2003, p. 290. (in Chinese)

the parties' substantive rights and obligations, and determines the value of the procedure of fund. This will certainly provoke confusions and challenges.

IV. Reflections on the Purpose of the Establishment of the Procedure of Fund

Chinese legislators have not developed a procedure for examining the limitation of liability for maritime claims since such a procedure will extend the length of the procedure for the application of a limitation of liability. This makes it difficult for the person liable to protect his ship or other properties from being detained before the liability is determined by constituting a fund and renders it impossible for the person liable to receive protection as regulated in Article 214 of the Maritime Law of China. However, in practice, the constitution of a fund is unable to fulfill its intended purpose, proving that the understanding and interpretation of Chinese legislators regarding the purpose of the constitution of a limitation fund has deviated from its original purpose of the procedure of fund. Multiple scholars have begun to reflect upon the purpose of the procedure of the constitution of a fund.

There is no doubt that "the system of the limitation fund for maritime claims", provided for under the Maritime Law of China, draws upon the provisions of international conventions. This raises the questions: What caused those who draft international conventions to constitute a limitation fund for maritime claims? What is the true purpose of the constitution of a fund? Is the interpretation of Chinese legislators correct? The answer is no.

The limitation fund for maritime claims is a certain amount of money provided by the person liable for the purpose of limiting his liability and is allocated to all the restrictive creditors for debt payment.[12] As such, the fund's substantive purpose is to satisfy restrictive creditor's rights, if the person liable is entitled to the limitation of liability.

An important principle concerning the limitation of liability for maritime claims is "one quota for one accident". This principle states that, even though there may be claims from multiple creditors, the person liable only needs to compensate for a legal quota so as to resist the rights of all restrictive creditors

12 Si Yuzhuo ed., *Maritime Law Dictionary*, Beijing: China Communications Press, 1998, p. 692. (in Chinese)

without assuming additional liabilities. However, since there are multiple claimants in a maritime accident which are located within different jurisdictions, each claim is heard in a different court. As a result, the person liable would have to go to different courts for the same limitation of liability. Even if the person liable were to successfully defend themselves, the total compensation to be paid by the person liable may exceed the legal quota.[13] For instance, a wrecked ship involves ten cargo owners and the total loss is 40 million Yuan. Each cargo owner claims 4 million Yuan and the ship owner's liability quota is 10 million Yuan. If different courts hear different creditors' maritime claims separately, the person liable cannot apply for limitation of liability since each cargo owner's claim is less than 10 million Yuan. Accordingly, the person liable must compensate a total of 40 million Yuan without any limitation of liability. Assuming that the total loss in this accident is 40 million Yuan, the ship owner's liability quota is 10 million Yuan, the loss suffered by cargo owners A and B is 15 million Yuan respectively, and eight other cargo owners suffer from a total loss of 10 million Yuan. In this case, the person liable can only limit his liability for cargo owners A and B, and the final compensation he has to pay is 30 million Yuan, far higher than the quota of 10 million Yuan he is entitled to.

In order to realize the principle of "one quota for one accident", an ideal solution is to concentrate claims of all restrictive creditors' rights arising from the accident to one court for hearing, and to request that court to allocate the liability quota. Therefore, we must find a method to allow for the claims of all restrictive creditors' rights to be heard in one court. It just so happens that the formulators of international conventions have found the connection to allow this, through the constitution of a limitation fund for maritime claims. For instance, in the case of *Miss New York*,[14] Judge Taft described the procedure of limitation of liability as having characteristics of injunction of prohibiting multi-party litigation in a certain sense and expecting to reach a fair solution to many-sided disputes. It indicated that one of the basic purposes of the restriction of liability is to enable the ship owner to concentrate individual claims so as to avoid the undeniable

13 Yang Liangyi, *Maritime Law*, Dalian: Dalian Maritime University Publishing House, 1999, p. 242. (in Chinese)

14 Quoted from Xing Haibao, *Research on Special Maritime Procedure Law*, Beijing: Law Press China, 2002, p. 426. (in Chinese)

burden of defending himself in different courts.[15] Just like CMI's comment on Article 11 of the Convention on Limitation of Liability for Maritime Claims, 1976 (hereinafter referred to as the "1976 Convention"), the constitution of a fund will help to concentrate all claimants to one court and make compensations to the victims efficiently. Therefore, procedurally speaking, the purpose of constituting a limitation fund is to concentrate claims of all restrictive creditors' rights arising from an accident to one court so as to ensure that compensation to the victims is completed as quickly as possible under the principle of "one quota for one accident".[16]

As such, the true purpose of the constitution of a limitation fund within international conventions is misunderstood, either substantively or procedurally, by Chinese legislators. The provision of the "bar other action" as stated in Article 13 of the 1976 Convention (equivalent to the provisions of Article 214 of the Maritime Law of China) is the legal consequence of the constitution of a fund[17], rather than the purpose of the legislators to include the provisions regarding limitation fund in the Convention, since if the person liable has constituted a fund which is available for allocation, he has provided reliable security to all restrictive creditors. It would be unfair if, by this time, the security provided earlier by the person liable is still not released, thereby allowing the creditors to get a second security for the same claim.

