中国海洋法学评论

China Oceans Law Review

2006 年卷第 2 期 总第 4 期

（Volume 2006 Number 2）

（香港）中国评论文化有限公司出版

(Hong Kong) China Review Culture Limited

中国海洋法学评论

2006 年卷第 2 期　总第 4 期

CHINA OCEANS LAW REVIEW

Volume 2006 Number 2

卷首语

过去三、四年之间，美国的海军测量船多次进入中国和印度的专属经济海域进行所谓的“军事测量”。这一做法当然受到了中、印两国人士的抗议。但是，美国宣称“军事测量”并非《联合国海洋法公约》中所规范的“海洋科学研究”，因此沿海国并没有理由反对。这就使得“军事测量”和“海洋科学研究”的管辖权问题浮上了台面。除此而外，《联合国海洋法公约》对于沿海国在其专属经济海域内，是否可以立法规范石油等危险性较高的液态货物过驳活动，也是一项值得特别重视的国际法新生问题。

本期的《中国海洋法学评论》特别针对上述这些《联合国海洋法公约》未加定义的问题，以及相关的沿海国海上自卫权问题，刊出了傅崐成教授的 1 篇英文论文，以及张海文博士和邢广梅博士的 2 篇中文论文，分别对这一系列问题做了深入的分析。

行政处罚在海洋相关实务上的适用问题也是本期的一个重点。韩立新教授与宣行、刘东铖和曹英志与张志华、任洁等几位学者的大作，分别讨论了我国远洋渔船行政处罚问题，以及“一事不再罚”原则在海洋行政处罚中的适用问题。

另外，本期还发表了郭萍教授对于海商法解释原则及解释方法的深入研究，以及林明华硕士对于船舶燃油污染损害赔偿责任的全面性研究。巩固博士生有关海域使用权的法律性质与其价值、功能的双重性分析，也具有很强的创新性，值得读者们仔细阅读。

本期的另一项特色是：我们不但将几次重要的相关会议作成了综述——其中包括了厦门大学海洋政策与法律中心在 2006 年秋主办的有关两岸小三通法律问题的研讨会，而且还将国际法院有关海洋法案件的新发展，以及中国在 2006 年有关海洋法的研究论文大要，分别作成综述。相信读者们会从中发现一定的参考价值。

此外，自本期开始，本刊新聘了两位顾问，他们是加拿大的知名国际海洋法学者、《海洋发展与国际法》期刊主编 Ted McDorman 教授，以及比利时的

国际知名海洋法专家 Erik Franckx 教授。凡是研究海洋法的读者都会了解，这两位先生均为本领域内的翘楚。

《中国海洋法学评论》的正式出版，瞬已两载。承蒙国内外各位专家学者的爱护与支持，不但文章深刻精彩，读者人数逐渐成长，并且成为中国知识基础设施工程（CNKI）下属中国知识网首批邀请加入《中国优秀法律学术论文集全文数据库》的专业学术刊物之一。编辑部全体同仁愿在此表达我们最诚挚的谢意，并期许未来能对中国海洋法学的发展做出更多的贡献。

编辑部　谨识

EDITOR'S NOTE

For the last three or four years, the United States surveillance vessels have entered into the exclusive economic zones of China and India to conduct the so-called "military survey" activities. Suchactundoubtedly received strong opposition from the Chinese and Indian people. However, the United States claimed that"military survey"does not belong to"marine scientific research"regulated by the United Nations Convention on the Law of the Sea (UNCLOS) and thus the coastal States have no grounds to raise anyobjection to it. This gives rise to the issuesin connection with the jurisdiction over"military survey" and "marine scientific research". Besides, whether the UNCLOS allows legislations by the coastal States onoil and other hazardous liquid cargo transferin their exclusive economic zone is also a newly-born international law issuethat deserves high attention.

The current Issue of China Oceans Law Review containsthree articles specifically addressing those issuesundefined by theUNCLOS and the related right of self-defenseenjoyed by coastal Statesat sea, including one English article by ProfessorKuen-chenFUand two Chinese articles by Doctor ZHANGHaiwen and Doctor XINGGuangmei. All these articles provide deep analysis ofa series of problems.

The applicationof administrative penalty in maritime-related practice is also one of key topics in thisIssue. The articles authored by Professor HANLixin andXUAN Xing, LIU Dongcheng, CAOYingzhi and ZHANG Zhihua, as well as REN Jie discuss the issues of theadministrative penalty on the pelagic fishing vessels inChina and the application of the principle of prohibition against double jeopardy in maritime administrative penalty respectively.

Additionally, the current Issue also covers a deep exploration by Professor GUO Ping on principles and methods of the interpretation of maritime law and a comprehensive research by Master LINMinghua on the compensationliability for bunker oil pollution damage. Doctor GONG Gu's analysis on the dual legal character and double values and functions of the right to use sea areas is innovative, which deserves thorough reading by the readers.

The other character of the current Issue is that we not only summarized several important conferences, including the seminar on the legal problems in connection with the “mini three links”which was held in autumn, 2006 by Xiamen UniversityCenter for Oceans Law and Policyand also reviewed therecentdevelopment of cases relating to the law of the sea entertained by the International Court of Justice and briefed research papersdedicated to the law of the sea in 2006 in China. We believe the readers will find the summaries and reviews useful and valuable.

Moreover, since the current Issue, theJournalhas hired two advisors. One is Professor Ted McDorman, a well-known Canadian scholaron the law of the sea and the chief editor ofOcean Development & International Law; and the other is Professor Erik Franckx,a famous Belgian expert on the law of the sea. The readers who study the law of the sea would know that the two professors are both top scholars in the field.

It has been two years since the formal publication of the China Oceans Law Review. Thanks to the care and support from domestic and foreign experts and scholars, the articles are profound and splendid with the number of readers increasing. The Journal has also been invited as one of first journals to be listed in the full-textdatabase of Outstanding Academic Papers on Lawin China under the China National Knowledge Infrastructure (CNKI). TheCOLR editorialwould like to express oursincerest appreciation hereby and wish to make more contributions to the development of the law of the seaof China in the future.

COLR Editorial

目 录

论文

Table of Contents

Regulations and Recent Developments

Appendix

Articles

Table of Contents

Military Survey and Liquid Cargo Transfer in the EEZ: Some Undefined Rights of the Coastal State

Kuen-chen FU *

Abstract: In the past several years, the "notorious" *USS Bowditch* and her sister ships have been conducting various military surveys in India's exclusive economic zone (EEZ) and the Chinese EEZ (mainly in the East China Sea area). Both India and China protested and contended that the U.S. violated the rules for scientific research established by the United Nation Convention on the Law of the Sea (UNCLOS). Other than these incidents, to save harbor costs and tariffs, more foreign vessels are nowadays transferring liquid cargos in coastal States EEZs, bringing in high risks for the coastal States' marine environment. After detailed analysis of the UNCLOS, the author concluded that because the legislative intent was clearly for non-military, peaceful aims, these and some other undefined rights in the EEZs should belong to the coastal States. Also, because the UNCLOS has become customary international law, non-contracting party States like the U.S. should be bound by the Convention as well.

Key Words: United Nation Convention on the Law of the Sea; Exclusive economic zone; Scientific research; Military Survey; Liquid cargo; Undefined rights; Customary law

I. Basic Definition of the Exclusive Economic Zone and Coastal State's Defined Rights

* Kuen-chen FU, LL.M., SJD (UVA), Professor of Law at Xiamen University Law School, and Director of the Xiamen University Center for Oceans Policy and Law. This article is based on the author's presentation at the International Symposium on the Changing Oceanic Landscape in the Indian Ocean Region: Issues and Perspectives of the Debate, 13-15 December 2006, Chennai, India.

The legal regime of the exclusive economic zone (EEZ) and its lineament have been constantly evolving by way of practice of the various counties in the world. Disputes concerning the exact definition of the EEZ and the latter's undefined rights have brought for the international community new issues and challenges. These new issues and challenges have made this paper of some necessity.

The EEZ is an area beyond and adjacent to the territorial sea, not extending beyond 200 nautical miles from the baselines. It should be subject to the specific legal regime established in Part V of the United Nations Convention on the Law of the Sea (UNCLOS), under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed.[1]

According to the UNCLOS, a listing of all the rights, and duties, which are actually the other side of these legal rights, for the coastal States, and for other States in the coastal States' EEZs, can be summarized as follows:

For the coastal States, their rights include:[2]

(a) sovereign rights - for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the "economic" exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;

(b) jurisdiction - as provided for in the relevant provisions of this Convention with regard to:

(i) the establishment and use of artificial islands, installations and structures;

(ii) marine scientific research;

(iii) the protection and preservation of the marine environment; and

(c) other rights and duties provided for in the UNCLOS.

For other States, their rights in the coastal States' EEZs should include:[3]

(a) the freedoms referred to in Article 87 (on freedom of the high seas) for

(1) navigation;

(2) overflight;

(3) laying submarine cables and pipelines; and

(b) other internationally lawful uses of the sea related to the above-mentioned freedoms, such as those associated with the operation of ships, aircraft and

---

1 Article 55, UNCLOS.
2 Article 56(1), UNCLOS.
3 Article 58, UNCLOS.

submarine cables and pipelines, and compatible with the other provisions of the UNCLOS.

To facilitate implementation of these "other internationally lawful uses of the sea," the UNCLOS has stretched out to include "Articles 88 to 115 (on the high seas) and other pertinent rules of international law" to apply to the EEZ in so far as they are not incompatible with Part V (on EEZ) of the Convention.[4]

Also, what is extremely meaningful for the coastal States is that their rights as enjoyed at the seabed and subsoil of their EEZs "shall be exercised in accordance with Part VI (on continental shelf) of the UNCLOS."[5] This should make the legal principles, which are applicable to continental shelf within 200 nautical miles from the baselines, simultaneously applicable to the EEZ.[6]

To avoid potential disputes, the UNCLOS further tries to take a more balanced and thorough position, by urging States to have mutual respects among themselves. Whilst the Convention requires the coastal State to pay "due regard" to the rights and duties of other States in exercising its own rights in its EEZ, in a manner compatible with the provisions of this Convention,[7] it also provides that other States "shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State".[8]

Certainly, the framers of the UNCLOS understood the weakness of these provisions of the above-cited Articles 56 and 58. "Having due regard to the other State's rights and duties" is simply too vague a norm to be enforceable, and does not help eliminate disputing interpretations of the provisions concerning rights and duties in the EEZ. Thus it became necessary to agree upon another set of principles for resolving potential conflicts. Article 59 of the UNCLOS thus provides that in cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the EEZ, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.

---

4 Article 58(2), UNCLOS.
5 Article 56, UNCLOS.
6 Thus, in delimiting overlapping EEZ boundaries, pertaining States should apply legal principles set by the UNCLOS for the continental shelves, including the natural prolongation rule, for their final equitable solutions.
7 Article 56, UNCLOS.
8 Article 58(3), UNCLOS.

Like the provisions for EEZ (and continental shelf) boundary delimitation, the UNCLOS leaves the difficulty of law interpretation to the "principle of equity". In China, this is called a method of "sawing off the part of an arrow (which remains out of the wound)". The appearance will be smooth; yet the issue is not resolved at all. Nevertheless, we probably have to tolerate this, because sometimes it is simply beyond our limited human intelligence to settle disputes with pre-drafted, strictly defined norms. To settle the potential disputing rights or jurisdiction between coastal States and other States in the EEZs, "equitable principles" might still be the only way to follow for the time being.

II. Customary International Law and Non-Contracting State's Rights in the Coastal State's EEZ

The UNCLOS has long been regarded as the Charter for the world's oceans, and as such is a cornerstone for the rule of law and for the international ocean management. However, the United States as the contemporary largest sea power of the world has not yet accepted this Convention. Up to now, the position of the U.S. toward the UNCLOS, including the provisions on EEZ, has been a kind of "passive acceptance", which is arguably "not enough" to protect its own interests.[9] This passive position has also created a major portion of the current world's difficulties.

On 1 April 2001, an American EP-3 "spy plane" encountered and literally clashed with a Chinese interceptor in the Chinese EEZ airspace over the South China Sea. The damaged EP-3 later landed at Lingshui airport on Hainan Island. After several correspondence of mordancy, eventually the U.S. sent China a letter mentioning "sorry" or "we are sorry" for three times, and the Chinese returned the plane to the US.

In the last several years, the "notorious" *USS Bowditch* and her sister ships have been conducting various military surveys in India's EEZ and the Chinese EEZ (mainly in the East China Sea area). India's naval headquarters prepared an analysis of the *Bowditch*'s activity in India's EEZ during 2002-2003 to India's Ministry of Defense in May 2004 contending that the *Bowditch* violated the rules for scientific

---

9 Candace L. Bates, U.S. Ratification of the U.N. Convention on the Law of the Sea: Passive Acceptance Is Not Enough to Protect U.S. Property Interests, *North Carolina Journal of International Law and Commercial Regulation*, Vol. 31, Spring 2006, p. 748.

research established by the UNCLOS.[10] The Chinese government has also brought its strong disagreement to the U.S. government in various occasions.

The issue before us is whether the UNCLOS provisions concerning EEZ have become part of the contemporary customary international law. As some might argue that since the U.S. has not yet acceded to the UNCLOS, the provisions of this Convention might not be applicable to the non-contracting United States, unless their status of customary law can be established.

Very recently, a young Chinese scholar, Martin Lishexian Lee, offered an article having all the relevant discussions on the UNCLOS and its relationship with the customary international law summarized in the San Diego International Law Journal.[11]

Obviously, Article 38(1) of the Statute of the International Court of Justice provides: "The Court… shall apply… international custom, as evidence of a general practice accepted as law…" Two elements are identified by the Statute to determine whether custom exists in a particular circumstance: (1) general State practice, or the actual behavior of States, and (2) the acceptance of a practice as law, or *opinio juris* - the conviction that the practice is either required or allowed by customary international law.[12]

Traditionally these two elements must be proven in order to establish the existence of a rule of customary international law. In regard to proving actual State practice, several factors should be taken into account concerning the nature of the practice, including the duration and repetition of the practice, the level of compliance by States, uniformity, and consensus. These elements are flexible and

---

10 Ranjit Bhushan, Spying on the Seas, at http://www.outlookindia.com/full.asp?fodname=20040607&fname=navy+%28f%29&sid=1, 7 June 2004, cited from Jon M. Van Dyke, Recent Incidents and Developments: Their Implications for the EEZ Regime, paper presented at a seminar on the law of the sea at Shanghai, China, October 28-29, 2004.

11 Martin Lishexian Lee, The Interrelation between the Law of the Sea Convention and Customary International Law, *San Diego International Law Journal*, Vol. 7, Spring 2006, p. 408.

12 Malcolm N. Shaw, *International Law*, 4th ed., Cambridge: Cambridge University Press, 1977, pp. 58~59; Robin Rolf Chuichill and Alan Vaughan Lowe, *The Law of the Sea*, Manchester: Manchester University, 1988; Alexei Zinchenko, The UN Convention on the Law of the Sea and Customary Law, at http://www.geocities.com/enriquearamburu/CON/col5.html, September 2005. See Martin Lishexian Lee, The Interrelation between the Law of the Sea Convention and Customary International Law, *San Diego International Law Journal*, Vol. 7, Spring 2006, pp. 408~409.

depend on surrounding circumstances.[13]

However, according to Lee, modes of developing new rules of customary international law have greatly changed since the Second World War. The result of such changes is that the orthodox approaches to both the sources of international law and the evaluation of evidence of the creation or development of customary international law have been replaced by international multilateral conventions.[14] Although determining that a specific treaty provision has becomes customary international law is often difficult and complex, conventions are still regarded as a legitimate means of creating law. Also, it is widely recognized that in some circumstances conventions can generate customary rules of law that are binding on all States, including nonparties.[15]

The ICJ has identified three relatively uncontroversial circumstances in which international conventions may be relevant to finding customary international law. These circumstances are when a convention: (1) codifies existing customary international law; (2) causes customary international law to crystallize; and (3) initiates the progressive development of new customary international law. In each of these circumstances, States' negotiation and adoption of certain international

---

13 Malcolm N. Shaw, *International Law*, 4th edition, Cambridge: Cambridge University Press, 1977, pp. 58~59; See Martin Lishexian Lee, The Interrelation between the Law of the Sea Convention and Customary International Law, *San Diego International Law Journal*, Vol. 7, Spring 2006, pp. 411~412.

14 Louis B. Sohn, The Law of the Sea: Customary International Law Development, *American University Law Review*, Vol. 34, 1984, p. 273; Louis B. Sohn, Generally Accepted International Rules, Washington Law Review, Vol. 61, 1986, p. 1078. See Martin Lishexian Lee, The Interrelation between the Law of the Sea Convention and Customary International Law, *San Diego International Law Journal*, Vol. 7, Spring 2006, p. 412.

15 Kathryn Surace-Smith, United States Activity outside of the Law of the Sea Convention: Deep Seabed Mining and Transit Passage, *Columbia Law Review*, Vol. 84, 1984, p. 1035, note 10. Martin Lishexian Lee, The Interrelation between the Law of the Sea Convention and Customary International Law, *San Diego International Law Journal*, Vol. 7, Spring 2006, p. 417.

agreements are evidence of customary international law.[16]

All of these methods may be identified in the UNCLOS, and in its associated Agreements. In addition, the UNCLOS has pioneered a fourth avenue for creating customary international principles through the adoption of its "package deal" theory. Thus Lee concluded in his article that, through the combined force of these four methods, the UNCLOS represents customary international law to a very wide extent, and consequently binds all States to its provisions, governing human activities on the ocean.

According to the Chronological Lists of Ratifications of, Accessions and Successions to the UNCLOS and the Related Agreements as at 2 November 2006, among the 192 United Nations member States, 152 States have already officially accepted the UNCLOS.[17] More countries in the world, and that should include the U.S. itself, have behaved as recognizing the EEZ as an internationally accepted legal regime created by that Convention.

Notably, though the required legislative procedures for acceding to the UNCLOS have not yet been fulfilled in the U.S. Congress, the U.S. courts have already referred to certain provisions of the Convention as reflecting customary international law; some U.S. courts have referred to the UNCLOS directly believing that because the U.S. is actively considering accession to the Convention, it has, in their view, an obligation "to refrain from acts which would defeat the object and purpose of [the] treaty".[18] Thus the provisions of the UNCLOS concerning EEZ can safely be regarded as customary international law, and therefore be binding for the U.S. and any non-contracting States of that Convention.

After all, it was the two Truman Proclamations of September 28, 1945, that declared the United States of America's control over marine resources and coastal fisheries beyond its territorial sea, and opened the flood-gates for claims of State sovereignty over the high seas. Since the U.S. itself is significantly benefited

---

16 Jonathon L. Charney, International Agreements and the Development of Customary International Law, *Washington Law Review*, Vol. 61, 1986, p. 971. See North Sea Continental Shelf (Federal Republic of Germany/Denmark & Netherlands), *I.C.J. Reports*, 1969, pp. 37~39; Wladyslaw Czaplinski, Sources of International Law in the Nicaragua Case, *International & Comparative Law Quarterly*, Vol. 38, 1989, p. 153. See also Martin Lishexian Lee, The Interrelation between the Law of the Sea Convention and Customary International Law, *San Diego International Law Journal*, Vol. 7, Spring 2006, p. 415.

17 At http://www.un.org, 6 November 2006.

18 John A. Duff, The United States and The Law of The Sea Convention; Sliding Back from Accession and Ratification, *Ocean and Coastal Law Journal*, Vol. 11, 2005/2006, pp. 4~5.

from the legal regime of EEZ, there is indeed no reason for the U.S. to deny the UNCLOS provisions concerning the EEZ scheme. The fact is that nowadays most of the relevant intellectuals in that country would want the UNCLOS be acceded by the U.S. as soon as possible. However, the split-up country has been struggling between their two major political parties. Only when those unreasonable domestic political bars are removed in the Capital Hill, the U.S. will be able to acceded to the UNCLOS with the constitutionally required two third of the votes in the U.S. Senate.[19]

Maybe the only real problem today for the U.S., and more precisely for the world, is that the U.S. always tends to choose application of statutory, or customary, international law, depending on nothing but its own immediate interests. For that part of the issue, it might not be a topic, which can be discussed meaningfully in this occasion.

III. Freedom of Navigation and Overflight and the Difference between Scientific Research and Military Survey

Much has been talked nowadays about the freedoms of navigation and overflight in the coastal States' EEZs. Therefore, I intend to be short on this section.

The EEZ areas used to be high seas of the world until the 1982 UNCLOS entered into force on 16 November 1994, or exactly 12 years ago from today. Ever since then, the freedoms of navigation and overflight as originally enjoyed by various countries at high seas have derogated drastically, even though the UNCLOS does stipulate that other States enjoy these traditional rights and freedoms in the coastal States' EEZs.[20]

---

19 According to my conversations with Prof. John N. Moore and Prof. Myron Nordquist in March 2005 at Xiamen University, and that with Prof. Bernard Oxman in October 2005 in Beijing. Also, Senator Lugar once emphasized the need for U.S. accession in the context of global security and leadership: "More than 140 nations are party to the Law of the Sea Convention, including all other permanent members of the U.N. Security Council and all but two other NATO members." All major U.S. ocean industries, including offshore energy, maritime transportation and commerce, fishing, and shipbuilding support U.S. accession to the Convention because its provisions help protect vital U.S. economic interests and provide the certainty and stability crucial for investment in global maritime enterprises. See John A. Duff, The United States and The Law of The Sea Convention; Sliding Back from Accession and Ratification, *Ocean and Coastal Law Journal*, Vol. 11, 2005/2006, pp. 4~5.

20 Article 58,UNCLOS.

For many years, navigational freedoms have been the core of the law of the sea for most of the sea powers. Now that, because of the practice of the coastal States, significant restrictions have been imposed upon these freedoms.

Fishing vessels are subject to the most restraints and, to protect the coastal States fishery resources, they are required to install VMS on board to allow real-time monitoring of their positions by both the flag States and other pertaining States, if they want to fish in the latter's EEZs with prior permit. If they want to navigate through another State's EEZ, even without any intention to fish, they usually have to tolerate visits made by the coastal States for various reasons. Security is a newer reason after the 9/11 incidents.

Oil tankers, and any ship with a dangerous cargo, must conform to international, regional, and national regulations. Particularly those oil tankers with single hulls are subject to a variety of restraints. After the 2002 incidence of *The Prestige*, in some countries like Spain and France, single hulled oil tankers are not even allowed to enter and dock in their harbors.

Ships carrying ultra-hazardous nuclear cargoes have been told by many countries to avoid their EEZs, and these ships have in fact picked routes designed to avoid most EEZs. Japan, as one of the main carriers of highly radioactive wastes, used to ignore the spirits of Article 23 of the UNCLOS, and keep secrete on the routes of its ships with such cargoes.[21] However, according to some Japanese scholars, the new Abe Cabinet might change the longstanding secrecy policy and will disclose the routes of their ships carrying the spent fuel from the nine Japanese nuclear power plants.[22] If this could be realized, it will certainly help improve the international image of Japan.

After 11 September 2001, security concerns have increased dramatically, and it has become almost common practice for the major maritime and military powers to assert the right to stop and board foreign vessels to look for suspect cargoes in all parts of the oceans − including the EEZs.

---

21 Kuen-chen Fu, Jurisdiction Over Environmental Violations in the Taiwan Strait Area - A Perspective from Each Side of The Strait, *University of British Columbia Law Review*, Vol. 27, No. l, 1993; Kuen-chen Fu and Liu Xianmin, An Analysis of the Legal Issues concerning Vessel-Source Pollution in the Taiwan Strait, *China Oceans Law Review*, No. 1, 2006, pp. 78~89. (in Chinese)

22 According to Prof. Shigeki Sakamoto of Kobe University and some others, at Tsinghua University Law School last October in Beijing.

A new norm of customary international law appears to have emerged that allows coastal States to regulate navigation through their EEZ based on the nature of the ship and its cargo. Even military vessels, which traditionally enjoy immunity from seizure, must nonetheless respect many rules that have been established to protect the marine environment and the security of coastal populations.[23]

Though the U.S. still insists that coastal States have only the primary rights to the "natural resources" in the EEZ, while foreign States retain the freedom of navigation and overflight through this zone,[24] it appears that it is no longer accurate to say that the freedom of navigation, and that of overflight, exists in the EEZ of other countries to the same extent that it exists on the high seas. The balance between navigation and other national interests continues to develop, and navigational freedoms appear to be disappearing during this evolutionary process.[25]

One might want to single out the issue of the freedom of overflight, trying to distinguish it from that of the navigation. Nevertheless, the situation is similar. If vessels (and logically aircraft also) have to avoid the safety/buffer zones created by the coastal States around their artificial structures in the EEZs,[26] and obey the rules

---

23 Jon M. Van Dyke, Recent Incidents and Developments: Their Implications for the EEZ Regime, paper presented to a seminar in Shanghai, 28-29 October 2004.

24 George V. Galdorisi and Alan G. Kaufman, Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict, *California Western International Law Journal*, Vol. 31, Spring 2002, p. 235.

25 Jon M. Van Dyke, Recent Incidents and Developments: Their Implications for the EEZ Regime, paper presented to a seminar in Shanghai, 28-29 October 2004.

26 Article 60(4) provides that "[t]he coastal State may, where necessary, establish reasonable safety zones around such artificial islands, installations and structures in which it may take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures." Article 60(6) provides that "[a]ll [SHIPS] must respect these safety zones and shall comply with generally accepted international standards regarding navigation in the vicinity of artificial islands, installations, structures and safety zones." Logically, not only ships have to avoid those artificial structures, but also the aircraft, particularly helicopters and hot balloons, so as to maintain safety of those structures, and the essential order and security in the EEZs.

and regulations set by the coastal States for their EEZs,[27] they do not have the same traditional freedoms at the high seas any longer. Note that in the *Ocean Yearbook (Vol. 3)* co-edited by Elizabeth Mann Borgese and Norton Ginsburg, the air space above the EEZ was deliberately named the "EEZ air space", not the "international air space". The so-called "international air space" exits only above the water areas beyond the 200-nautical-mile limits of the EEZs.[28]

The difficulty faced by the international community today is that countries like the U.S. have from time to time refused to obey the laws and regulations as promulgated by the coastal States for their EEZs.

As in the above-mentioned cases involving the *USS Bowditch* and her sister ships, while facing repeated protests from India and China, the U.S. insisted that what they did in the India's EEZ, and the Chinese EEZ, were only "military surveys", not any "marine scientific researches". Thus the articles of the UNCLOS should not be applicable.[29]

One may try to follow the Anglo-American inductive way of legal thinking to explain the U.S. attitude. Since the statutory law of the sea has not expressly prohibited the *USS Bowditch* to do "military surveys", unless a competent court makes a clear decision against it, the *USS Bowditch* is entitles to do it.

However, if one would follow the deductive European Continental legal thinking, and interpret the UNCLOS accordingly, it will be much easier to know why the *Bowditch* should not be entitled to such "military scientific researches". Theoretically and practically, the statutory UNCLOS has to be read and understood as a whole "Constitution" for the world's oceans, particularly when interpretation of a specific article becomes necessary.

Though Article 56(1)(b)(ii) mentions only that "[t]he coastal State has jurisdiction as provided for in the relevant provisions of the Convention with regard to… (ii) marine scientific research…" it is provided for clearly in another two relevant articles of the UNCLOS - Article 88 and Article 246(3). The former stipulates that all high sea activities have to be for peaceful purposes. And the latter stipulates that all EEZ (and continental shelf) marine scientific researches must be exclusively for peaceful purposes.

---

27 Article 73,UNCLOS.

28 Michael A. Morris, Military Aspects of the Exclusive Economic Zone, in Elizabeth Mann Borgese and Norton Ginsburg eds., *Ocean Yearbook, Vol. 3*, Chicago: The University of Chicago Press, 1982, p. 326.

29 Article 56 , UNCLOS.

Article 88 provides that"[t]he high seas shall be reserved for peaceful purposes". That means all the rights or freedoms, including those of navigation and overflight, as enjoyed by various States at high seas, must be "for peaceful purposes" only. As we mentioned earlier in the first section of this paper that other States' rights in the coastal States EEZs should include "the freedoms referred to in Article 87 (on freedom of the high seas) for… navigation and overflight". Therefore these freedoms of navigation and overflight in the EEZs are adopted from those at the high seas; and they are all "for peaceful purposes", since their inception, and in their nature. It is simply illogical, and contradictory to the UNCLOS, to allow any "peaceful" freedoms or rights at the high seas to be exercised "militarily" in the coastal States' EEZs.

The last, yet not the least, argument the U.S. might bring before a competent tribunal, had the disputes been submitted to one of them, is that a "military activity" might still be "for peaceful purposes". If you read carefully the title of the article written by Captain George V. Galdorisi, USN (ret.) and Commander Alan G. Kaufman, JAGC, USN, "Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict," published on *California Western International Law Journal*, 2002, you might found that their arguments are clearly that all these military researches are still for "peaceful purposes".[30]

My rebuttal would be simplified.

When the *USS Bowditch* sailed into the India's EEZ and collected that coastal State's national security information without the latter's per-permit, it was committing espionage against the India's sovereign interests, in a water subject to India's exclusive jurisdiction and prescriptive rights. If the U.S., or anyone else in the world, would try to "defuse conflicts" for "peaceful purposes" with his own discretionary interpretation of the UNCLOS articles, he is not making peace, but making troubles. And troubles concerning such sovereign and national security interest matters would usually lead to real confrontation. Such self-defined "military operations" cannot reasonably be regarded as "peaceful" in this 21st Century.

Article 246 of the UNCLOS has to be taken into account by various countries involved. The text of Article 246(3) reads:

---

30 George V. Galdorisi and Alan G. Kaufman, Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict, *California Western International Law Journal*, Vol. 32, Spring, 2002, p. 253.

Coastal States shall, in normal circumstances, grant their consent for marine scientific research projects by other States or competent international organizations in their exclusive economic zone or on their continental shelf to be carried out in accordance with this Convention exclusively for peaceful purposes and in order to increase scientific knowledge of the marine environment for the benefit of all mankind. To this end，coastal States shall establish rules and procedures ensuring that such consent will not be delayed or denied unreasonably.

For years, international trade items are categorized into three categories: civil used, military used and dual used. Similarly, "marine scientific research" projects may be classified into these three categories. Obviously, if the U.S., or any other States, would need to do some marine scientific research of dual (civil and military) usage but clearly for "peaceful purposes", in the EEZ of any coastal State, that coastal State should "grant his consent, and should establish rules and procedures to ensure such consent will not be delayed or denied unreasonably". Therefore, Article 246(3) has truly expressly given the coastal State such authority for making decisions on consenting to any research projects in its EEZ; and has provided for such a scheme as to satisfy the potential demands as proclaimed by the U.S. "to prevent uncertainty and to defuse conflicts" - or simply for peaceful purposes. Hardly can anyone find a reason for the U.S. to be discretionary as it always tends to be.

The current issue is, to some extent, more or less like a case concerning interpretation of a statutory law, which forbids any shopkeepers to hang their commercial signs on the street trees in front of their shops along the street. Can a smart shopkeeper, instead of hanging any signs on the tree itself, make a cement pillar to enclose the whole tree before his store first, and then hang his shop sign onto that cement pillar? The answer should be "no". Because if the law prohibits you to do something, you simply cannot detour to do something against the purpose of that same legislation, nor can you do it by putting on a different hat.

To sum up, the UNCLOS has expressly required that all these high seas freedoms of navigation, of overflight, or of other kinds, to be exercised in the coastal State's EEZ, be exercised "for peaceful purposes" only. And the UNCLOS has also expressly stipulated that any "marine scientific research" projects, of civil or military usage, to be carried out within a coastal State's EEZ, should be consented to by that costal State, as long as they are exclusively for peaceful

purposes. Any military marine research project, which is for peaceful purposes, should be consented by the coastal State. Only the judgment on "being peaceful or not peaceful" shall be made by that coastal State itself, not by any other State which is to do the project in the coastal State's EEZ. This has been the evidenced purpose of the legal regime of the EEZ as defined by the UNCLOS drafters. Thus, unless the U.S. applies for and is denied of such peaceful, military or civil, marine scientific research project, he will be able to argue over the decision following the dispute settlement procedures established in Part XV of the UNCLOS.

While we are discussing these issues, the U.S. Congress has just approved a nuclear sales project to India.[31] Perhaps, with that friendly alliance relationship established between the two countries, the above disputes would be settled without any further legal arrangements. For that reason, we sometimes have to appraise the works of political scientists, not of the lawyers.

IV. Liquid Cargo Transfer in the EEZ

The oceans are suffering more and more risky pollution damages. Among many other types, oil spill has been the most drastic. On December 12, 1999, the Maltese flagged tanker *Erika* sank off the coast of France, spilling between 12,000 and 15,000 tons of fuel oil. Short attentions were given to the public in that year and the coming year of 2000. Then, three years later, in the year of 2002 alone, two significant incidents occurred. The *Prestige* sank off the Spanish coast, spilling another 10,000 tons of oil; and the *Tasman Sea* sank off the Chinese coast, spilling some 205.924 tons of light crude oil into the Bohai Bay. The latter case constitutes in China, the first civil case for claims over marine environmental damages caused by oil spill. The claims made by the public and the private sectors in a Chinese court totaled RMB 170 million - another number one in China's history of civil court procedures.[32]

Nevertheless, again, oil spill has been much talked in various occasions. There is, in the EEZ of a coastal State, another significant new issue concerning environmental protection, and probably concerning national tax income problems of the coastal State, that should be addressed with more emphasis. That is the

---

31 The Hindu (a daily newspaper published in Inida), p. A1,10 December 2006.

32 Chen Haibo, The "Tasman Sea" Cases on Oil Pollution Compensation Disputes after Collision - An Analysis, *China Oceans Law Review*, No. 2, 2005, pp. 85~102. (in Chinese)

transfer of liquid cargoes in the coastal State's EEZ. Little literatures can be found on this topic up to now. Yet, in China, and some other coastal States, this challenging new issue is getting more notice nowadays.

People may want to ask about the legitimacy of the expanding coastal State's jurisdiction over this new subject matter on transfer of liquid cargoes in a coastal State's EEZ. Indeed, the UNCLOS framework, in large part, maintains the existing balance and tension that historically has existed between maritime and coastal States with respect to jurisdictional control over the ocean and the activities conducted thereon. Admittedly, those coastal States' assertions of prescriptive jurisdiction over vessel-source pollution are in tension with the limited prescriptive jurisdiction afforded such States by the UNCLOS. However, this is not to say that in limiting coastal State prescriptive jurisdiction UNCLOS in some way prohibits further expansion of coastal State jurisdiction - either prescriptive or enforcement - through newly developed customary international law. Finding themselves inadequately protected by the existing framework, coastal States may seek to unilaterally increase their own prescriptive and enforcement jurisdiction through customary international law principles, thus eroding the stability and balance that UNCLOS drafters seek to preserve.[33]

The following part of this paper tends to discuss such unilaterally enacted domestic legislations, their legitimacy, and their limits on regulating transfer of liquid cargoes within the coastal States' EEZs.

Oil and many other kinds of liquid cargoes are explosive, and could cause serious damages, not only to the environment, but also to the public order and security of the oceans. Therefore, many coastal States have already enacted detailed laws and regulations to control and to regulate transfer operations of such liquid cargoes. In China, disasters caused by transfer of liquid cargoes occur often. On 29 March 2003, a Singaporean flagged oil tanker was committing transfer of oil with a Maltese flagged tanker near the Dan-Gan Islands in the Da-Peng Bay. The operation was done within the Chinese EEZ without any permits from the Chinese Shenzhen Port Authority. The eventual explosion caused 1 death and 3 injuries, not

33 Christopher P. Mooradian, Protecting "Sovereign Rights": The Case for Increased Coastal State Jurisdiction over Vessel-Source Pollution in the Exclusive Economic Zone, *Boston University Law Review*, Vol. 82, 2002, p. 768.

to mention the serious marine environment damages caused from the oil spill.[34]

Until this moment, China has no specific laws and regulations on the transfer of any cargoes within her EEZ. Article 2(2) of the 1996 Regulations on Safeguard of Liquid Cargo Transfers on Board at Waters provides that the "waters" where these Regulations shall apply should include the inland waters, including the rivers, lakes, reservoirs and cannels, and the coastal harbors, internal waters, territorial seas and any other seawaters under the jurisdiction of the PRC. Without permit from the Ministry of Transportation, foreign vessels are not allowed to transfer any cargo in the non-opened-up waters or harbors of this country.[35]

Presumably this so-called "any other sea waters under the jurisdiction of the PRC" should include the Chinese EEZ, though The PRC Law of the EEZ and Continental Shelf was enacted on 26 June 1998, or about two years later than the 1996 Regulations on Safeguard of Liquid Cargo Transfers on Board at Waters.[36] Nevertheless, this question has never been clarified by the Chinese authorities.