It is therefore clear that it is wrong for the Special Maritime Procedure Law of China to interpret the purpose of constituting a fund as protecting the ship or other properties of the person liable from being detained before the substantive responsibility is determined. A fund cannot cover all maritime claims. With respect to claims made by unrestrictive creditors, the person liable should still rely upon the provision of maritime security to remove the detention.

V. The Establishment of the Procedure of the Limitation of Liability for Maritime Claims

15 Xing Haibao, *Research on Special Maritime Procedure Law*, Beijing: Law Press China, 2002, p. 426. (in Chinese)

16 Zhu Moquan and Shen Xiaoping, On Improving the Procedure of Limitation of Liability for Maritime Claims in China, *Annual of China Maritime Law (Vol. 2003)*, Dalian: Dalian Maritime University Publishing House, 2004, pp. 252~253. (in Chinese)

17 Li Shouqin and Li Hongji, *China Maritime Trial*, Beijing: Law Press China, 2002, p. 239. (in Chinese)

The current Special Maritime Procedure Law has provided for the procedure for constitution of a limitation fund for maritime claims. This procedure does not determine whether or not the person liable is entitled to the limitation of liability, nor does it mention the final settlement of compensation liability assumed by the person liable. This procedure is comprehensible, but when put into practice it is of little value.[18] The inconsistencies within the procedure of the constitution of a fund cannot be overcome by adding judicial interpretations. Many scholars propose that Chinese legislation ought to separately establish the procedure for instituting action concerning limitation of liability for maritime claims, and the authors also hold that the creation of such a procedure should act as a prepositive procedure to the constitution of a fund.

A. Theoretical and Practical Foundations for the Independent Establishment of the Prepositive Procedure for Instituting Action concerning the Limitation of Liability for Maritime Claims

The system of limitation of liability for maritime claims involves three basic concepts: the liability for maritime claims, the limitation of liability for maritime claims, and the constitution of a limitation fund for maritime claims. The liability for maritime claims is the precondition and foundation of the limitation of liability for maritime claims, since if there would not be the limitation of liability or the constitution of a limitation fund for maritime claims without it. The limitation of liability for maritime claims is both an exception of the full performance of liability for maritime claims and a precondition of the constitution of a limitation fund; it not only decides the scope of compensation liability for the person liable but also the standard of such a fund, given that the fund is constituted. On the other hand, the constitution of a limitation fund for maritime claims is a reflection of the limitation of liability for maritime claims, which guarantees and ensures that the liability for maritime claims will finally be discharged, in spite of the fact that not all of the liability for maritime claims will be discharged. In this connection, if there is no liability for maritime claims, then there will be no limitation of liability for maritime claims, and if this is the case, then we cannot say that the liability for creditors has been discharged by the person liable, even if a limitation fund for

18 Li Shouqin and Li Hongji, *China Maritime Trial*, Beijing: Law Press China, 2002, p. 243. (in Chinese)

maritime claims has been constituted.

Logically speaking, if the person liable is not entitled to a limitation of liability, then there will be no question as to the constitution of a limitation fund. If this is the case, then this will not give rise to any legal consequence of limitation of liability, even if the fund has been constituted. If a limitation fund is constituted when the issue of limitation of liability has not been clarified, then such a fund cannot be called a limitation fund since its precursor does not exist.

In practice, the constitution of a limitation fund is only a small portion of the procedure of the limitation of liability for maritime claims and not a mandatory step or precondition for setting the limitation of liability. If the person liable is not entitled to a limitation of liability, then the constitution of a limitation fund will be insignificant. Therefore, whether or not the person liable is entitled to a limitation of liability should be ascertained prior to the constitution of a fund.

B. The Nature of the Application for a Limitation of Liability for Maritime Claims

Whether or not an action concerning the limitation of liability for maritime claims can be filed with the maritime court as an independent action is highly controversial within Chinese academic circles. There are two main views: First, entitlement to the limitation of liability for maritime claims is only a right of defense, since the system of the limitation of liability for maritime claims represents a type of legal privilege granted under Maritime Law to limit the liability of subjects such as the ship owner, charterer, operator and salvor. This neither creates an obligation to maritime creditors, nor constitutes the legal relationship of rights and obligations in respect of limitation of liability for maritime claims. Besides, unlike an entitlement to the package limitation of liability, whether or not to file an application for a limitation of liability for maritime claims on behalf of a subject of the limitation of liability should be voluntarily decided and actively referenced by the person liable throughout the action. The court is neither entitled nor obliged to initiate the application to determine liability. If the person liable does not file an application with the court, then the court shall not take the initiative.

As such, the limitation of liability for maritime claims is a right of defense, based on which a subject of the limitation of liability resists the claimants by limiting his compensation liability within the legal scope. The reason why the Special Maritime Procedure Law of China has not provided for the procedure

for instituting action concerning the limitation of liability for maritime claims is largely that legislators believe that the limitation of liability is only a right of defense which may be exercised exclusively by the person liable when he defends himself in the substantive action and hence cannot constitute an independent action. Moreover, if the application for the limitation of liability is deemed an independent action, the issue of liability of the person liable, which is ascertained during the independent hearing of limitation of liability, may contradict the conclusion reached in the subsequent substantive hearing. Of course, China is not the only country which deems the entitlement to the limitation of liability for maritime claims as a right of defense during an action. In fact, some countries which have adopted a continental law system (e.g. Germany, Norway, Panama, Japan, etc.) also believe that the application for a limitation of liability is a defense against the right of making maritime claims and cannot be treated as an independent action.[19]

Second, some scholars hold that entitlement to the limitation of liability for maritime claims is a right of claim and can be exercised as in an independent action. This is because an application for a limitation of liability for maritime claims conforms to the definition of an action.[20] With respect to the application for the limitation of liability, the subject matter of the action is the relationship between the applicant and respondent of the rights and obligations of the limitation of liability; the subject of the action is the limitation of liability for subjects such as the ship owner and the salvor, who, according to legal regulations, should assume limited compensation liability. According to Article 104 of the Special Maritime Procedure Law, an applicant for the constitution of a limitation fund for maritime claims shall attach relevant evidence to and specify the cause of the application within the application letter, i.e., cause of action concerning the limitation of liability for maritime claims.

The authors assert that the procedure of limitation of liability for maritime

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19 In these countries, as long as the ship owner and any other party apply for the limitation of liability, the specific procedure of the limitation of liability shall be applicable (e.g. Maritime Procedure Law of Germany, Chapter III of Law of Liability Limitation of Shipowners of Japan, Articles 231~245 of Maritime Law of Norway, etc.). See Lei Ting, Nature and Influence of Referencing to Limitation of Liability for Maritime Claims in China, *Annual of China Maritime Law (Vol. 2001)*, Dalian: Dalian Maritime University Publishing House, 2002, p. 113. (in Chinese)

20 An "action" is the claim filed by a party with the court to protect its rights and interests. An independent action should consist of three elements, i.e. the subject of action, subject matter of action and the cause of action.

claims ought to exist independently from the procedure which gives rise to maritime claims (i.e. the procedure of substantive case) for the following reasons: First, the application for a limitation of liability has the constituent elements of an action and hence constitutes an independent action. Second, even though within the procedure of a substantive case the person liable is the applicant for the limitation of liability, in the limitation of liability procedure the person liable is also an obligee and their entitlement to the limitation of liability is a legal right which cannot be deprived unless though legal procedures. In this connection, it violates legal principles if the procedure for limitation of liability is deemed to be subordinate to the procedure for maritime claims. Third, the substantive case procedure cannot settle all issues related to the limitation of liability. When the person liable is confronted with one or several claims, and the total amount does not exceed the amount of the limitation fund, the two procedures will not contradict with each other. However, if the person liable is confronted with one or several dozens of actions and the person liable, as a form of defense, applies for a limitation of liability with each court, even if each application is successful, the total amount may exceed the amount of the limitation fund. In fact, the entitlement to the limitation of liability for claims cannot be implemented. Fourth, the procedure of the limitation of liability procedure has its own jurisdiction just like the procedure for the constitution of a fund (see the discussion below). In summary, China ought to establish an independent procedure for the limitation of liability so as to resolve whether or not the applicant for the limitation of liability is entitled to a limitation of liability.

C. Drawing upon Foreign Legislation

With respect to the limitation of liability for maritime claims, the laws of the UK, the United States, Japan and other countries have provided specific procedures for actions, which will be of great significance when discussing Chinese legislation. The authors elaborate as follows in terms of whether the procedure of application for the limitation of liability is directly combined with the procedure for instituting substantive action.

First, the direct combination of the limitation of liability procedure with the procedure for instituting substantive action, as found in the UK.

According to the Special Rules for Maritime Actions of the UK, when applying for limitation of liability, it is unnecessary for the applicant to provide a

limitation fund.[21] Within 7 days after the writ which is issued upon the applicant's application is served to the applicant, the applicant may apply for the opening of a court session and the registrar of the court shall hold a hearing. First, if the parties' opinions do not differ in respect to the application for the limitation of liability, the registrar shall judge that the applicant is entitled to a limitation of liability and determine the amount. Second, if the parties' opinions differ then the hearing will be postponed while the parties produce evidence. Third, if the opinions of both parties are vastly different, then the subsequent procedure is roughly the same with the general procedure of maritime action, and the maritime judge shall ultimately provide a judgment concerning this case. Additionally, the court with jurisdiction over the liability action may combine actions against the person liable brought by the creditors with other courts for the purpose of a hearing.