As to the so-called "non-opened-up waters or harbors," it was subject to the Ministry of Transportation's discretion when the 1996 Regulations were promulgated. However, after the 2001 PRC Law of Management of the Use of Maritime Zones entered into force on 1 January 2002, it is now subject to the central and the local governments to decide accordingly which maritime zones should be used for local or foreign vessels to operate cargo transfers in China.[37]

From the view point of international law, the basic undecided legal question is whether a coastal State does enjoy the rights and duties to regulate such transfer

---

34 Illegal Transfer of Oil at Sea by Two Foreign Tankers Caused Fire and Explosions, *Qingdao News Net*, 1 April 2003, at http://www.qingdaonews.com/content/2003-04/01/content_1189496.htm, 20 November 2006. (in Chinese)

35 The 1996 Regulations on Safeguard of Liquid Cargo Transfers on Board at Waters was promulgated by the Ministry of Transportation on 16 April 1996, and entered into force on 1 May 1996.

36 The PRC Law of the EEZ and Continental Shelf was enacted on 26 June 1998 by the 3rd meeting of the Standing Committee of the 9th National Peoples Congress.

37 The 2001 PRC Law of Management of the Use of Maritime Zones was enacted on 27 October 2001 by the 24th meeting of the Standing Committee of the 9th National Peoples Congress.

operations of liquid cargoes in its EEZ. After all, Article 56(1)(c) of the UNCLOS provides only the coastal State's "other rights and duties provided for in this Convention". To answer this question, *The M/V Saiga Case* and *The M/V Saiga (No. 2) Case* might be indicative.[38]

Early in the morning of 27 October 1997，*The Saiga*，a bunkering boat flying the flag of Saint Vincent and Grenadines, sailed across the maritime boundary between Guinea Bissau and Guinea, and entered the EEZ of the Guinea. On that same day, *The Saiga* transferred fuel oil to three foreign fishing vessels at a location roughly 32 nautical miles from Guinea's Island of Alcatraz. This operation was discovered by the Guinean government. After chasing and firing by the Guinean gunboats, *The Saiga* was stopped and arrested. Actions for deciding the legitimacy of this arrest, and prompt release of the ship and its crews, were brought to the International Tribunal for the Law of the Sea (ITLOS).

In its judgment, the ITLOS states that navigation in a coastal State's EEZ is not the same as that at the high seas. And transferring fuel oil (bunkering) in a costal State's EEZ for fishing vessels should be regarded as fishing activities in the EEZ, which is the coastal State's sovereign rights according to Articles 55 and 56 of the UNCLOS. The Tribunal further pointes out that Guniea has the right to make legislations to protect its own public interests. In this case, this means that Guinea can enact its Customs Law to tax such bunkering service suppliers in the Guinean EEZ. But, this right of legislation has to be exercised with due regard to the other State's interests, according to Article 58(3) of the UNCLOS. And the limit for Guinea to do so should be on the basis of "principle of necessity". In other words, the ITLOS believes that if the enforcement of the Guinea's Customs Law in its EEZ is "the only way" to protect its interests in the EEZ, and "will not damage any other State's interests", then it can legitimately enforce it.

Unfortunately, the Tribunal does not find it "necessary", and finds that there are other ways for Guinea to protect its tax interests in its EEZ. Thus with 18 votes agree and only 2 against, the Tribunal holds Guinea be liable for compensating the plaintiff, Saint Vincent and Grenadines, US $ 2,123,357.[39]

With this decision of the ITLOS on *The M/V Saiga Case*, we may find that the coastal State may make domestic laws and regulations to regulate, including

---

38 For a detailed report of *The M/V Saiga Cases*, at http://www.itlos.org/start2_en.html, 25 November 2006.

39 At http://www.itlos.org/start2_en.html,18 November 2006.

to tax for, operations of transferring liquid cargoes within its EEZ, as long as the following two requirements are satisfied:

(1) It is for the public interests of that coastal State; and

(2) It is in accordance with the "principle of necessity", i.e., if there is no other ways to protect the coastal State's EEZ interests, and it will not damage any other State's interests.

Although transfer of liquid cargoes in a coastal State's EEZ might not necessarily be for commercial purposes, the truth is that today most of the operations of transferring oil, or other liquid cargoes, in a costal State's EEZ are for the purpose of avoiding taxation and harbor charges. In China, there are already several court decisions concerning un-permitted transfer of oil cargo in the Chinese territorial seas, contiguous zones and internal waters - not in the EEZs. They are usually punished as smugglers.[40]

What can be done then?

Firstly, coastal States may want to modify their domestic taxation laws to collect business tax, customs tax and even environmental tax from domestic/foreign vessels carrying liquid cargo transfer operations in their EEZs - if the requirement of the "principle of necessity" can be met. This seems well supported by the above-mentioned ITLOS decisions.

Secondly, prior permit should be required by coastal States for transfer of liquid cargoes within their EEZs (and actually any other waters under national jurisdiction). This should be provided for in their domestic laws and regulations together with the designation of the proper zones for that kind of operations.

Thirdly, specially sensitive zones should be duly publicized, and violators should be punished heavily in accordance with the coastal States' statutory provisions.

Fourthly, non-commercial operation of transferring liquid cargoes by governmental vessels should be provided for separately and specifically by the coastal States. If a foreign governmental claims immunity, it should be identified first whether the operation of transfer is for commercial purposes. Those for commercial operations should not enjoy immunity.

Fifthly, if the cargoes transferred are high level radioactive materials, or

---

40 Tang Yuankai, International Oil Price Surges: Smuggling at Sea Getting Active, *BeilingWeekly*,13 April 2005, at http://www.bjreview.com, 15 November 2006 (in Chinese); Xinhua Net,13 April 2005, at http://www.xinhuanet.com, 15 November 2006. (in Chinese)

other highly hazardous ones, they should be managed in accordance with relevant international rules and standards. Precautionary controls are essential, for it should be more important than legal punishment or any other after math treatments. Application for cargo transfer permit with proper documentations and the environmental impact statements (EIS) should be required by the coastal State's domestic laws and regulations.[41]

Sixthly, the WTO rules should be taken into account for commercial transfer of liquid cargoes in the EEZ of a coastal State, which has acceded to the WTO conventions.

Seventhly, if at least one party of the two vessels carrying out liquid cargo transfer in the coastal State's EEZ is a foreign flagged vessel, the management approaches should be different from those for all domestic vessels.

Eighthly, special emphasis on responsibilities of the large oil companies should be codified in domestic laws and regulations. MARPOL has been less effective in terms of controlling large oil companies' pollution activities.[42] In the past many years, oil tankers are slow to shift to anti-spill double hulls, until some main port States changed their domestic laws to refuse their docking in their harbors, owners of these oil tankers began to take it more seriously.[43]

---

41 MAYAGUEZANOS POR LA SALUD Y EL AMBIENTE, ET AL., Plaintiffs, Appellants, v. UNITED STATES OF AMERICA, ET AL., Defendants, Appellees. No. 99-1412, UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT,198 F. 3d 297; 1999 U.S. App.LEXIS 33416; 49 ERC (BNA) 1889; 2000 AMC 2476; 30 ELR 20214, December 20 ,1999 , Decided. OPINION: LYNCH, Circuit Judge. On February 3, 1998, the *Pacific Swan*, a British-flag freighter carrying a cargo of vitrified high-level nuclear waste, passed through the Mona Passage, a stretch of seas between the islands of Puerto Rico and Hispaniola. It was bound for Japan, by way of the Panama Canal, from France. A day earlier, a group of fishermen and environmental organizations from western Puerto Rico, fearing an accident or maritime disaster, brought this action for an injunction to stop the shipment until the United States filed an Environmental Impact Statement (EIS) in accordance with the National Environmental Policy Act (NEPA), 42 U. S. C. §4321 et seq. After the parties filed cross-motions for summary judgment, the district court denied the claim for injunctive relief and dismissed the action. See: Mayaguezanos por la Salud y el Ambientev, United States, 38 F. Supp, 2d 168,178 (D.P.R.1999).

42 Emeka Duruigbo, Reforming the International Law and Policy on Marine Oil Pollution, *Journal of Maritime Law and Commerce*, Vol. 31, January 2000, p. 69.

43 Craig Welch, Oil Tankers Slow to Shift to Anti-Spill Double Hulls, *Seattle Times*, 5 May 2003.

Ninthly, criminal punishment should be adopted in domestic criminal codes, so to more effectively prevent serious intentional marine pollution activities in the coastal States' EEZs. For environmental disasters caused by illegal transfer of liquid cargoes in the coastal States waters, shipowner and operator's criminal liabilities should be significantly increased.[44]

Lastly, but not least importantly, is that coastal States, port States and flag States should strengthen cooperation among themselves to combat illegal transfer of liquid cargoes in the EEZs. International maritime regimes long have recognized the preeminent role that flag States have in ensuring crew and vessel safety and environmental protection. While the UNCLOS envisions a partnership among flag, coastal and port States, in the response to potential violations of marine environmental protection laws and standards, the flag State remains the lead partner. Yet, without any doubt, as some scholars have argued, port State's authority should be increased. And this can be realized by their domestic legislations also.[45]

V. Conclusions

The discussions may lead to some simple conclusions that the UNCLOS framework is not all proper for ensuring the peaceful use of the EEZs of various countries of the world, even though people may apply the principle of customary international law to try to resolve the contemporary issues and difficulties. With some further consultations, it should be not very difficult to have the UNCLOS modified in the future review conferences of the Convention at the United Nations.

Among others, Article 59 should be modified to make the principle of equity more feasible, if possible.

Article 60(6) should be modified to include "aircraft" for protecting the safety/ buffer zones established in the coastal States' EEZs.

Specific definition of "marine scientific research" should be given in either Part V (Article 56(1)(b)(ii)) or in Part XIII (Article 246). Thus, "military" marine scientific research in the EEZ and on the continental shelf shall be regarded as marine scientific research, too. It should be consented by coastal States for "peaceful

---

44 David G. Dickman, Recent Developments in the Criminal Enforcement of Maritime Environmental Laws, *Tulane Maritime Law Journal*, Vol. 24,Winter 1999, pp. 4~5.

45 Jeremy Firestone and James Corbett, Combating Terrorism in The Environmental Trenches: Responding to Terrorism: Maritime Transportation: A Third Way For Port And Environmental Security, *Widener Law Symposium*, Vol. 9, 2003, p. 419.

purposes" only.

The Preamble of the UNCLOS should be re-emphasized by the United Nations General Assembly with a resolution, so as to avoid any further disputes concerning the peaceful use of the coastal States' EEZs. The Preamble reads as follows:

> *Recognizing the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment;*
>
> *...*
>
> *Believing that the codification and progressive development of the law of the sea achieved in this Convention will contribute to the strengthening of peace, security, cooperation and friendly relations among all nations inconformity with the principles of justice and equal rights and will promote the economic and social advancement of all peoples of the world, in accordance with the Purposes and Principles of the United Nations as set forth in the Charter;*
>
> *Affirming that matters not regulated by this Convention continue to be governed by the rules and principles of general international law.*

Lastly, for better protection of the world's oceans environment, the coastal States should endeavor to promulgate new laws and regulations to regulate illegal transfer of liquid cargoes in their EEZs.

沿海国海洋科学研究管辖权与军事测量的冲突问题

张海文 *

内容摘要: 从海洋科学研究法律制度的演进过程可以看出，国际海洋法赋予沿海国对越来越大范围的海域拥有越来越多的管辖权，其中包括对海洋科学研究活动越来越严格的管辖。随着现代科学技术水平的发展，纯粹的“海洋科学研究活动”与“海洋测量活动”已经很难明确区分。在国际社会尚未完全达到和平共处、甚至存在局部军事对抗和战争的现代国际关系下，一些海洋强国主张通过“海洋测量”（或“军事测量”）活动所收集到的海洋数据仅仅用于“和平的目的”或“造福全人类”，这很难令人信服。因此，必须支持目前广大发展中沿海国为了维护国家海洋权益所持的主张，即所有为了增加人类对海洋及其变化规律的知识的活动均属于海洋科学研究的范畴，均应事先得到沿海国的同意。

关键词: 《联合国海洋法公约》 海洋科学研究 军事测量

一、前 言

人类自古以来一直在海洋上航行，并致力于海洋及其自然资源的开发和利用，迄今为止，海洋仍然是人类尚未完成深刻认识和了解的神秘领域之一。现代科学技术的发展为人类更深刻地了解海洋提供了必要的条件和手段，必将造福全人类;但是，也给人类带来了冲突和矛盾。

人类社会的生存和可持续发展已经越来越多地依赖海洋。海洋已经成为人类从事地质、气象和太空研究不可或缺的重要活动空间。作为地球的重要组成部分，海洋对人类的意义日益受到重视。在科技领域，海洋既是人类的科研对象，也是人类的新科研空间，为人类提供了一个海、陆、空、天、水下和地下神奇的多维空间，

---

* 张海文，海洋发展战略研究所研究员，法学博士。本文是笔者根据 2005 年 3 月 9–12 日中国厦门召开的“海洋法的新发展与中国”研讨会上的发言整理和修改而成，原文参 见 Myron H. Nordquist, John Norton Moore and Kuen-chen Fu eds., Recent Developments in the Law of the Sea and China, Leiden: Martinus Nijhoff Publishers, 2006, pp. 317~331.

使人类得以更全面、更深入和更完整地认识自然世界，发展科学技术。因此，各沿海国越来越重视对海洋的研究。海洋科学已经成为一门十分重要的综合性科学，它是研究世界海洋环境的物理、化学、地质、生物、水文、气象等各类学科的总称。[1]

人类有久远的海洋航行历史，其中有一些航海家也关注对海洋的观测工作，例如，中国明代著名的航海家郑和。[2] 在西方进入资本主义阶段以后，随着工业的高度发达和科学技术的广泛应用，海洋科学研究的范围和内容也日益扩大。但是，一般认为现代科学意义上的海洋科学研究历史是从 19 世纪 70 年代英国“挑战者”号进行的环球科学考察开始的，当代海洋科学研究是从 20 世纪 40 年代以后才开始的。海洋科学研究几乎涉及自然科学的各个分支，并不断开辟着新的领域。随着科学技术的迅速发展，人类海洋科学研究的范围已由近海扩展到世界各大洋；调查的内容由进行自然地理描述发展到环境和资源的调查研究、为海洋开发服务。海洋科学研究的国际化带来了法律问题，从 1907 年海牙和平会议所通过的一系列公约开始，直到 1982 年《联合国海洋法公约》的规定，逐步发展形成一个比较完整的海洋科学研究法律制度。

二、海洋科学研究法律制度演变的简要回顾

（一）1958 年之前

在 1958 年以前，一般国际惯例是鼓励海洋科学研究活动，海洋科学研究船舶具有中立地位，享有豁免权。

早在 18 世纪，就有在战时保护海洋科学研究船舶的事例。不从事敌对行为的海洋科学研究船舶享有豁免，已经成为一般国际惯例。[3] 有的国家还将此列入国内法。例如，1877 年意大利《商船法》第 247 条规定，交战国的军舰，只要是从事科学研究任务的，就允许进入或停泊其港口、锚地或近岸处。

在 1907 年第二次海牙和平会议上，意大利代表团提出了对从事科学、宗教和慈善任务的敌船免予拿捕等建议，经与会代表反复讨论，一致同意将意大利各建议分别写入有关公约。例如，海牙第十一公约（即《海战时限制捕获权公约》）第 4 条规定，对未参加任何作战活动的、负有宗教、科学或慈善使命的船舶，不得加以攻击或拿捕。海牙第十三公约（即《海战时中立国的权利和义务公约》）第 14 条规定，对专为科学考察研究的军舰，可不受 24 小时停泊规定的限制；被敌国雇用或租用的中立国科学船舶，不得被视为“从事非中立役务”。

---

1 刘楠来等著：《国际海洋法》，北京：海洋出版社 1986 年版，第 409 页。

2 早在十四世纪上半叶，郑和“七下西洋”，经南海、印度洋和红海一带，远达非洲北部，记载了沿途所经各地的水文、海水运动和水深的变化等。

3 刘楠来等著：《国际海洋法》，北京：海洋出版社 1986 年版，第 412 页。

第二次海牙和平会议以后，许多国家制订了相应的中立法律或捕获条例。例如，1914 年（民国 3 年），当时的北京政府颁布了《局外中立条规》，其中规定，交战国从事科学研究的军舰得停泊中国口岸，并不受对普通军舰所施加的 24 小时停泊制度，和同一时间内不得有超过 3 艘军舰停泊以及添补必需品等限制。1932 年（民国 21 年），国民党政府颁布的《海上捕获条例》也规定，不参加军事活动的、从事学术研究的敌船不应予以拿捕。其他许多国家的国内法，例如 1938 年《意大利战争法》, 法国于 1934 年颁布的一项命令等，也有类似的规定。[4]

不过，在这个历史阶段，虽然已经形成在战时保护海洋科学研究船舶的国际惯例或国内立法，但是，那些都只是出于对科学和宗教事业的尊重，以及出于人道主义，还没有形成海洋科学研究自由的概念。1926 年，国际法协会维也纳会议曾把海洋科学研究自由与航行自由等并列。但是，当时国际社会尚未承认和接受海洋科学研究自由这个概念。

（二）1958 年《公海公约》与《大陆架公约》

1956 年国际法委员会第八届会议通过的海洋法条款草案，在列举“公海自由”时，仅仅包括航行自由、捕鱼自由、铺设海底电缆和管道的自由以及飞越自由，而没有海洋科学研究自由。

1958 通过的《公海公约》中也没有列举海洋科学研究自由。不过，国际法委员会对《公海公约》第 2 条的说明是：本条所列举的公海自由是没有限制的。委员会只不过是指出了四项主要的自由，并特别指出了在公海进行研究的自由，这种自由仅仅由于任何行动违背了普遍原则，对另一国家的国民在公海利用上产生不良影响而受到限制。

1958 年日内瓦四公约中，只有《大陆架公约》直接明确地规定了海洋科学研究问题。《大陆架公约》的通过，标志着现代海洋科学研究法律制度逐步开始建立起来，沿海国对其管辖海域内的海洋科学研究活动拥有管辖权。但是，在《大陆架公约》具体条款中，也没有使用“科学研究自由”一词。

《大陆架公约》一方面保留了鼓励和支持海洋科学研究的传统，在第 5 条第 1 款规定了基础海洋学等研究不得受干涉；另一方面，又赋予了沿海国对海洋科学研究的部分管辖权，该条第 8 款规定，任何有关大陆架的研究或在大陆架上进行的任何研究均应取得沿海国的同意，即建立了“同意制度”。实际上《大陆架公约》如此规定是试图将大陆架上进行的海洋科学研究分为两类，即对大陆架的物理或生物特征所作的纯科学性研究和此种研究之外的研究。但是，后来的实践表明，该条款的解释和实施方面都出现争论。

---

4 刘楠来等著：《国际海洋法》，北京：海洋出版社 1986 年版，第 413 页。

（三）1982 年《联合国海洋法公约》

可以说第三次联合国海洋法会议之前，关于在公海上进行海洋科学研究，无论在理论上还是在实践中都没有争议，各国均享有在公海进行海洋科学研究的自由；有争论的只是沿海国对大陆架上进行海洋科学研究活动的管辖权问题。

第三次联合国海洋法会议关于海洋科学研究的争论基本上是以前争论的继续，核心问题是国家管辖海域内进行海洋科学研究的“同意制度”。

在第三次联合国海洋法会议讨论沿海国对海洋科学研究的管辖权问题时，中国的立场是，“任何希望在其他沿海国家管辖内的海域进行海洋科学研究的国家，必须取得该沿海国的事先同意，并遵守其有关法律规章。”[5]“经济区和大陆架在性质上是国家管辖范围内的海域，沿海国对该海域内的科学研究行使专属管辖权是理所应当的。广大发展中国家主张在经济区进行海洋科学研究要得到沿海国明确同意，这是从维护沿海国安全和正当海洋权益的基本立场出发的”、[6]“设于沿海国管辖海域范围内的科学设施，除经沿海国同意外，必须置于沿海国的管辖之下，设置国必须尊重沿海国的这种管辖权，这是一个重要的原则。”[7]

历经十余载的漫长讨论，尽管其条款中还有模糊和可争论之处，但 1892 年通过的《联合国海洋法公约》是迄今为止对海洋科学研究问题规定的最详细的一个国际公约，其第十三、十四章分别规定了海洋科学研究和海洋技术转让问题，基本建立起一个完整的海洋科学研究法律制度。

《联合国海洋法公约》首先明确规定了海洋科学研究应遵循的基本原则是：应专为和平目的而进行（第 240 条（a）项）；应以符合公约的适当科学方法和工具进行（第 240 条（b）项）；不应对符合本公约的海洋其他正当用途有不当的干扰（第 240 条（c）项）；应遵守依照本公约制定的一切有关规章（第 240 条（d）项）。

其次，《联合国海洋法公约》以进行海洋科学研究的海域为基础，将海洋科学研究制度分为 2 类：

1. 国家管辖海域内的海洋科学研究制度

在领海（内水、群岛水域）进行海洋科学研究：必须取得沿海国的“明示同意”（第 19、245 条）；

在国际海峡与群岛海道进行海洋科学研究：必须取得沿海国的“事前准许”（第 40、54 条）；

---

5 1974 年 7 月 19 日中国代表在第三次联合国海洋法会议上的发言，见 Official Records of the Third United Nations Conference on the Law of the Sea, Vol. II, p. 344.

6 1976 年 9 月 14 日中国代表在第三次联合国海洋法会议上的发言，见《我国代表团出席联合国有关会议文件集（1976,7-12）》，北京：人民出版社 1977 年版，第 183~184 页。

7 1975 年 4 月 17 日中国代表团在第三次联合国海洋法会议上的发言，见《我国代表团出席联合国有关会议文件集（1975,1-6）》，北京：人民出版社 1976 年版，第 76 页。

在专属经济区和大陆架（毗连区）进行海洋科学研究：应经沿海国同意（第56、58、246 条）；沿海国正常情况下，应给予同意；但是如果该计划与自然资源的勘探和开发有直接关系等 4 种情况，沿海国有斟酌决定权，可以拒不同意海洋科学研究计划（第 246 条第 5 款）。

2. 国家管辖海域外的海洋科学研究制度

公海：明确在公海自由中列入了海洋科学研究自由（第 87、247 条）；

国际海底区域：国际海底管理局、各国和各主管国际组织都有进行海洋科学研究的权利，但是，必须以和平目的和为全人类谋利益（第 143、256 条）。

（四）小结

从海洋科学研究的法律制度发展演变过程可以看出，沿海国对其管辖海域进行的海洋科学研究的管辖经历了从无到有，从鼓励、豁免到越来越严格、越明确的事先批准等制度的发展过程。

海洋科学研究法律制度的发展历程与国际海洋法的历史发展轨迹是完全相符合的。长期激烈的争论的结果是：沿海国管辖海域范围越来越大，已经从传统的 3 海里领海发展到了 200 海里的专属经济区和可能大于 200 海里的大陆架，公海面积越来越小，传统的公海自由也受到越来越多的限制；沿海国对管辖海域所行使的权利内容越来越多，已经从传统的、单一的领海主权发展到多元的对专属经济区和大陆架自然资源的主权权利和一些事项的管辖权，其中包括对海洋科学研究的管辖权。由此可以看出，国际海洋法中海洋科学研究法律制度的立法精神是与整个国际海洋法制度发展趋势相一致的。结论有二：一、专属经济区虽然不是领海，但是也绝不是公海，而是属于沿海国的管辖海域之一；二、国际海洋法赋予了沿海国越来越多的权利，对专属经济区内海洋科学研究的管辖权就是沿海国新发展的权利之一。

三、海洋科学研究与军事测量等活动的关系

（一）相关术语

《联合国海洋法公约》对海洋科学研究、海道测量、军事测量等用语均未加以定义，由此，在理论和国家实践中均产生了不同的解释和实施。下面仅查看相关工具书的解释。

1. 海道测量

（1）《海道测量词典》（国际海道测量局 1990 年版）

海道测量指以水体数据的测定为主要目的的测量。海道测量可以有下列一种

或几种数据的测定构成:水深、海底形状和底质、流向与流速、潮高和潮时、水位、以测量和航行为目的的固定物标定位。

(2)《辞海》(缩印本,上海辞书出版社 1999 年版,第 1130 页)

海道测量,是以保证航行安全为主要目的,对海洋、江河、湖泊水域及其沿岸地带进行的测量和调查工作。主要内容有:控制测量、海岸地形测量、水深测量、扫海测量、水文观测、底质探测和海区资料调查等。其成果主要用于编制航海图书。

(3)《英汉双解科技大词典》(朗文—清华,1996 年版,第 1625 页)

测量,(动词)地面或空间相关点位的测量,使能按比例尺把天然和人工要素的水平关系和垂直关系绘在图纸上。

(4)《测绘词典》(测绘词典编辑委员会编,上海辞书出版社 1981 年版,第 551~552 页)

海道测量亦称"水道测量"、"航道测量",是海洋、江河、湖泊等水体的水下地形测量的总称。其任务是测量有关水域的制图要素,进行海区资料调查,为编制海图、编写航路指南和海洋科学研究提供资料。按区域分沿岸测量、近海测量和远海测量以及江河、湖泊、港湾测量等。基本内容有控制测量、地形岸线测量、水深测量、扫海测量、底质探测、水文观测、测定助航标志和海区资料调查等。它既是上述测量工作的综合,又是这些测量工作与科学调查工作的综合。我国海道测量有悠久历史。早在《吴子》中已提出了解水域深浅与军事的关系:"登高四望,必得水情,知其广狭,尽其浅深,乃可为奇以胜之。"

(5)《海洋大词典》(辽宁出版社 1998 年版)

海道测量,是为保证舰队战斗行动和航行安全对海洋和江河湖泊所进行的测量和调查工作。包括港湾测量、沿岸测量、近海测量和远海测量。获得的各种资料主要用于编制航海图。海道测量的主要内容包括控制测量、水深测量、扫海测量、海底底质探测、海岸带地形测量、海洋水文观测、助航标志测定、海区资料调查。随着科学技术的发展,海洋测量的内容将从海道测量发展成综合测量。

2. 海洋测量

《海洋测绘词典》(测绘出版社 1999 年版,第 283~284 页)

海洋测量,是在海洋区域及邻近在海洋区域及邻近陆地开展的各种测量工作的统称。主要内容包括:海洋大地测量、水深测量、海底地形测量、海洋工程测量、海洋重、磁力测量及其他专题测量与调查。

3. 军事测量

(1)《辞海》(普及本,上海辞书出版社 1999 年版,上册,第 1070 页)

军事测量,是获取、处理和提供军用大地测量成果、图像资料、军用地图和其他军事地理信息资料的职业技术勤务。包括:(1) 军事测绘成果的生产、存储和供应。主要通过天文大地测量、……地形测量、海洋测量,……等技术过程,完成符合规范要求并经专门验收、存储、按规定供应部队的军事测绘基础产品。(2) 为

部队指挥，军种、兵种、战区军事活动，国防科学研究，武器装备运用，部队调动等提供军事测绘信息和成果，进行野战快速测绘和军事地形学的训练等。

（2）《海洋大词典》（辽宁出版社 1998 年版）

军事测量是为军事目的在海洋和沿岸水域承担的关于海洋数据收集的活动。军事测量所收集的包括海洋地理的、海洋地质的、化学的、生物的、以及声学的数据。

4. 军事活动

《海洋大词典》（辽宁出版社 1998 年版）

军事活动包括正常的船舶操作、部队调动、飞机起落、操作军事装备、情报收集、武器演习、军械试验以及军事测量。军事活动包括军事测量，或者说军事测量属于军事活动。

5. 海洋调查

（1）《简明大不列颠百科全书》（中国大百科全书出版社 1985 年 8 月版第 3 卷，第 663 页）

海洋调查是多学科的科学事业。资源开发、海上运输和国家安全促进了海洋调查工作的发展；工程和技术是海洋调查事业发展的基础。

（2）《辞海》（缩印本，上海辞书出版社 1999 年版，第 1129 页）

海洋调查，是对海洋环境要素分布状况和变化规律的调查工作。调查内容有：海洋水文要素观测、海洋气象要素观测、海水化学要素测定、海洋地质调查、海洋生物调查、海洋物理观测。调查方式有：大面观测、断面观测、连续观测和辅助观测。调查方法有：航空观测、卫星观测、船舶观测、水下观测、自动观测定位浮标和自动观测漂浮站等。资料形式有：数值、字符、图像和实物等多种类型。资料载体：有表格、磁带、磁盘和光盘等。

（3）《海洋测绘词典》（测绘出版社 1999 年版，第 288 页）

海洋调查，是对海洋现象进行观测、测量、采样分析和数据初步处理的全过程。海洋水文观测项目一般包括：深度、水温、盐度、海流、海浪、透明度、水色、海发光；同时还应获取气象、化学、声学、光学、地质、地球物理和生物等有关资料，包括数值型、字符型、图像型和实物型资料。

1872—1876 年，英国“挑战者”号第一次对大西洋、太平洋和南大洋进行海洋综合调查，航行 12 万多千米，调查内容有海洋气象要素、海流、水温、海水化学成分、海洋生物和海底沉积物等。调查成果：在 1880—1895 年间出版 50 卷巨著，共 29500 页，插图 3000 多张，对近代海洋学的创立起到重要作用。

（4）《海洋大词典》（辽宁出版社 1998 年版）

海洋调查，是对海洋中的物理学、化学、生物学、地质学、地貌学、气象学及其他一些性质的海洋状况的调查研究。一般分为综合调查和专业调查两大类。海洋调查的主要工具是海洋调查船，利用其备有的各种观测仪器测量海洋环境要素及其变化。随着科学技术的发展，现已形成有调查船、浮标、飞机、卫星、潜水器

等组成的立体海洋调查观测系统，从空中、水面和水下全面获取海洋环境资料。

6. 海洋科学研究

《海洋大词典》（辽宁出版社 1998 年版）

海洋科学研究，广义上可指任何足以增加人类对海洋环境了解的研究或相关科学实验，可能涉及有关海洋地质、生物、物理、化学、水文、气象、潮流等学科的研究。

笔者发现，在目前所能找到的工具书中，载有解释上述相关术语的并不很多。除了测量、海道测量和海洋调查之外，《辞海》等权威工具书一般都没有收纳“海洋科学研究”一词。从上述各相关术语的解释可以看出，军事测量、军事活动的目的和作用是不言而喻的，[8] 测量、海道测量、海洋调查等虽然各有其特定的目的和作用，但同时，它们也都可间接或直接的为一定的经济、军事、政治目的服务。在目前能查到的中文资料中，只有一个对“海洋科学研究”一词的解释，解释得很简练，而且是很宽泛的用语，很难判断出海洋测量、海道测量、海洋调查等与其有实质上的区别。美国历来主张“海洋科学研究”不包括“海道测量”。[9] 可是，从上述所引用的工具书的解释看，“海洋科学研究”完全可能涉及到有关“水文”的研究，要是按照美国等少数海洋强国的主张，就只能有以下解释：“海洋科学研究”不包括“水文”研究；或者是“海洋科学研究”中的“水文”研究与“海道测量”中所包括的“水深、海底形状和底质、流向与流速、潮高和潮时、水位”等内容是不一样的。

（二）海洋科学研究与军事测量等活动的关系

海洋科学研究是当代自然科学研究中的重要组成部分。海洋科学研究的对象是海洋及其周围的环境（海洋大气、海岸和海底等）。海洋科学研究的内容包罗万象，主要包括海洋水文气象、海洋地质学、海洋生物学、海洋化学和海洋物理学等研究。

传统上，人们根据目的不同，将海洋科学研究与其他自然科学研究一样，也分成基础科学研究（有人称为纯科学研究）和应用科学研究。海洋基础科学研究的目的是充分认识和了解海洋，为人类揭示最深刻、最普遍的自然规律，为开辟实际应用途经奠定基础。海洋应用科学研究的目的是从基础研究已知的客观规律中，找出最合理的应用途径，以商业性开发和利用海洋资源为主要目标。[10]

---

8 虽然有人认为，军事行为、军事活动也可用于和平目的，例如，联合国维和部队的行动。再如，还有人认为动用最现代化的武器和武装力量去打击伊拉克、将一个主权国家的总统抓到另一个所谓的“民主国家”国内法庭去接受审判等行动都是用于和平的目的。笔者不能完全同意这些观点，但是，这些不属于本文讨论范围。

9 在政府间海洋学委员会下属的法律专家咨询小组历次会议上，美国国务院的法律官员历来坚持此立场。在与中国的有关事件交涉中，美国军方及外交部门也均持此立场。

10 魏敏主编：《海洋法》，北京：法律出版社 1987 年版，第 316 页。

但是，海洋科学研究又与其他一切科学研究一样，无论是基础科学研究，还是应用科学研究，虽有区别但也密切联系，很难截然区分开。尤其是在运用现代高科技仪器设备和先进的科学方法手段的条件下，海洋科学研究的范围和目标已经覆盖了海洋的岸边、上空、水面、水体、海床和底土等立体的全方位。人们通过岸边的观测台站、空中的卫星和飞机遥感对水面和水体等海洋各层次进行调查。除了各式专业化程度非常高的测量船、调查船以及众多的志愿船、随机船等船舶之外，还有各类浮标（潜标）阵、悬浮式或固定的观测站，放置在海床和海底的海床基、可达 6000 米水深的深潜器、海底实验室、深海钻探平台等，已经建立起了一套立体调查系统，真可谓是“天罗地网”。因此，无论是从调查、测量所运用的仪器设备、技术手段、海洋资料收集的方式方法，还是从调查、测量的目的、成果的应用等各方面来看，海洋测量虽然在理论上看还有些方面有别于海洋科学研究，但是，在更多的方面，特别是其所能收集的海洋资料及其成果的最终应用等方面要严格加以区分已是十分困难的。

综上所述，海洋科学研究是个广义的概念，而海洋测量或海洋调查等活动则只是侧重于某个方面，属于专业性较强的研究，本质上也是为了更多更详尽地收集海洋资料、更深刻地了解海洋、更有效地开发利用海洋。因此，那种完全脱离社会实践和社会目的的所谓“纯基础的海洋科学研究”实际上是不存在的。这观点也是目前绝大多数发展中沿海国所主张和坚持的。[11]

个别海洋霸权国家在其军事测量船和军事侦察船进入中国管辖海域从事非法活动遭到中国的抗议和驱逐时，其主要的辩解理由之一是：海洋测量（或军事测量）活动所收集到的数据仅用于“和平的目的”，是“造福全人类”的。这样的理由从理论上看也许成立，但在目前国际社会尚未完全达到和平共处，仍然存在国家之间的遏制与反遏制、甚至局部海上军事对抗和战争的现代国际关系下，在目前中国所面临的严峻的海洋安全形势下，这样的理由就很难使人信服了。

（三）存在的主要问题

随着人类认识海洋程度的加深，人们更加了解海洋的重要性，也深切体会到需要开展更多的海洋科学研究，以便更加深刻的认识海洋，造福全人类。但是，从各沿海国的具体情况看，发展和需求都是不平衡的。一方面，技术发达的国家借助快速发展的科学技术，开发和利用海洋的能力得到极大的增强，对进行海洋科

11 2006 年 4 月 3—7 日在西班牙召开的政府间海洋学委员会下属的法律专家咨询小组会议上，来自中国、韩国、越南、菲律宾、阿根廷、巴西、摩洛哥、葡萄牙等许多沿海国家的代表均持这个立场，并表明其国内立法已经规定（或正在修改完善），凡是在其管辖海域内从事海洋调查、测量活动的均属于海洋科学研究的范畴，应事先取得该国的同意。

学研究的需求和愿望也更强烈;而另一方面,广大发展中国家,尽管其因技术、人才和国力等多方面原因所限,海洋科学研究的能力较弱,实际开发和利用海洋的能力也较弱,但是,它们已经很了解海洋对其国家安全和社会经济可持续发展的重要性,就加倍地珍惜和保护其管辖海域,希望将来自己也有能力去开发和利用,而不希望在自己能力不足的时候,其海洋利益受到别国的威胁和侵害。这个发展不平衡的问题还将继续存在下去,并必然会继续反映和影响到海洋科学研究领域。

虽然找到了问题的根源,但在人类社会发展不平衡的现阶段,还无法找到切实有效的解决方法。我们不得不转向其他方面的努力,其中包括善意地解释、适用和遵循现行的国际海洋法。经过各国数十年的共同努力,以《联合国海洋法公约》为核心的海洋科学研究法律制度应该说是明确的,只是在实践中还存在一些问题,例如,军事测量是否属于海洋科学研究、海洋科学研究是否可分为纯海洋科学研究和应用海洋科学研究等;还存在《联合国海洋法公约》的各项法律制度之间的衔接问题,例如,专属经济区的管辖权与公海自由、军事船舶在专属经济区内的豁免权、其他国际法规则在沿海国的适用和实施等问题。

回顾海洋科学研究法律制度的发展演变过程,笔者认为,无论从该制度的产生,还是从规定该制度的有关国际公约的制订过程中的争论和最终表述来看,在沿海国海洋科学研究管辖权问题上已经持续近 2 个世纪的争论,问题的根源在于沿海国家之间国力发展不平衡、利益舍取不同、海洋科学技术水平和能力发展的不平衡,由此不难推断,此争论仍将继续存在下去。由于《联合国海洋法公约》仅规定了海洋科学研究的基本法律制度,对海洋科学研究的定义、内容、方式方法等具体内容未加以规定。因此,各沿海国在这方面的国家实践,包括立法、行政管理和执法等行为,就显得尤为重要,这对于创设海洋科学研究的习惯规则和习惯法将有重要意义。

四、结　语

伴随着科学技术的发展、高新技术仪器和设备的运用,已经很难严格区分纯海洋科学研究和应用海洋科学研究,或海洋科学研究与海道测量(军事测量)活动之间的区别了,这些活动的成果都可以运用到科学研究、经济、军事等多方面。

《联合国海洋法公约》关于海洋科学研究的法律制度已经相当明确,在专属经济区从事海洋科学研究必须事先得到沿海国的同意;同时,沿海国无合理的理由时不得拒绝他国的海洋科学研究申请。只是存在一些定义等方面的缺憾。如果各缔约国都有诚意去实施,现行法律制度是可行的、具有可操作性的。对此问题目前尚有不同观点,但各沿海国有必要加强沟通和交流,努力就海洋科学研究与军事测量等问题和分歧达成共识和谅解,以便共同和平地开发、利用和保护海洋及其资源环境。

海上自卫权及相关法律问题初探

邢广梅 *

内容摘要: 海军作为我国海上武装力量和辅助海上执法力量，担负着必要时使用武力抵御海上侵略及维持海上秩序的使命。如何将执法中可能发生的使用武力与行使自卫权时的使用武力区分开来，以便准确地行使 2 种性质不同的权利，既是一个学术上鲜有讨论的理论问题，又是一个对海军行动有指导意义的现实问题。本文对该问题的核心——海上自卫权的特征、概念及与此相关的法律问题做出初步探讨，并在此基础上提出了行动建议。

关键词: 海上自卫权　海上行政执法权　使用武力

建国后，我国海军共行使过 2 次自卫权，一次是 1974 年西沙自卫战，一次是 1988 年 3•14 海战。与过去相比，当前我国海军面临的海上安全形势更为严峻：既面临着与 8 个海上邻国的海洋划界争端，与 4 个国家关于 44 个岛屿、岛礁主权的归属争端，又面临着与这些国家在国家管辖重叠海域管辖权的争夺。随着周边国家对海洋战略地位的日益重视，这种局面会愈加严重，未来不排除发生海上武装冲突的可能性。

海军作为我国的海上武装力量和辅助海上执法力量，担负着必要时使用武力抵御海上侵略及维持海上秩序的使命。如何将执法中可能发生的使用武力与行使自卫权时的使用武力区分开来，以便准确地行使这 2 种性质不同的权利，既是一个学术上鲜有讨论的理论问题，又是一个对海军行动有指导意义的现实问题。本文试就该问题的核心——海上自卫权的特征、概念及与此相关的法律问题做出初步探讨。

一、海上自卫权的特征及概念

将自卫权分解为海上、空中和陆上自卫权，并授权给国内相应的武装力量是一国将国际法上的自卫权国内化的体现，是国家落实该项权利的必由之路。但这

---

* 邢广梅，海军军事学术研究所副研究员，法学博士。本文属个人学术观点，不代表作者所在机构的立场。

项权利的实施必须符合国际法上自卫权的一般规定。

海上自卫权的直接法律渊源是《联合国宪章》（以下简称“《宪章》”）第 51 条的规定。该条指出：“联合国任何会员国受到武力攻击时，在安全理事会采取必要办法维持国际和平及安全以前，本宪章不得认为禁止行使单独或集体自卫之自然权利。会员国因行使此项自卫权而采取之办法应立即向安全理事会报告，此项办法于任何方面不得影响该会按照本宪章随时采取其所认为必要行动之权责，以维护或恢复国际和平及安全”。[1]

海上自卫权的间接法律根据是《圣雷莫海上武装冲突国际法手册》[2] 总则第一、二节的规定，该部分指出：海上自卫权的行使应遵循《宪章》和一般国际法的规定。

以《宪章》第 51 条为基础，结合国际司法判例、联合国决议及学者著述等可将海上自卫权特征概括为以下几个方面：

（一）在实施主体上，受害国或其同盟国中以海军为主体的武装部队承担了行使海上自卫权的使命

在自卫权实施主体方面，第 51 条未解决的问题是：1.《宪章》非会员国或非国家实体是否拥有此项权利；2. 他国未经受害国同意可否行使集体自卫权；3．国家中哪些机构承担该项使命。

对于第一个问题，主流观点认为除了非国家实体外，所有国家都享有自卫权。首先，虽然《宪章》仅提到“联合国任何会员国”，没有涉及非会员国，但由于自卫权是《宪章》对国家固有的“自然权利”的有条件确认，因此，通常认为，《宪章》“不仅对联合国会员国，而且对没有成为该组织会员国的少数国家也具有拘束力”；[3] 其次，自卫权是国际法上的一项权利，是国与国之间的权利行使，非国家实体没有此项权利。内战中任何一方不能以行使自卫权为理由向对方发起反攻；同时，他国也不能以行使集体自卫权为理由帮助其中一方作战。

对于第二个问题，考虑到区域机关在维护地区和平与安全方面所发挥的重要作用，《宪章》赋予受害国的同盟国以集体自卫的权利，但行使集体自卫权要遵守

---

1 周洪钧等编：《国际公约与惯例》，北京：法律出版社 1998 年版，第 15 页。

2 路易斯•道斯沃尔德 – 贝克主编，任筱锋等译：《圣雷莫海上武装冲突国际法手册》，北京：海潮出版社 2003 年 5 月版（笔者认为将其译为《圣雷莫国际海上武装冲突法手册》似乎更适宜）。该手册是 1988 年至 1994 年间，由国际人道法学院召集各国国际法和海军专家以个人身份参加的一系列圆桌会议起草的，它不是国际海上武装冲突法公约，不具有法律效力，但却重述了当代适用于海上武装冲突的一般国际法，对各国海上军事行动有重要的指导作用，目前，在尚没有国际海上武装冲突法法典的情况下，该手册已成为各国海军指导本国海上军事行动的指南。

3 Stanimir A. Alexandrov, *Self-Defense against the Use of Force in International Law*, The Hague/London/Boston: Kluwer Law International, 1996, p. 136.

国家行使单独自卫权所需的必要条件。同时，国际法院在 1986 年尼加拉瓜诉美国的军事及准军事行动案[4] 的判决中指出：第三国行使集体自卫权，还必须经受害国发出自己受到武力攻击的宣告，并向其提出帮助请求。

对于第三个问题，国际法未作明确规定。笔者认为，自卫作为一种国家行为，不能由抽象的国家，而只能由国家的代理人来实施。《国家责任条款草案》第二章将“在有关事件中系以此种资格行事”的国家机关、经授权的非国家或非地方政治实体和代表国家行事的人视为国家行为的代理人。[5]

由于一旦实施海上自卫权，出现的是武装冲突状态，因此，在法律适用上，“海上武装冲突各方，从使用武力之时起，受国际人道法的原则和规则的约束”。[6] 而国际人道法仅赋予武装部队成员以合法战斗员的身份，指出“这类人员有权直接参加敌对行动”。[7] 因此，能够以自卫的资格行事的国家代理人应是该国的武装部队。

对于什么是“武装部队”，1949 年日内瓦四公约及其附加议定书作了较明确的规定，[8] 指出“武装部队”包括正规军及经政府授权的具有统一指挥，有内部纪律约束和遵守武装冲突法规则的“团体”或“单位”。这里的“团体”或“单位”指第 1 附加议定书第 43 条第 3 款提到的“准军事机构或武装执法机构”等组织，只要这些机构“并入武装部队，应通知冲突其他各方”。可以推知，“准军事机构或武装执法机构”在其本国授权，并由其国家将此种授权在平时以法律的形式予以公布，或在战时通知冲突其他各方的时候享有自卫权。

通常，各国会以国内法的形式确定本国哪些人员担负行使本国自卫权的使命。美军现行交战规则[9] 规定包括美国海岸警卫队在内的美国军队担负行使国家自卫权的使命；[10] 日本《自卫队法》规定日本自卫队担负“对抗外来直接侵略和间接侵略”的使命；[11] 中国《国防法》第 17、22 条规定包括中国人民解放军预备役部队和民兵在内的中国武装力量担负巩固国防，抵抗侵略的使命。[12] 至于海上自卫权，各

---

4 该案参见陈致中编著：《国际法案例》，北京：法律出版社 1998 年版，第 112 页。

5 《国家责任条款草案》第 5 至 15 条。转引自贺其治著：《国家责任法及案例浅析》，北京：法律出版社 2003 年版，第 373 页。

6 路易斯•道斯沃尔德 – 贝克主编，任筱锋等译：《圣雷莫海上武装冲突国际法手册》，北京：海潮出版社 2003 年版，第 5 页。

7 王铁崖等编：《战争法文献集》，北京：解放军出版社 1986 年版，第 431 页，日内瓦公约第一附加议定书第 43 条第 2 款。

8 王铁崖等编：《战争法文献集》，北京：解放军出版社 1986 年版，第 206 页，第 1 公约第 13 条；第 229 页，第 2 公约第 13 条；第 244 页，第 3 公约第 4 条；第 431 页，第 1 附加议定书第 43 条。

9 即美国参谋长联席会议主席第 3121.01 号指令。

10 [美] 小沃尔特•加里•夏普著，吕德宏译：《网络空间与武力使用》，北京：国际文化出版公司 / 长春：北方妇女儿童出版社 2001 年版，第 241 页。

11 《自卫队法》名词解释，参见杨福坤等主编：《军事法学辞典》，北京：国防大学出版社 1993 年版，第 838 页。

12 《国防法》全文，参见中央军委法制局编：《中华人民共和国军事法规选编（1949—2002）》，北京：解放军出版社 2002 年版，第 85~97 页。

国武装部队成员均可实施，现实中，具体由哪个军兵种实施要视他国使用武力的具体情况来定。有时可以是各军兵种的联合反击，有时是海军单独反击，但通常以海军为主体。美国海军交战规则、中国人民解放军海军作战条令及日本海上自卫队条例均明确规定海军（海上自卫队）担负抗击来自海上侵略的使命。

日本的海上保安厅、中国的海上行政执法力量等武装执法机构在没有得到国内最高权力机构授权的情况下，不担负行使国家自卫权的使命，但它们享有自身受到武力攻击时反击以自保的权利。

由此可知，受害国或其同盟国是海上自卫权的实施主体，具体由哪支武装力量实施是一国的主权管辖事项，通常，各国会按照国际人道法的有关规定授权给以海军为主体的武装部队。

（二）在实施对象上，海上自卫权只能针对武力攻击国管辖下的特定目标进行

在自卫权的实施对象方面，《宪章》第 51 条没有明确的问题是：1. 自卫权是否必须针对武力攻击国本身进行；2. 自卫权是否可以针对恐怖组织等非国家实体进行。

对于第一个问题，学界争执不大，认为自卫权只能针对武力攻击国本身实施，而不能针对与武力攻击无关的第三国，除非第三国协助了武力攻击国，其行为被认定为具有武力攻击的性质。

对于第二个问题，学术界存在严重分歧。在国内，有学者主张“自卫只能针对发起武力攻击的一国或数国行使才是正当的”；[13] 有学者却基于打击恐怖主义行为的良好愿望，把对恐怖行为的遏制纳入到自卫权的适用范围，将诸如恐怖组织这样未经政府授权而实施武力袭击的非国家实体看作是自卫权实施的新对象，主张最严重的恐怖袭击达到了战争的效果，且危害了国家的安全利益，因此国家对此享有自卫权。对此，笔者认为，在恐怖袭击达到战争效果的时候，国家确实可以采取武力保护自己的安全利益，但这决不是自卫权的行使，而是司法权的行使，我们暂且将这种行为称为“司法管辖”。

一旦把对恐怖行为的遏制纳入到自卫权的适用范围，将产生以下不良后果：一是根本上破坏《宪章》的基本宗旨——维护世界和平与安全：自卫权是《宪章》确立的体现维护世界和平与安全的基本宗旨的原则——禁止国际关系间使用武力原则的例外，这种例外是对联合国集体安全保障机制局限性的补充，对此应加以严格限制，一旦扩大它的适用范围，将意味着禁止国际关系间使用武力的原则受到

13 黄瑶著：《论禁止使用武力原则——联合国宪章第二条第四项法理分析》，北京：北京大学出版社 2003 年版，第 295 页。

挤压，从而根本上破坏《宪章》的基本宗旨；二是违背历史的发展趋势，产生历史倒退：与联合国安理会集体安全机制相比，自卫权是国家的私力救济措施，从历史上考察，无论国内法还是国际法，均经历了一个从私力救济向公权力管理的过渡，扩大自卫权的适用范围是对历史潮流的逆动；三是混淆国际犯罪的罪名：一国未经安理会授权对他国实施武力攻击，一般可认定为是侵略罪，[14] 其实施主体为国家，对此，《宪章》第 51 条特许国家可以武力实施自卫；而达到一定危害程度的恐怖行为从其主客体、主客观 4 个方面判定，更适宜被定性为反人类罪，其实施主体既可以是国家，也可以是未经授权的非国家实体，国际法未赋予国家以自卫的权利。因此，对其只可以采取司法手段予以制止，至于司法手段能否有效制止恐怖行为，笔者认为，法律本身就是一种强制手段，如果有必要，它的强度仍可提升到足以制服恐怖行为的程度，即必要时可以使用武力。对此，仍应以联合国机构为主导，寻求解决问题的正确途径。

总之，实施武力攻击的只能是国家，而不是未经授权的非政府实体，武力攻击只有被归因于国家行为才能对其实施自卫，未经授权的非国家实体实施的攻击只可被认定为是反人类的犯罪行为，对其只能实施司法管辖权。

海上自卫权的具体实施对象也不是抽象的国家，而是武力攻击国管辖下的特定目标，包括直接发起攻击的武装部队及虽未发起攻击但反击就可以消减攻击国军事潜能的军事目标及因参加敌对行动而丧失豁免权的人员或民用目标等。

（三）在实施条件上，海上自卫权的行使必须以受到针对或来自海上的武力攻击为前提

在实施条件方面，《宪章》第 51 条只规定了会员国受到武力攻击时才可实施自卫，但却未明确“武力攻击”的涵义。于是，该问题成为实践中判定国家行使自卫权是否合法的最大障碍。

笔者认为，可以对其实施自卫权的“武力攻击”应具备以下 4 个特征：1. 主体上，实施武力攻击的是国家；2. 主观方面，国家存在武力攻击的主观故意。主观故意分直接故意和间接故意。直接故意是指明知会发生武力攻击的后果，积极追求这种结果的发生；间接故意是指明知会发生武力攻击的后果，但放任这种结果的发生。其体现出来的形式是国家的作为与不作为。没有主观过错的意外事件不构成武力攻击，可排除国家行为的不法性；3. 客体上，武力攻击行为侵害的是一国的国家主权、领土完整或政治独立；[15] 4. 客观方面，有武力攻击的事实存在，包括已发

14 目前，国际社会还未对侵略罪作出界定。

15 参见《关于侵略定义的决议》第 1 条，载于西安政治学院编：《战争法条约集》，西安：西安政治学院训练部 2001 年版，第 29 页。

生损害的攻击和损害虽未发生，但若不采取反击就必定发生损害的攻击。前者如军舰被击中，后者如军舰尚未被击中，但敌方的导弹或鱼雷已射向军舰等。对于后者，有学者将其归为预防性自卫，否认它的合法性。对此，至少有 2 个权威阐述可予以澄清：一是“刻不容缓的、压倒一切的、没有选择手段和余地的、没有考虑时间的”的加罗林原则[16]包括这类自卫；二是联合国秘书长安南在 2005 年度联合国改革草案报告中指出：“第 51 条充分涵盖了紧迫威胁的情况，并维护主权国家对武力攻击进行自卫的自然权利。”[17]

至于现实中存在的“他国向侵害国或受害国国内的反对派提供武器装备或后勤、财政或其他支持的援助行动”，[18]或对侵害国予以庇护，或在非受害国的领土上攻击受害国国民等行为，均不能算作是“武力攻击”，只能看作是非法使用武力或武力威胁或对一国内政外交的干涉。

由上可知，海上武力攻击是指已经发生的针对海上或来自海上的武力攻击，包括已发生损害的攻击和损害虽未发生，但若不采取反击措施就必定发生损害的攻击。攻击必须具有直接或间接的主观故意，主观没有过错的意外事件不构成武力攻击。

能够确定海上武力攻击形式的文献是 1933 年苏联在国联提出的制定侵略定义和侵略公约的建议、1974 年联合国大会通过的《关于侵略定义的决议》及国际法院在 1986 年对尼加拉瓜诉美国的军事及准军事行动案的判决。苏联《建议》列举了 5 种侵略形式：1. 一国向另一国宣战；2. 一国武装力量不经宣战进入另一国领土；3. 一国海陆空轰炸另一国的沿海或港口；4. 一国海陆空军不经另一国政府的允许，登陆或进入另一国边界，或损害这种允许的条件，特别是对相近或相邻的国家；5. 一国海军封锁另一国的沿海或港口。[19]

1974 年联合国大会通过的《关于侵略定义的决议》第 3 条[20]列举了 7 种侵略行为：1. 一个国家的武装部队侵入或攻击另一个国家的领土，或因此种侵入或攻击而造成的任何军事占领，不论时间如何短暂，或使用武力吞并另一国家的领土或其一部分；2. 一个国家的武装部队轰炸另一国家的领土，或一个国家对另一国家的领土使用任何武器；3. 一个国家的武装部队封锁另一国家的港口或海岸；4. 一个国家的武装部队攻击另一国家的陆、海、空军或商船和民航机。5. 一个国家违反其与另一国家订立的协定所规定的条件使用其根据协定在接受国领土内驻扎的武装部队，或在协定终止后，延长该项武装部队在该国领土内的驻扎期间；6. 一

16 即自卫权的行为限度原则，后文将论述。
17 下载于 http://www.un.org/chinese/largerfreedom/part3.htm，第 124 段，2006 年 11 月 15 日。
18 [英] 詹宁斯等修订，王铁崖等译：《奥本海国际法》（第一卷第一分册），北京：中国大百科全书出版社 1995 年版，第 309 页。
19 转引自刘大群：《论侵略罪》，载于《武大国际法评论》2005 年第 3 卷，第 6 页。
20 沈阳军区军事法院编：《战争法资料选编》，沈阳：白山出版社 1994 年版，第 14 页。

个国家或以其领土供另一国家使用以让该国用来对付第三国进行侵略行为；7. 一个国家或以其名义派遣武装小队、武装团体等非正规军或雇佣兵，对另一国家进行武力行为，其严重性相当于上述所列各项行为，或该国实际上卷入了这些行为等。

国际法院在 1986 年对尼加拉瓜诉美国的军事及准军事行动案的判决中指出："'武力攻击' 不仅指武装部队跨越国界的行动，还包括对他国派出武装分子——如果它的规模和效果与武力攻击一样的话，也可列入 '武力攻击' 之列"。[21]

一般认为侵略等同于武力攻击。结合海上作战环境的特点，针对或来自海上的武力攻击大致分 4 种：1. 海上攻击：一国武装部队攻击另一国的陆、海、空军或商船和民航机；2. 海上轰击：一国武装部队轰炸另一国港口或海岸；3. 海上封锁：一国武装部队封锁另一国港口或海岸；4. 海上入侵：一国武装部队不经另一国政府的允许，进入另一国领海，或损害这种允许的条件。关于第四点涉及到军舰无害通过权的问题，较为复杂，本文将在后半部分予以阐述。

（四）在实施时间上，海上自卫权必须是在安理会采取必要措施之前，对正在进行中的武力攻击的回应

在实施时间方面，《宪章》第 51 条只规定了"制裁前自卫"原则，但没有明确"实施中自卫"原则。

所谓"制裁前自卫"原则是指海上自卫权只能在安理会采取必要措施之前实施，一旦安理会采取措施，自卫权实施国就应停止自卫，或经安理会许可继续实施自卫。这说明自卫权从属于安理会集体安全机制，是一项临时补救措施，安理会在维持国际和平与安全事务中具有优先和权威地位。

所谓"实施中自卫"原则是指海上自卫权针对的是正在进行中的武力攻击，而不是已经结束或尚未发生的攻击。对于前者，我们称之为"报复"，1970 年《国际法原则宣言》明确规定"各国有义务避免涉及使用武力之报复行为"。对于后者，我们称之为"预防性自卫"，它是国家针对"潜在威胁"进行的"自卫"，譬如，1981 年以色列对伊拉克核装置的攻击以及日前日本国内针对朝鲜在日本海试射导弹一事，提出朝鲜的核基地已构成对日本生存的"潜在威胁"，应采取先发制人措施将其击毁的提法。

"预防性自卫"理论是部分国家为防止大规模杀伤性武器扩散可能给本国造成"潜在威胁"而提出的，该理论已成为近年来武力使用者越来越倾向的主张，也被一些学者认为是国际法发展的新趋势。由于目前国际法对此尚无明确规定，也没有健全的国际监督控制机制，所以这一理论很容易沦为强权国家侵略他国的藉

21 陈致中编著：《国际法案例》，北京：法律出版社 1998 年版，第 112 页。

口。针对这一现象，联合国秘书长安南指出“在威胁并非紧迫而是潜在的情况下，《宪章》充分授权安全理事会使用军事力量，包括为预防目的使用军事力量，以维护国际和平与安全。”[22] 由此，安南提出了一个应对“潜在威胁”的新思路，即由安理会采取或授权采取先发制人的打击予以制止。

笔者认为，对“实施中自卫”的理解，重要的是辨明武力攻击“正在进行、尚未开始”和“正在进行、已经结束”2 组概念的界限：前者在于武力攻击是否已经实施，而不是处于实施的准备阶段（为攻击而研制武器、进行军事动员或制定和部署作战计划）。按照这一标准，“正在进行中的武力攻击”应理解为攻击行为已经启动，受攻击国刚刚遭到实际侵害结果，譬如，设施被炸、领土被侵犯等，或虽未遭到实际损害，但若不采取紧急措施就必定会发生实际损害结果，譬如，有足够的证据证明侵害国的导弹已离开导弹发射架正在飞往所要攻击的受侵害国目标的途中。而“正在进行、已经结束”的界限在于武力攻击是否已被击退，紧迫的威胁是否已经消除和侵害国在短期内是否还有再次攻击的可能性。“已经结束的攻击”应具备攻击方主观放弃再次攻击的意愿，或客观丧失短期内再次攻击的能力的特征。击退攻击后，自卫权应自行终止，否则将演变成非法使用武力的行为。

（五）在行为限度上，海上自卫权必须遵循必要性和相称性 2 项基本的国际习惯法原则

在自卫权行为限度方面，《宪章》第 51 条没有做任何规定。实践中，各国延用了习惯法原则。这一原则是 1842 年美国国务卿丹尼尔•韦伯斯特在给英国的外交信件中针对 1837 年“加罗林号事件”[23] 提出的加罗林原则，包括必要性和相称性 2 项具体原则。

国际法院在 1986 年对尼加拉瓜诉美国的军事及准军事行动案的判决及在 1996 年“关于核武器的合法性问题”咨询意见中确认了这 2 项原则，并将其称为习惯国际法。

《圣雷莫海上武装冲突国际法手册》第二节“武装冲突与自卫法”部分重点阐述了这项原则，指出行使自卫权“受宪章规定的和产生于一般国际法尤其包括必

---

22 下载于 http://www.un.org/chinese/largerfreedom/part3.htm，第 125 段，2006 年 11 月 15 日。

23 1837 年，英国因美国船加罗林号向英国殖民地加拿大的叛军提供武器弹药，便越过美国国境把加罗林号驱逐到尼亚加拉瀑布，然后将该船焚毁，船上 2 个人被击毙。对于美国政府的指责，英国政府宣称他们的攻击是正当的，对它本身来说是必要的自卫和自保措施，因为这种对加拿大海岸的非法侵袭并没有受到美国官方的阻止。当时的美国国务卿韦伯斯特就此事件在给英国当局的通信中阐述了自卫的基本要素，这些要素史称“加罗林原则”，并被视为是对合法自卫所需条件的经典阐释。转引自黄瑶著：《论禁止使用武力原则——联合国宪章第二条第四项法理分析》，北京：北京大学出版社 2003 年版，第 282 页。

要和相称原则的条件和限制的制约”，“必要和相称原则同等适应于海上武装冲突，并要求一国实施的交战行为，在不为武装冲突法所禁止的情况下，不应超过击退武装来犯和恢复自身安全所需要的程度和种类”，“一个国家对敌国采取军事行动的合法程度，取决于敌国为之负责的武装攻击的强度、规模和造成的威胁的程度”。[24]

由此可知，行使海上自卫权需遵循这 2 项习惯法规则。所谓海上自卫权的必要性原则，是指海上自卫必须是在“刻不容缓的、压倒一切的、没有选择手段和余地的、没有考虑时间的”情况下才能进行的一种方式，[25] 如果不必使用武力就可以阻止已经开始的武力攻击，那就不允许受害国采取自卫行为。譬如，对侵害国封锁其海岸的行为，受侵害国首先可以尝试通过外交途径或提请安理会解决，若侵害国因此而撤兵，则说明自卫的必要条件并未出现。但如果受害国的军舰在海上遭到侵害国的攻击，再不反击就有被击沉的危险时，就属于自卫的必要情形而不必先寻求和平的解决手段了。

所谓海上自卫权的相称性原则，是指海上自卫者所使用的武力强度、规模要与它所受到的攻击的严重程度及所要达到的阻止或击退攻击的目的相对称，如果超出了这个限度，使用超出必要限度的武力或以惩罚、报复、占领、掠夺为目的，则自卫就演变成非法使用武力的情形。同时，相称性原则还要求国家在实施自卫时应遵守国际人道法关于禁止或限制使用作战方法和手段及保护武装冲突受难者及财产的有关规定，避免过度使用武力和伤及无辜，尽可能将武力冲突造成的损失降低到最小。一旦受侵害国违背上述规定，其海上自卫行动的合法性也将受到质疑。

综上 5 点所述，所谓海上自卫权是国际法上自卫权的下位概念，指一国遭到他国针对海上或来自海上的武力攻击时，在联合国安理会采取必要措施以维护国际和平与安全之前，迫不得已授权其国内以海军为主体的武装部队使用相称的武力或其盟国在受害国请求下使用相称的武力阻止或击退侵害国攻击的权利。

二、海上自卫权相关法律问题初探

（一）军舰无害通过领海问题与海上自卫权的行使

军舰无害通过领海问题是国际法上一个非常复杂而颇具争议的理论及现实问

---

24 路易斯•道斯沃尔德 – 贝克主编，任筱锋等译：《圣雷莫海上武装冲突国际法手册》，北京：海潮出版社 2003 年版，第 5 页。

25 [英] 詹宁斯等修订，王铁崖等译：《奥本海国际法》（第一卷第一分册），北京：中国大百科全书出版社 1995 年版，第 309 页。

题。它是海洋法中既存的沿岸国利益派与海洋航行自由派长期力量对峙不决的体现。

1982 年《联合国海洋法公约》（以下简称“《公约》”）将领海界定为沿海国陆地领土及其内水以外邻接的处于其主权之下的一带海域；对于群岛国而言，是群岛水域以外邻接的、处于群岛国主权之下的一带海域。[26] 领海是国家领土的组成部分，受国家主权的支配和管辖。国家对领海内的一切人和事（除享有外交特权和豁免权者外）行使属地管辖权，其主权及于领海的上空、水域及其海床和底土。

但是，国家对其领海的主权不是绝对的，而是要受他国船舶无害通过权的限制。[27] 所谓无害通过权，通常是指外国船舶在不损害沿海国和平、安全与良好秩序的情况下，继续不停地、迅速地穿过沿海国的领海，或为驶入内水或自内水驶往公海而通过沿海国的领海的权利。[28] “无害”指的是“不损害沿海国的和平、良好秩序或安全”，[29]《公约》第 19 条第 2 款规定了 12 种船舶通行的有害活动。[30]

长久以来，各国普遍承认商船享有无条件无害通过它国领海的权利，并认为这是一项习惯法规则。但对军舰是否享有此种权利却始终存在分歧。以英美法等海上发达军事强国及其盟国为代表的海洋航行自由派主张军舰应无条件享有无害通过它国领海的权利；以中国等发展中国家为代表的沿岸国利益派主张军舰需要附条件地享有无害通过它国领海的权利。后者又包括 2 种类型：第一种仅要求军舰通过它国领海须事先经批准或通知，如中国、伊朗、巴基斯坦等；第二种要求或还要求附加其他条件。如荷兰规定在同一时间内同一国家 3 艘以上军舰要通过，必须事先取得荷兰政府的准许。前苏联则规定，外国军舰只能在波罗的海、鄂霍茨克海和日本海的苏联领水内享有无害通过权。[31]

---

26 《联合国海洋法公约》第 2 条第 1 款。

27 《联合国海洋法公约》第 17 条：“在本公约的限制下，所有国家，不论为沿海国或内陆国，其船舶均享有无害通过领海的权利。”

28 《联合国海洋法公约》第 18 条：“1. 通过是指为了下列目的，通过领海的航行：(a) 穿过领海但不进入内水或停靠内水以外的泊船处或港口设施；或 (b) 驶往或驶出内水或停靠这种泊船处或港口设施。2. 通过应继续不停和迅速进行。通过包括停船和下锚在内，但以通常航行所附带发生的或由于不可抗力或遇难所必要的或为救助遇险或遭难人员、船舶、飞机的目的为限。”

29 《联合国海洋法公约》第 19 条第 1 款。

30 这 12 种有害活动是 (a) 对沿海国的主权、领土完整或政治独立进行任何武力威胁或使用武力，或以任何其他违反《联合国宪章》所体现的国际法原则的方式进行武力威胁或使用武力；(b) 以任何种类的武器进行操练或演习；(c) 任何目的在于搜集情报使沿海国的防务或安全受损害的行为；(d) 任何目的在于影响沿海国防务或安全的宣传行为；(e) 在船上起落或接载任何飞机；(f) 在船上发射、降落或接载任何军事装置；(g) 违反沿海国海关、财政、移民或卫生的法律和规章，上下任何商品、货币或人员；(h) 违反本公约的任何故意和严重的污染行为；(i) 任何捕鱼活动；(j) 进行研究或测量活动；(k) 任何目的在于干扰沿海国任何通讯系统或其他设施或设备的行为；(l) 与通过没有直接关系的任何其他活动。

31 前苏联将领海称为领水。

正因为始终存在上述两大派别的斗争，原本 1974 第三次海洋法会议第 2 期会议文件《主要趋势》采纳了两派的立场，但到了第 3 期会议起草的《非正式单一协商案文》删去了反映沿岸国利益的“经通知或批准”的条款，只保留了反映发达国家利益的“无害通过权的规则适应军舰”的条文；在沿岸国利益派的强烈反对下，第 4 期会议文件《订正的单一协商案文》又删除了“无害通过权的规则适应军舰”的条款。由此，之后的文件再没出现有关军舰无害通过权的明确规定。第 7、9 期会议，中国等发展中国家再次就文件添加“通知或经批准”的规定做努力，但未获成功。第 11 期会议，中国与其他 27 个国家作了最后努力，结果所提的有关维护沿岸国安全利益的议案有 46 个国家支持，30 多个国家反对。为了避免会议出现分裂，在大会主席协调下，两派同意大会作出如下声明：“虽然 L.117 号文件中修正案的共同提案国为了澄清案文而提出了该项修正案，但为了响应主席的呼吁，他们同意不再坚持要求其提付表决。但是他们愿意重申，这并不妨碍沿海国按照公约第 19 条（领海无害通过的意义）和第 25 条（沿海国的保护权）的规定采取措施以保证其安全利益的权利。”[32] 由此，1982 年《联合国海洋法公约》和 1958《领海与毗连区公约》一样，没有在文字中出现领海无害通过权是否适应军舰、军舰无害通过领海时是否须事先通知或经批准的表述，这就成为后来理论和实践中对该问题争执不下的隐患。

实践中，沿岸国利益派根据第三次第 11 期会议有关 L.117 号文件的声明，在国内法中制定了本国对军舰无害通过领海的要求。譬如，我国于 1992 年颁布的《领海及毗连区法》第 6 条规定：“外国军用船舶进入中华人民共和国领海，须经中华人民共和国政府批准”。1996 年 5 月，我国正式批准《联合国海洋法公约》时声明：“联合国海洋法公约有关领海内无害通过的规定，不妨碍沿海国按其法律和规章要求外国军舰通过领海必须事先得到该国许可或通知该国的权利。”

理论上，我国学界主流观点认为是否给予外国军舰无害通行领海或附条件通过领海权是一国内政，外国军舰须遵守沿海国的相关法律规定。譬如，邵津指出：“沿海国可以允许外国军舰无害通过领海而不加特别要求，也可以规定须事先通知或许可，或履行其他要求；意欲实行这种通行的外国军舰应遵守沿海国的法律和规章所规定的要求。”[33] 赵建文指出：“根据《公约》和一般国际法，是否给予军舰在领海的无害通过权，是各国可以自由处理的事项。军舰在通过外国领海之前，应当查明该国是否允许军舰无害通过，是否要求外国军舰事先通知或得到许可。如果沿海国有要求这种通知或许可的法律或规章，军舰所属国应予以遵守。这是领海的法律地位和军舰的特殊性质决定的。如果沿海国妨碍执行符合国际法使命

32 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 132 页。

33 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 138 页。

的外国军舰的通过或者使这种通过实际上成为不可能，军舰所属国可以采取对等措施以平衡利害关系。”[34]

鉴于现实中存在的这种二元并行的军舰无害通行领海的国内立法及实践，对军舰在沿岸国未知的情况下进入该国领海的法律性质也必然存在 2 种看法：认为军舰可以无条件无害通过领海的海洋航行自由派会认为这种行为不构成侵略（武力攻击），不能对其行使海上自卫权，只能在军舰不遵守沿岸国法律的情况下，按照《公约》第 30 条规定要求其离开领海；认为军舰须经通知、批准或满足其它条件下才能进入领海的沿岸国利益派会认为这种行为应初步被认定为入侵行为，构成对该国的武力攻击，可以行使自卫权。由此，对军舰进入领海的同一种行为，因为存在着二元并行的军舰无害通过领海的国内立法及实践，就会得出或者是侵略或者不是侵略、可以实施自卫或者不可以实施自卫的矛盾结论。这对将在 2009 年对侵略罪定义作出界定的国际刑事法院及对侵略行为具有判断权的安理会来说是一个难以解决的现实问题。

鉴于各国对此类事件行使自卫权的意见分歧，我国海军应采取慎重态度。首先，意欲进入他国领海，须事前查清其法律规定，按规定通行。但应对关涉我国重大利益的海峡、水道通行制度的合法性进行论证，对那些不符合《公约》规定的海峡、水道通行制度可通过外交照会等形式表明我国立场，或进行进一步的交涉；其次，他国军舰违背我国法律规定有意进入我国领海，可初步认定为是对我国领土主权的侵犯，一旦明确对方有敌意，可实施自卫权，但应遵循实施自卫权的基本条件。

（二）我海军行使海上自卫权与辅助海上执法权的区别

海军作为我国海上武装力量，通常会在海上执法机构不能或不足以有效制止在我国管辖海域的外国船舶或飞机的违法活动时，应有关机关请求，协助执法。协助执法期间，可对商船或民用飞机采取登临检查、扣押等强制措施，对军舰采取驱逐出领海的做法。遭民用船机暴力抗法危及我过舰只、人员安全时，可视情况使用轻武器、火炮等进行警示性射击，遭军舰攻击时，我舰可使用武力予以反击。由此会引发出这样的问题：我国海军在辅助海上执法时使用武力与自卫时使用武力有何不同？笔者认为有 6 点不同：

1. 行使权力的前提不同。海上自卫权是遭到他国来自海上的武力攻击，安理会采取必要措施之前实施；辅助海上执法权是执法力量遭到管辖海域内违反我国法律规定的外国商船、民用飞机的严重暴力抗法并应相关部门请求时实施。

---

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

2. 实施攻击的主体不同。武力攻击由侵害国的武装力量实施，是一种对他国领土、主权造成侵害的国家行为；暴力抗法是外国商船、民用飞机或未经授权的非政府组织实施的非国家行为，该行为构成对沿岸国法律的违反，重者可构成犯罪。