It should be recognized that there are advantages to the British system. First, there are three different circumstances which are treated separately based upon the extent of the dispute between parties with respect to the limitation of liability. Such treatment is highly flexible, and helpful for settling the applicant's limitation of liability issue quickly and easily. Second, the limitation of liability is defined in a judgment and hence has strong legal authority, thereby avoiding disadvantages which arise from hearing the substantive case twice.[22] The legal system of the UK is sound and has a high degree of integrity which makes this highly scientific and reasonable model successful, however it may not be easily applied in other countries. The modernisation of Chinese legislation started much later and the quality of Chinese citizens is uneven. If the model of the UK is used, then, in the majority of cases, the third approach shall be taken. As a result, many regulations will exist in name only. In this sense, the advantages of implementing a system similar to the UK are negated.

Second, separation of the limitation of liability procedure and the procedure for instituting substantive action, as found in the United States.

In the United States, granting a limitation of liability to the ship owner is a public policy. The Limitation of Liability Act of 1851, provides that an independent court will judge whether the ship owner is entitled to an exemption, or at least a limitation of liability, and the subsequent action is called "concursus".

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21 However, almost all applicants will provide actively. As such, as long as the court judgment allows the constitution, the fund will immediately be available for distribution.

22 As mentioned above, first-instance judgment will avoid the defects inherent in a second-instance ruling.

According to the Limitation of Liability Act and Rule F (i.e. Rule F of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions), the application for the limitation of liability shall be filed by the ship owner within six months after receiving the written notice of the claim (or summons and bill of complaint). In the event of several claims, the action concerning the limitation of liability shall be filed no later than six months after receiving the first notice of claim; otherwise, the ship owner will lose all entitlement to the limitation of liability.[23] As a condition of the application for the limitation of liability, the ship owner shall provide the court with a sum equivalent to the price of the ship and the freight or provide a corresponding security. In the meantime, the Limitation of Liability Act regulates that all claims and actions against the ship owner shall come to an end. In other words, as long as the person liable files an application for the limitation of liability, he is granted the power to transfer all actions against him to maritime courts, even though those courts are unwilling to waive the reservation clause. In fact, the suitor is deprived of the right to choose the forum of hearing.

Undoubtedly, the establishment of a dedicated procedure and court for actions concerning the limitation of liability within the United States will be helpful for the fair settlement of disputes between both parties and the improvement of the efficiency of the trial. However, its blind application, without regard to the parties' disputes over the entitlement to limitation of liability, is inflexible. Moreover, the laws of the United States require that the applicant should provide a sum equivalent to the price of the ship and the freight or provide a corresponding security, which will undoubtedly increase the applicant's burden and hence fail to embody the advantage of the limitation of liability.

Third, the separate, yet combined form of the limitation of liability procedure and the procedure for instituting substantive action within Japan.

According to the provisions of the Law of Liability Limitation of Shipowners of Japan, where the person liable applies to the court for limiting his liability, the court may decide to commence the limitation of liability procedure only after the applicant has provided a fund. Such a decision is made based upon unilateral application without being subject to hearing. With respect to the creditors, who accept the court's decision and do not raise any objection, their rights can be registered and distribution shall be made by the court from the fund. Creditors who

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23 G. Gilmore and C. L. Black, translated by Yang Zhaonan et al., *The Law of Admiralty (II)*, Beijing: Encyclopedia of China Publishing House, 2000, p. 1151. (in Chinese)

do not accept the court's decision to start the limitation of liability procedure may either appeal against the decision or bring a general claim procedure against the person liable, in which case the court which has accepted the action concerning the limitation of liability shall combine this action into the general action for further hearing.

Even though it appears that Japan's dedicated procedure has not combined the limitation of liability procedure with the substantive action, the issue of the substantive action is inevitably involved. Such a mode provides sufficient protection to the applicant, who is able to receive protection through the limitation of liability as long as he provides a fund. Some creditors (those who do not raise any objection) also receive protection since they are able to receive compensation within a short time. However, Japanese laws are unfavourable to the claimants while absolutely guaranteeing rights to the ship owner. Moreover, once the allocation of funds has been started before it is determined whether or not the person liable is entitled to the limitation of liability. If the result of the general action shows that the person liable is not entitled to a limitation of liability, then the consequence may be that those creditors who have raised an objection receive little compensation from the fund or security. In addition, if some of the creditors who have raised an objection appeal while others bring an action, the disadvantages of this system will be prevalent.

Considering the problems confronting China's current Special Maritime Procedure Law and drawing upon foreign legislations, the authors hold that the Chinese procedure of action concerning the limitation of liability for maritime claims shall observe the following basic principles: First, an independent procedure of action concerning the limitation of liability for maritime claims should be established. In order to apply for this limitation of liability, the person liable shall first institute a procedure of action concerning the limitation of liability either before or after the proceedings of the action. Second, the procedure of action concerning the limitation of liability shall be independent from the action which gives rise to maritime claims, and the issue as to whether the person liable has the right to limit liability shall be settled before settling the issue of compensation between both parties. Third, only after it has been determined whether or not the person liable is entitled to a limitation of liability can it be ruled as to whether or not the person liable is allowed to constitute a limitation fund, and it is up to the discretion of the person liable to constitute a fund or not. Fourth, the determination regarding whether the person liable has the right to limit liability shall be made in

the form of a judgment, and the ordinary procedure shall be applied. If both parties do not have major disputes, upon the consent of both parties, the court may apply the summary procedure to determine whether the person liable is entitled to a limitation of liability. Fifth, if it is determined that the person liable is entitled to a limitation of liability, all actions against him shall be brought to the maritime court in which the person liable has applied for a limitation of liability for the purpose of a hearing. Finally, even if the person liable is entitled to a limitation of liability, if he does not constitute a limitation fund, other procedures cannot be suspended.

D. Specific Steps for Hearing Actions Concerning the Limitation of Liability for Maritime Claims

On the basis of observing the above principles, the authors have conceived the following procedure for the limitation of liability for maritime claims:

1. Application and Jurisdiction

a. Application

a) Applicant. According to Articles 204 and 206 of the Maritime Law, subjects, including the ship owner, salvor, insurer, and the employees and agents of the ship owner or salvor, are entitled to apply for a limitation of liability. Consistent with subjects entitled to apply for the constitution of a fund, as regulated under the Special Maritime Procedure Law, the ship owner includes the charterer and operator of the ship.

b) Application method. With reference to Article 104 of the Special Maritime Procedure Law, an application, with relevant evidence, shall be filed in writing. The application shall indicate the applicant's name (in cases with many applicants, all applicants and their representatives as recommended shall be clearly listed), place name, ship name, nationality and tonnage of the concerned ship, known names, addresses and contact method of creditors and their stakeholders, total claim amount, information of maritime accident, loss and liability status, etc.

c) Application period. An applicant may file an application for action concerning the limitation of liability for claims before an action is brought or during the legal proceedings, but no later than the judgment is given in the first instance.

b. Jurisdiction

As jurisdiction greatly influences the parties' rights and obligations, the parties' right to choose the court shall be minimized, so that the competent court

will be relatively certain. In reference to the provisions of Article 102 of the Special Maritime Procedure Law regarding the constitution of fund, the following rules shall be established: where an application for the limitation of liability is filed before an action is brought, the application shall be filed with the maritime court where the accident had occurred, where the contract is performed or where the ship is detained. The place in which the contract is performed includes the ship's cargo discharging port involved in the limitation of liability, but excluding the original arrival point of the ship, the registry port of the concerned ship, the place where a security is provided or the domicile of the respondent. In instances where an application is filed during the legal proceedings, according to Article 81 of the Judicial Interpretations of the Special Maritime Procedure Law, the parties shall file the application with the maritime court hearing the relevant maritime dispute case.

2. Preliminary Examination and Acceptance

The court shall conduct the necessary preliminary examination of the application for the limitation of liability filed by the parties. As per Article 83 of the Judicial Interpretations of the Special Maritime Procedure Law, the following issues should be subject to examination:

(1) Whether or not the applicant qualifies a subject of limitation of liability as regulated under the Maritime Law. Based on the evidence submitted by the applicant, the court shall preliminarily examine whether the applicant is entitled to the limitation of liability for maritime claims as provided under the Maritime Law.

(2) Whether the concerned ship is entitled to the limitation of liability, which is to be examined in writing based on the ownership certificate and other effective necessary certificates of the concerned ship submitted by the parties.

(3) Description and cause of accident. According to Article 209 of the Maritime Law, even though the final conditions determining the applicant's entitlement to the limitation of liability is whether the person liable is intentional and at fault in causing the maritime accident, this requires evidence and debate by relevant parties to make the determination. The court cannot determine this during the preliminary examination.

If the court deems, upon preliminary examination, that the applicant's reason for the application is sufficient and the procedure is legal, it shall file the case and notify the parties within 3 days. Otherwise, it shall rule not to accept the case within 3 days. This preliminary examination is different from the procedure for the constitution of a fund in the sense that whether or not the creditor's right applied to be subject to limitation is restrictive is not examined. Hence, the date on which

the court shall determine whether to place the case on file or not must be 4 days in advance. If the applicant has any objection to the ruling, the court shall notify the applicant that he may appeal and the court shall provide a ruling within 7 days.

3. Notice and Announcement of the Court

After the maritime court has accepted an application for a limitation of liability, it shall notify all known stakeholders within 3 days and make a public announcement through the media for a period of 3 days. If the ship navigates international routes, the announcement shall be made through externally issued newspapers or other media sources so as to ensure that stakeholders are aware of the procedure through reasonable approaches.

The contents of the notice and the announcement shall include the name and address of the applicant, the facts of the application, reasons, time period (generally no less than 30 days), place and requirement to raise any objection to the ruling, and the legal consequence of the stakeholders' waiver of the right to object.