3. 法律依据不同。海上自卫权依据的是体现以《联合国宪章》为核心的我国缔结的一系列武装冲突法公约精神的国内法规定，辅助海上执法权依据的是体现《公约》精神的我国国内法规定。与后者相比，前者对自卫权实施的武力行为作出了严格的限制。

4. 行为性质不同。海上自卫权是国际法赋予一国针对他国在海上或针对海上实施武力攻击时自主决定合法使用武力的权利；辅助海上执法权是国内法赋予海军为维护国家管辖海域法律秩序而行使的执法权。

5. 目的不同。海上自卫权以击退或阻止武力攻击，保卫国家领土完整或政治独立为目的；辅助海上执法权以制服违法者交相关执法部门依法惩办，维护沿岸国海洋法律秩序为目的。

6. 合法性判断机构不同。海上自卫权的实施是否合法由联合国安理会根据《宪章》第 51 条规定作出判断；辅助海上执法过程中使用武力是否合法由国内相关机构根据国内法规定做出判断。

由此可知，如果同样是使用武力，行使海上自卫权会受到严格的条件限制，吸引更多的国际关注及外交反应；而在执法中使用武力，国际法尚没有十分明确的禁止性规定，它是一国主权管辖范围内的事，一般只需遵循国内法有关必要性和相称性原则等规定。从目前世界各国实践考察，海军执法中使用武力是较为普遍的现象。

值得注意的是，在某些情况下，辅助海上执法权可转化为海上自卫权。譬如，外国军舰经同意进入我领海航行，期间违反了我国法律规定，包括海军在内的我海上执法部门可要求其遵守法律；若该军舰无视要求，可令其离开领海；若该军舰抗拒离开并使用武力，海军可实施自卫权。这时，海上执法权就转为海上自卫权。

三、思考与建议

1. 法律的解释与适用应围绕国家利益需求并结合立法本意进行。本文涉及到 2 处法律解释：海上自卫权及军舰无害通过领海权问题。对于前者，文章采取了限制性解释立场。这既符合联合国宗旨与精神，又与我国的外交立场相一致。《宪章》的首要宗旨是维护国际和平与安全，基本精神是将国际关系中国家使用武力的机率降低到最小；而我国的外交立场是维护联合国权威及世界和平与安全，和平解决国际争端，反对使用武力或威胁处理国际问题，两者是相一致的。对于后者，采取了有利于保护国家管辖海域安全利益的解释立场。这是基于对我国安全战略以近

海防御为主、远洋防卫为辅及应以维护国家管辖海域安全利益为主，维护航行自由权为辅的思考与判断。

2. 加强研究。首先，要加强基础性研究，本文就属此类研究；其次，要加强前瞻性研究，就使用武力而言，海上执法中的使用武力及司法管辖领域中的使用武力研究是前瞻性研究；再次，要加强应用性研究，即将基础性与前瞻性研究与海上军事行动实践结合起来，制定可行的行动预案，做到以法律为武器维护、争得国家利益。

3. 完善立法。就海上自卫权而言，与美国相比，我国的法律规定过于笼统与抽象，缺乏可操作性，对此需进一步细化完善；就军舰进入领海问题而言，目前，我国缺乏军舰遇险、救助进入，军舰无害通过审批程序等法律规定，使海上自卫权难以准确、有效地行使。

4. 建立包括海军在内的统一海上执法队伍。这样可以在淡化海军使用武力敏感性的前提下，探索海军在辅助执法过程中适度使用武力的方式；同时，也能确保个体抗法行为转化为国家武力攻击行为时，及时有效地行使海上自卫权。

对我国远洋渔船行政处罚问题研究

韩立新* 宣 行** 刘东铖***

内容摘要：对我国远洋渔船行政处罚权的分配及罚款数额的确定，是渔业行政管理中需要解决的重要问题之一。本文根据不同的情形分析了我国远洋渔船行政处罚权的分配问题，并在此基础上指出，“一事不再罚”原则并不适用这种情况，但行政处罚权的享有并不意味要对远洋渔船进行再次完全处罚，而应考虑多种因素对违反我国远洋渔业行政管理秩序的远洋渔船的罚款数额的影响。

关键词：远洋渔船 行政处罚权分配 罚款数额 “一事不再罚”原则

一、相关概念及问题的提出

按照我国 2003 年 6 月 1 日起施行的《远洋渔业管理规定》，远洋渔船是指中华人民共和国公民、法人或其他组织所有并从事远洋渔业活动的渔业船舶。远洋渔业，按 1982 年《海洋法公约》精神和国际惯例，一般将其定义为：远离本国基地到别国专属经济区或公海从事海洋捕捞以及为其产前、产中、产后配套服务的经济活动。渔业捕捞活动，是指捕捞或准备捕捞水生生物资源的行为，以及为这种行为提供支持和服务的各种活动。娱乐性游钓或在尚未养殖、管理的滩涂手工采集水产品的除外。

自 20 世纪 80 年代中期以来，我国的远洋渔业发展十分迅速。据有关资料统计，我国共有 90 多家远洋渔业企业，1700 多艘远洋渔船在 40 多个国家的专属经济区及大西洋、印度洋、太平洋内从事远洋渔业生产，年产量约 110 万吨。同时，我国已与一些国家签订了渔业协定，如《中日渔业协定》、《中韩渔业协定》、《中越北部湾渔业合作协定》。[1] 按照这些协定，我国远洋渔船要到这些周边国家的管辖海域作业必须得到该国政府的许可，交纳入渔费，并遵守该国的法律法规。2000 年修正的《中华人民共和国渔业法》第 23 条明确规定：“国家对捕捞业实行

---

* 韩立新，大连海事大学海商法教授，博士生导师，法学博士。
** 宣行，大连海事大学海商法硕士研究生。
*** 刘东铖，大连海事大学海商法硕士研究生。

1 黄金铃：《国际海洋法与我国渔业的发展》，载于《海洋渔业》2001 年第 2 期。

捕捞许可证制度。……到他国管辖海域从事捕捞作业的，应当经国务院渔业行政主管部门批准，并遵守中华人民共和国缔结的或者参加的有关条约、协定和有关国家的法律。”按照《远洋渔业管理规定》，农业部主管全国远洋渔业工作，负责全国远洋渔业的规划、组织和管理，会同国务院其他有关部门对远洋渔业企业执行国家有关法规和政策的情况进行监督，并对远洋渔业实行项目审批管理和企业资格认定制度，依法对远洋渔业船舶和船员进行监督管理。

可见，我国远洋渔船如果要到外国海域从事捕捞作业，应向农业部申请批准，在许可证许可的海域和渔期内进行捕捞作业，并遵守我国缔结或参加的有关条约、协定和有关国家的法律。但实践中经常发生我国远洋渔船没有在有关条约、协定限定的海域范围内，或没有协议而直接到他国管辖的专属经济区内捕鱼的情况。如韩国联合通讯社木浦 2005 年 3 月 1 日消息，韩国木浦海察署 28 日称，在最近 12 天内，有 152 艘中国渔船因涉嫌在“过渡水域”内进行非法捕捞而被扣留，并向中方通报相关情况。[2] 实践中也发生了中国渔船违反沿海国法律法规进行捕捞作业，被沿海国按照当地法律法规进行了处罚后，沿海国有关部门还要求中国政府对非法渔船进行处罚的情况。由此也引发了对这种渔船是否还要进行处罚，如果处罚，如何进行处罚的争议。本文根据国际法和国内法有关规定，试图对这些现实问题进行分析，供我国有关部门处理时参考。

二、对我国远洋渔船行政处罚权的分配

根据国际法的一般原理，船舶在外国领海、专属经济区、群岛国的群岛水域等国家管辖范围内的海域，受沿海国与该海域的地位相符合的制度的管辖，同时也受船旗国的管辖，也就是受沿海国属地和船旗国属人的双重管辖。这些渔船在违反他国相关法律法规的同时也可能违反了我国的渔业行政管理秩序，这涉及到我国与他国渔业行政主管机关行使行政处罚权的分配，及相关的数额确定等一系列法律问题。

对渔业行政处罚权的分配，要根据不同的情形具体加以分析，主要可以分为下列情形：

（一）两国已签订渔业协定的情况

目前我国已与一些国家签订了双边的渔业协定。协定一般都就两国渔业行政处罚权的分配问题作了明确的规定，按其规定，签订协定的双方在大多数情形下

2 继风：《关注中国渔船秘鲁被扣事件》，载于《中国水产》2005 年第 1 期。

都有权对渔业行政相对人实施行政处罚。

如《中越北部湾渔业合作协定》第 9 条第 2 款规定：“缔约一方授权机关发给缔约另一方国民和渔船在共同渔区内己方一侧水域违反中越北部湾渔业联合委员会的规定时，有权按中越北部湾渔业联合委员会的规定对该违规行为进行处理，并在通过中越北部湾渔业联合委员会商定的途径，将有关情况和处理结果迅速通知缔约另一方。被扣留的渔船和船员，在提出适当的保证书和其他担保后，应迅速获得释放。”此条赋予了越南有关渔业行政主管机关对违反该协定的有关行为实施行政处罚的权力。

该协定第 9 条第 4 款规定：“缔约各方有权根据各自国内法对未获许可证进入共同渔区内己方一侧水域从事渔业活动或虽获许可证进入共同渔区但从事渔业活动以外不合法活动的渔船进行处罚。”根据该条的规定，“缔约各方有权根据各自国内法对未获许可证进入共同渔区内己方一侧水域从事渔业活动”的渔船进行处罚，说明对于未获许可证而进入越南管辖水域的我国远洋渔船，越南有关渔业行政主管机关可对其实施行政处罚；“缔约各方有权根据各自国内法对虽获许可证进入共同渔区但从事渔业活动以外不合法活动的渔船进行处罚”的规定表明，如果我国远洋渔船进入越南管辖水域从事渔业活动以外不合法的活动，则我国与越南的有关渔业行政主管机关均可依各自国内法对其实施行政处罚。

又如《中韩渔业协定》第 5 条第 1 款规定：“缔约各方为确保缔约另一方的国民及渔船遵守本国有关法律、法规所规定的海洋生物资源的养护措施及其他条件，可根据国际法在本国专属经济区采取必要措施。”此条赋予了韩国有关渔业行政主管机关在本国专属经济区对违反相关规定的行为实施行政处罚的权力。《中韩渔业协定》第 7 条第 3 款规定，在“暂定措施水域”内，如果中国远洋渔船违反了中韩渔业联合委员会的决定，韩国有关渔业行政主管机关无权对其实施行政处罚，而应将有关情况通知我国，我国的渔业行政主管机关在采取相关的处理措施，包括行政处罚措施后，将其通报给韩国。

由上可以看出，对于哪国享有对远洋渔船实施行政处罚的权力，不同的渔业协定作了不同的规定。在存在渔业协定的情形下，应该按照协定的具体规定分配对远洋渔船的行政处罚权。其最重要的法理依据来源于条约法上的“条约必须信守原则”。所谓“条约必须信守原则”，是指一个合法缔结的条约，在其有效期间内，当事国有依约善意履行的义务。其重要的意义在于为国际间的互信和互赖提供条件，从而确定国际关系的稳定和国际和平的维持。我国与相关国家所签订的双边渔业协定属于条约的范畴，当然也必须遵循该原则。既然协定中已经对行政处罚权的分配作了相关的规定，在条约有效的前提下，各缔约方应善意履行协定的规定。同时按照我国法律规定，我国的法律同我国缔结的国际条约有不同规定的，适用条约的规定，从而解决了条约和国内法冲突的问题。因此，对于处罚权的分配问题，如果条约有规定的按其规定。而对于条约中没有就相关问题作出规定的，

则应当遵循协商一致的原则进行处理，协商不成的，应按照下述两国未签订渔业协定的情形确定渔业行政处罚权的分配。

（二）两国未签订渔业协定的情况

我国渔船进入未与我国签订渔业协定的他国管辖水域进行渔业活动，违反他国相关行政法的规定，此时两国行政处罚权的分配问题较复杂，笔者分为以下几种情形讨论：

1. 未与我国签订渔业协定的他国已加入《海洋法公约》

由于我国也是《海洋法公约》的缔约国，因此，当我国远洋渔船进入未与我国签订渔业协定但参加了该公约的他国管辖水域进行渔业活动时，应优先适用该公约的相关规定。

第一，如果我国远洋渔船在他国专属经济区内，由于造成海洋环境污染以外的原因而应受行政处罚，则行政处罚权的分配应适用《海洋法公约》第五部分专属经济区中的相关规定。

一般情形下，远洋渔船在他国进行捕捞作业等远洋渔业活动的区域仅限于该国的专属经济区。《海洋法公约》第 62 条第 4 款规定：“在专属经济区内捕鱼的其他国家的国民应遵守沿海国的法律和规章中所制定的养护措施和其他条款和条件。”从该条规定可以看出，如果我国远洋渔船违反相关规定，其他国家有权实施行政处罚。根据《海洋法公约》第 73 条的规定，沿海国行使勘探、开发、养护和管理在专属经济区内的生物资源的主权权利时，可采取为确保其依据《海洋法公约》制定的法律和规章得到遵守所必要的措施，包括登临、检查、逮捕和进行司法程序。沿海国对于在专属经济区内违反渔业法律和规章的处罚，如有关国家无相反的协议，不得包括监禁或任何其他方式的体罚。在逮捕、扣留外国船只的情形下，沿海国应通过适当途径将其所采取的行动及随后所施加的任何处罚迅速通知船旗国。

《海洋法公约》的规定明确了沿海国实施行政处罚权的法律根据。若我国远洋渔船同时也违反我国《渔业法》、《渔业法实施细则》等法律法规的规定，我国渔业行政机关当然也有权对其实施行政处罚。如《渔业法》第 23 条第 4 款规定：“到他国管辖海域从事捕捞作业的，应当经国务院渔业行政主管部门批准，并遵守中华人民共和国缔结的或者参加的有关条约、协定和有关国家的法律。”

第二，如果我国远洋渔船造成对他国管辖水域的海洋环境污染，则在行政处罚权分配上，应适用《海洋法公约》第十二部分“海洋环境的保护和保全”的相关规定。该部分对于此问题作了十分详尽的规定，体现在第 216 条、第 217 条、第 218 条、第 220 条、第 228 条、第 230 条和第 231 条的相关规定。由于此部分并不偏重适用于远洋渔船，在此不做详细论述。

2. 未与我国签订渔业协定的另一国也未加入《海洋法公约》

如果未与我国签订渔业协定的另一国也未加入《海洋法公约》，那么对远洋渔船实施行政处罚的权力应如何分配，应当进行具体分析。

笔者认为，远洋渔船在外国管辖的海域捕鱼应遵守船旗国的法律，也应遵守沿海国的法律。按照我国行政法上的依法行政原则，行政机关有义务执行和实施现行法律规定的行政义务。远洋渔船在他国海域内非法捕鱼损害了他国的自然资源和管理秩序，必然会受到该沿海国的制裁。远洋渔船的行为若同时违反了我国渔业法有关远洋渔业的管理规定，如捕捞许可证制度、远洋渔船到他国管辖海域从事捕捞作业需经国务院渔业行政主管部门批准，渔业管理部门应根据我国现行法律法规，对违法的远洋渔船进行行政处罚。

三、关于“一事不再罚原则”的分析

根据上述分析可以看出，当我国远洋渔船既违反沿海国有关渔业管理法律规定，又违反国内有关法律法规时，中国渔船会被沿海国予以处罚，我国渔业主管部门也有权力对其进行处罚。而且在实践中，有时中国渔船被沿海国予以行政处罚后，沿海国有关部门仍要求我国渔业行政主管机关对非法渔船进行再次处罚。国内主管部门再次给予处罚是否违反行政法中的“一事不再罚”原则？对于此种情形，有观点认为按照“一事不再罚”原则，我国渔业行政主管机关不必再对已受处罚的渔船再次进行处罚。但笔者认为，此情形并不适用“一事不再罚”原则，从而我国渔业行政主管机关有必要进行再次处罚。

“一事不再罚”是行政处罚中一项公认的理论原则，也是现代法制的重要原则。“一事不再罚”目的在于防止重复处罚，体现过罚相当的法律原则，以保护当事人的合法权益。[3]

对于这一原则的涵义和适用范围的理解，学理界历来众说纷纭，大体上可以概括为以下两大类：一类观点认为，“一事不再罚”原则是指对于相对人的同一违法行为，只能给予一次处罚。如果一个违法行为违反数个法律规范或触犯刑法，则按重罚吸收轻罚原则处理。具体说来，“对于违反两个以上行政法律规范的同一违法行为，行政机关应选择其中较重的罚则予以处罚。对于违反行政法律规范已构成犯罪的，行政机关不再予以处罚。”[4] 另一类观点则认为，“一事不再罚”原则是指同一行政机关对于同一违法行为只能实施一次行政处罚，即“一事不再罚

3 全国人大常委会法制工作委员会国家法、行政法室编著：《中华人民共和国行政处罚法讲座》，北京：法律出版社 1996 年版，第 88 页。

4 应松年：《行政行为法——中国行政法制建设的理论与实践》，北京：人民出版社 1993 年版，第 469 页。

原则只禁止同一行政机关对同一违法行为进行两次以上的处罚。如果同一行政机关遇有相对人两个以上违法行为的，可以处罚两次；两个以上行政机关对于同一违法行为触犯多种行政法律规定的，可以给予不同的处罚；某一违法行为触犯刑法而被追究刑事责任的，并不排除因同一违法行为而被追究行政责任。[5]

笔者赞同后一种观点："一事不再罚"原则的基本要素是"同一违法行为"和"同一理由"（即同一法律依据），"同一违法行为"并不是简单地违反同一法律、法规的行为或现实中的一个违法事实，而是指侵害同一种受法律保护的行政管理关系的一个违法事实，是侵害行政管理关系行为与现实中违法事实的结合。一般情况下，调整同一类行政管理关系的同一类行政法律规范只规定由一种行政主体行使行政管理职权，对违法者给予行政处罚。同一行政机关一般在一种类型的行政管理关系中充当行政主体，无论是根据相同还是不同的行政法律规范给予违法者的一个违法事实给予处罚，一般都只是惩罚侵害同一种行政管理关系的行为，如果对一个这样的违法事实予以两次或两次以上的处罚，就是重复处罚。至于不同机关依据同一行政法律规范或不同行政法律规范给予违法者的一个违法事实以处罚，一般情况下，是可以根据各自职权实施相同或不同形式的行政处罚的，因为此时的同一违法事实，大多是侵害不同行政管理机关的违法事实，不属于"一事不再罚"中的"同一违法行为"之列。[6] 并且不同的行政法律法规体现了对不同的社会关系的保护，行为人的一个行为如果违反两个或两个以上行政法律法规，意味着这种违法行为破坏了两种或两个以上行政法律法规，意味着这种违法行为破坏了两种或两种以上的为行政法律法规所保护的社会关系，不同的行政机关分别对其处罚，符合行政权行使的目的、特点，而且有些违法行为仅由一个行政机关来处罚不足以消除行为的危害后果和危险性。对于一种行为违反数个法律规范，不同的主管行政机关可以分别依据不同的法律规范给予行政处罚。

对于我国远洋渔船违反沿海国法律规定进行捕捞作业，属于违反两个以上的行政法规，受国内外两个行政处罚机关管辖，即法规竞合和行政职权竞合情况，不适用"一事不再罚"原则，可以重复处罚，原因如下：

1. 处罚的依据不同。如前所述，适用"一事不再罚"原则的限制条件是同一事实、同一理由，对于不同事实或同一事实但基于不同理由均不适用"一事不再罚"原则。中国远洋渔船在外国海域非法捕捞是一种违法行为，但外国行政机关和我国行政主管机关处罚的法律依据不同，即两个行政机关分别是根据本国的行政法律法规做出各自的处罚，并不违反"一事不再罚"原则。

2. 违法行为具有双重违法性。我国的远洋渔船在外国海域非法捕捞，既违反

---

5 张尚华：《走向低谷的中国行政法学——中国行政法学综述评价》，北京：中国政法大学出版社 1991 年版，第 238 页。

6 刘勉义：《"一事不再罚"原则的争论》，载于《中国律师》1996 年第 9 期。

了我国有关渔业捕捞的行政法规，破坏了我国渔业管理秩序，同时也触犯了他国的有关行政法律，侵害了他国的渔业资源和管理秩序，具有双重违法性。这种双重违法性决定了它应受到双重处罚。

3. 重复处罚具有互补性。如果适用“一事不再罚”原则，仅仅处罚一次，并不足以消除违法行为的全部危害后果和影响。由于行政主体间有不同的行政任务，在法规竞合的情况下贯彻“一事不再罚”原则容易阻碍不同行政主体间制裁功能的全面实现，为克服此类缺陷，适当允许第二次处罚实有必要。也就是说，为杜绝以后再有类似的事件发生，维护我国的对外形象和我国有关渔业行政法律法规的权威，更好地对远洋渔船进行管理，可以对该渔船进行再次处罚。

总之，行为人的一个行为同时触犯了数个法律规范，构成法律法规竞合的情况，应把握以下原则：一是同一违法行为违反两个以上法律规范时，应依据法律规范分别处罚，这是遵循处罚法定原则；二是如果一个行政机关对违法行为人已经给予足以有效制止违法行为的处罚的，其他行政机关一般不应再科处同种类的处罚；三是采取其他种类的处罚时，可以考虑违法行为人已受处罚的事实从轻或减轻处罚。[7]

四、对我国远洋渔船行政罚款数额的确定

笔者认为，在我国远洋渔船同时违反国内外渔业管理法律规定时，如国内外主管部门均可以对其进行处罚，在实践中就会遇到这样的问题：既然我国远洋渔船已经被外国行政机关按照其国内法进行了处罚，是否还需要对这些渔船再次进行完全处罚。笔者认为，应当将行政处罚权的享有与处罚数额的确定分开考虑，我国享有行政处罚权并不意味渔业行政机关一定要对其进行完全处罚，而应从国家政策取向、人权保护、外交关系等方面做具体的分析。本文拟从法理角度分析此问题，建议行政机关酌情减免对渔民的行政罚款数额，理由如下：

（一）行政合理性原则的必然要求

传统的法治以法律至上为基本内容，强调依法执政。现代的法治同样承认和坚持法律至上，但对法律的理解不拘泥于法律的文字，更注重法律的精神，只有在明确法律的最终目的、法律要体现的最高价值后，才能真正在实践中贯彻和执行法律。并且随着社会发展变迁，具体案情的错综复杂，在强调合法性的前提下，我

7 李援等：《中华人民共和国行政处罚法实用问答》，北京：经济科学出版社 1966 年版，第 118 页。

们更注重合理性，因为合理性问题不只是法律所追求的价值取向，它还是全人类全社会都要追求的价值取向。合理性体现在行政法原则上，主要表现为比例原则。比例原则的基本涵义是：行政机关实施行政行为应兼顾行政目标的实现和保护相对人的利益。行政机关在采取行政行为时，应全面权衡有关的公共利益和个人利益，采取对公民利益造成限制或损害最小的行政行为，并且使行政行为造成的损害与所追求的行政目标相适应，行使自由裁量权不仅应该限制在法定幅度内，而且应公平、适度，显失公平的行政行为属于不当行政行为，行政不当行为同样会直接给国家造成损失，给集体和个人的合法权益带来损害。

我国的渔业行政管理制度也应当遵循此原则，对已在国外受过行政罚款的渔民适当减轻其责任，是符合行政合理性原则要求的。这符合我国远洋渔业的发展现状，能真正体现我国相关渔业行政立法的价值取向。

（二）渔业行政机关与渔业行政相对人权利义务平衡的必然要求

现代行政法本质上是追求行政机关与相对人权利义务总体平衡的“平衡法”，其理论基础是“平衡论”。“平衡论”的核心理念在于揭示：现代行政法是且应当是对行政机关与公民之间权利义务关系进行平衡调整的法律体系，而且鉴于行政机关通常被认为因维护和促进公共利益的需要而获得其权力，公民的权利则一般被认为出于其个人利益的需要。[8] 因此“平衡论”主张现代行政法必须追求公共利益和个人利益之间的平衡关系。我们不能过分拘泥于个人利益让位于公共利益，法律应承认并保障公民人身利益和法律公正利益，并且利益衡量的目标在于实现相关利益的最大化，把利益的牺牲或摩擦降低到最低限度。

在渔业行政处罚案件中，我们也要考虑到行政主体与行政相对人利益的平衡，尤其是对远洋渔船来说，应当在罚款数额上找到一个平衡点，使行政相对人的权利与义务统一起来。

（三）与实践相适应的必然要求

我国的远洋渔业正处于发展阶段，由于相关的远洋渔业企业规模有限，因此在对远洋渔业船舶给予行政处罚时，不应过分强调惩罚的目的。外国对我国非法渔船进行的行政罚款数额，从现行规定来看，基本上都高于我国法律的规定，如密克罗尼西亚对非法进入该国海域捕捞的渔船处罚，最高刑事罚金为 80 万美元，最高民事罚款为 500 万美元，法院可下令没收渔船、渔具和渔获物。阿根廷法律规

8 孙笑侠：《法律对行政的控制——现代行政法的法理解释》，济南：山东人民出版社 1999 年版，第 8 页。

定，对非法进入其海域捕捞的外国渔船将给予严厉处罚，其中包括没收全部非法渔获，并处以高达 50 万美元的罚金。从行政法的目的而言，如果国外的行政罚款已达到了行政惩罚的目的，则可不对其再次进行完全处罚，即可考虑对罚款的数额给予减免。因为如果再次对这些渔船进行完全处罚，有相当的远洋渔业企业可能会面临破产，从价值目的上看根本不能达到发展渔业的目的。

五、结　语

在对远洋渔船行政处罚权的分配问题上，渔业行政主管机关应当根据具体情况，行使其行政职权。如果他国已经对该违法渔船按照他国的法律进行了行政处罚，我国渔业主管机关仍可以对其按照我国有关法律的规定进行再次行政处罚。但我国享有对远洋渔船的行政处罚权并不意味着一定要对其进行再次完全处罚，而应根据我国的立法宗旨和具体实践，酌情减轻或免除对远洋渔船的罚款。

论“一事不再罚”原则在海洋行政处罚中的适用

曹英志* 张志华** 任 洁***

内容摘要：“一事不再罚”原则是国际上的一项重要责任制度，它直接来源于“一事不再理”原则。我国《行政处罚法》确立的“一事不再罚”原则有其特殊的内涵，本文对其特殊内涵作了积极探索。本文结合国内外法学的理论研究将“一事不再罚”原则与我国海洋行政处罚实践相结合，对“一事不再罚”原则在我国海洋行政处罚中的适用和例外作简要探讨，并论述“一事不再罚”原则给我国海洋行政处罚带来的启示。

关键词：一事不再罚 禁止双重危险 海洋行政处罚 适用 例外

一、“一事不再罚”原则的推导

（一）古罗马法中的“一事不再理”原则

在罗马法中有一个古老的原则：“不得对同一标的提起两次诉讼”，[1] 即诉讼程序中存在的“一案不二诉”原则，但是确切地说，应当是不得对同一议题再次提起诉讼，即不得再根据同一法律事实要求承认同一权利。罗马法学家在此基础上发展了“一事不再理”原则，即当事人对已经正式判决的案件不得申请再次审理。

从历史渊源上看，“一事不再理”原则来自于古罗马法中“诉权消耗”的理论。[2] 古罗马人从朴素的唯物观出发，将诉权也看作物质的，由于在常识上物质的运动必然带来物质的消耗，因而他们认为诉讼权的行使也将导致诉权的消耗。所谓诉权消耗，是指所有诉权都会因诉讼系属而消耗，对同一诉权或请求权，不允许二次

---

* 曹英志，国家海洋信息中心助理研究员，中国海洋大学国际法学硕士。
** 张志华，国家海洋局海域管理司海域处副处长，北京大学法学硕士。
*** 任洁，中国海洋大学国际法学硕士。

1 彼德罗•彭梵得著，黄风译：《罗马法教科书》，中国政法大学出版社 2005 年版，第 81 页。

2 仇慧玲、黄文青：《一事不再理原则与我国刑事再审制度》，下载于 http://www.studa.net/xingfa/04/012/113619.html，2004 年 10 年 12 日。

诉讼系属，即“一案不二诉”。[3] 一旦限制同一诉权或请求权只能有一次诉讼系属，那么即使允许当事人对同一案件提出诉讼请求，被告也可以提出既决案件的抗辩或诉讼系属的抗辩，使当事人的诉讼请求无法成立。不管怎样，对同一案件一旦诉讼系属成立后，就不能再次对这一案件提出诉讼请求，这就是罗马法中的“一事不再理”原则。据此，在罗马法中，“一事不再理”的效力是自案件发生诉讼系属后就产生的，而不是自判决确定时才产生。

据考察，“一事不再理”原则比较成熟的表述，始见于公元 6 世纪前半期查士丁尼的《学说汇编》，其中将该原则表述为“长官不应当允许同一个人因其一项本人已被判决无罪的行为再次受到刑事指控”。[4] 罗马的诉讼法实行“没有告诉人就没有法官”[5] 的做法，按照罗马法学者的观点，“既判的事实，应视为是真实的”，这就是“既判力”。在罗马法中，实行“一事不再理”，有三个条件：其一，必须是同一个案件；其二，必须是同一个诉讼标的；其三，必须是相同的当事人。[6] “一事不再罚”原则正是来源于古罗马法中的“一事不再理”原则。[7] 这种原则在民事诉讼领域得到普遍适用之后，行政诉讼也将其引用过来，而行政诉讼中的“一事不再罚”原则与“一事不再理”原则确实有着相似的价值取向。因为对一个违法行为重复处罚，不但会增加行政成本，浪费不必要的行政资源，导致行政机关无法更好地维护公共秩序和保护公共利益，并且被处罚者也会因为无休止的不当处罚而使自身合法权益受到损害。

（二）《公民权利和政治权利国际公约》第 14 条第 7 款

“一事不再理”原则最早在国际上得到承认，是在联合国 1966 年 12 月通过的关于《公民权利和政治权利国际公约》里，其第 14 条第 7 款规定：“任何人已依一国的法律及刑事程序被最后定罪或宣告无罪，不得就同一罪名再予审判或惩

3 宗卫明：《交通事故肇事者赔偿损失后受害人能否再向雇主请求精神损害赔偿》，下载于 http://www.dffy.com/sifastijiam/at/200507/20050702/42438.html，2005 年 7 月 2 日。

4 张毅：《刑事诉讼中的禁止双重危险规则论》，北京：中国人民公安大学出版社 2004 年版，第 39 页。

5 谢邦宇主编：《罗马法》，北京：北京大学出版社 1990 年版，第 382 页。

6 谢邦宇主编：《罗马法》，北京：北京大学出版社 1990 年版，第 383 页。

7 魏勇：《浅论“一事不再罚”原则在税务行政处罚中的运用》，下载于 www.pux.com.cn，2005 年 12 月 5 日。作者还认为：“一事不再罚”理论在我国已发展为“一事不二罚款”原则。但文章也指出根据行政处罚法推导出的结论，解决了“一事不再罚”原则中的“不再罚”问题，但对于如何正确把握“一事不再罚”原则的核心问题，即何谓“同一个违法行为”（一事），却没有明确阐述。

罚。”[8] 公约的这条规定通常被称为“一事不再理”原则。联合国人权事务委员会第 13 号一般性意见第 19 段针对该条款指出：“在审议缔约国报告时往往对第 14 条第 7 款规定的范围产生不同意见。有些缔约国认为必须对刑事案件的重审程序保留意见，委员会觉得大多数缔约国对在例外情况下再进行审判和依第 7 款所载‘一罪不二审’原则禁止重审这两点明确地加以区分。了解了‘一罪不二审’这一词的意义可能会促使缔约国重新考虑它们对第 14 条第 7 款规定所持的保留意见。”[9] 因此可见，《公民权利和政治权利国际公约》第 14 条第 7 款的原则并不是等于禁止进行重审。这一原则出现在国际公约里，其积极意义是无庸置疑的，它反映了当代法律的公正化与效率化趋势，既体现了对一国法律平等地位的尊重，又渗透着人权观念，因而使得“一事不再理”原则成为现代法律普遍遵循的国际准则。

但是任何事物都有正反两个方面，绝对化理解“一事不再理”原则的积极意义，相反却不可避免地产生消极因素，因此现在许多国家在考虑“一事不再理”原则的同时，也不得不考虑其消极方面，如刑事审判中的两审终审制[10] 或三审终审制，终审判决后又发现新的证据证明被告人是无罪的，或者有证据证明在终审判决中所依据的证据是伪造的，如果仍绝对地坚持“一事不再罚”原则，则将使无罪的公民蒙受冤屈。因此从司法正义的最高目标出发，许多国家对“一事不再理”原则采用了网开一面的理解。“一事不再理”原则的例外，兼顾了程序正义和实体正义，是法治社会发展的必然要求。从这个意义上说，对《公民权利和政治权利国际公约》规定的“一事不再理”原则进行限制是对该原则的进一步完善。

（三）《欧洲人权公约》关于“一事不再理”原则

欧洲理事会 1950 年 11 月在罗马签订的《欧洲人权公约》第 7 号协议书第 4 条规定：1. 在同一国家的管辖下，任何已依该国的法律及刑事程序被最后宣告无罪或者有罪者，不得就同一犯罪再予审判或惩罚；2. 如果有表明新的或者新发现

---

8 陈光中主编：《〈公民权利和政治权利国际公约〉与我国刑事诉讼》，北京：商务印书馆 2005 年版，第 316 页。

9 “一事不再理”原则是一项涉及到刑事、民事、行政三大诉讼的重要原则，联合国人权事务委员会第十三号文件根据需要，仅仅对刑事诉讼中的“一事不再理”原则作出了规定，但这并不意味着这一原则在民事诉讼和行政诉讼中不适用。可参阅杨宇冠著：《人权法——〈公民权利和政治权利国际公约＞研究》，北京：中国人民公安大学出版社 2003 年版；金伟峰：《一事不再罚原则新探》，载于《行政法学研究》1997 年第 4 期；何乃忠：《试论一事不再罚原则》，载于《现代法学》1993 年第 1 期。

10 目前世界上实行两审终审制的国家已成为少数例外，除了人口稀少的国家和州之外，只有以前苏联为样本的国家，而其中罗马尼亚已于 1990 年将审级制度改为三级结构。参见傅郁林：《审级制度的建构原理——从民事程序视角分析》，载于《中国社会科学》2002 年第 4 期。

的事实证据，或者如果在原诉讼程序中有根本性的瑕疵，有可能影响案件的结果，前款规定不应妨碍根据有关国家的法律和刑事程序对同一案件的重新开启；3. 不得根据公约第 15 条的规定，对本条规定予以克减。[11]“一事不再罚”原则在《欧洲人权公约》中的特点是：其一，该公约对这一原则的肯定已经达到了强制的程度，“不得克减”意味着任何缔约国都得强行遵守这一规则。实际上，各缔约国对这一原则的运用是十分灵活的，有的国家，例如俄罗斯将这一原则写进了国内法。[12]有的国家虽然没有将这一原则列为国内法，但是允许公民直接到欧洲议会和欧洲人权法院去申诉本国违法该公约。[13] 其二，该公约并不排斥例外情形。“如果有表明新的或者新发现的事实证据，或者如果在原诉讼程序中有根本性的瑕疵，有可能影响案件的结果”这两个条件不是并列关系，而是选择关系，只要具备任何一个条件，该原则就失去了适用基础。这种例外制度对于保障欧洲公民人权起到了巨大的推定作用。

（四）两大法系国家关于“一事不再理”原则

大陆法系的“一事不再理”原则直接接受了古罗马“既决案件”的理论，发展为既判力理论，强调生效判决的既判力，对已发生法律效力的裁判“不再理”；而英美法系国家继承了古罗马“一事不再理”原则的精髓，并将其发展为“禁止双重危险”原则。[14] 在大陆法系，“一事不再理”原则最初只是一项基本诉讼原则。德国学者谢尔曼教授认为：“一事不再理”原则是指，无论是有罪还是无罪，作出生效判决后不允许对同一行为再启动新的程序。[15] 此原则的出发点是国家的处罚权已经耗尽。近至现代，这一原则成为了大陆法系国家一项根深蒂固的诉讼原则，但是，大陆法系国家也不是顽固地坚持这一原则，也就说大陆法系国家不再绝对化地使

---

11 陈光中主编：《〈公民权利和政治权利国际公约〉与我国刑事诉讼》，北京：商务印书馆 2005 年版，第 317 页。

12 俄罗斯是联合国《公民权利和政治权利国际公约》和《欧洲人权公约》的参与国，该国的刑事诉讼法典明确规定：“公认的国家法原则和准则及俄罗斯联邦签署的国际条约是俄罗斯联邦调整刑事诉讼的立法的组成部分。如果俄罗斯联邦签署的国际条约规定了与本法典不同的规则，则适用国际条约的规则。”故此，俄罗斯国内立法中对那些不符合《公民权利和政治权利国际公约》和《欧洲人权公约》的情形是命令禁止的。