4. Objections and the Opening of a Court Session

(1) Period to raise any objection. A stakeholder shall, in writing, raise an objection to the maritime court with jurisdiction within 7 days after receiving the notice or within 30 days after the announcement is made if the notice is not received. Prior to the judgement of the court, if the stakeholder has discovered new evidence and raised an objection against the applicant, then the court shall allow him to directly participate in the action.

(2) Scope of the objection. A relevant stakeholder may rightfully raise objections to such matters as whether the applicant qualifies as a subject entitled to limitation of liability, whether the concerned ship is entitled to the limitation of liability, whether the creditor's rights constitute restricted creditor's rights and whether or not they are caused by the same accident, whether or not the person liable is intentional and at fault in causing the maritime accident, etc. In situations where a relevant stakeholder raises any objection in writing, that stakeholder shall bear the burden of proof.

(3) Hearing in court. After the court receives a written objection from the stakeholder, upon the expiration of the objection period, the court shall serve the summons to the applicant and the stakeholder who has raised the objection. The collegiate bench, consisting of judges, shall hold a hearing to determine the limitation of liability for maritime claims. The hearing shall include evidence adducing, cross-examination, debate and a final statement; however it shall not include mediation and reconciliation.

5. Judgment and Appeal

The maritime court shall judge whether the applicant has right to limit liability within 30 days, taking into account the relevant facts and the case details. Where the applicant is entitled to a limitation of liability, the court shall judge that the applicant is entitled to a limitation of liability, and if the applicant concurrently applies for the constitution of a fund, then the court shall simultaneously rule that the applicant is permitted to constitute a fund. Where the applicant is not entitled to the limitation of liability, the relevant application for the limitation of liability shall be rejected.

Since the system of limitation of liability grants a legal privilege, the involved party may appeal against a decision. In the event that the involved party has any objection to the judgment, he shall appeal within 7 days after receiving the judgment, and the appellate court shall deliver a judgment within 15 days after receiving the appellate petition.

6. Constitution of a Fund and the Suspension of Other Procedures

The applicant entitled to the limitation of liability according to the judgment may apply for the constitution of a fund and the court with which the fund is constituted shall be consistent with the court having given the ruling of approval. The applicant shall submit the limitation fund for maritime claims to the maritime court within 3 days after the ruling allowing the applicant to constitute a limitation fund for maritime claims takes effect. If the fund is not constituted within the specified time limit, the application will be automatically withdrawn.[24] The fund constituted by any person entitled to the limitation of liability shall be deemed as jointly constituted by all persons liable.

Where a limitation fund has been constituted by a person liable, any person who has made a claim against the person liable may not exercise any right against the assets of the person liable. Where any ship or property belonging to the person who has constituted the fund has been detained, or, where a security has been provided by such person, the court shall order the release of the detained ship and property or the return of the security provided.

7. Registration and Settlement of Creditor's Rights

(1) Registration and announcement. The ruling allowing the applicant to

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24 See Article 84 of the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Special Maritime Procedure Law of the People's Republic of China.

constitute a limitation fund for maritime claims shall be announced for at least 3 days consecutively through a newspaper or other media outlet. All creditors with restrictive creditor's rights who are involved in maritime accidents occurring under a specific occasion shall register their creditor's rights with the court where the legal person has constituted a fund within 30 days, and shall be deemed as waiving their creditor's rights if they fail to register their creditor's rights within the specified time limit.

(2) Provision of evidence of creditor's rights. A creditor applying to the maritime court for the registration of creditor's rights shall submit a written application and provide relevant evidence of creditor's rights, including the judgment, ruling, settlement agreement, arbitration ruling or notarial certificate of creditor's rights which possess legal force and can prove the creditor's rights, and other evidential materials proving his entitlement to the right of maritime claim.

(3) Review of creditor's rights. The maritime court shall review the creditor's application and then decide to approve registration where evidence of creditor's rights is provided or to reject the application where such evidence is absent. Where the creditor provides judgment, ruling, settlement agreement, arbitration ruling, or notarial certificate of creditor's rights to prove his creditor's rights, upon review and affirmation of the truthfulness and legality of the above documents, the court shall rule to confirm these details. Where the creditor provides other evidence to prove his right to maritime claims, after the registration of creditor's rights has been completed, a right affirming action shall be brought to the court which has accepted the registration of creditor's rights. In the event that the involved parties have an arbitration agreement, they shall apply for arbitration in a timely manner. The review of the rights of the creditor by the maritime court shall include a review of the nature of such creditor's rights, i.e. whether or not the creditor's rights are restrictive.

(4) Action confirming claims. The maritime court's judgment regarding the action confirming claims has legal force and the parties cannot appeal against it. However, it does not eliminate the creditor's rights, and the parties may file for a separate action.

(5) Meeting of creditors. After the maritime court hears and affirms the rights of the creditors, it shall send a notice for a meeting of creditors to them, organize and convene the meeting of creditors. Eventually, the settlement sequence and amounts shall be determined through consultations based on legal principles.

VI. Feasibility of the Establishment of the Procedure of Limitation of Liability for Maritime Claims

Some scholars may argue that to propose the independent establishment of the procedure of action concerning the limitation of liability for maritime claims creates disadvantages. Undoubtedly, there is no perfect legal system. What we can do is to select a system which minimizes these disadvantages and has taken into account the special conditions of China. The authors believe that it is feasible to independently establish the procedure of limitation of liability for maritime claims.

A. Independently Established Procedure of Action concerning Limitation of Liability for Maritime Claims Will not Replace the Role of the Procedure of Fund

Some scholars doubt that, if a person liable is allowed to constitute a fund only after his liability for claim is determined, such person liable generally would not take the initiative to constitute a fund, since during the action, his ship or other properties may have been detained, the security may have been provided, and as such the constitution of a fund will be unhelpful. Even if a fund is not constituted, the person liable is no longer at risk. By this time, rather than actively handing money to the court for distribution to the creditors, it is a better idea to allow the creditors to directly implement the court's judgment. In this way, it seems that there is no need for the system of fund to exist.[25] To respond to such a view, we need to discuss the significance and legal effect of the constitution of a fund.

1. Can All Restrictive Creditor's Rights Be Eliminated?

After the person liable constitutes a fund, as regulated in Article 112 of the Special Maritime Procedure Law, the creditors shall, within the period of the public announcement, apply to register their rights. In instances where this registration does not occur at this time, the creditor's rights shall be deemed as having been waived and eliminated, and no action shall be brought thereafter.[26] In this case, the creditors shall no longer claim any right against the person liable.

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25 Huang Yongshen, Several Issues to be Clarified Concerning the Procedure of Limitation of Liability for Maritime Claims, *Annual of China Maritime Law (Vol. 2005)*, Dalian: Dalian Maritime University Publishing House, 2006, p. 295. (in Chinese)

26 Xing Haibao, *Research on Special Maritime Procedure Law*, Beijing: Law Press China, 2002, p. 423. (in Chinese)

According to Article 101 of the Special Maritime Procedure Law, when the person liable applies for a limitation of liability, he may not constitute a fund, but it is not regulated as to how compensation should be made if a fund is not constituted. Article 10 of 1976 Convention provides, in a principled manner, for the limitation of liability when a limitation fund is not constituted. Article 10(2) points out that Article 12 of the 1976 Convention (distribution of the fund) shall be applicable in the case where such a fund is not constituted; in other words, even if a fund is not constituted, the claimants shall be compensated in proportion to the sequence specified in Articles 6 and 7, the same as the constitution of a fund. Therefore, according to Article 6(1) of the 1976 Convention, even if a fund is not constituted, the principle of "one accident, one quota" shall be applied. However, this is difficult to carry out in practice. If a fund is not constituted, it will be difficult to concentrate all the restrictive creditor's rights, and because of this each claim may be heard in a different court. This may result in either the person liable being unable to enjoy the limitation of liability or the final liability quota may exceed the amount specified in the Maritime Law.

2. Can Ship Detention, as per Maritime Lien, Be Prevented?

According to Article 30 of the Maritime Law, maritime lien shall not affect the implementation of regulations on the limitation of liability for maritime claims. A maritime lien shall be enforced by the court by arresting the concerned ship. After a fund is constituted, no one can apply for ship arrestment by virtue of creditor's rights that may be discharged with the fund. If the creditor's rights secured by the maritime lien are restrictive ones arising out of the same accident, then they cannot be exercised by arresting the ship. Application can be made only to pay them through the fund.

3. Can Creditors with Restrictive Creditor's Rights Arrest the Ship?

The constitution of a fund may limit the liability assumable by the person liable for claims, and avoid or remove the detention of the properties of the person liable. Article 214 of the Maritime Law provides that: "When a limitation fund has been constituted by a person liable, any person having made a claim against the person liable may not exercise any right against any assets of the person liable. Where any ship or other properties belonging to the person constituting the fund has been arrested or attached, or, where a security has been provided by such person, the court shall order without delay the release of the ship arrested or the properties attached or the return of the security provided". This article is criticized by scholars since they believe it covers too wide of a group of creditors when it

states "any person having made a claim against the person liable". However, this is not the intention of legislators, since non-restrictive creditor's rights are unaffected by the limitation fund. Therefore, some scholars have proposed to change this article from "any person having made a claim against the person liable" to "any person having made a claim against the fund".[27] If this revision is made, then creditors can still exercise rights against other properties of the applicant, which may also prove to be problematic.[28] The authors argue that this article ought to be revised so that it states that "any person who can or may make a claim against the fund". The authors suggest this revision for the following reasons: Non-restrictive creditors cannot, whatsoever, make a claim against the fund, as the limitation fund is constituted to settle restrictive creditor's rights. This limits who can make a claim against the fund to the restrictive creditors. In this way, the possibility of creditors with restrictive rights arresting other properties of the person liable can be avoided, and non-restrictive creditor's rights can be excluded in this process.