13 根据《欧洲人权公约》的规定，任何在条约国受到终审判决的人，都可以在 6 个月内向“欧洲人权委员会”提起申诉，这就为欧洲公民提供了一条对生效判决的特殊的救济渠道。但是公约也规定，当个人提出申诉并提交了申诉申请后，需要有法定代理人出席庭审，这为当事人的申诉权利带来一定的难度，欧洲理事会为此还专门设定了一套法律援助方案来帮助无法聘请法定代理人的申诉者。

14 仇慧玲、黄文青：《一事不再理原则与我国刑事再审制度》，下载于 http://www.studa.net/xingfa/4/012/113619.html，2004 年 10 月 12 日。

15 [德] 约阿希姆•谢尔曼：《〈德国刑事诉讼法典〉中译本引言》，载于李昌珂译：《德国刑事诉讼法典》，北京：中国政法大学出版社 1995 年版，第 14 页。

用这一原则，而是给这一原则作了更为周密的完善，例如增加了“一事不再理”原则的例外情况。《法国刑事诉讼法》第 622 条规定：在某些情况下，为维护任何重罪、轻罪犯人的利益，均可提出复核的申请书。德国《违反秩序法》第 19 条规定，同一行为违反数个法律，依照罚款数额最高的法律科处罚款，并可以同时处以其它法律中的附加措施。[16]

在英美法系国家里，“一事不再理”原则被称为“禁止双重危险”原则，即被告人不得因同一罪行而受到两次起诉、审判和刑事处罚。[17] 该原则在近代资产阶级革命时期被英国普通法所接受，美国 1789 年《宪法修订案》将其纳入书面文本中，美国《宪法》及修正案规定，一旦陪审团裁定，在美国的任何法庭都不能再次审理，不能再次按照通用法则。在后来的判例中，法官对这一原则分别作出了经典的表达，并将这一原则视为代表“宪法传统中的一种基本精神”。[18] 实际上，“禁止双重危险”原则和“一事不再理”原则虽然出发点基本一样，由于因其侧重点不同，因而适用范围尚有一定的差异，在适用范围上，“禁止双重危险”原则比“一事不再理”原则略广一些。但基本上，两者有着相同的价值取向，两者不存在本质的区别。

（五）我国《行政处罚法》第 24 条

我国《行政处罚法》第 24 条规定“对当事人的同一个违法行为，不得给予两次以上罚款的行政处罚”。[19] 本条款是针对在行政处罚实践中，行政机关众多，职能又相互区分与联系，无法避免多个行政机关共同管辖一事物的可能，不同部门实施管理所依据的法律规范不同，必然出现同一违法行为触犯多个行政法律规范的情形。按照关于我国《行政处罚法》的立法解释，“一事不再罚”原则可界定为：行政机关对违法当事人的同一个违法行为，不得以同一事实和同一依据，给予两次以上同类（罚款）的行政处罚，即行政机关对于违法当事人的违法行为，只能依

16 德国、奥地利对处以行政秩序罚的行为构成要件要求相当严格，几乎与刑法并无二致。《德国违反秩序罚法》第 10 条规定：“违反秩序行为的处罚，以出于故意行为为限，但法律明文规定对过失行为处以罚款者，从其规定。”《奥地利行政罚法》第 5 条规定：“与行政法规无关责任条件的特别规定时，过失行为已足为处罚的理由，仅对违反禁止或作为命令的行为，而无须以引起损害或危险作为违反行政义务行为的构成要件者，如行为人不能证明其无法避免行政法规的违反，应认为有过失。”故其行政处罚的也是相当严格的。

17 陈光中主编：《〈公民权利和政治权利国际公约〉与我国刑事诉讼》，北京：商务印书馆 2005 年版，第 318 页。

18 [美] 彼得•G•伦斯特洛姆主编，贺卫方等译：《美国法律辞典》，北京：中国政法大学出版社 1998 年版，第 160 页。

19 《最新中华人民共和国常用法律法规全书》，北京：中国方正出版社 2000 年版，第 344 页。

法给予一次处罚，不能重复处罚。[20] 实际上，由于在立法当初，一者是由于我国对于“一事不再罚”原则的研究以及立法技术尚不够成熟，二者是对我国法律、法规规定的行政处罚种类繁多、职权交叉重迭的现象的解决尚不能彻底，制度尚未充分完善，因此，我国《行政处罚法》第 24 条的规定“一事不再罚”也仅仅是浅层次面上的规定。

例如，首先“一事不再罚”原则的适用范围是有限的，仅仅是对 2 次以上罚款的行政处罚的限制，而不限制其它的行政处罚方式的第二次或多次适用，如吊销营业执照或其它许可证、责令停产停业等，可以没收违法所得，只是不能再兴罚款的行政处罚方式。[21] 这在以后的立法实践中需要补充和完善。

其次，“一事不再罚”原则在我国理论研究与立法实践中尚有未得以充分明晰之处，导致了行政管理实践中的一些混乱、相悖状态。随着行政法制的发展与法律法规的制定，及其调整的日益细化和保障社会关系的需要，一个违反行政管理法规的行为可能会导致侵犯了不同社会利益客体的后果，这时就可能会出现保护不同利益客体的特别法都对该行为竞相适用，而同时产生几个不同的法律责任、法律后果的现象，也就是法律法规适用的竞合。[22]《行政处罚法》的“一事不再罚”原则对适用法规时的冲突没有提供合适的冲突适用规则。[23]

第三，《行政处罚法》的“一事不再罚”原则对都有处罚权、相同行政职能的不同行政主体由谁处罚、是否排斥相同的处罚没有提供法定指引。[24] 更有学者认为，《行政处罚法》第 24 条的规定违背了立法语言文字规则。[25]

---

20 杨琼鹏、周晓主编：《行政处罚法新释与例释》，北京：同心出版社 2000 年版，第 149 页。

21 李晓秋：《如何理解我国行政处罚中“一事不再罚”原则》，下载于 http://www.hljda.gov.cn/show.aspx?newsid=46608Ltypeid=26，2006 年 2 月 21 日。作者认为：在我国行政处罚法的立法过程中，认为确立一个覆盖所有行政处罚种类的“一事不再罚”原则实在太困难了，故在我国《行政处罚法》第 24 条规定“对当事人的同一个违法行为，不得给予两次以上罚款的行政处罚。”此即是“一事不再罚款”原则，其仅是“一事不再罚”原则的一个部分。

22 朱新力：《论一事不再罚原则》，载于《宪法学、行政法学》2002 年第 2 期。作者认为：法条竞合的本质是法律所规定的违法构成要件的竞合。它的特征是：相对人只实施了一个违法行为（一事）；但因法律错综复杂的规定，出现触犯数个违法行为（多事）的状态；数个违法行为之间在构成要件上存在交叉、从属的逻辑关系。

23 张曦：《试议行政处罚适用中的“一事不再罚”原则》，下载于 http://lunwen,eduxue.com/Article/d/d16/d/607/200412/Article/1798.html，2004 年 12 月 21 日。作者认为：随着行政法制的发展与法律法规的制定，及其调整的日益细化和保障社会关系的需要，一个违反行政管理法规的行为可能会导致侵犯了不同社会利益客体的后果，这时就可能会出现保护不同利益客体的特别法都对该行为竞相适用，而同时产生几个不同的法律责任、法律后果的现象。该文作者称之为法律法规适用的竞合。

24 张曦：《试议行政处罚适用中的“一事不再罚”原则》，下载于 http://lunwen,eduxue.com/Article/d/d16/d/607/200412/Article/1798.html，2004 年 12 月 21 日。作者认为这种情况是行政处罚主体竞合的另一种特殊表现形式。

25 靳怀宇：《从立法学角度谈“一事不再罚”》，载于《甘肃农业》2006 年第 3 期。

二、“一事不再罚”原则的内涵

（一）“一事不再罚”原则的涵义

“一事不再罚”原则是近些年来行政法学界讨论较多、分歧也较大的一个问题。对于学者的争论主要在以下几个方面：什么是同一违法行为；对同一违法行为在什么样的情况下，可以实施两次以上的行政处罚，在什么样的情况下，不得实施两次以上行政处罚，或者都不得实施两次以上的行政处罚；不再罚中的“罚”的涵义和范围，其中主要是行政处罚和刑罚的关系问题。[26] 本文尚不在这里讨论关于这一传统原则理论界中的观点，本文作者主要是采用我国《行政处罚法》上的通说，即“一事不再罚”原则是指行政主体对当事人的同一个违反行政法规范的行为，不得给予两次以上的行政处罚。这种限制既适用于同一事实同一理由（一行为违反一规范），也适用于同一事实不同理由（一行为违反数规范）。只要当事人客观上只有一个违法事实，只能给予一次行政处罚，不能两次或多次，其中一个行政主体处罚了，其它行政主体就不能再罚，已实施行政处罚的主体也不能再次处罚，否则无效，即“先罚有效，后罚无效”。“一事不再罚”限制的是所有行政处罚种类的重复、多次适用，并不排除在某些情形下行政处罚和刑罚等其它性质不同的法律处罚的同时适用。

（二）“一事不再罚”原则的基本特征

第一，按照上文观点，“一事不再罚”原则的本意是防止同一行政违法行为受到两次或两次以上的重复处罚。当多个行政主体对同一违法行为都有处罚权时，只有其中的一个行政主体有处罚权，“谁先发现，谁先处罚”。在当前我国分散的处罚体制下，因各行政主体处罚权不一样，行政机关之间相互配合比较困难，做出一个完整的行政处罚是存在一定问题的。另外，行政机关的行政处罚程度轻重不同，就有可能使行政相对人的同一违法行为受到不同数额的罚款处罚。面对这些问题，立法工作者选择“一事不再罚”原则作为行政处罚法基本原则时，主张一个行政主体，一次行政处罚。这种立法基调一方面能缓解我国行政处罚过程中存在的矛盾，但是也使得“一事不再罚”原则内涵范围缩小，过于保守，失去锋芒，这

---

26 关于对“一事不再罚”原则的有关讨论，可见朱新力：《论一事不再罚原则》，载中国人民大学书报资料中心：《宪法学、行政法学》2002 年第 2 期，文章对“何为一事”、“能否再罚”等等问题均作了详细的讨论；方海伟：《对“一事不再罚”原则的再思考》，下载于 http://www.studa.net/faxuelilun/060620/17362444.html，2006 年 6 月 20 日；周杏梅：《也谈一事不再罚原则》，下载于 http://www.duozhao.com/lunwen/dld/lunwen_57350.html，2006 年 1 月 19 日。

是我国“一事不再罚”原则最大的基本特征。

第二，但是，“一事不再罚”原则又是跨国界的。[27] 一方面，各国纷纷将这一原则作为国内法律的基本原则之一，这也成为现代国际立法的一个重要特征；另一方面，当某一个行为触犯了数个国家的法律，而数个国家均有管辖权，其它国家不会因为其中一个国家对该行为给予了处罚而放弃本国的管辖，这一点可以理解的，因为在国家的基本权利中，管辖权（或者称为治权）是四大重要组成部分之一。[28] 关键是如何处理各个国家的管辖权，其中一个重要的途径便是签署共同条约或者公约，例如《公民权利和政治权利国际公约》和《欧洲人权公约》等。

第三，“一事不再罚”原则最大的魅力在于它不是绝对的，它存在着适用条件上的例外的情况，例如《欧洲人权公约》对这原则的规定。这要求我们在具体运用这一原则的时候要保持灵活性，因为只有使“一事不再罚”原则的例外在科学合理的范围内发挥作用，才能保证“一事不再理”原则在我国立法中的基础地位，并使这一原则与例外情形一起构筑比较理想的立法体制。

（三）“一事不再罚”原则在我国《行政处罚法》中的法律地位

第一，“一事不再罚”原则成为《行政处罚法》中的重要原则，既是由其自身的上述特征所决定的，也是由其符合《行政处罚法》原则的特点决定的。根据法理有关理论，按照原则的抽象性程度不同将原则分为基本法律原则和具体法律原则。基本原则构成整个法律制度体系的指导思想和出发点，具有较高的法律地位，基本原则具有基础性和根本性；具体法律原则是基本原则派生的，它构成其它法律规则的基础，具有相对明确性。[29] 我国《行政处罚法》的基本原则为指导行政处罚法的制定、贯穿行政处罚法始终、体现行政处罚法精神，由《行政处罚法》规定和体现的基本价值观念。[30] 在我国《行政处罚法》的基本原则有：处罚法定原则；处罚公开、公正原则；处罚与教育相结合原则；当事人权利保障原则；处罚权力分工制约原

27 杨荣新教授在《从维护既判力角度适用“一事不再理”》一文中认为：对于一个国家法院的生效裁判，从理论上讲也应“一事不再理”，也就是“一事不再理”原则也应在国际上得到承认。两个都有管辖权的国家的法院，应以先受理该案的国家的法院判决为有效。如果后一国家的法院认为前一国家法院对案件不应受理的，可以说明自己受理该案意见，允许起诉；否则，即应在当事人申请的条件下，承认和执行前一国家法院的生效裁判。

28 佟连发主编：《国际法学》，北京：北京大学出版社 2003 年版，第 62 页。

29 陈金钊主编：《法理学》，北京：北京大学出版社 2002 年版，第 90 页。

30 冯军：《行政处罚法新论》，北京：中国检察出版社 2003 年版，第 101 页。

则等。[31]“一事不再罚”原则是行政机关实施行政处罚的具体法律原则，[32]具体来说，其是可以由当事人权利保障原则派生出来的，与基本原则相比，级别稍低。但是“一事不再罚”原则也是相对人主张自身权利的法律依据，因此在行政处罚中具有十分重要的地位。

第二，“一事不再罚”原则与其它原则一起，共同构建了我国行政处罚中行政机关与行政相对人的权利与义务关系。在我国，实行的是由行政机关为主的行政主体独揽行政处罚权的体制，相对而言，行政相对人处于弱者的位置，行政机关独揽行政处罚权与行政相对人弱者地位形成了阶差，有的时候矛盾重重甚至爆发冲突，“一事不再罚”原则就仿佛一个调控器或者润滑剂，确立了双方的权利与义务，以使两者出现平衡[33]与和谐。

第三，“一事不再罚”原则是行政处罚法法律体系中不可分割的组成部分。我国《行政处罚法》文本中总则部分主要论述该法的立法宗旨和立法依据、适用范围、行政处罚中当事人的权利和几个基本原则（主要是处罚法定原则、公开公正和过刑相当原则、处罚与教育相结合原则、行政处罚与民事责任和刑事责任竞合适用原则等）有关问题，分则部分论述了行政处罚的种类和设定、实施机关、管辖和适

---

31 冯军：《行政处罚法新论》，北京：中国检察出版社 2003 年版，第 103 页。

32 关于“一事不再罚”原则是行政处罚法的基本原则还是具体原则，在法学界还是有争论的。一些著作，如张宏声主编：《海洋行政执法必读》，北京：海洋出版社 2004 年版，第 172 页，编者认为海洋行政处罚法的基本原则有：处罚法定原则、公正公开原则、“一事不再罚”原则等，“一事不再罚”原则的具体内容包括：保障海洋行政相对人权利原则、处罚和教育相结合的原则；滕祖文主编：《海洋行政管理》，青岛：青岛海洋大学出版社 2002 年版，第 252 页，编者认为海洋行政处罚的基本原则有：海洋行政处罚法定原则，海洋行政处罚公开公正原则，海洋行政处罚救济原则，一事不再罚原则，海洋行政处罚的过罚相当原则，做出处罚决定的机关和收缴罚款的机构分离原则；滕祖文、彭垣、闵庆方：《论海洋行政处罚》，《海洋开发与管理》2002 年第 6 期也将“一事不再罚”原则作为海洋行政处罚法的基本原则。本文作者认为行政处罚法基本原则和具体原则相比较，基本原则具有很强的宣示性和指导性，在基本原则中更多凝聚着的是执法者应予掌握的法律精神和法律意识，基本原则规范性不是很强，通常是寓于某个具体的法律规则之中，并通过这些规范性很强的规则得到贯彻和实施，基本原则通常不直接作为处理案件的法律依据，从这个意义上说，“一事不再罚”原则更适合、更具备具体原则的特征，作者的观点是值得商榷的。

33 在行政法理论中，曾有“管理论”、“服务论”、“政府法治论”、“平衡论”等各种观点。1993 年北京大学罗豪才教授在《中国法学》第 1 期上发表了《现代行政法的理论基础—论行政机关与相对一方的权利义务平衡》一文，“平衡论”观点得到了普遍的关注。“平衡论”观点认为，行政法的发展过程就是行政机关与相对一方的权利与义务从不平衡到平衡的过程，行政机关与相对一方权利义务在不同的行政法律关系中存在着不平衡，恰恰是为了实现两者在整个行政法律关系中的平衡。在关于实现行政机关与相对一方权利义务平衡的法律的手段方面，“平衡论”主张在立法上公平分配行政机关与相对一方的权利义务，在执法过程中渗透着民主与公正因素，通过行政合同和行政指导等权力色彩较淡的行政手段淡化行政权利的“命令—服从”特征，确立既保障公民权，又监督和维护行政权的行政诉讼制度等。关于“平衡论”的争论和评价可参考杨解君：《关于行政理论基础若干观点的评析》，载于《中外法学》1996 年第 2 期；吕泰峰：《试论行政法学的再次革新》，载于《郑州大学学报》1995 年第 6 期；笑侠：《论新一代行政法治》，载于《外国法译评》1996 年第 2 期等文章。

用、决定和有关程序等问题，[34]“一事不再罚”原则正是总则部分基本原则的衍生，而且是体现我国行政处罚法立法宗旨的有益补充，舍之有损其整体性，留之则使我国行政处罚体系更加完善。

三、“一事不再罚”原则在海洋行政处罚中的适用

（一）“一事不再罚”原则是我国海洋行政处罚法的重要原则之一

法律原则是法律制度基础性真理或原则，并为其它法律要素之基础或本源。[35]法律原则体现了人们对法律灵活性的认识，增强了法律适应社会的能力，突出了法律的目的性。海洋行政处罚的基本原则是指对海洋行政处罚的设定和实施具有普遍指导意义的基本行为准则。海洋行政处罚的基本原则来源于两个方面，一个方面归纳自海洋行政处罚的实践和个案，另一方面推导自更抽象之上位原则，具体而言是指我国宪法、行政法、行政处罚法等法律法规中的基本原则。[36]

《中华人民共和国海域使用管理法》是海域使用管理的基本规范，它对海洋功能区划、海域使用的申请和审批、海域使用权和海域使用金，以及监督检查等基本制度作了明确的规定，针对违法占用海域的行为、非法批准和超越批准权限批准使用海域的行为、阻挠海域使用权人依法使用海域的行为、不按规定办理海域使用权续期手续仍继续使用海域的行为、擅自改变海域用途的行为、原海域使用权人在海域使用权终止后不按规定拆除用海设施和构筑物的行为、不按期缴纳海域使用金的行为、拒不接受海洋行政主管部门监督检查以及不如实反映情况或者不提供有关数据等违法行为设定了具体的行政处罚。应该说，《海域使用管理法》是体现我国海洋行政处罚法中重要原则——“一事不再罚”原则的适用范围相对全面、程度相对彻底、级别相对较高的法律文本。

我国《海洋行政处罚实施办法》于 2002 年 12 月 12 日经国土资源部第六次部务会议审议通过。该《办法》明确了中国海监机构实施行政处罚的职责，统一了海洋行政处罚程序，规范了海洋行政处罚行为，有效保障了海洋行政处罚合法、高效的实施。《海洋行政处罚实施办法》的发布，对加强海洋管理，进一步强化海洋执法监察工作，促进依法行政，具有重要的意义。《办法》主要体现了海洋行政处

---

34 《最新中华人民共和国常用法律法规全书》，北京：中国方正出版社 2000 年版，第 341 页。

35 陈金钊主编：《法理学》，北京：北京大学出版社 2002 年版，第 86 页。

36 法律原则可以从个案中归纳出来，亦可以从更抽象之上位价值推导出来，我国“一事不再罚”原则也不例外。

罚法定原则、海洋行政处罚效率原则、海洋行政处罚公开公正原则、海洋行政处罚过罚相当等原则，其中，“一事不再罚”原则也是《办法》的重要原则之一。

此外，《中华人民共和国海洋环境保护法》、《中华人民和国涉外海洋科学研究管理规定》、《海洋自然保护区管理办法》、《铺设海底电缆管道管理条例》等海洋法律、法规、规章也都体现了“一事不再罚”原则。

（二）“一事不再罚”原则成为海洋行政处罚法重要原则的原因分析

从法理上说，“一事不再罚”能成为海洋行政处罚法的重要原则是基于以下几个主要理由：

第一，诚实信用和信赖保护[37]的需要。诚实信用产生于罗马法，[38]作为当事人意思的补充，普遍存在于契约法或者债法等私法领域，其实质为道德准则的法律化，它要求当事人以爱人如己之心善待他人、履行义务。[39]我国《行政许可法》第8条首次在我国立法中规定信赖保护原则：“公民、法人或者其他组织依法取得的行政许可受法律保护，任何行政机关不得擅自改变已经生效的行政许可。”信赖保护主要适用于授益行政行为的撤销，因为行政相对人因此种行政行为而获得利益，一经撤销而遭受损害，所以行政机关撤销授益行政行为时，应当考虑补偿相对人因出于信赖而已受到或将受到的损失。[40]“一事不再罚”原则体现了公众与国家之间的一种道德准则，当事人足够相信，国家不会就同一违法行为在不得已之情况下给予其两次惩罚，否则在一定程度足以造成对诚实信用和信赖保护的打击。

第二，维护当事人权益、监督行政主体行使职权的需要。我国1996年颁布实施的《行政处罚法》在第1条就明确把有效实施行政管理，维护公共利益和社会秩序，保护公民、法人或者其它组织的合法权益作为了立法的目的和宗旨并加以确认。[41]一方面，法律赋予行政主体以一定权力，旨在维护社会秩序和公共利益；一方面，由于这种权力客观上存在着易腐性、扩张性以及对个人权利的侵犯性，因此

---

37 二战后，信赖保护原则在许多国家的行政法制实践中得到广泛的认可和运用，它的兴起是行政伦理及责任政府理念的内在要求。在现代国家，无论是权力的行使还是义务的履行，都要求不得损害对方的信赖。根据该原则，经合法性和安定性、公共利益和个人利益的权衡，如果存在值得保护的信赖，行政机关不得撤销违法的行政行为，或者只能在给予合理补偿的前提下才能撤销。

38 申卫星主编：《民法学》，北京：北京大学出版社2003年版，第37页。

39 梁慧星：《诚实信用与漏洞补充》，载梁慧星主编：《民商法论丛》第2卷，北京：法律出版社1994年版。

40 孟鸿志主编：《行政法学》，北京：北京大学出版社2002年版，第62页。

41 《行政许可法》第1条：“为了规范行政处罚的设定和实施，保障和监督行政机关有效实施行政管理，维护公共利益和社会秩序，保护公民、法人或者其他组织的合法权益，根据宪法，制定本法。”

必须加以监督和制约。当出现了海洋行政相对人的某一违法行为同时违反了 2 个以上法律、法规和规章的规定的情形，行政机关该如何处理，这也是立法宗旨和目的需要解决的问题。

第三，比例和对价的要求。行政法学中的“帝王条款”——比例原则认为，实施公权力行为的手段与行政目的之间应该有一定的“比例”。[42] 对于海洋行政相对人来说，其因违法行为所应该承受的法律责任应该在可承受的范围内，而国家一旦对其违法行为作出了与海洋行政相对人违法行为不均衡的行政处罚，势必会造成对相对人的损害。同时，海洋行政相对人基于其违法的行为已受国家处罚，相当于个人为自身错误已经付出对价，基于公民人格自由和人性尊严的发展，国家不应再次启动处罚程序，否则个人必成为国家权力鱼肉的客体。

（三）“一事不再罚”原则有效解决了我国海洋管理实践中多头处罚与重复处罚的问题

1. 我国海洋行政处罚形式

《中华人民共和国海域使用管理法》第 7 章第 42 条至第 51 条对行政相对人、海洋行政机关分别应当承担的法律责任进行了详细规定。[43]《海洋行政处罚实施办法》第 41 条规定：“重大海洋违法案件，是指拟作出下列海洋行政处罚的案件：（一）责令停止经批准的海底电缆管道海上作业、责令停止经批准的涉外海洋科学研究活动、责令停止经批准的海洋工程建设项目施工或者生产、使用的以及其它责令停止经批准的作业活动的；（二）吊销废弃物海洋倾倒许可证的；（三）注销海域使用权证书，收回海域使用权的；（四）对个人处以超过五千元罚款、对单位处以超过五万元罚款等海洋行政处罚的。”[44] 归纳起来，我国海洋行政处罚形式主要有以下几种：

(1) 申诫罚

包括警告和通报批评。警告是指海洋行政主体对海洋行政相对人实施的违法行为情节较轻，且尚未构成实际危害后果的一种影响海洋行政相对人声誉的海洋行政处罚形式。通报批评是指海洋行政主管部门将对违法人的批评以书面的形式公布于众，指出其违法行为，予以公开谴责和告诫，以避免其再犯的处罚形式。如《中华人民共和国海洋环境保护法》第 85 条和《铺设海底电缆管道管理规定实施

---

42 我国行政立法上并没有把比例原则明确纳入条文，但是随着行政法理论的进步与完善，行政实践活动范围的日益扩大，我国行政立法也应该考虑这个原则。实际上，国外已经有国家把比例原则纳入了法律文本中，例如《德国联邦行政程序法》就明确规定了诚实信用原则、比例原则、信赖保护原则、公益原则、明确性原则、平等性原则等。

43 卞耀武、曹康泰、王曙光主编：《中华人民共和国海域使用管理法释义》，北京：法律出版社 2002 年版，第 129~131 页。

44 张宏声主编：《海洋行政执法必读》，北京：海洋出版社 2004 年版，第 423 页。

办法》第 20 条对于警告所设定的规定。

(2) 财产罚

包括罚款、没收财产、责令金钱或物质赔偿。罚款是指海洋行政主体强制违法当事人交纳一定数量金额的处罚方式。立法中关于罚款数额规定的情形有：规定上限及下限，如《海域使用管理法》第

条，“……并处非法改变海域用途的期间内该海域面积应缴纳的海域使用金五倍以上十五倍以下的罚款”只规定上限而不规定下限，如海域法第 45 条，“……可以并处一万元以下的罚款”；以某一特定基数为罚款数额，如《中华人民共和国海洋环境保护法》第 91 条第 2 款，“……，但最高不得超过三十万元”。没收是指海洋行政主体将违法行为人的违法所得和非法所得物收归国有的处罚形式。如《海域使用管理法》第 42 条，“……恢复海域原状，没收违法所得。”

(3) 行为罚

是指海洋行政主管部门限制和剥夺违法当事人某些特定行为能力和资格的处罚，包括责令停产停工、吊销暂扣证件等。责令停产停工指海洋行政主管部门依法强令海洋行政相对人在一定时期内或永久性的不准违法从事海洋工程建设、海洋开发、经营和生产活动一种海洋行政处罚。海洋行政处罚中的责令停产停业类处罚有：《中华人民共和国海洋环境保护法》有责令停止经批准的海洋工程建设项目施工或者生产、使用的规定等。《铺设海底电缆管理规定》有责令停止经批准的海底电缆管道海上作业的规定；《涉外海洋科学研究管理规定》有责令停止经批准的涉外海洋科学研究活动的规定等。[45]

吊销暂扣证件是指海洋行政主管部门依法收回或者暂扣海洋行政相对人已经获得的从事某种活动的权利和资格的证书。例如《中华人秘共和国海域使用管理法》第 46 条，“……对拒不改正的，由颁发海域使用权证书的人民政府注销海域使用权证书，收回海域使用权。”

(4) 行政拘留、劳动教养等法律、法规规定的其他处罚

如《中华人民共和国专属经济区和大陆架法》第 12 条规定，“中华人民共和国在行使勘查、开发、养护和管理专属经济区的生物资源的主权权利时，为确保中华人民共和国的法律、法规得到遵守，可以采取登临、检查、逮捕、扣留和进行司法程序等必要的措施。”[46]

---

45 条文均可参见张宏声主编：《海洋行政执法必读》，北京：海洋出版社 2004 年版。

46 《中华人民共和国海洋法规选编》，北京：海洋出版社 2001 年版，第 13 页。

2.“一事不再罚”原则出现在我国海洋行政处罚中的几种情形

(1) 海洋行政相对人的一种违法行为，违反了一个法律、海洋行政法规和海洋行政规章的规定，而该法律法规规章并没有规定海洋行政主体可以同时并处 2 种处罚，这个时候按照法理推定，对行政相对人的行政处罚是属于“一事不再罚”原则的范围。

(2) 海洋行政相对人的一种违法行为，违反了一个法律、海洋行政法规和海洋行政规章的规定，而该法律法规规章同时也规定海洋行政主体可以并处 2 种处罚（例如，可以没收并处罚款，或罚款并处吊销许可证等行为），则对行政相对人的行政处罚不属于“一事不再罚”原则的范围。

(3) 海洋行政相对人的一种违法行为，同时违反了两个以上的法律、海洋行政法规和海洋行政规章的规定，可以给予 2 次以上的处罚，但如果涉及罚款，则只能实施 1 次；其它处罚可以是吊销许可证、责令停产停工，也可以是没收违法所得等，但不能 2 次罚款。

(4) 海洋行政相对人违反了法律、海洋行政法规和海洋行政规章的规定（不论法律、海洋行政法规和海洋行政规章个数的多少），同时又构成了犯罪，海洋行政机关必须将案件及时移交司法机关，追究刑事责任。但海洋行政机关认为需依法应予以海洋行政处罚的，仍可适用海洋行政处罚。但在人民法院涉及罚金时，海洋行政机关已经给予当事人罚款处罚的，应当折抵相应罚金。

3.“一事不再罚”原则在海洋行政处罚中的例外

(1)“一事不再罚”原则在海洋行政处罚中的例外的合理性分析

如上所述，“一事不再罚”原则在海洋行政处罚中得到了充分的尊重和体现，“一事不再罚”原则有助于处理我国海洋行政处罚中的各种问题。但是比较遗憾的是，我国大部分理论尚不承认以法律原则来作为行政法的渊源，[47]《中华人民共和国海域使用管理法》、《中华人民共和国海洋环境保护法》、《铺设海底电缆管道管理条例》、《中华人民和国涉外海洋科学研究管理规定》等海洋法律、法规、规章也没有非常明确地把行政法原则中的“一事不再罚”原则纳入法律法规或者规章的文本中，这些文本中并没有规定“一事不再罚”原则适用的条件、范围，因而我们现在的理论仅仅是对这种原则的推定和延伸。因此，现实中应该灵活加以运用，应针对个案的具体情况，在科学发展观的统领下，综合考虑立法目的和精神，

47 应松年、何海波在《我国行政法的渊源：反思与重述》（上、下）中比较了当今 12 部不同版本、不同主编的中国行政法学教科书，例如罗豪才主编：《行政法学》，北京：中国政法大学出版社 1996 年版；叶必丰：《行政法学》，武汉：武汉大学出版社 1996 年版；王连昌主编：《行政法学》，北京：中国政法大学出版社 1997 年版；方世荣主编：《行政法与行政诉讼法》，北京：中国政法大学出版社 1998 版等，发现在论述行政法渊源时，在法律渊源问题上表现出高度一致，即事实上基本原则没有作为行政法的原则。实际上，如若将基本原则定位为行政法的渊源，势必造成法律渊源和法律规范关系的混乱。

力求以最小的代价实现法律的多重价值，促进海域资源的合理利用和海洋经济的可持续发展，在这里我们不得不非常注意“一事不再罚”原则在海洋行政处罚中的例外情形。

值得注意的是，“一事不再罚”原则存在例外也具有一定的合理性。第一，客观上讲，“一事不再罚”原则具有一定的局限性。例如因各行政主体有不同的行政任务，在法规竞合的情况下贯彻“一事不再罚”原则容易阻碍不同行政主体间制裁功能的全面实现。再例如，我国目前立法中所确立的部分处罚类型如责令停产停业除了达到制裁目的外，还兼有防止违法者继续违法的功能，实行“一事不再罚”原则有时则可能阻碍此种非制裁功能的实现。[48] 第二，大陆法系的“一事不再罚”原则更多的体现的是法院判决的既判力，其适用时间通常是在判决生效后，即在判决生效后不得对被告人重新提起诉讼和审判。但是裁判有时是会发生错误的，无罪的人被判有罪，罪轻的人被判重罪，发生错误后应不应该对被告人进行救济？该如何救济？如果一味坚持“一事不再理”，维护判决的既判力，维护法律的权威，被告人反而可能遭受更大的不公正，这无疑与“一事不再理”原则保护被告人权利的初衷背道而驰了。[49] 第三，诚实信用原则、比例原则、对价理论也都不是绝对的最高价值，[50] 当这些价值与其它价值（如正义、秩序、自由、平等原则）发生冲突时，必须经过利益衡量，因而“一事不再罚”也不是绝对的。第四，“一事不再理”原则在刑事诉讼和民事诉讼中也存在。例如，通过设立了再审制度就更好地解决了法律的稳定性与现实生活的多样性之间的矛盾。第五，国外也有相应的规定。例如德国《违反秩序罚法》第 19 条规定：“同一行为触犯科处罚锾之数法律，或数次触犯同一法律时，仅得处一罚。触犯数法律时，依罚最高之法律处罚之。但其它法律有从罚之规定者，仍得宜告之。”奥地利 1950 年颁布的《行政罚法》第 22 条甚至规定：“行政被告以各种独立之行为违反不同之行政义务时，或一行为而牵涉数罪名，而应各别处罚时应予各别处罚。”

(2)“一事不再罚”原则在海洋行政处罚中的例外情形

第一，行政处罚与刑事处罚并存。

行政相对人违反了法律、海洋行政法规和海洋行政规章的规定，同时又触犯刑法，这个时候不再适用“一事不再罚”原则。例如《中华人民共和国海域使用管

48 韦和平：《浅议一事不再罚原则》，下载于 http://www.jcacc.com，2005 年 11 月 22 日。作者指出，如果简单地规定对同一违法行为只能处罚一次有可能会使违法者逃脱应受的处罚；但如果盲目地允许对同一违法行为有管辖权的行政机关都有权再处罚，必然会侵害行政相对人的合法权益，影响处罚的合理性和合法性，同时也会损害行政机关在人民群众心目中的形象。正因为如此，有必要对同一违法行为侵犯了同一或者不同法律规范的几种情形作出分析。

49 仇慧玲、黄文青：《一事不再理原则与我国刑事再审制度》，下载于 http://www.studa.net/xingfa/04/012/113619.html，2004 年 10 月 12 日。

50 朱新力：《论一事不再罚原则》，载于《宪法学、行政法学》2002 年第 2 期。

理法》第 51 条规定："国务院海洋行政主管部门和县级以上地方人民政府违反本法规定颁发海域使用权证书，或者颁发海域使用权证书后不进行监督管理，或者发现违法行为不予查处的，对直接负责的主管人员和其它直接责任人员，依法给予行政处分；徇私舞弊、滥用职权或者玩忽职守构成犯罪的，依法追究刑事责任。"依据《中华人民共和国海域使用管理法释义》，[51] 给予行政处罚的前提条件是不构成犯罪，海洋行政当事人既违反了行政法的规定，又违反了《刑法》的有关规定，如条文所述的徇私舞弊、滥用职权或者玩忽职守行为，海洋行政机关必须将案件及时移交司法机关，追究刑事责任。当然海洋行政机关可以追加诸如罚款、没收违法所得、收回有关证件等行政处罚。

第二，海洋行政主管机关重新作出了行政处罚。如果海洋行政机关发现先前的行政罚款决定不当，并依法撤销后或者行政罚款决定被上级海洋行政机关或者人民法院撤销并责令重新作出具体行政行为，海洋行政机关据此重新作出的海洋行政罚款决定，不属于一事再罚，不违反"一事不再罚"原则。

第三，个案里出现了 2 个或 2 个以上的法律事实。"一事不再罚"原则的适用，要求同一当事人、同一事实和理由、同一诉讼请求，三者皆具，缺一不可。当出现新的法律事实，或者个案里出现了两个或两个以上的法律事实，海洋行政机关就两个法律事实同时进行了行政处罚，不违反"一事不再罚"原则。

第四，一事罚多人。包含三种情形：当行政相对人共同违法的，海洋行政机关可以作出不同的行政处罚决定，对各违法行政相对人分别处罚；或者海洋行政机关已经作出了一次行政处罚，对其他行政相对人仍然可以依据不同的法律规定或者依据行政相对人的违法程度、情节，在合理限度内，进行第二次行政处罚；或者多个行政相对人因不同的违法行为违反同一个法律法规不同法律规范的，依法可以由海洋行政机关分别裁决，合并执行。

第五，对于行政相对人的连续违法行为和持续违法行为，一旦出现法理上中断的状态，海洋行政机关可以对行政相对人的同类性质的违法行为给予新的行政处罚，先前的处罚决定不构成对"一事不再罚"原则的违反。

四、"一事不再罚"原则给海洋行政处罚带来的启示

（一）关于海洋行政处罚与刑罚的衔接关系

海洋行政处罚是海洋行政主管部门依法对海洋管理相对人（包括公民、法人

51 卞耀武、曹康泰、王曙光主编：《中华人民共和国海域使用管理法释义》，北京：法律出版社 2002 年版，第 115~117 页。

或者其它组织、外国组织和个人）违反海洋行政法律规范尚未构成犯罪的行为，给予法律制裁的行政行为。[52] 海洋行政处罚的主体是国家海洋行政机关，对象是与国家海洋行政机关之间没有隶属关系的公民和组织，海洋行政处罚以行为人违反海洋行政法规为前提，以追究违法者的行政责任为目的。海洋行政处罚作为行政处罚的组成部分，和刑罚在性质、适用对象、制裁方式等方面存在着差异，[53] 但是二者本身都是国家对违法行为实施的法律制裁，在违法程度和处罚程度上是存在衔接关系的。“一事不再罚”原则中的“罚”既包括了行政处罚，也包括了刑罚，由于刑罚比行政处罚更严厉、更有强制性，在实践中，国家立法也是明令禁止“以罚代刑”或者“以刑代罚”，“一事不再罚”原则给行政处罚和刑罚的适用带来了更多的思索。

首先，我国《行政处罚法》第 28 条规定了刑罚对行政处罚的吸收制度，行政拘留应当依法折抵相应刑期，罚款折抵罚金，意在限制行政处罚和刑罚的重复适用，但所针对的仅仅是能够为刑罚所吸收的同种类的人身罚和财产罚。对于行政处罚和刑罚的不同罚则，如吊销许可证执照、责令停产停业等，如何衔接则未作规定。“一事不再罚”原则使得行政处罚与刑罚之间的关系更加微妙。其次，“一事不再罚”原则使得海洋行政机关在立法时更多地考虑什么时候该使用行政处罚方式，什么时候该使用刑罚手段这个话题，而这个话题的思索是对行政相对人权利的尊重，是对实现法治国家的积极探索。

（二）关于目前我国海洋行政执法主体的地位

“一事不再罚”原则必然涉及到我国海洋行政执法主体的地位问题。海洋行政执法主体是指在海洋行政执法中，依法享有国家海洋行政管理职权，根据国家有关海洋法律法规、规章的规定，能够代表国家并以自己的名义进行海洋行政执法活动，并独立承担行政执法活动所产生的法律后果的组织。[54] 可以看出，海洋行政主体享有行政处罚权必须同时具备两个条件：必须是履行外部行政管理职能的机关，必须有法律法规的明确授权。[55] 根据《中华人民共和国海域使用管理法》、《中华人民共和国海洋环境保护法》及其他海洋法律法规，各级海洋行政主管部门依法享有相应的海洋行政处罚权。也就是说海洋行政主管部门下属的中国海监各机构具备海洋行政处罚主体资格，为此，国家海洋局于 2002 年下发了第 3 号文《关于中国海监集中实施海洋行政处罚权的通知》。同年，国土资源部发布了《海洋行

52 张宏声主编：《海洋行政执法必读》，北京：海洋出版社 2004 年版，第 75 页。
53 孟鸿志主编：《行政法学》，北京：北京大学出版社 2002 年版，第 223 页。
54 滕祖文、彭垣、闵庆方：《论海洋行政处罚》，载于《海洋开发与管理》2002 年第 6 期。
55 张惠荣主编：《海洋行政执法案例汇编》（第一辑），北京：海洋出版社 2006 年版，第 36 页。

政处罚实施办法》[56]，明确规定中国海监各级机构负责具体承担海洋行政处罚工作。中国海监队伍是由国家海洋行政主管部门组织的一支海洋行政执法队伍，其总队是国家海洋局，在北、东、南三大海区分别设有海区总队，在省、市、县分别设有总队、支队和大队。

目前，中国海监总队性质上是事业单位，而非国家海洋局的内设行政部门或法律、法规明确授权的组织，在行政处罚程序中，中国海监总队必须以局机关的名义实施行政处罚，局机关对总队执法行为进行监督，并对其后果承担法律责任。我国《行政处罚法》第 18 条第 2、3 款规定，“委托行政机关对受委托的组织实施行政处罚的行为应当负责监督，并对该行为的后果承担法律责任。”“受委托组织在委托范围内，以委托行政机关名义实施行政处罚；不得再委托其它任何组织或个人实施行政处罚。”可见，我国海监总队作为受委托的组织是不能独立承担法律责任的，因此对海监总队的行政处罚范围、管辖及权限、地位必须进一步明确。

（三）关于多个行政机关均可对同一个违法行为实施行政处罚权的具体分析

当海洋行政相对人的一种违法行为，违反了一个法律、海洋行政法规和海洋行政规章的规定，而该法律、海洋行政法规和海洋行政规章规定由 2 个或者 2 个以上的行政机关进行处罚，这种情形也经常会出现在海洋管理实践中。例如，某一当事人未经论证、或者论证未被批准或者未取得海域使用权证书违法开采海砂，对当事人的同一违法采砂行为，依据《海砂开采海域使用论证管理暂行办法》第 12 条的规定，[57] 海域使用管理部门和矿产资源管理部门都可以依据有关规定对当事人进行行政处罚，究竟给予当事人何种处罚往往比较复杂，但归结一点，那就是应该视行政处罚的种类具体确定。前文已经例举了我国海洋行政处罚的种类，现在就此种情形下，当按照行政处罚的种类同和异两种情况具体分析。

第一种情况：海洋行政相对人的一种违法行为，违反了一个法律、海洋行政法规和海洋行政规章的规定，法律、海洋行政法规和海洋行政规章规定两个或者两

---

56 《海洋行政处罚实施办法》第 3 条：县级以上各级人民政府海洋行政主管部门是海洋行政处罚实施机关（以下简称实施机关）。实施机关设中国海监机构的，海洋行政处罚工作由所属的中国海监机构具体承担；未设中国海监机构的，由本级海洋行政主管部门实施。中国海监机构以同级海洋行政主管部门的名义实施海洋行政处罚。

57 《海砂开采海域使用论证管理暂行办法》第 12 条：未经论证、论证未获批准或者未取得《国家海域使用许可证》擅自开采的，按《中华人民共和国矿产资源法》和《国家海域使用权管理暂行规定》等有关法律法规进行处罚。需要指出的是：由于《国家海域使用权管理暂行规定》已经被《中华人民共和国海域使用管理法》取代，“国家海域使用许可证”业已变化为“海域使用权证”，该暂行办法是迫切需要修改的。但是，在海砂管理的实践中，海域使用管理部门和矿产资源管理部门都有行政处罚权。

个以上的行政机关都有处罚权，但是行政处罚的种类相同的。如上述违法采砂个案中，根据“一事不再罚”原则，尽管两个行政机关都有处罚权，也不能分别作出罚款决定，而只能处罚一次，一般由先查处的机关作出处罚。但是在理论上，如若海洋行政主管机关依法作出罚款的数额和矿产资源行政管理部门依法作出罚款的数额存在量上的差异时，采用哪个罚款数额是值得讨论的。

第二种情况：海洋行政相对人的一种违法行为，违反了一个法律、海洋行政法规和海洋行政规章的规定，法律、海洋行政法规和海洋行政规章规定两个或者两个以上的行政机关都有处罚权，但是行政处罚的种类不同。如上述违法采砂个案中，若海洋行政机关给予了罚款的行政处罚，而矿产资源管理部门吊销了其矿产开采证。根据“一事不再罚”原则，两个行政机关的处罚权都是在其职权范围内，依法分别作出了不同种类的处罚，是不违反“一事不再罚”原则的。

总之，“一事不再罚”原则作为一项古老的诉讼原则一直延续至今，是基于现代诉讼功能的多元化取向。“一事不再罚”原则是必要与科学的，是反映自然公正、法治等价值理念追求的。[58] 纵观人类法律历史的演进，显然，所有真正体现着法律的“善良和公正”[59] 的制度，其设立无一不是围绕着这一目的。同时，我们亦观察到，伴随着人类社会的发展，确认、协调、批准、鼓励、活跃和促进社会经济的发展，愈发成为法律最为主要的目的。[60] 更为重要的是，现代诉讼的价值目标不仅仅要惩罚和控制犯罪，而且应保障人权。国家权力的行使不应以损害公民的个人权利作为代价，而应兼顾程序的经济性。“一事不再罚”原则正是通过对国家权力的合理限制，来达到保障人权的目的，实现诉讼经济价值。我们在海洋行政执法的理论与实践中，还须进一步深入细致研究，以期尽识其真义，从而使其真正完备起来，为我国海洋行政执法、海洋行政处罚实践提供更全面、更具依据性、可操作性的理论指导。

---

58 李晓秋：《如何理解我国行政处罚中“一事不再罚”原则》，下载于 http://www.hljda.gov.cn/show.aspx?newsid=46608Ltypeid=26，2006 年 2 月 21 日。

59 杨振山、[意] 桑德罗•斯奇巴尼主编：《罗马法、中国法与民法法典化——物权和债权之研究》，北京：中国政法大学出版社 2001 年版。

60 [法] 泰•德萨米著，黄建华、姜亚洲译：《公有法典》，北京：商务印书馆 1982 年版，第 225 页。

海商法解释原则及解释方法问题研究

郭 萍*

内容摘要：海商法作为民法的特别法，具有较强的涉外性、专业性、技术性和风险特殊性等特点。虽然总体上说，我国海商法属于一部较为成熟的法律，但是由于在制订条文中，部分内容借鉴了一些英美法和国际公约的内容，加上立法当时对上述内容理解上的偏差，致使一些问题和矛盾已经在海事海商司法审判活动中体现出来。但目前鲜见有关海商法解释的论著。本文试图结合我国民法解释的相关理论和原理，结合海商法的特征，对海商法解释应遵循的基本原则和具体的解释方法进行探讨。

关键词：海商法 解释原则 解释方法 法律解释

一、引 言

《中华人民共和国海商法》（以下简称“《海商法》”）自 1993 年 7 月 1 日颁布实施以来，已经历经 13 年。《海商法》的出台，不仅标志着我国调整海上运输关系和船舶关系的专门法律制度的形成，也是我国航运事业发展史上的一个重要历程碑。《海商法》的颁布对于推动我国海事审判的发展具有重要意义。作为民法的特别法，[1]《海商法》具有自身特点，主要体现在如下方面：第一，《海商法》具有较强的涉外性。这种涉外性不仅体现在法的形式，吸收和借鉴了较多的国际公约和国际惯例，还表现在其调整的对象多数具有涉外因素；此外《海商法》的效力范围不仅适用本国海域的外国船舶，而且适用外国海域的本国船舶以及外国海域的外国船舶。第二，具有较强的专业性和技术性。由于《海商法》涉及海上运输以及船舶关系，这些必然会涉及船舶、船员、航海、货物运输、航运管理等专业和技术。第三，具有风险特殊性，由于某种原因海上运输活动面临特殊的风险，致使《海商法》形成了一些特殊的法律制度，例如海事赔偿责任限制制度、船舶抵押制度、船

---

* 郭萍，法学博士，大连海事大学法学院教授、硕士生导师。本文系笔者参加的司法部资助立项科研课题“中国海商法基本理论问题研究”（编号：02SFB1016）部分成果。

1 司玉琢等：《新编海商法学》，大连：大连海事大学出版社 1999 年版，第 32 页。

舶优先权制度、海事请求保全制度、海难救助制度、共同海损制度等，这些特殊的法律制度是其他民事法律制度所不具有的。[2]

尽管《海商法》具有合理性、稳定性、明确性，是一部成熟的法律，[3] 但是由于部分条文在制订之时，融入了一些英美法的内容和概念，而我国民商法则建立在成文法体系之上，加上当时立法者对部分公约内容理解上的偏差，导致《海商法》部分条文内容含混不清或模棱两可，甚至在基本民法中找不到相应概念或制度与之对应。由此产生的问题和矛盾已经在海事海商司法审判活动中体现出来，这就涉及到对海商法的解释问题。然而，我国目前鲜见有关海商法解释的论著，因此本文试图借鉴我国民法解释的相关理论和原理，结合海商法的特征，对海商法解释应遵循的基本原则和具体的解释方法进行探讨。

二、法律解释的涵义和功能

所谓法律解释，是为了阐明法律本身之意义，以合理的方法，不拘泥于立法者的主观意见，而寻求法律真正含义的情形。[4] 法律解释的意义在于：其一，为了确定字义。即通过法律解释，能够使法律条文的涵义和目的趋于明确，此为法律解释的主要功能。其二，为了纠正词句辞句。法律条文之辞句，有时含义太狭窄，有时又过于宽泛，因此通过法律解释对该条文进行扩张解释或限缩解释，以合乎法律之真实含义。其三，为了补充法意。因为法律用词常常是比较抽象的概念，因此通过法律解释，使之含义具体化，以满足实践的需求。[5] 法律必须经由解释，始能适用。[6]

法律解释有广义和狭义之分。广义的法律解释包括狭义法律解释，即确定法律规范内容的解释，还包括法律漏洞的补充，以及不确定法律概念和一般条款的价值补充。[7] 狭义的法律解释是指有权的国家机关依照一定的标准和原则，根据法律权限和程序，对法律的字义和目的所进行的阐释。[8] 受文章研究目的限制，本文仅探讨狭义的法律解释问题。

---

2 司玉琢等：《新编海商法学》，大连：大连海事大学出版社 1999 年版，第 6 页。
3 司玉琢等：《新编海商法学》，大连：大连海事大学出版社 1999 年版，第 34~36 页。
4 梅仲协著：《民法要义》，北京：中国政法大学出版社 1998 年版，第 12 页。
5 梅仲协著：《民法要义》，北京：中国政法大学出版社 1998 年版，第 12~13 页。
6 王泽鉴著：《民法学说与判例研究》，北京：中国政法大学出版社 1998 年版，第 18 页。
7 梁慧星著：《民法解释学》，北京：中国政法大学出版社 2000 年版，第 209 页。
8 张文显主编：《法理学》，北京：法律出版社 1997 年版，第 374 页。

三、法律解释方法及其种类

不同国家的学者从不同角度，将法律解释方法划分为不同种类。例如，从解释手段上划分，德国学者考夫曼将法律解释方法划分为：文理解释或语言学的解释、伦理解释或体系解释、主观解释或历史解释、客观解释或目的论解释。日本学者伊藤正，将法律解释方法分为：文学解释、文理解释、扩张解释与缩小解释、类推解释与反对解释、当然解释。台湾学者则多将法律解释方法分为：文理解释、论理解释。我国学者梁慧星教授则进一步细化为：文义解释、论理解释、比较法解释、社会学解释。其中论理解释又包括：体系解释、法意解释、扩张解释、限缩解释、当然解释、目的解释、合宪性解释。[9]

上述各法律解释方法之间应当没有阶位顺序，也不能仅采用其中一种方法进行解释。因为每一种解释方法具有不同功能，但是又各自存在局限性，不可绝对化。因此几种解释方法应当相互补充，配合使用，才能得出合理的解释结果，以更合理地解决当事人之间的矛盾，维护法律的正义。当然，上述解释方法之间仍然存在内在的联系。王泽鉴先生对此提出，文义解释为解释的基石，只有文义解释仍然不能明确法律规范之含义时，才应当进一步采用体系解释、法意解释、目的解释等方法；如果采用上述论理解释仍不得法，则应考虑比较法解释或社会学解释方法。[10]

正如前文所言，《海商法》的制定是以通行的海事国际条约为基础，吸收体现国际海事惯例的民间规则，这些公约和规则中很多源于英美法中的法律制度，这是法律移植的一种形式。[11] 但是在采用这种方式进行解释时，不能局限于单纯的法律条文或制度的比较，应当了解外国法之真实含义和背景，也不能直接援引外国法以取代本国法律。同时要注意引用的外国法与本国法律制度的协调，不能违反本国的公序良俗和法的基本精神。对此，我们不妨引用王泽鉴先生关于外国立法例适用问题上提出的观点，即“惟不可拘泥于英美法上之概念用语，切不可以美国法有某项规定，或某种学说，或某类判决，而在适用之际，必辗转解释，强其必同。反之，应经由解释之途径，将英美法之概念用语，纳入吾既有之‘法律体系’，使之与‘现行法’之概念用语相契合。盖法律为一有机体，部分应与整体调和，始能实现其规范之功能。”[12] 因此比较法解释的作用就相对显得比较突出。

---

9 梁慧星著：《民法解释学》，北京：中国政法大学出版社 2000 年版，第 210 页。

10 王泽鉴著：《民法实例研习——基础理论》，第 154~157 页，转引自梁慧星著：《民法解释学》，北京：中国政法大学出版社 2000 年版，第 239~241 页。

11 张文显主编：《法理学》，北京：法律出版社 1997 年版，第 213 页，转引自刘冰：《谈海商法的解释方法——海商法的特殊性在法律解释实践中的体现》，下载于 http://www.ccmt.com.cn/hs/explore/exploreDetial. php? sId=256，2006 年 12 月 1 日。

12 王泽鉴著：《民法学说与判例研究》，北京：中国政法大学出版社 1998 年版，第 18 页。

四、海商法解释应遵循的基本原则

（一）与基本民事法律解释原则一致的原则

海商法属于民法的特别法，因此有关民法解释的一般方法对海商法的解释也同样适用。而且法律解释学和民法解释学几乎为同义语，民法解释的方法具有普遍可行性，因此民法解释方法将构成海商法解释方法的重要组成部分和基础。[13]

此外，从海商法起源来看，由于海商法源于奥列隆惯例集，该惯例集属于民事法律，海事审判的法官也多是根据有关民事法律进行司法活动，所以有关民事法律的一般解释原则亦适用于海商法的解释。[14]

在笔者收集到的国内有关民事法律解释基本原则方面的论著中，张文显教授明确提出，法律解释的一般原则大致可以概括为如下几个原则：(1) 兼顾法律的稳定性与情势性原则，即同时考虑法律具有相对稳定性和抽象性，而社会生活具有运动性和具体性之间的关系问题；（2）联系立法历史背景与司法现实条件的原则；（3）结合立法意图与司法目的原则；（4）合理分配立法解释权与司法解释权的原则。[15] 除上述一般原则外，有学者认为，民法的基本原则也适用于民法的制订、解释和执行。[16] 有的学者则更加明确指出“民法的基本原则是解释、理解民事法律的准绳。任何法律的适用都离不开法律的解释、理解，理解是否准确，解释是否合法，都要靠以其是否合乎基本原则来衡量。”[17]

此外，国内一些学者们根据我国《民法通则》第一章关于基本原则的法律规定，将我国民法的基本原则总结为：民事主体地位平等原则、等价有偿原则、自愿和公平原则、诚实信用原则和民事权利受法律保护原则。

因此，上述法律解释的一般原则以及民法中的基本原则同样适用于海商法解释方面。此外笔者注意到，有关合同解释基本原则的论述较为集中。而在海商法中，有关商事合同方面的规定占了相当篇幅，例如关于海上货物运输合同的规定、海上旅客运输合同、船舶租用合同、海上拖航合同、海难救助合同、海上保险合同等。同理，笔者认为有关合同解释的原则也适用于海商法中有关合同内容的解释。合同解释原则一般包括对用语应当按照通常的理解进行解释原则、目的解释原则、

---

13 刘冰：《谈海商法的解释方法—海商法的特殊性在法律解释实践中的体现》，下载于 http://www. ccmt. com. cn/hs/explore/exploreDetial. php? sId=256，2006 年 12 月 1 日。

14 Prof. William Tetley, Q. C., Canadian Interpretation and Construction of Maritime Conventions, *R. G. D.*, Vol. 23, 1991, pp. 109~128.

15 张文显主编：《法理学》，北京：法律出版社 1997 年版，第 377~378 页。

16 佟柔主编：《中国民法》，北京：法律出版社 1994 年版，第 22 页。

17 王利明主编：《中国民法案例与学理研究》（总则篇），北京：法律出版社 1998 年版，第 5 页。

整体解释原则、习惯解释原则、诚实信用原则、对起草者不利解释原则。[18] 笔者以下结合这些基本原则，说明对海商法律的适用。

1. 所谓“对用语应当按照通常的理解进行解释”原则，又称为“以合同文义为出发点，客观主义结合主观主义原则”，[19] 是指法官既不能根据当事人一方的理解解释合同，也不能根据起草合同一方对合同所作的理解来解释合同，只能按照一个合理人的标准来解释。一个合理的人既可能是社会上一般的人，也可能是在一定的地域、行业中从事某种特殊交易的人。在采用这种方式进行解释时，还需要注意确定哪些内容属于合同的条款和条件。因为在缔约过程中，双方可能使用了合同书、附件、备忘录、信件、往来传真、确认书等各种各样的文件以及登载的广告等，这些内容并非都是合同内容。例如在航次租船合同中常见的术语“良好天气工作日，星期天、节假日除外，即使已经使用。”根据我国法律规定，目前星期六、星期日、节假日都属于非工作日，因此尽管条文没有明确提及星期六是否除外，在对该内容进行理解时，应当理解将星期六排除在工作日之外。同样对于“即使已经使用”的理解上，也应当将星期六包括在内。

2. 目的解释原则，即首先判断当事人的目的。根据意思自治原则，双方当事人订立合同的目的是希望所从事交易的行为达到预期目标，合同本身不过是当事人实现其目标的手段。该原则在区分海上拖航合同和海难救助合同方面非常重要，即从行为的目的进行划分。例如要看被拖物是否处于危险之中，如果答案是肯定的，则当事人订立合同的合同应当是救助合同；如果答案是否定的，则订立合同应当是拖带合同。因此不论订立合同的标题是什么，仍应通过实施行为的目的来判定合同类型。

3. 整体解释原则，又称“体系解释”，指将全部合同的各项条款以及各个构成部分作为一个完整的整体，根据各个条款以及各个部分的相互关联性、争议的条款与整个合同的关系以及其在合同中所处的地位等各方面因素考虑，来确定所争议的合同条款的含义。例如，定期租船合同明确规定承租人有在租期内提供并支付燃油费、港口使用费等义务，合同中还规定当约定事项发生时，承租人可以停止支付租金。但是停租期间，承租人是否还有支付燃油费等费用的义务？这就要看合同对此是否有明确规定，例如 NYPE’46 格式明确规定这种情况下，仍然由出租人负担。那么这种情况下，应当按照当事方的约定处理。但是如果没有类似于 NYPE’46 格式条款的明确约定，那么根据合同上下文理解，承租人仍然需要支付上述费用。

4. 习惯解释原则，是指在合同文字或条款的含义发生歧义时，按照交易习惯

---

18 王利明著：《民商法研究》（第 5 辑），北京：法律出版社 2001 年版，第 384~403 页。

19 王利明、崔建远著：《合同法新论——总则》，北京：中国政法大学出版社 1998 年版，第 488 页。

的含义予以确定;在合同存在漏洞致使当事人的权利、义务不明确时，参照交易习惯加以补充。交易习惯是指在当时、当地或者某一行业、某一类交易关系中，为人们所普遍采纳的且不违反公序良俗的习惯做法。例如航次租船合同中明确规定装卸率为“按照港口习惯尽快装卸”，那么这里对“港口习惯”的理解，就要综合考虑挂靠的港口、船舶类型、装卸的货物种类、货物包装形式、使用的装卸机械、船舶航行的季节等通常港口进行装卸作业要考虑的各项因素。例如装运 1 万吨玉米，在 A 港每天装货率达到每小时 3 千吨，而在 B 港则只有 1 千吨，不能简单地以 A 港口的装卸率来认为 B 港口的装卸效率低下，违反合同规定等等。

5. 诚实信用原则，是合同法中一个重要基本原则，也适用于合同解释。特别是在合同漏洞的填补方面，如果当事人在合同中缺乏规定或者条款本身不明确，则按照一个诚实信用的人所应当作出的理智的选择进行解释。

6. 对起草者不利解释原则，又称为“逆利益方原则”，来自于罗马法的“有异议时，应作不利条款制定人之解释”。我国《合同法》也有类似规定，并且限于格式合同。笔者认为该原则应当适用于一切合同。因为一方面从利益平衡考虑，合同条款起草者在起草合同时充分考虑了自身利益;另一方面从过错考虑，起草者在起草时应当对合同条款负有更多的审核义务。在海商实践中，提单是海上货物运输合同中大量使用的运输单证，由于是承运人事先印就，并且通常托运人无法对该格式进行修改，因此很多学者认为提单证明的合同属于我国《合同法》中规定的格式合同的定义。因此对提单条款的解释，如果出现规定不明确的情况，应当根据此原则进行解释，以保护包括托运人在内的货方利益。此外不容忽视的是，在租船合同、海难救助合同、海上拖航合同中，当事人也往往会根据航运惯例，选择一些国际组织制订并推荐的标准的合同格式。但是笔者认为这些合同并不属于我国《合同法》规定的格式合同，因为双方在洽谈、签订合同过程中，仍然可以体现“意思自治”。只不过为了节省时间和精力，采用了固定格式的合同版本而已，属于示范性合同格式。当然代表不同利益当事人的国际组织在制订、起草这些标准格式的合同时，毫不例外地会站在某一方的角度去考虑问题，不可避免地比较倾向于保护某一方的利益。因此笔者认为，尽管这些合同不属于我国《合同法》意义上的格式条款或格式合同，“逆利益方原则”依然应当适用。

（二）有限地体现和突出海商法特殊法律制度的原则

这里的“特殊性”体现在如下方面:第一，由于海上特殊风险，长期以来形成了特殊的法律制度，例如海事赔偿责任限制制度、船舶抵押制度、船舶优先权制度、海事请求保全制度、海难救助制度、共同海损制度等。对于这些特殊法律制度下的法律规范进行解释的时候，不能完全照抄照搬我国民事法律制度下相关内容的解释，必须考虑这些特殊法律制度产生的背景和历史缘由。例如《海商法》规定船

舶抵押登记针对第三人采用“对抗主义”，而根据我国民事法律的规定，抵押登记效力采“生效主义”。如果非要用民事法律规范原则去解释海商法之相关规定，将会产生法律混乱和法律冲突。第二，我国《海商法》在起草、制订之时，与其他内国法相比，较多地参考和借鉴相关的国际公约、国际惯例。正如加拿大台特雷教授所言，“由于各国海商法比较多地借鉴了有关的国际公约，所以关于国际条约的一般解释原则也适用”。[20] 而这些国际公约或国际惯例大多援自英美法系，因此在对这些内容进行解释时，还应当借鉴和参考英美法的解释原则。

1969 年《维也纳条约法公约》第 31 条规定了条约的一般解释原则，第 32 条规定了条约解释的补充原则。将第 31 条的一般解释原则的规定归纳总结如下：第一，任何关于国际条约的解释都应当是遵循诚实信用原则基础之上，考虑到条约制订的目的和需要达到的目标，对条约内容按照通常字面意思予以解释。第二，在考虑条约解释时，除了考虑条约正文（包括条约的前言和附录），还应当包括如下内容，即与条约订立有关的，在条约所有成员之间达成的任何协议；与条约订立有关的，一个或多个成员制定的并得到条约其他所有成员方认可、接受的文件；第三，除正文内容之外，还应当考虑就条约解释和条约内容适用方面，条约各成员方之间达成的补充协议；在条约适用方面，成员方之间达成的解释协议在实践中的应用情况；处理各成员方之间关系方面所适用的国际法的相关规则；第四，如果条约成员方就某一术语的特定含义达成一致意见，则应遵循该含义所表达出来的意思予以解释。第 32 条补充解释原则的大致含义为：如果根据第 31 条规定的解释原则，将会使条文内容含混不清、模棱两可或者明显不合理等，将根据条约准备工作情况、订立条约当时的情形等因素得出合理的解释。就其实质内容看，仍然没有脱离前文所讨论的有关法律解释方法的范畴。

英国传统的法律解释原则为：字义规则、黄金规则和除弊规则三大原则，在法律条文含义不清、模棱两可的情况下，英国法官常用这三大原则之一对法律进行解释。但是在一些疑难案件中，由于适用不同规则进行解释会导致不同的结论，所以选择哪一种规则进行解释至关重要。[21] 所谓字义规则，又称“平义规则”，[22] 是英国所有法律解释规则中最重要、最基本的一项。根据这一规则，如果法律文本的含义是清楚的，即使该字面含义会导致明显的荒谬结果，法官也必须遵循该字面所表达的含义。实际上字义规则属于“无解释”规则，即如果法律的字面含义是

---

20 Prof. William Tetley, Q. C., Canadian Interpretation and Construction of Maritime Conventions, *R. G. D.*, Vol. 23, 1991, pp. 109~128.

21 魏玮：《英国法律解释三大规则之应用》，载于《法律适用》2002 年第 2 期。

22 刘冰：《谈海商法的解释方法—海商法的特殊性在法律解释实践中的体现》，下载于 http://www. ccmt. com. cn/hs/explore/exploreDetial. php?s1d=256，2006 年 12 月 1 日。

清楚的，则不需要做任何法律解释。[23] 笔者理解这种解释方法类似于前文论述的文义解释。英国在怀特利诉查普尔案（1868）、伦敦及东北铁路公司诉贝里曼案（1946）、沃尔沃克诉贾尔斯案（1970）[24] 等案件中，均采用该规则。

所谓的“黄金规则”，指如果根据字义规则，对于制定法的字面含义的解释将导致不连贯、荒谬或不便利的结果，法官就可以采用这些字词的其他通常含义对其加以修正的方法。实际上该规则是对字义规则的有限“背离”。英国在王室诉艾伦案（1872）、阿德勒诉乔治案（1964）、米耶诉罗伯茨案（1978）、王室诉林赛案（1995）中体现了该规则。除弊规则，又称“弥补规则”或“弊端规则”，是指法官在解释成文法时要充分考虑成文法所要弥补的法律制度上的漏洞，并努力弥补议会在制定成文法时所要弥补的缺陷。英国虽然是传统的判例法国家，但是随着社会的发展进步，原有的判例法存在无法克服的弊端。如何消除这种弊端，唯一的办法就是制定成文法，以弥补普通法的不足。英国在艾略特诉格雷案（1959）、阿尔法塞尔诉伍德沃德案（1972）、布拉德福德诉威尔逊案（1983）、王室诉波利基案（1992）等案件中采用了该规则。因此在涉及英美法，特别是英国法律解释时，应考虑上述英国法律解释的原则。

所谓“有限地”体现和突出海商法特殊法律制度的原则，是说不能单纯为了突出和体现海商法中的特殊制度，为了单纯地应用国际条约的解释规则或英美法中的法律解释规则，而一味地脱离我国民事法律的解释规则和法律体系，更不能违反我国的公序良俗以及我国的《宪法》和其他法律。前文提及的王泽鉴先生关于外国立法例适用问题上提出的观点，是理解“有限性”的最好诠释。正如鲁迅先生所言，在拿来主义中，学会扬弃，为我所用。

（三）注重与基本民事法律解释原则相协调的原则

在考虑海商法律特殊的法律制度同时，无法回避海商法是民法的特别法的事实，因此在对海商法进行解释时，应当注重与民事法律解释基本原则协调一致。例如《海商法》第六章关于定期租船合同的规定中，第 141 条规定承租人未及时向出租人支付租金或约定的其他款项的，出租人对船上属于承租人的货物或财产以及转租船舶收入有留置权。其中按照航运习惯以及通常做法，如果承租人将船舶再以航次租船或定期租船的方式出租出去，则会有转租运费或转租租金的收入，统称为转租收入。根据我国《民法通则》和《担保法》的规定，留置权的实现要以留置权人对留置物占有为前提，如果丧失占有，则相应地丧失留置权。而转租收入的所谓“占有留置”，就根本无法实现。因为转租收入系转租承租人向承租

23 魏玮：《英国法律解释三大规则之应用》，载于《法律适用》2002 年第 2 期。
24 案例名称援自魏玮：《英国法律解释三大规则之应用》，载于《法律适用》2002 年第 2 期。

人支付的，作为原合同的出租人与转租承租人之间没有直接的合同关系，转租承租人也没有义务向原出租人缴付任何费用，那么作为出租人如何行使事实上根本没有办法“占有”的留置权呢？是否可以根据海商法律的特殊性，赋予出租人对于转租收人的“留置”可以不以“占有”为前提？显然这样的解释只会导致法律概念的混乱。究其原因在于，《海商法》立法者将英文中的“lien on sub-freight or sub-hire”中的“lien”直接翻译成“留置权”。事实上，英美法中的 lien 的含义十分丰富，这里提及的权利不是占有留置的含义，而是一种通过法律程序要求法院签发令状，在转租承租人支付转租收入给承租人之前，出租人享有“截留”该费用的权利。因此涉及对《海商法》第 141 条“留置权”进行解释时，要考虑其法源和背景，可以解释为一种特殊的权利，但是不能仅仅因为英文翻译上的原因，就单纯地认为海商法中的“留置权”可以不以占有为前提。综上，在肯定和保持海商法相关特殊法律制度、法律概念的同时，仍然要与我国基本民事法律制度和相关概念进行协调，这也是第二个原则中“有限性”的一个方面。

上述三个原则不是互无关系、相互独立的，而是应当互相配合、综合适用。从前文关于法律解释原则以及方法的一般原理论述，可以看出“与基本民事法律解释原则一致的原则”是最为重要的基本原则，在这样一个大前提下，有限度地突出和体现海商法特殊的法律制度。

五、海商法律解释方法探析

前文关于法律解释的若干方法应该完全适用于对海商法律的解释之中。在具体应用某一个方法时，还应当注意海商法的特性。此外，由于海商法具有较强的涉外性、专业性、技术性和风险的特殊性等特性，所以在对海商法进行解释时，除了综合运用上述十种方法外，还应使用一些针对海商法特性的特殊解释方法。以下将对此进行分析。

（一）采用一般法律解释方法解释海商法律应注意的问题

文义解释是法律解释中最基本、最主要的一种解释方法，采用这种方法对海商法律进行解释时，要注意如下几个方面：

1. 法律解释应当结合专业解释、技术解释。这是由《海商法》较强的技术性和专业性特点决定的。就有关海上运输和船舶的法律规范而言，其必然涉及船舶、船员、航海、货物运输和管理等专业和技术。例如，在船舶方面，涉及船舶的结构、性能、船舶的设备和安全条件等；在船员方面，涉及船员的资格、培训、发证等；在航海方面，涉及船舶驾驶、航线制定、雷达观测、航海图书资料的使用、气象报告、

海上避碰规则和轮机操作;在货运方面，涉及货物的特性、配载、货物的装卸、保管和照料等等。《海商法》是与航海技术和航运业务联系较为紧密的法律，也是《海商法》区别于其他许多法律的特点之一。[25] 再比如有关承运人在开航前、开航当时使船舶适航的义务。[26] 这里“开航”一词的理解，就不单纯是法律含义。开航可以是指装卸货完毕的时间，也可以是船舶启动预热的时间，还可以是起锚或解缆离泊的时间。根据英国权威性的判例解释，通常认为起锚或解缆离泊的时间为船舶开航的时间。[27]

2. 注意中文解释与英文解释相对照。本来对于一国法律的解释应以本国文字的文义进行解释。但是在制订中，我国《海商法》许多章节参照了国际上通行的国际公约，甚至有少数用语因找不到对应的中国法律术语，直接采用了公约英文版本中相关术语的中文翻译。还有一个不容忽视的现象，就是航运实践中，在涉及海商活动中，双方当事人大量地采用英文格式的各种合同或单证，例如提单内容和条款、租船合同的条款、海难救助合同条款等几乎全部是英文的。因此对上述公约或合同中的英文条文的正确理解有助于揭示该法条的真正含义。例如，我国《海商法》关于承运人适航义务的标准中，用了“谨慎处理”一词。我国民法中没有这一概念，显然《海商法》中的中文含义直接翻译自英文“due diligence”。根据英文解释以及参考英国的判例，可以明确其含义大致是从客观标准出发，要求承运人作为一名具有通常要求技能并谨慎行事的人，在当时情况下采取各种为特定情况所合理要求的措施。如果承运人通过上述措施，仍然不能发现船舶存在的潜在缺陷，则即使船舶事实上是不适航的，仍然不视为违反适航的义务。尽管本文提及要与相关内容的英文解释相对照，但并不是要否认中文解释的效力，只是通过对英文解释的参考和借鉴作用，以达到更好地理解中文法律条文含义的目的。

此外，在采用上述几种解释方法时，应当综合、灵活地考虑单独使用或者并用。例如，《海商法》第 22 条规定：“……海难救助的救助款项的给付请求具有船舶优先权”。采用体系解释方法，根据“海难救助”一章中，第 172 条关于救助款项的界定，字面上应当解释为包括救助报酬、救助酬金和特别补偿。结合船舶优先权制度设立的目的和作用以及有关国际公约的相关内容，可以得出只有针对救助报酬的海事请求才可以享有船舶优先权，而特别补偿以及救助酬金的请求不能享有船舶优先权。因此对第 22 条关于“救助款项”一词的理解时，要采用限缩解释方法。那么对于第 22 条整个条文的理解和解释问题，针对上文论及的内容，笔者认为应当综合采用体系解释、限缩解释、目的解释、比较法解释以及社会学解释等方法。

---

25 刘冰：《谈海商法的解释方法—海商法的特殊性在法律解释实践中的体现》，下载于 http://www.ccmt.com.cn/hs/explore/exploreDetial.php?sId=256，2006 年 12 月 1 日。

26 《中华人民共和国海商法》第 47 条。

27 司玉琢等：《海商法详论》，大连：大连海事大学出版社 1995 年版，第 120 页。

（二）海商法特殊的法律解释方法

在海商法律解释中，除了一般的解释方法之外，针对海商法律，特别是那些涉及商事活动的国际海上货物运输合同、租船合同、救助合同、拖航合同、保险合同等，还应当参考其他国家的法律解释方法。因为通常上述合同当事方不仅采用英文的固定合同格式或版本，甚至有的在合同中明确“因合同产生的争议或纠纷依据外国法，在外国某一个法院或仲裁机构予以解决”。这里提及的外国法律常常是英国法律。因此针对这种情况，对于这些合同内容进行解释时，应当借鉴和考虑英美合同法中一些不同于我国合同法解释的原则。

英美合同法的解释原则，主要体现在如下方面：1.“逆利益方原则”；2.“除外责任条款严格解释原则”；3.“手写条款效力高于印刷条款效力原则”；4. 尊重习惯和惯例原则”；5.“考虑订约背景原则”；6.“考虑小字印刷条款效力原则”；7.“同类解释原则”。[28] 其中“逆利益方原则”、“尊重习惯和惯例原则”、“考虑订约背景原则”前文以及述及，因此本文将结合海商法特性，对其他几个原则进行讨论。

英美法院在对合同中的除外责任条款进行解释时采用严格解释原则，特别是针对合同中的免除责任条款以及责任限制条款的解释上更加严格。除了要考虑该条款的字面意思之外，还要考虑合同的性质、订约的目的、当事人在订立该条款时的合理预期以及解释该条款所能够考虑的其他各种因素。

“手写条款效力高于印刷条款效力原则”是指在采用标准格式的合同中，条文内容往往是事先印刷的，双方当事人在洽谈合同的过程中，往往会对其中的内容进行删改、增加、变更，因此在该原则下，有以下几点需要把握：（1）打印的内容效力一般高于印刷内容的效力；（2）手写内容的效力一般高于打印内容的效力；(3) 特别约定条款的效力高于一般条款效力；（4）附加条款的效力优先于正文条款的效力。

在英文格式的合同中，常常会存在一些小字印刷的条款，特别是证明海上货物运输合同的提单，背面常常印有非常小并且不太容易辨认、识别的字体和条款，而且单证或合同中常常没有提示语言要求一方当事人注意背面的小字印刷条款。英美法院对于提单背面印刷的小字条款常常持有敌意，他们认为如果一个条款的识别需要借助于放大镜来看的话，那么该条款不能成为合同的内容，不能起到保护承运人的作用，除非承运人已经在提单中提示托运人注意提单背面的条款内容。[29] 并且英美法院常常警告承运人，如果他们想要援引提单中的条款免除责任，不仅要用非常明确的语言，而且要使一个通常谨慎的人在看到这份文件的时候，

---

28 Prof. William Tetley, Q. C., Seven Rules of Interpretation (Construction) of Bills of Lading, Antwerp: Liber Amicorum Robert Wijffels, 2001, pp. 359~379.