There is no mandatory provision in either international conventions or the Maritime Law of China that the person liable must constitute a fund. It is at the discretion of the person liable as to whether he will constitute a fund or not and when to apply for the constitution of a fund. Even though it will not affect such person's entitlement to the limitation of liability, it will affect the realization of his entitlement to the limitation of liability for maritime claims.

B. Independently Established Procedure of Action concerning the Limitation of Liability for Maritime Claims Will Not Influence the Duration of the Hearing

If the procedure of action concerning the limitation of liability is a precondition for the constitution of a fund, the biggest obstacle will be that the duration of the hearing will be too long, as the opponents to such practice assume that the

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27 China did not recognize action in rem at first, but it is regulated in Article 86 of the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Special Maritime Procedure Law of the People's Republic of China that: "Where a limitation fund for maritime claims has been constituted, any person having made a claim against the fund shall be barred from exercising any right in respect of such claim against any other assets of a person by or on behalf of whom the fund has been constituted". Provisions in this Interpretation seem to conflict with this principle.

28 Jin Zhengjia ed., *Comment on the Maritime Procedure Law*, Dalian: Dalian Maritime University Publishing House, 2001, p. 425. (in Chinese)

judgment on whether the person liable is entitled to the limitation of liability should be a part of the whole case and should be pending until the judgment for the whole case is made, however this is not so. The hearing of a dispute regarding a specific accident is different from the determination of a person's entitlement to a limitation of liability. According to Article 209 of the Maritime Law of China, in order to determine whether or not the person liable is entitled to a limitation of liability, we must rule out that "the loss is resulted from his act or omission done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result". This is related to the facts of the case, however this only constitutes a relatively concentrated part thereof, and a prior judgment can be made by the court through the evidence provided by the parties and cross-examination.[29] Regulations under the Maritime Law of China have made extracts from Article 4 of 1976 Convention, i.e. "Conduct barring limitation". In terms of conditions for the person liable to be deprived of the limitation of liability, the 1976 Convention has increased the burden of proof compared with the International Convention Relating to the Limitation of the Liability of Owners of Sea-Going Ships, 1957 (hereinafter referred to as the "1957 Convention"). In other words, it is even harder to prevent the person liable from limiting his liability. Under the 1957 Convention, as long as the person liable himself has negligence or fault, he will be deprived of the right to a limitation of liability. Hence, it is very easy for the person liable to be deprived of such a right. However, under the 1976 Convention, it must be proven that the person liable has the intent or gross negligence. This increases the threshold of the burden of proof and has made it more difficult to adduce evidence for the evidence adducing party. Undoubtedly, it will become more likely that an application made by the person liable for a limitation of liability will be successful. On the other hand, the scope and difficulty of the hearing will be reduced when the court is reviewing such person's entitlement to the limitation of liability. This will shorten the duration of the review. As a result, it would take, at most, 2 months from the applicant's submission of the application for the limitation of liability to the issuance of the first-instance judgment. This embodies a substantial improvement compared with the current procedure for the constitution of a fund which "takes 2 months at least". More importantly, the confusion arising from the constitution of

29 Guan Zhengyi, Relevant Issues Concerning the Procedure for the Constitution of a Limitation Fund for Maritime Claims, *Annual of China Maritime Law (Vol. 2002)*, Dalian: Dalian Maritime University Publishing House, 2003, p. 316. (in Chinese)

a fund before the substantial liability assumable by the person liable is ascertained can be avoided.

C. No Need to Revisit the Behaviours of the Person Liable during Substantial Case Hearing

The authors are of the opinion that when determining whether the person liable has the right to limit his liability, ordinary judicial proceedings shall be applied and an adjudication shall be made. Any party may appeal against the first-instance adjudication; however, when the adjudication has taken effect, based on the principle of "*non bis in idem*" under the Civil Procedure Law of China, no party shall raise any objections to the judgment concerning the behaviour of person liable during the subsequent corresponding substantial action.

In summary, the authors hold that only after the issue as to whether the person liable is entitled to the limitation of liability is settled can a series of issues such as the constitution of a fund, fund distribution and final compensation be generated. In this connection, the authors suggest that the Special Maritime Procedure Law of China shall establish the procedure of action concerning the limitation of liability for maritime claims and that such a procedure shall not only be independent from the procedure of action concerning maritime claims but also be a procedure prior to the procedure for the constitution of a limitation fund.

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主编：傅崐成

主办：厦门大学法学院

厦门大学海洋政策与法律中心

地　址：中国福建省厦门市思明南路 422 号　邮编：361005

Xiamen University Law School, Xiamen, Fujian 361005, CHINA

电　话：（86-592）-2187383　（86-592）-2187781

传　真：（86-592）-2187781

E-mail: colr@xmu.edu.cn; copl@xmu.edu.cn

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CHINA REVIEW CULTURE LIMITED

地　址：香港北角英皇道 250 号北角城中心 2205-2207 室

Rm. 2205-2207, Fortress Tower, 250 King's Road

North Point, Hong Kong

电　话：(852)-28816381

传　真：(852)-25042131

E-mail: cnreview@cnreview.com

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