29 Paterson, Zochonis & Co. v. Elder, Dempster & Co., *Lloyd's Law Reports*, Vol. 13, 1922, p. 517.

不会忽视该内容的存在。[30]

在英国合同法解释中，法院常常会采用同类解释原则。当合同中采用一些一般概括性语言和用词时，如果其寓意限定于特定含义，则根据同类解释原则，不能够按照一般概括性语言表面所表达的宽泛意思来理解，而只能限定于特定含义范围内所表达的意思理解。例如在佛斯柯罗•曼果诉斯太格班轮运输公司一案中，英国上诉院对于提单中出现的自由绕航条款中的词句“为了添加燃料或者其他目的，可以以任何顺序挂靠任何港口……”进行解释时，认为该条款中的“其他目的”一词不能够扩大解释为包括“为了验证船舶上的过热器而偏离航线以便将 2 名工程师送到岸上的情况”。在适用该原则时要注意一点：即只有当属于某一种类的概括性用词前面出现特定含义用词的情况下，才适用同类解释原则；如果没有该特定种类的含义出现，则概括性用词不受前面特定含义用词的限制。例如在爱福特船务有限公司诉林登管理公司案中，枢密院大法官认为对海牙规则中“易燃、易爆或者危险特性的货物”进行解释时，不能适用同类解释原则将“危险特性”的货物仅限于前面提及具有特定含义的“易燃、易爆”的意思，而是应当采用“危险货物”的一般含义理解。[31]

综上所述，本文结合一般法律解释原则和方法，特别是合同解释方法，结合有关公约和国外相关规定，对海商法律解释原则和方法进行探讨，并提出个人所见。应该说所提想法和意见，尚存在许多不成熟之处，希望本文能够起到抛砖引玉之用，以推动国内学者对海商法基础理论问题的研究。

30 *Crooks v. Allan*, (1879) 5 Q. B. 38, p. 41.

31 Prof. William Tetley, Q. C., *Seven Rules of Interpretation (Construction) of Bills of Lading*, Antwerp: Liber Amicorum Robert Wijffels, 2001, pp. 359~379.

船舶燃油污染损害赔偿责任研究

林明华 *

内容摘要：《燃油污染损害民事责任国际公约》的通过填补了国际上船舶燃油污染损害赔偿的法律空白，其所规定的责任基础、责任主体、责任承担、强制保险等初步构建了船舶燃油污染的国际赔偿体制，但是该公约的体制并非尽善尽美。我国缺乏有关燃油污染损害赔偿责任的专门立法，不利于保护受害人利益和海洋环境。本文主要通过比较分析和实证分析的研究方法，对船舶燃油污染损害赔偿的国际公约进行研究，并在此基础上对我国的相关问题进行探讨，提出立法建议。

关键词：燃油污染　责任主体　责任承担　责任限制　强制保险

一、引　言

船舶对海洋环境的污染损害以油类物质污染最为普遍且危害最为严重。为了保护海洋环境，减少因船舶溢油带来的巨大损害，国际海事组织制定了一整套确定油污损害责任的国际公约。《1969 年国际油污损害民事责任公约》（以下简称“《CLC 1969》”）及其 1992 年议定书（以下简称“《CLC 1992》”）、《1971 年设立国际油污损害赔偿基金国际公约》及其 1992 年议定书共同确立了油轮散装油类货物的污染损害国际赔偿机制。《1996 年关于海上运输有毒有害物质损害责任和赔偿的国际公约》（以下简称“《HNS 1996》”）建立了有毒有害物质造成海洋环境污染的国际赔偿机制。

据国际海事组织统计，许多非油轮装运的燃油比油轮装运的货油还要多。[1] 英国保赔协会对污染索赔进行分析后指出，非油轮溢油污染的风险，无论在个案数量还是溢油总量上，均大于油轮溢油污染。一半以上的污染索赔是由非油轮的事

---

* 林明华，法学硕士，厦门行政学院讲师。

1 Suzanne Starbuck and Roger Overall,Conventional Wisdom, at http://www.worldbu86nkering.com/pages/Issue6_2 conventional.html, 26 February 2003．另据《石油泄露信息导报》统计，全球航行在海上的油轮装载的货油大约为一亿三千万吨，而同一时间全球船舶上所装的燃油总量却高达一亿四千万吨。

故引起的。[2] 另外，由于燃油特别难以清除，处理燃油污染通常比处理原油污染更为复杂和昂贵。[3] 然而，船舶燃油污染的赔偿责任问题一直没有得到应有的重视。由于《CLC 1969》仅适用于油轮的货油造成的污染，船舶燃油污染的损害赔偿责任则处于空白状态。在《CLC 1992》草拟期间，部分国家主张将“所有船舶”的燃油污染纳入《CLC 1992》进行规范。但由于“油轮的货油或燃油”与“一般船舶的燃油”有相当差异，为避免过分复杂造成困扰而影响《CLC 1992》的通过，《CLC 1992》最后仅规定了“油轮的燃油污染”，并没有将“一般船舶的燃油污染”纳入其调整范围。

燃油污染的国际赔偿责任机制的缺失使得遭受燃油污染的受害人在进行索赔时，在确定责任主体、责任承担和责任限制等方面存在困难。一些国家，如英国，认识到建立燃油污染损害赔偿体系的重要性，将《CLC 1992》的体制扩大适用于燃油污染损害赔偿。[4] 其他一些国家，如美国，通过《1990 年油污法》处理各种船舶的油类物质污染。但是，由于缺乏统一的国际体制，越来越多的国家各行其是。

为了填补船舶燃油泄漏造成的海洋环境污染的国际赔偿机制的空白，国际海事组织于 2001 年通过了《燃油污染损害民事责任国际公约》（以下简称《燃油公约》）。《燃油公约》对责任主体、责任承担和强制保险等方面进行规范，初步构建了船舶燃油污染的国际赔偿体制。

由于船舶燃油污染损害发生在动态的海洋上，涉案船舶国籍、类型、致损原因不同使损害具有多样性、特殊性、复杂性，而我国缺乏关于船舶燃油污染损害赔偿的专门立法，导致司法实践中对责任主体、责任承担认识不一、裁判各异。因此，笔者认为，深入研究船舶燃油污染损害赔偿案件的责任主体、责任承担方式以及责任限制等问题，对于建立适合我国的船舶燃油污染损害赔偿机制、完善海洋环境保护立法，从而公正、公平地处理船舶燃油污染损害事故具有积极的意义。有鉴于此，笔者在对《燃油公约》和《CLC 1992》进行比较的基础上，就船舶燃油污染损害赔偿的责任主体、责任承担、责任限制以及强制保险等问题进行分析，并对我国建立燃油污染损害赔偿责任机制发表一些浅见。

需要说明的是，由于篇幅的限制，本文并没有对船舶燃油污染损害赔偿所涉

---

2 在国际海事组织法律委员会第 75 届大会上，澳洲代表提出了一项统计数据。该数据显示，1975 年到 1996 年间，澳洲邻近海域的油污事件，有 83％是由非油轮所致，用于清除燃油污染的费用占全部清除油污费用的 78％。

3 New Convention on Liability and Compensation for Pollution from Bunkers, at http://www.isma-london.org/focus/focus06.htm,27 October 2005.

4 英国 1995 年修订的《商船航运（油污）法》第 151 条第 1 款规定：“油类，包括任何种类的油……”

及的全部内容进行探讨，只是选取具有其特殊性的相关法律问题进行讨论。[5]

二、对《燃油公约》的比较研究

（一）责任主体

责任主体是损害赔偿责任制度的重要要素，责任主体的确定是责任承担的前提。虽然相关国际公约和国内立法没有对责任主体做出具体的区分，但笔者认为存在直接责任主体和潜在责任主体之分。直接责任主体是指《燃油公约》和国内相关燃油立法明确规定应当承担燃油污染责任的主体；潜在责任主体是指直接责任主体之外的可能造成燃油污染的其他人，《燃油公约》和国内相关燃油立法没有明确规定其应当承担的船舶燃油污染责任，但也没有明确排除其承担燃油污染责任的可能性。二者法律地位不同，导致受害人索赔的依据有所区别：对于直接责任主体，受害人根据《燃油公约》和国内相关燃油立法直接对其提出索赔；对于潜在责任主体，受害人所依据则是《燃油公约》和国内相关燃油立法之外的其他法律。

1. 直接责任主体

根据《燃油公约》的规定，事故发生时船舶所有人应承担船载燃油导致的，或由船舶引起的污染损害责任；在发生一系列污染事故时，由第一起事件发生时的船舶所有人承担责任。[6] 但是，在战争、不可抗力、第三方故意、受害人故意等因素造成燃油污染损害的情况下，船舶所有人可以免除责任。[7] 可见，《燃油公约》规定的直接责任主体是船舶所有人，这与《CLC 1992》的规定基本一致。但在具体认定上，两部公约又存在着明显的区别。

第一，船舶所有人的含义不同。根据《CLC 1992》第 1 条第 3 款的规定，船舶所有人是指登记为船舶所有人的人；如果没有登记，则是指拥有该船的人。如果船舶为国家所有并由在该国登记为船舶经营人的公司所经营，船舶所有人即指该公司。而《燃油公约》第 1 条第 3 款规定的船舶所有人的范围则大得多，包括登记所有人、光船承租人、船舶管理人和经营人。因而，《燃油公约》下，包括登记所有人、船舶管理人、船舶经营人、光船承租人在内的船舶所有人都是直接责任主体，

---

5 不同船舶上燃油的法律地位不尽相同，因此，必须首先界定船舶的含义。《燃油公约》第 1 条第 1 款规定："船舶，指任何海船和任何海上航行器。"同时，第 4 条第 1 款规定："本公约不适用于民事责任公约规定的污染损害，不论该种损害根据该公约能否被赔偿。《民事责任公约》规定的"污染损害"是指《CLC 1992》规定项下的船舶（为了行文方便，笔者将其简称为油轮）所造成的污染损害。因此，相对于《CLC 1992》而言，《燃油公约》中的船舶是指非油轮，其调整的是非油轮的燃油污染，而油轮的燃油污染则受《CLC 1992》的规制。若无特别说明，本文所指船舶亦均为《燃油公约》规定的船舶。

6 《燃油公约》第 3 条第 1 款。

7 《燃油公约》第 3 条第 3 款。

对船舶燃油污染损害承担责任。

第二，赔偿体制不同。《CLC 1992》规定了“狭道条款”，[8] 由登记所有人承担油污损害赔偿责任，而登记所有人之外的人不承担公约内和公约外的油污损害赔偿责任。[9] 但是“狭道条款”并不意味着登记所有人是唯一的责任人，因为《CLC 1992》由《1971 年设立国际油污损害赔偿基金国际公约》补充，如果污染发生的地方也是基金公约的缔约国，国际油污赔偿基金可以作为赔偿的补充。《燃油公约》没有第二层基金提供补充赔偿，因此，为了扩大受害人的索赔途径，《燃油公约》将登记所有人、光船承租人、船舶经营人和船舶管理人均规定为直接责任主体。

(1) 登记所有人

在登记所有人是否承担燃油污染责任的问题上，在国际海事组织第 79 届法律委员会议上曾经有过不同意见。一种意见认为，应当采用《CLC 1992》和《HNS 1996》模式，将船舶登记所有人规定为直接责任主体，由其承担燃油污染责任；第二种意见认为，在现代船舶经营管理中，船舶登记所有人往往并不参与船舶的经营管理，在这种情况下，由其承担责任是不公平的，与“谁污染，谁赔偿”的原则不符，应当由实际控制人来承担；第三种意见认为，船舶登记所有人应当与船舶管理人、船舶经营人、光船承租人一起承担燃油污染责任。[10] 但《燃油公约》最终还是将船舶登记所有人列为直接责任主体，笔者认为有以下考虑：

第一，这符合传统上法律有关责任和义务的规定。登记所有人作为船舶的所有者享有船舶的所有权，理应对船舶所造成的污染损害承担责任。

第二，这便于受害人及时索赔。相对船舶经营人、管理人和光船承租人这些实际控制船舶的人而言，登记所有人更容易确定，有利于受害人确定责任主体并及时获得赔偿。

第三，这是强制保险的客观要求。实践中，实际控制船舶的人不具有稳定性和可预见性，要求其投保强制保险是不现实的。因而，要使强制保险行之有效，就必须把登记所有人规定为直接责任主体和强制保险的投保人。

(2) 光船承租人

在《燃油公约》下，光船承租人也是船舶燃油污染损害的直接责任主体。[11] 光船承租人往往是实际控制船舶的人，由其承担燃油污染责任是合理的。这与《CLC 1969》和《CLC 1992》明显不同。《CLC 1969》第 3 条第 4 款规定：“不得要求船舶所有人对本公约没有规定的污染损害做出赔偿，不得要求船舶所有人的雇佣人员或代理人对本公约规定的或其他污染损害做出赔偿。”可见，在《CLC 1969》下，

---

8 “狭道条款”是指责任集中或限定于一个人的条款。

9 《CLC 1992》第 3 条第 4 款。

10 IMO Legal Committee-79th Session, at http://www.comitemaritime.org/news/n11999.html, 12 December 2006.

11 《燃油公约》第 1 条第 3 款和第 3 条第 1 款。

船舶所有人的雇佣人或代理人不承担公约内和公约外的责任。但是通常情况下，承租人不会被认定为船舶所有人的雇佣人或者代理人，因此，根据《CLC 1969》的规定，承租人（包括光船承租人）是船舶燃油污染损害的潜在责任主体，存在和船舶所有人一起承担责任的可能性。而在《CLC 1992》下，根据其第 3 条第 4 款的规定，光船承租人被“狭道条款”排除在责任主体之外，受害人不能根据任何法律对光船承租人直接提出索赔。

可见，光船承租人在《燃油公约》下的责任比《CLC 1969》和《CLC 1992》下的责任要大得多，这也反映了国际上保护海洋环境、保护污染损害受害人的立法趋势。

(3) 船舶经营人和船舶管理人

与《CLC 1969》和《CLC 1992》不同，《燃油公约》明确规定船舶经营人和船舶管理人被包括在船舶所有人的定义里，属于直接责任主体。[12] 两者因参与船舶经营而成为实际控制船舶的人，让其承担责任，可以提高他们在经营中的责任意识，以避免燃油溢漏；同时，便于在燃油溢漏后迅速采取行动，减少潜在的污染损害。船舶造成的燃油污染损害直接与船舶的经营相联系，将责任赋予日常经营船舶责任方是合理的。但是《燃油公约》并没有对船舶经营人和船舶管理人的概念作出明确的界定，这可能导致各国在司法实践中做出不同的解释，不利于公约的统一适用，也不利于纠纷的及时解决。

关于“船舶经营人”的范围，美国海岸警卫队在执行《水质量改良法》的报告中指出：“任何人，包括但不限于船舶所有人、光船承租人或对船舶的经营负有责任的合同者，对船舶的建造、修理、碰撞或销售负有责任的人均属于经营人的范畴。”[13] 美国法院根据调整危险物质泄漏责任的《环境应急、赔偿和责任综合法》，对“船舶经营人”进行了宽泛解释：“船舶经营人，是指合法地被授予对污染设备的日常操作承担责任的人，包括对船舶负有维修、保养、航务、配备船员、缔约和一般管理责任的人或组织。”[14] 官方对这个术语进一步解释道：“船舶经营人不包括那些不完全负责船舶营运的个人。”比如，引航员也许在一小段时期里，完全负责船舶的航行，然而，他不是“经营人”，因为他没有给船舶配备人手、供应物料。在美国诉舰队托收信贷公司案中，在公司资产中持有担保物权的贷款银行被认定为“经营人”，因为它能参与借贷人的财务管理并施加影响。[15] 同样地，一个对拥有船舶的子公司或分支机构的经营行使广泛控制的母公司也可能被认定为船舶经

12 《燃油公约》第 1 条第 3 款和第 3 条第 1 款。

13 Charles B. Anderson and Colin de la Rue, Liability of Charters and Cargo Owners for Pollution from Ships, *Tulane Maritime Law Journal*, Vol. 26, 2001.

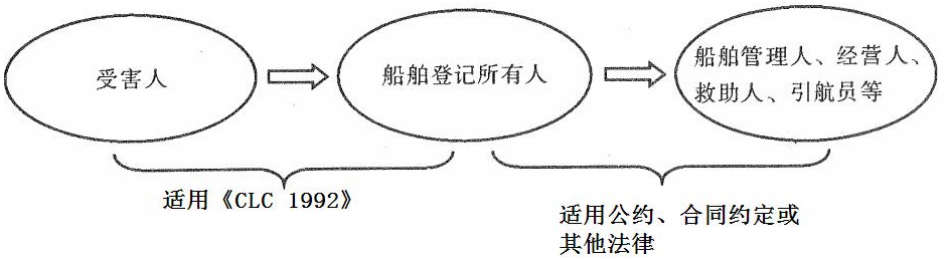
14 但《环境应急、赔偿和责任综合法》本身并没有对“经营人”作出界定，只是一般性地说明“经营人”是指任何拥有、经营或租赁船舶或设备的人。

15 United States v. Fleet Factors Corp., 901 F.2d 1550,1557-59 (1.1st Cir. 1990).

营人，从而承担船舶经营人的责任。例如，在美国诉凯塞 - 罗斯公司案中，根据《环境应急、赔偿和责任综合法》，被告公司对其子公司产生的清除危险废物费用负有责任，因为它对子公司的活动行使普遍的控制，如账款的征收、预算、政府合同、房地产租赁和买卖、高级职员和董事职位的安排等。[16] 除此之外，不论是有关油污的立法，还是涉及油污责任的案例，都少见对“船舶经营人”具体含义的明确界定。

2. 潜在责任主体

如前所述，《CLC 1992》将责任主体限定为登记所有人，而船舶所有人的雇佣人、代理人、承租人、船舶管理人、经营人等不承担根据公约和其他法律产生的对受害人的燃油污染责任，除非这种污染事故是由其有意造成的。[17] 同时，船舶所有人有权根据其他法律和合同的约定向这些人以及其他责任人追偿。《CLC 1992》实际上将污染责任的索赔途径限定为“背靠背”的追偿方式上，受害人不能直接向除船舶登记所有人之外的其他人提出损害赔偿请求。其索赔途径如下图所示：



这样规定的目的是为了避免出现受害人直接根据其国内法向公约规定的直接责任主体以外的其他人索赔，从而规避《CLC 1992》适用的情况，甚至出现责任人根据有关国内法承担高于《CLC 1992》规定的责任的情况。但是，在实践中，《CLC 1992》中的“狭道条款”存在以下的困难：

首先，事故发生时，承租人可能同时具有多重身份，如装卸码头的所有人、经营人等。[18] 此时，受害人可以把该承租人作为装卸码头的所有人、经营人提起诉讼，上述“狭道条款”对该承租人就不产生作用。

其次，从行文上看，“任何承租人”指任何类型的承租人，包括期租人、程租人和光船承租人，而不是指承租人可能拥有的其他身份。因此，如果承租人同时是这个事故中与这艘船舶碰撞的另一艘船舶的所有人，他能否援引“狭道条款”以排除该身份产生的任何责任是不确定的。

---

16 United States v. Kayser-Roth Corp., 910 F.2d 24 (1st Cir. 1990).

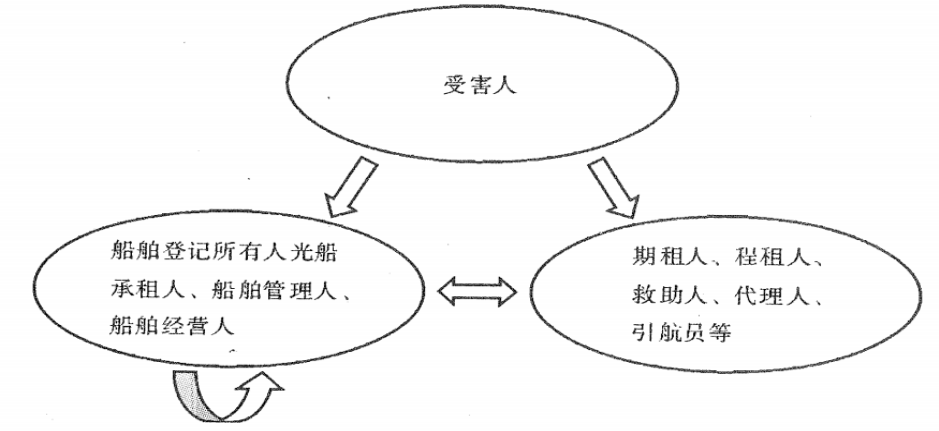
17 《CLC 1992》第 3 条，《HNS1996》第 7 条第 5 款作了类似的规定。

18 Charles B. Anderson and Colin de la Rue, Liability of Charters and Cargo Owners for Pollution from Ships, *Tulane Maritime Law Journal*, Vol. 26, 2001.

再次，“狭道条款”在特定的情况下可能无效。如果对有关公约范围之外的损失或损害提出索赔，或者是对非公约缔约国提起诉讼，船舶登记所有人之外的其他人根据适用的法律直接承担船舶的燃油污染责任的可能性是存在的。

最后，“狭道条款”在埃里卡号事件[19]后面临新的挑战，欧共体严厉指责该条款，美国也主要因为该条款而拒绝加入《CLC 1992》。两者都认为，将承租人、经营人、管理人排除在责任主体之外，会打击他们谨慎操作船舶、维护船舶质量的积极性。[20]

正是因为“狭道条款”在实践中存在上述困难，《燃油公约》放弃使用该条款。因此，受害人既可以依据《燃油公约》直接对船舶所有人进行索赔，也可以依据《燃油公约》之外的公约或法律对船舶所有人以外的其他人，即期租人、程租人、救助人、代理人、引航员等进行索赔。而这些人可以依据有关法律向船舶所有人追偿，船舶所有人之间也可以相互追偿，其直接索赔和追偿途径相当广泛，如下图所示：



《燃油公约》这样规定的目的是最大限度地方便受害人索赔，保护受害人的合法权益。但是由于缺乏“狭道条款”的保护，非光船承租人、应急反应者作为潜在的责任主体可能承担其他法律项下的燃油污染责任。

(1) 非光船承租人

非光船承租人不是直接责任主体，受害人不能依据《燃油公约》直接对其提出索赔，但可依据《燃油公约》之外的其他法律（如一国国内法）提出索赔。

---

19 1999 年 12 月 12 日满载 31000 吨重油的“埃里卡号”油船在布列斯特港以南 70 公里处海域沉没，造成大量重油泄漏，严重污染了附近海域及沿岸一带。法国西海岸，至少有 30 万只以上的海鸟已成为“埃里卡号”油船泄漏污染海洋的牺牲品。来自法国渔民、商家和旅游业者的索赔大大超过 FUND1992 的 13.5 亿特别提款权的责任限额。News from IOPCF, Autumn Meetings–23–27 October 2000, at http://www.Comitemaritime.org/news/n12000.html, 6 November 2006.

20 Chao Wu, Liability and Compensation for Bunker Pollution, *Journal of Maritime Law and Commerce*, Vol. 30, 2002, p. 558.

《1990 年油污法》规定“任何拥有、经营或者光船租用泄漏油污的船舶的人，要对清除费用和特定的损害负责。”[21] 可见，《1990 年油污法》规定的直接责任主体是船舶所有人、船舶经营人和光船承租人。笔者认为，《1990 年油污法》只规定光船承租人属于直接责任主体，而没有提及同属于承租人范畴的期租人或程租人，是消极地暗示期租人和程租人不属于直接责任主体。基于下述原因，非光船承租人完全可能成为潜在的责任主体，从而承担燃油污染责任：

第一，从《1990 年油污法》本身及其立法历史看，它没有对非光船承租人（期租人或程租人）作出明确界定，也没有提供更进一步的解释。因而，非光船承租人（期租人或程租人）被解释成“经营人”的可能性是存在的。在 Slaven v. BP America, Inc. 案中，原告主张期租人作为船舶的所有人 / 营运人承担责任。[22]

第二，由于美国《1990 年油污法》并不优先于州的油污法，因而不同的州制定各自的污染立法，与联邦《1990 年油污法》并行。大多数的立法规定责任主体是“导致污染的主体”或“任何直接或间接导致泄漏的人”。在这种情况下，非光船承租人（期租人或程租人）就成为潜在的责任主体，和货物所有人与船舶所有人一起对油类物质污染（包括燃油污染）承担责任。

第三，根据普通法的疏忽理论，期租人或承租人可能对受到燃油污染的第三方承担责任。[23] 根据一般海事法，疏忽是可诉的错误，被告必须达到正常人的注意标准。[24]《1990 年油污法》通过规定美国司法部长可对任何责任方或依照任何法律应当承担责任的任何其他人提起诉讼，以补偿由基金支付的赔偿，从而默示承认了这个概念。[25] 因而，在理论上，如果期租人或承租人违反照顾义务，直接导致对第三方的燃油污染损害，会被裁定对这种损害负有责任。

认定期租人或承租人是否违反照顾义务而承担对第三方的燃油污染责任，控制因素起着决定性的作用。在 In re P & E Boat Rentals,Inc. 案中，美国上诉法院第五巡回法庭确立了认定控制因素的规则：“如果没有相反意思表示，期租人没有控制船舶，对船员或船舶的不适航不承担责任。”本案中，期租人实施作为一个期租人的行为时存在疏忽，即指挥船舶在浓雾高速航行导致船舶碰撞和后来的损害和人身伤亡，根据疏忽理论而被裁决负有责任。[26] 同一个法庭在后来的人身伤害诉讼中进一步解释了“控制”的含义。在 Williams v. Central GulfLines 案中，[27] 法

21 OPA 1990, 33 U. S. C. § 2702(a).
22 See 786 F. Supp. 853, 1993 AMC 455 (C. D. Cal. 1992).
23 Colin De La Rue and Charles B. Anderson, *Shipping and the Environment*, London: Lloyd's of London Press, 1998, p.221.
24 Thomas S. Schoenbaum, *Admiralty and Maritime Law*, Berkeley: West Information Pub Group, 2001, pp. 173~174.
25 OPA 1990, 33 U. S. C. § 2715(b).
26 872 F. 2d 642, 1989 AMC 2447 (5th Cir. 1989).
27 Williams v. Cent. Gulf Lines, 874 F. 2d 1058, 1989 AMC 2634 (5th Cir. 1989).

庭认为："控制，是指操作性地控制船舶，而不是对其目的港或货物进行最终的控制。"上述认定控制因素的规则也被上诉法院第九巡回法庭在 Alexander v. United States 案中加以确认。[28]

(2) 应急反应者

应急反应者是指采取预防措施的任何人，一般情况下是指救助人和清污合同人。对《燃油公约》是否像《CLC 1992》那样加入应急反应者责任豁免条款，在国际海事组织第 79 届法律委员会的讨论过程中，存在严重分歧。一些国家和国际组织代表强烈呼吁《燃油公约》应给予应急反应者责任豁免，如国际油轮船东防污联盟、波罗的海国际海运理事会、国际海事委员会、国际独立油轮船东协会、国际航运公会、国际保赔协会集团、国际救捞联合会等。[29] 他们指出，加入该条款符合《CLC 1992》和《HNS 1996》的先例，符合《燃油公约》的立法意图，有百利而无一害。救助人和国际救捞联合会也坚持《燃油公约》应规定这个条款，他们认为，虽然救助人一般是熟练且装备良好的，但他们经常不得不冒着无法预见的风险，而从事着不能确切预测结果的救助行为。

归纳起来，主张豁免的主要理由有三：第一，应急反应者在救助过程中可能产生燃油污染损害，比如为了起浮遇难船舶，或使被救助船舶不至于断裂而造成更大的污染，救助人故意把搁浅的油轮的油释放到水里。[30] 但是救助人的目的是采取有效措施以减少污染，不能等同于造成污染事故的污染者；第二，根据国内法来解决责任豁免问题存在困难，因为有些国家对应急反应者的责任豁免问题没有给予应有的重视，缺乏相关立法；即使一国国内法规定了救助人责任豁免，该国内法也不一定得以适用；第三，如果公约取消责任豁免，救助人可能会感到潜在的风险增大，从而不愿意救助燃油污染的船舶，这样会给救助和防止污染扩大带来消极影响。反之，可以鼓励救助人积极采取措施，防止和减轻环境污染损害。[31]

而另外一些国家则认为这一问题不宜在《燃油公约》中规定，应由各国在国内法中解决。澳大利亚和英国就明确表示，他们适用《燃油公约》的国内立法，将包含"应急豁免"条款，并且建议由外交大会通过决议，呼吁各国在制定其国内法时考虑对这些人的责任予以豁免。[32] 反对在《燃油公约》中规定豁免的主要理由有以下几点：第一，根据"谁污染谁负责"，任何人都不能逃脱油污责任；第二，责任豁

---

28 63 F. 3d 820, 1996 AMC 303 (9th Cir. 1995).

29 IMO Legal Committee-79th Session,at http://www.comitemaritime.org/news/n11999.html, 12 December 2006.

30 The New Bunker Convention,at http://www.gard.no/Publications/GardNews/Recentlssues/gn165/art_7.asp, 27 February 2006.

31 傅国民、徐庆岳：《〈船舶燃料油污染损害民事责任国际公约〉评介》，载于《海商法研究》第 7 辑，第 97 页。

32 IMO Legal Committee-79th Session, at http//www.comitemaritime.org/news/n11999.html, 12 December 2006.

免问题可以根据一国的国内立法来解决，可以通过大会决议，敦促各国做出相应的规定；第三，基于船舶的光租人、管理人和经营人已经被包括在船舶所有人的定义里，将这种豁免条款扩大适用于这三类人可能会导致混淆；第四，取消责任豁免并不会使那些采取适当行动的救助人面临风险，相反，会促进船舶所有人与救助人和应急组织预先签订防油污合同。[33]

《燃油公约》最终没有规定“狭道条款”，从而取消了应急反应者的责任豁免。这种规定无疑增加了应急反应者的责任风险，即燃油污染的受害人可以就应急反应者在采取防止和减轻污染损害措施中的疏忽而造成的损失，向应急反应者提出索赔。虽然《燃油公约》外交大会通过决议敦促各国在适用公约时，考虑引入应急反应者责任豁免，但是决议的作用是有限的，必须求助于各国的国内法。

（二）责任承担

司法实践中因船舶燃油污染损害诉至法院的案件主要有 2 类：一类为船舶因操作性排放不当，造成污染损害而引起损害赔偿纠纷。例如，船舶所有人或者有关管理人没有按照相关规定添加燃油而造成燃油污染损害；另一类为船舶发生碰撞、搁浅、船壳断裂、火灾或爆炸等海损事故，造成燃油污染损害而引起赔偿纠纷。船舶操作性排放不当造成燃油污染和单艘船舶的海损事故造成的燃油污染，一般仅涉及单方责任主体，责任承担形式相对简单；而两艘或多艘船舶发生海损事故造成的燃油污染则比较复杂。

1. 单方责任主体的责任承担

根据《燃油公约》第 3 条第 1 款的规定，事故发生时船舶所有人应承担船载燃油导致的，或由船舶引起的污染损害责任，在发生一系列污染事故时，由第一起事件发生时的船舶所有人承担责任。第 2 款规定：“若根据第 1 款应负责的人超过一人的，这些人应负连带责任。”由于《燃油公约》在第 5 条中规定了涉及两艘或多艘船舶的事故的责任承担，因此笔者认为，这里的连带责任是针对一艘船舶造成的污染而言的，[34] 例如船舶光船出租后造成燃油污染的，船舶所有人（包括登记所有人和光船承租人）对燃油污染损害赔偿负连带责任。

《燃油公约》这样规定的主要原因一是《燃油公约》赔偿责任机制没有第二层赔偿基金，船舶所有人承担连带责任才能保证受害人得到充分赔偿；二则有利于保障受害人的利益，不管船舶是否出租、是否由其他人经营或管理、登记所有人对燃

33 宋春风：《2001 年〈关于燃油污染损害民事责任国际公约〉介评》，载于《海商法研究》第 5 辑，第 27 页。

34 Michael N. Tsimplis, The Bunker Pollution Convention 2001: Completing and Harmonizing the Liability Regime for Oil Pollution from Ships, *Llord's Maritime and Commercial Law Quarterly*, February 2005, p. 89.

油污染是否有过失，受害人都可以向其中任何一人索赔。因此，该规定可以视为对国际公认的“谁污染谁赔偿”原则的一个突破。[35]

但是，《燃油公约》并没有明确规定这种连带责任的具体承担方式。因此，各国在实践中会产生操作上的差异。特别是船舶光船出租后，在船舶登记所有人、光船承租人都投保强制保险的情况下，《燃油公约》下的责任是否必须由“船舶所有人”的定义所包含的当事人连带承担？在这三方当事人和他们的保险人之间如何分配？这些问题都会导致责任主体间的纠纷，从而减缓应急反应和赔偿的过程。[36] 笔者认为，《燃油公约》下的连带责任应当由船舶所有人承担。由于连带责任是法定责任，选择谁作为索赔的对象是法律赋予受害人的权利，因此，受害人可以向船舶登记所有人、光船承租人、船舶经营人或管理人以及他们的责任保险人中的一个、两个或多个提出索赔。

2. 多方责任主体之间的责任承担

(1) 受相同公约调整的责任承担

《燃油公约》第 5 条规定：“当涉及两艘或多艘船舶的事故发生并造成污染损害时，除非按第 3 条规定免责外，所涉每艘船舶的所有人应对不能合理分割的上述损害负连带责任。”《燃油公约》这条关于多方责任主体之间责任承担的规定与《CLC 1992》的规定相同。[37] 有学者主张，《CLC 1992》所规定的油污责任主体仅指实际漏油船舶的所有人，即当发生涉及两艘或两艘以上船舶的事故并造成污染损害时，对遭受污染的受害人承担赔偿责任的只是其中漏油的船舶的所有人；而没有漏油的船舶的所有人对受害人并不承担赔偿责任。[38] 如果将这一观点适用到燃油污染，可以得出这样的推论：《燃油公约》下，一船泄漏燃油而另一船未泄漏燃油的情况下，明显属于可以合理分开的损害，两船所有人并不因此而承担连带责；只有两船都漏油时，才存在可能无法合理分开的情况。[39]

笔者认为这种观点是片面的。比较《CLC 1969》和《CLC 1992》的相关条文可以发现，[40]《CLC 1992》下责任主体承担连带责任并不以船舶溢出或排放油类为条件。首先，从字面上看，《CLC 1969》强调的是两艘或多艘船舶都溢出或排放油类造成损害，此损害无法合理分开时，有关船舶所有人承担连带责任。而《CLC

35 司玉琢主编：《海商法专题研究》，大连：大连海事大学出版社 2002 年版，第 407 页。

36 LEG/CONF.12/9, 18 January. 2001, quoted from Chao Wu, Liability and Compensation for Bunker Pollution, *Journal of Maritime Law and Commerce*, Vol. 30, 2002, p.559.

37 《CLC 1992》第 4 条规定：“在发生涉及两艘或多艘船舶的事故并造成油污损害时，所有有关船舶的所有人，除可免责外，应对所有无法合理分开的此种损害负连带责任。”

38 余晓汉：《船舶互有过失碰撞所致油污的责任主体》，载于《中国海商法年刊》(2000 年卷)，大连：大连海事大学出版社 2001 年版，第 198~205 页。

39 司玉琢主编：《海商法专题研究》，大连：大连海事大学出版社 2002 年版，第 406 页。

40 《CLC 1969》第 4 条规定：“两艘或多艘船舶溢出或排放油类造成损害，所有有关船舶的所有人，除可免责外，应对不能合理区分的损害负连带责任。”

1992》并没有提及“两艘或多艘船舶都溢出或排放油类”的要求，只要求损害是涉及两艘或多艘船舶的事故造成的损害无法分开。其次，从逻辑上看，如果《CLC 1992》强调的条件和《CLC 1969》一样，即要求两艘或多艘船舶事故都溢出或排放油类造成的损害才承担连带责任的话，那么，《CLC 1992》根本没有必要在措辞上进行改变，从而增加不必要的误解。最后，从立法目的上看，连带责任的目的是为了更好地保障受害人的利益，如果还是拘泥于《CLC 1969》的原则的话，保护受害人利益的目的就不能很好地实现。因此，笔者认为，《燃油公约》下多方责任主体只有在符合以下条件的情况下才承担无限连带责任：第一，发生事故的各船舶均为《燃油公约》调整的船舶；第二，不能合理区分是由哪一艘船舶造成损害；第三，各船舶均不能免责，即不论碰撞的船舶是否实际漏油，均应对污染损害承担连带赔偿责任，公约规定可以免责的除外。由于连带责任的承担限于法定情形，因此不符合条件的有关船舶所有人并不承担《燃油公约》项下的连带责任。

(2) 受不同公约调整的责任承担

如果发生事故并造成燃油污染的船舶属于不同的公约调整的范畴时，如一艘载货油船与一艘普通杂货船碰撞造成燃油污染损害，这些船舶的所有人是否承担连带责任？由于连带责任限于法定，而《燃油公约》没有规定，因而只能求助于各国国内法。

（三）责任限制

海事赔偿责任限制是国际海事法中特有并区别于民法上一般损害赔偿原则的一项法律制度，是立法上赋予责任人的特殊保护。[41] 1957 年《船舶所有人责任限制公约》（以下简称“《LLOSS 1957》”）、1976 年《海事索赔责任限制公约》（以下简称“《LLMC 1976》”）及其 1996 年议定书均有海事赔偿责任限制的规定。

油污损害赔偿责任限制制度与海事赔偿责任限制制度存在很大区别。一般情况下，油污损害责任限制制度独立于海事赔偿责任限制制度；在海事实体法上，海事赔偿责任限制一般不包括由公约或国内法所调整的油污损害赔偿责任限制。例如，美国《1990 年油污法》所规定的油污损害赔偿责任限制就独立于其 1851 年《船舶所有人责任限制法》，[42]《CLC 1992》规定单独的油污责任限制制度也区别于海事赔偿责任限制制度。

---

41 William Tetley, Shipowners' Limitation of Liability and Conflicts of Law, *Journal of Maritime Law and Commerce*, Vol. 23, 1992, p. 585.

42 美国 Jahre Spray Ii K/S, et al., Limitation Proceedings, M/V Jahre Spray and In Re: Metlife Capital Corp., etc. Commonwealth of Puerto Rico, et al. v. M/ V Emily S., et al. 2 案的裁判结果均为：溢油责任人不能以 1.851 年《船舶所有人责任限制法》限制赔偿责任，而应依《1990 年油污法》赔偿责任限额的规定限制赔偿责任。参见 AMC, 1998, pp. 635~644。

与《CLC 1992》及《1990 年油污法》不同，《燃油公约》没有单独的责任限制制度，仅在第 6 条规定："本公约的规定，不得影响船舶所有人和提供保险或其它财务担保者根据可适用的国内或国际制度，如按经修正的《LLMC 1976》，限制其赔偿责任的权利。"因此，在《燃油公约》下，燃油污染的责任限制依赖于各缔约国国内法或责任限制公约的规定。

1. 责任限制公约的适用性

《燃油公约》的上述规定反映了国际社会避免出现过多特别责任限制制度，影响建立统一的责任限制制度的努力。但同时也带来了如何适用有关责任限制公约的困难，以及如何处理《燃油公约》与其他责任限制公约的关系等问题。因此，有必要考察现行的责任限制公约，看其能否适用于燃油污染损害索赔。关于这个问题，学界和实务部门存在较大争议。笔者认为应针对不同情况具体分析。

(1)《LLMC 1976》对燃油污染损害的适用

普遍的观点认为，《LLMC 1976》已经规定了燃油泄漏污染的责任限制，但国际保赔协会集团在提交给外交会议的议案中指出，这种观点并不完全正确。《LLMC 1976》第 2 条第 1 款规定财产的损害或损失及因侵权而受到的损失的赔偿请求可以享受责任限制，但是如果燃油污染既没有造成财产的有形损害，也没有侵犯某项权利，那么它能否依据《LLMC 1976》第 2 条第 1 款的规定享受责任限制，这点存在很大的疑问。[43]

《LLMC 1976》第 2 条第 1 款规定：

> 除按第 3 条和第 4 条的规定外，下列索赔无论其责任的根据如何，均须受责任限制的制约：
>
> (a) 有关在船上发生或与船舶营运或救助作业直接相关的人身伤亡或财产的灭失或损害（包括对港口工程、港池、航道和助航设施的损害），以及由此引起的相应损失的索赔（以下简称"(a) 项索赔"，其它各项依此类推）；
>
> (b) 有关海上货物、旅客或其行李运输的延迟引起的损失的索赔；
>
> (c) 有关与船舶营运或救助作业直接相关的，侵犯非合同权利的行为造成其它损失的索赔；
>
> (d) 有关沉没、遇难、搁浅或被弃船舶（包括船上的任何物件）的起浮、清除、毁坏或使之变为无害的索赔；
>
> (e) 有关船上货物的清除、毁坏或使之变为无害的索赔；
>
> (f) 有关责任人以外的任何为避免或减少责任人按本公约规定可限制其

43 Patrick Griggs, International Convention on Civil Liability for Bunker Oil Pollution Damage 2001, at http://www.bmla.org.uk/documents/imo-bunker-convention.html, 12 December 2006.

责任的损失所采取的措施，以及由此措施而引起的进一步损失的索赔。

从上述规定可以看出，《LLMC 1976》并没有明确指出可以限制的责任包括燃油污染责任；燃油污染造成的损害要依据《LLMC 1976》限制责任，则需证明有关索赔属于上述的范畴。

下文将分别讨论燃油污染可能造成的各项索赔能否适用《LLMC 1976》项下的责任限制问题。根据《CLC 1992》的经验，提出的油污损害赔偿请求，一般包括：清污费用和其他清除措施、实质损失、纯经济损失、环境损害的恢复。

第一，清污费用和其他清除措施。在（d）项和（f）项两种情况下，清污费用和其他清除措施可以根据《LLMC 1976》限制责任。根据（f）项，“责任人以外”的应急反应者才能向责任限制基金提出责任限制的请求，这明显禁止作为船舶燃油污染直接责任者的船舶所有人向责任限制基金提出责任限制的请求。而《CLC 1992》在第 5 条第 8 款规定：“对于船舶所有人为防止或减轻污染损害而引起的合理费用或自愿作出的合理牺牲所提出的索赔，应与对基金提出的其他索赔处于同等地位上。”该规定它有利于鼓励船舶所有人在油污泄漏后采取迅速的措施减少或防止污染，因而对成功地减少油污进一步造成海洋环境污染是至关重要的。《HNS 1996》也有类似的规定。然而，《HNS 1996》和《CLC 1992》的这种重要特征在《燃油公约》中却没有体现，也没有在有关责任限制公约中体现。笔者认为，《燃油公约》没有这么规定的理由在于，在《CLC 1992》和《HNS 1996》下，存在由货主分摊的第二层补偿基金机制，船舶所有人以应急者身份出现的时候，可以通过向货主设立的基金索赔，从而鼓励应急反应。而《燃油公约》没有这种第二层补偿机制，[44] 只有由船舶所有人设立的基金，船舶所有人自然不能要求以自己设立的基金赔偿自己的支出。

第二，实质损失。实质损失是侵权行为造成损害的传统的类别，包括人员伤亡、财产损害和因此产生的损失。燃油泄漏造成的人员伤亡，比如人员掉人受污染的海里导致受伤、死亡；燃油泄漏造成的财产损害，比如对鱼网鱼场的毁坏、更新被损害或被污染的鱼网鱼场的费用，以及由此产生的不能使用鱼网鱼场的经济损失，可以认为属于（a）项索赔，因而享有责任限制的权利。

第三，纯经济损失。也称“经济财产上的损害”，是指请求人因财产的有形灭失或损害以外的原因而遭受的资金损失，[45] 如当船舶燃油污染波及海岸时，虽然岸上的旅馆、餐馆并没有受到污染，但是海滩污染造成旅游减少、餐馆停业从而导致旅馆、餐馆所有人的利润遭受损失。

---

44 由于燃油作为船舶的燃料时，与作为货物的燃油不同，不可能要求货主对这种赔偿基金作出分摊。

45 《国际海事委员会油污损害指南》第 2 部分第 3 条第 3 款。

普通法系法院通常只承认财产的有形损害，对纯经济损失原则上不予赔偿，但法院已开始适用“合理的近因原则”[46] 来判定纯经济损失是否予以赔偿。[47] 大陆法系许多国家则认为“如果财产或其他财产利益受到侵犯，应得到赔偿，而纯经济损失不是财产，不予以赔偿。”法律多把纯经济损失视为一种事实问题而由法院适用一般的侵权法律原则予以自由裁量。[48]《燃油公约》承认了纯经济损失的可补偿性，但是由于纯经济损失不属于财产的有形损害，因此不符合 (a)、(b)、(d)、(e)、(f) 项索赔。《LLMC 1976》的 (c) 项“关于侵权导致的其他损失的索赔”要求伴随着物质的有形损害而产生的损失，而纯经济损失并不是伴随着物质的有形损害而产生的，因而纯经济损失的索赔也不符合 (c) 项索赔。因此，对纯经济损失的索赔，责任人并不能适用《LLMC 1976》进行责任限制。[49]

第四，环境损害。《燃油公约》第 1 条第 9 款规定：“……对环境损害的赔偿（该种损害的利润损失除外），应限于已实际采取或将要采取的合理恢复措施的费用……”可见，《燃油公约》下，只有对被损害的环境采取恢复措施的费用才是可以补偿的，而环境损害本身并没有作为“损失”被列在应受《LLMC 1976》限制的索赔中，因而环境损害在《LLMC 1976》下也不能享受责任限制。

因此，除了有关实质损失的索赔可以根据《LLMC 1976》限制赔偿责任外，船舶所有人根据《燃油公约》应承担的其他燃油污染损害赔偿责任，在《LLMC 1976》项下是不可限制的。[50]

(2)《LLOSS 1957》对燃油污染损害的适用

《LLOSS 1957》第 1 条第 1 款规定：

> 海船所有人对由于下列事故所引起的索赔，除引起索赔的事故是由于船舶所有人的实际过失或私谋以外，都可以根据本公约第 3 条限制其责任：
>
> (a) 船上所载的任何人的死亡或人身伤害，以及船上任何财物的灭失或损害；

---

46 即判定纯经济损失与油污损害有否密切关系而决定是否给予赔偿。参见郭杰：《论油污损害中的纯经济损失》，载于《中国海商法年刊》（1994 年卷），大连：大连海事大学出版社 1995 年版，第 258 页。

47 美国在《1990 年油污法》颁布以前，对“不伴随着物质损害”的纯经济损失原则上不予以赔偿；而在《1990 年油污法》颁布之后，允许对由环境损害而引起的利益损失和收人给予一定程度的补偿。参见郭杰：《论油污损害中的纯经济损失》，载于《中国海商法年刊》(1994 年卷），大连：大连海事大学出版社 1995 年版，第 251 页。

48 廖一帆：《船舶碰撞中定期承租人的纯经济损失》，载于《中国海商法年刊》(1993 年卷），大连：大连海事大学出版社 1994 年版，第 228~229 页。

49 Chao Wu, Liability and Compensation for Bunker Pollution, *Journal of Maritime Law and Commerce*, Vol. 30, 2002, p. 563.

50 Chao Wu, Liability and Compensation for Bunker Pollution, *Journal of Maritime Law and Commerce*, Vol. 30, 2002, p. 564.

(b) 由于应由船舶所有人对其行为，疏忽或过失负责的在船上或不在船上的任何人的行为、疏忽或过失所引起的陆上或水上其他人的人身伤亡，任何其他财产的灭失或损害，或任何权利的侵犯。但对于后一种人的行为、疏忽或过失，船舶所有人仅在其行为、疏忽或过失是在驾驶或管理船舶时，或在货物装船、运输或卸船，以及在旅客上船、乘船或上岸时发生，才有权限制其责任；

(c) 与清除船舶残骸有关的法律所要求的和由于或有关浮起、清除或毁坏任何沉没、搁浅或被弃船舶（包括船上任何物件）而发生的义务或责任，以及由于港口工程、港池或航道所造成的损害引起的义务与责任。

可见，《LLOSS 1957》规定的索赔请求与《LLMC 1976》的基本相似，因此根据《LLOSS 1957》进行责任限制与根据《LLMC 1976》限制责任存在的困难相同。另外，由于上述《LLMC 1976》第 2 条第 1 款规定的（f）项索赔在《LLOSS 1957》并不存在，因此，责任人的清污费用和清除措施的责任只有在船舶沉没、搁浅或被弃的情况下才能限制。[51]

综上，燃油污染的责任人不论是适用《LLMC 1976》还是适用《LLOSS 1957》进行责任限制都存在着不可克服的困难。因此，笔者认为《燃油公约》关于责任限制的规定不具有确定性，不利于责任人责任限制权利的实现，也不利于索赔纠纷及时合理地解决。

2. 燃油污染责任限制基金的独立性

在海事实践中，为确保损害赔偿的顺利进行，法院经常会扣押责任人的其他财产作为保障。因此，如果责任人要在其他财产免于被法院采取强制措施的情况下享受责任限制，就必须设立一个基金。设立基金的方式，可以由责任人向受理案件的法院或其他主管当局提交专款，由法院或其他主管当局以保管人的名义存入银行；也可以由责任人提供被法院或其他主管当局认可的担保函。设立责任限制基金的方式有利于保障受害人和责任人双方的利益。

海事事故产生的损害通常包括船舶燃油污染损害、船舶和所载货物的损坏或灭失、人员伤亡等。因海事事故引发的索赔诉讼中，如果只有燃油污染损害，依据可适用的国内法或国际体制设立赔偿责任限制基金不存在障碍。但如果同时涉及燃油污染索赔和其他损害（如货损货差）索赔时，则会产生困惑，即上述索赔是否都应包括在依据适用的法律（如根据《LLMC 1976》）设立的责任限制基金之内？换言之，船舶所有人此时为享受燃油污染赔偿责任限制，在为货损货差索赔设立一个海事赔偿责任限制基金的同时，是否必须另行设立一个燃油污染赔偿责任限

51 Chao Wu, Liability and Compensation for Bunker Pollution, *Journal of Maritime Law and Commerce*, Vol. 30, 2002, p. 564.

制基金?

最初在国际海事组织法律委员会讨论《燃油公约》的过程中，一些国家热切希望设立一个完全由船东提供资金的基金专门用于燃油污染损害赔偿，[52] 但该提议遭到各方，特别是船东和保险界的强烈反对。[53] 因为各国在责任限制问题上已有默契，即燃油污染损害的索赔应该包括在根据《LLMC 1976》建立的责任限制基金之内。[54] 如果《燃油公约》单独规定一个确定的责任限制基金，在燃油泄漏的情况下，对《LLMC 1976》缔约国的船舶来说，至少要建立《LLMC 1976》责任限制基金和燃油污染责任限制基金两个基金；如果污染是来自一艘载有有毒有害货物的船舶，则须设立三个基金，即有毒有害物质责任限制基金、《LLMC 1976》责任限制基金和燃油污染责任限制基金，这对船舶所有人和保险人都不利。

但笔者认为，燃油污染责任限制基金应该独立。首先，从文义上解释，《燃油公约》第 7 条要求提供的保险或担保数额“等于根据适用的国内法或国际机制规定的责任限制额，不得超过经修正的《LLMC 1976》”，即要求在所有其他索赔的责任限制基金之外，单独设立一个燃油污染责任限制基金。其次，从横向的比较可以看出，一般的船舶油类物质污染设立的责任限制基金是独立于其他索赔的，没有理由把同是油类物质污染的燃油污染区别对待。最后，从保护海洋环境的角度考量，船舶燃油污染对海洋环境的损害并不亚于海事事故造成的其他损害，把燃油污染索赔和其他索赔设立在同一个基金内，不利于补偿船舶燃油污染对海洋环境的损害。

3. 燃油污染责任限制限额的差异性

根据《燃油公约》第 6 条的规定，船舶所有人及提供保险或其它财务担保的人，可以根据可适用的国内或国际体制享受责任限制。一般情况下，责任限制的权利和责任限额受法院地法约束。但由于不同国家关于燃油污染的责任限制不同，有些国家是某个责任限制公约的缔约国，如新加坡、澳大利亚、比利时、丹麦、芬兰、法国、德国、英国、印度、荷兰、挪威、波兰是《LLOSS 1957》的缔约国，瑞典则是《LLMC 1976》的缔约国；有些国家有专门的国内立法处理燃油责任限制，如美国《1990 年油污法》；[55] 而有些国家则根本没有燃油污染责任限制的法律。而中国

---

52 Michael N. Tsimplis, The Bunker Pollution Convention 2001: Completing and Harmonizing the Liability Regime for Oil Pollution from Ships, *Llord's Maritime and Commercial Law Quarterly*, February 2005, p. 91.

53 Patrick Griggs, International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001, at http://www.bmla.org.uk/documents/imo-bunker-convention.html, 12 December 2006.

54 宋春风：《2001 年〈关于燃油污染损害民事责任国际公约〉介评》，载于《海商法研究》第 5 辑，第 30 页。

55 由于《1990 年油污法》规定，油污包括燃油污染，因而关于油污的责任限制也当然适用于燃油污染产生的责任。

则既没有加入《燃油公约》，也没有专门规定燃油污染责任限制的法律，对于燃油污染能否适用《海商法》的责任限制，存在争议。此外，《燃油公约》并没有对缔约国的资格做出特别的限制，如果一个既没有自己的责任限制的国内立法，也不是相关的责任限制公约的缔约国的国家加入《燃油公约》，[56] 那么，船舶所有人对燃油污染承担的责任可能是无限的。船舶所有人可能成为不公平的责任限额的承担者，而且无法评估他们由于燃油泄漏所面临的财务风险。由于限制数额的差异性和不确定性，保险人也有同样的困难。

（四）强制保险

海洋环境污染损害事故一旦发生，不仅给受害方造成严重损失，而且巨额的赔偿责任往往使责任方无力承担而破产倒闭、人员失业，数十年的经济积累可能因一次污染事故化为乌有。为了保障各方的利益，国际上的现行做法是对船舶进行强制保险或相应的财务保证。[57] 强制保险和财务保证是两个概念，但同为燃油污染损害赔偿的担保方式，对于受害人具有同样的法律作用。因此，《燃油公约》对二者作了类似的规定。为了行文方便，本文将以强制保险为例进行说明。

1. 强制保险的实体规定

《燃油公约》第 7 条规定了强制保险的投保人、投保的船舶、强制保险和财务保证证书的签发主体等问题。

(1) 投保人

《燃油公约》第 7 条第 1 款仅仅要求登记的船舶所有人投保，而不要求《燃油公约》第 1 条“船舶所有人”定义中的其他船舶所有人投保。而其第 7 条第 10 款规定：“任何污染损害索赔可直接向保险人或为登记船舶所有人的污染损害责任提供财务担保的其他人提出。”从《燃油公约》的行文看，这里的“保险人”并不仅仅限于登记船舶所有人，还包括“船舶所有人”定义中的其他船舶所有人，因而，受害人行使直接诉讼权利并不限定为“登记所有人”的强制保险人，但要求登记的船舶所有人之外的人都遵照《燃油公约》第 7 条投保显然是不现实的。[58]

---

56 Herry Lawford, Oil Spills and Compensation System, Oil Spill International Conference 2000, at http://www.pcs.gr.jp/doc/esymposium/12173/epaj2000.html, 26 November 2006.

57 将船舶所有人投保强制责任险的要求予以公约化是国际海事组织目前的工作重点之一，而国际海事委员会目前研究的方向是希望能将现有各公约的各自规定予以统合，二者面临的最大问题均来自责任保险市场，特别是国际保赔集团的消极抗争，这与美国《1990 年油污法》要求进出美国的油轮均须出具财务担保的情况类似。尽管目前面临着船东团体和国际保赔集团与国际环境保护和保护受害人趋势的顽强抵抗，但船舶所有人强制责任保险公约化似乎不可抗拒。

58 Patrick Griggs, International Convention on Civil Liability for Bunker Oil Pollution Damage 2001, at http://www.bmla.org.uk/documents/imo-bunker-convention.html, 12 December 2006.

（2）船舶

根据《燃油公约》第 7 条第 1 款的规定，在缔约国登记的大于 1000 总吨的船舶要投保燃油污染险。应当注意的是，1000 总吨以上的船舶如果没有投保强制保险，并不影响其享有责任限制的权利。

根据《燃油公约》，缔约国主管当局应当向拥有强制保险或财务保证的船舶签发证书，证明该强制保险或财务保证的有效性。[59] 由于普通商船的数量远远超过油轮的数量，[60] 将适用于油轮的体系延伸适用于普通商船，[61] 给国家制造了巨大的行政管理负担。尽管《燃油公约》规定允许由缔约国选择一个机构或组织来签发证书，但是，这只是将行政负担从一方转到另一方，并没有消除或减少这种负担。[62]

(3) 保险金额

根据《燃油公约》第 7 条第 1 款的规定，投保的金额应当与可适用的国内或国际责任限制制度规定的赔偿责任限额相等，但不超过按经修正的《LLMC 1976》设立的限额。《燃油公约》起草者曾经把“可适用的国内或国际体制”解释为污染损害发生国适用的法律，而不是船舶登记国适用的法律。[63] 在损害发生国不止一个的情况下，由于不同国家的责任限制制度不同，强制保险或财务保证担保的金额也不同，可能会造成混乱。同时如果船舶登记所有人、光船承租人或船舶经营人、管理人分别投保，保险金额不确定不利于责任的划分，因此有人建议应明确保险的金额。[64] 但是这个建议并没有得到采纳，原因有二：第一，这一建议不具有必要性，如果强制保险所确定的保险数额和实际责任数额不一致，可以立即要求保险人补足差额，而没有必要明确规定一个固定的数额。[65] 第二，该建议缺乏可行性，对《LLOSS 1957》的缔约国而言，由于投保的金额应当与可适用的国内或国际限制制度规定的赔偿责任限额相等，确定保险数额（一般情况下，《LLOSS 1957》的责任限额比较低）等于承认保证更大数额的责任限制，这是《LLOSS 1957》缔约国所不愿意看到的。

---

59 《燃油公约》第 7 条第 2 款。

60 以 1999 年为例，世界主要国家 1000 总吨以上海上商船拥有量为 29212 艘，而 1000 总吨以上的海上油轮拥有量为 6671 艘，下载于 http://www.iicc.ac.cn/oversea/sts/shcyyl.html，2006 年 5 月 10 日。

61 《CLC 1992》第 7 条规定，在缔约国登记的并且载运 2000 吨以上作为货物的散装油类的船舶的所有人必须进行保险或取得其他财务保证。

62 Chao Wu, Liability and Compensation for Bunker Pollution, *Journal of Maritime Law and Commerce*, Vol. 30, 2002, p. 566.

63 Patrick Griggs, International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001,at http://www.bmla.org.uk/documents/imo-bunker-convention.html, 12 December 2006.

64 IMO Legal Committee-79th Session, at http://www.comitemaritime.org/news/nl1999.html, 17 November 2006.

65 Chao Wu, Liability and Compensation for Bunker Pollution, *Journal of Maritime Law and Commerce*, Vol. 30, 2002, p. 566.

2. 强制保险的程序保障——直接诉讼

尽管有人会认为受害人对保险人提起直接诉讼并没有存在的必要，[66] 但笔者认为，《燃油公约》最终规定的直接诉讼的权利，是保障受害人合法权益的重要手段。

(1) 受害人提起直接诉讼的对象

只有明确哪些人可以被直接提起诉讼的情况下，受害人才能行使直接诉讼的权利。对此，《燃油公约》第 7 条第 10 款规定："任何污染损害索赔可直接向保险人或为登记所有人的污染损害责任提供财务担保的其他人提出。"可见，提起直接诉讼的对象包括保险人和登记所有人的财务担保人。笔者注意到，《燃油公约》在措词上，对保险人没有进行限定，却把财务担保人限定为登记所有人的财务担保人。《燃油公约》之所以如此规定，原因在于实践中光船承租人、船舶经营人和管理人提供财务担保的方式比较少见。从受害人角度看，由于登记所有人的强制保险或财务保证是强制要求的，受害人可以对登记所有人的强制保险人或财务担保人直接提起诉讼进行索赔。

(2) 强制保险人的诉讼地位

如果原告同时将船舶所有人和责任保险人或财务保证人作为被告提起诉讼，则船舶所有人和强制保险人或财务保证人属于共同被告。这也是受害人维护自己利益的最好做法，比如，在船舶所有人丧失责任限制而保险人或财务人享有责任限制的时候，受害人同时向船舶所有人和保险人或财务保证人提起诉讼，不仅可以在保险人或财务保证人的责任限额之外从船舶所有人处得到补充的赔偿，而且可以防止在向保险人或保证人提起的诉讼终结之后超过了对船舶所有人的诉讼时效。[67] 如果受害人直接将强制保险人列为被告提起诉讼，强制保险人在诉讼程序中有权要求船舶所有人参加。

三、我国船舶燃油污染损害赔偿责任的立法思考

我国目前没有关于船舶燃油污染损害赔偿的专门立法，涉及这方面的规定仅仅散见于一些法律和行政法规中。归纳起来，具有以下特点：第一，有关条文抽象，

---

66 在《燃油公约》中是否作出同样的规定，代表保险人和船东利益的国际组织观察员和一些国家代表提出了强烈的反对意见，认为这种规定与"责任人先付"这一责任保险的基本原则相悖，超出了保险人的承受能力。但这一意见并没有得到多数国家响应。国际海事组织第 81 届法委会最终决定采用《CLC 1992》的模式，即赋予受害人可以直接起诉保险人的权利，同时赋予保险人相应抗辩的权利和享受责任限制的权利。IMO Legal Committee-81thSession, at http://www.comitemaritime.org/news/n12000.html, 18 October 2006.

67 司玉琢主编：《海商法专题研究》，大连：大连海事大学出版社 2002 年版，第 441 页。

可操作性较差。比如《民法通则》第 124 条规定：“违反国家保护环境防止污染的规定，污染环境造成他人损害的，应当依法承担民事责任。”但是，由谁承担责任、承担什么责任、如何承担等问题均没有进一步的规定。第二，多为调整非平等主体之间纵向关系的行政法规，缺乏平等主体之间的民事责任与赔偿的规定。《防止船舶污染海域管理条例》作为《海洋环境保护法》的实施条例，专门有一章规定了船舶污染事故的损害赔偿，但只是提出了诉讼程序上适用《环境保护法》的规定，赔偿责任及赔偿金额的纠纷由港务监督调解处理。可以认为，我国目前缺乏一套完整合理的赔偿责任机制对船舶燃油污染进行规范，不利于对受害人合法利益和我国海洋环境的保护。

目前国际上关于船舶燃油污染损害的赔偿机制有两种类型，一是《燃油公约》建立的赔偿机制，二是美国《1990 年油污法》建立的赔偿机制。《燃油公约》是国际上对船舶燃油污染损害进行法律控制的努力和协调，代表了多数国家共同的价值取向。但是作为妥协的产物，《燃油公约》也存在许多不确定和不合理的地方。而《1990 年油污法》虽然在赔偿机制上基本上采纳了《燃油公约》的模式，但是作为国内法，由于无需妥协于其他国家的利益，因而在具体准则上反映了美国的单方需求和单边标准。有鉴于此，笔者认为建立我国的船舶燃油污染损害赔偿责任机制，应当结合我国的实际情况吸纳《燃油公约》的规定，同时借鉴吸收《1990 年油污法》的合理内容。

对于建立燃油污染损害赔偿机制的途径，学术界有两种观点，第一，参加《燃油公约》，借鉴公约的机制在修改《海商法》时，专门制定一章关于船舶污染损害赔偿责任，把船舶燃油污染损害责任作为其中一节予以规定；[68] 第二，以单行法的形式制定一部调整船舶类物质损害赔偿责任的法律。[69] 笔者认为第一种模式更为可取，理由为：第一，《海商法》的修改势在必行，在新修订的《海商法》里规定船舶燃油污染损害赔偿责任，可以降低立法成本，尽快建立船舶燃油污染损害赔偿责任制度，使有关案件的审理有法可依；第二，船舶燃油污染损害赔偿责任与《海商法》里的其他制度是相互联系的，规定在同一部法律中，有利于与其他制度的相互衔接，避免法律之间的冲突。

下文仅对我国船舶燃油污染的责任主体、责任承担和强制保险进行讨论。

（一）责任主体

我国关于船舶燃油污染损害的责任主体的规定，散见于有关环境保护的法

68 司玉琢主编：《海商法专题研究》，大连：大连海事大学出版社 2002 年版，第 442 页。

69 许光玉、周崇宇：《海上油污损害赔偿制度的现状和立法建议》，下载于 http://www.ccmt.org.cn/hs/explore/exploreDetial.php?s1d=214，2005 年 11 月 11 日。

律、法规中，[70] 且没有解决责任主体的确定问题。笔者认为，应借鉴《燃油公约》有关责任主体的规定，把包括登记所有人、光船承租人、船舶经营人和管理人在内的船舶所有人规定为直接责任主体。

对于潜在责任主体，应区别对待非光船承租人和应急反应者。非光船承租人在一定情况下承担燃油污染责任，可以扩大污染索赔的途径，有利于承租人提高风险意识，尽量租用良好的船舶进行运输，从而减少燃油污染损害事故的发生。从这个角度说，非光船承租人作为燃油污染损害的潜在责任主体是合理的。但是应急反应者不同，如前所述，《燃油公约》通过决议敦促缔约国规定其责任豁免，是否享受责任豁免依赖于一国国内法的规定。如果不给予应急反应者责任豁免，将会打击其救助产生燃油污染或有可能产生燃油污染的船舶的积极性，不利于船舶燃油污染的防止和减少。因此，笔者认为我国立法应明确规定应急反应者享有责任豁免。

（二）责任承担

对于单方责任主体的责任承担，笔者认为，我国立法应采用《燃油公约》的规定，由船舶登记所有人和被视为船舶所有人的光船承租人、船舶经营人和船舶管理人以及他们的强制保险人或财务保证人承担连带责任。如前所述，规定直接责任主体承担连带责任，可以扩大受害人的索赔途径。至于其内部责任分担，笔者认为以过失比例作为承担的方式比较合理。

对于多方责任主体之间的责任承担问题，实践层面尤其复杂。以船舶碰撞为例，船舶碰撞涉及的责任人一般为两个或两个以上，碰撞双方的过失情况不同，引起损害的类别也不同，因此船舶碰撞涉及的法律问题比较复杂。而船舶碰撞导致的燃油污染涉及的法律问题更为复杂，对于法律关系的性质、责任人是否承担责任、责任如何分配都存在争议。

1. 理论角度的考察

(1) 法律关系之界定

要正确地适用法律、界定责任主体，首先要明晰所涉及的法律关系的内容和性质。有学者认为，船舶碰撞产生的燃油污染损害应该包含在船舶碰撞引起的对第三人的财产损害之中，适用有关船舶碰撞的法律。[71] 笔者认为，船舶碰撞引起的对第三人财产损害和船舶碰撞产生的燃油污染损害是两个不同的法律关系。首

---

70 如《防止船舶污染海域管理条例》第 12 条规定：“发生污染事故或违章排污的船舶，其被处以罚款或需负担清除赔偿等经济责任的船舶所有人或肇事人，必须在开航前办妥有关款项的财务担保或缴纳手续。”另见《海洋环境保护法》第 90 条第 1 款的规定。

71 邱文宽：《海洋油污染损失怎么“买单”》，下载于 http://www.ccmt.org.cn/hs/explore/exploreDetial.php?sId=121，2005 年 6 月 2 日。

先，从侵害的对象看，虽然船舶碰撞和船舶燃油污染都对第三人的财产造成损害，但是燃油污染损害是基于对环境造成损害而产生的，二者性质不同，因此其法律规制也应当不同。其次，从主体看，船舶碰撞法律关系的主体因造成损害的不同而不同。船舶碰撞造成第三人财产损害的，主体双方分别是过失的碰撞方与第三人，过失的碰撞方对第三人的财产损害按照责任比例承担赔偿责任；船舶碰撞造成第三人人身伤亡的，碰撞双方为一方，受害人为另一方，碰撞双方对受害人承担连带责任。而船舶碰撞产生的燃油污染损害法律关系，主体一方是碰撞方，另一方是因为海洋环境受到污染而受到损害的人。因此。二者不能混淆，把船舶碰撞的法律规则适用于船舶碰撞产生的燃油污染法律关系中会引起荒谬的结果。[72]

(2) 行为性质之认定——共同侵权

共同侵权行为是现代侵权行为的一种主要形式。对于共同侵权行为的构成，学术界有以下几种主张：一是共同故意说，认为共同加害人之间必须有意思联络，即有共同故意，才构成共同侵权；[73] 二是共同过错说，认为共同侵权是二个以上的行为人基于共同的故意或过失对他人合法权益的侵害；[74] 三是客观说，即关联共同说，认为共同侵权行为以各个侵权行为所引起的结果，有客观的关联共同即可，行为人之间不必有主观上的联系；[75] 四是折衷说，认为行为人主观上有相同或相似的共同过错，客观上行为人的行为具有关联性。[76] 笔者认为共同侵权行为的认定宜采用“客观说”，即数个的行为人的行为相互关联，共同产生了某种损害后果，就可认定共同侵权行为成立。[77]

船舶碰撞产生的燃油污染是否属于共同侵权行为，争议很大，主要原因是各方对导致燃油污染损害的原因行为认识不同，因此澄清原因行为尤为必要。

有人认为，漏油是燃油污染损害的原因。船舶碰撞并非必然产生燃油污染，但燃油泄漏必然产生污染。碰撞能否造成污染损害取决于船载货物或燃油，不取决于碰撞本身。假设碰撞导致泄漏的物质是无污染性的水，则污染损害就不可能发生。[78] 但笔者认为，表面看来，船舶碰撞产生的燃油污染有“碰撞”和“漏油”两个原因行为，但从两者的关联性分析，漏油并不是独立的行为，认为漏油是燃油污

---

72 在内部责任划分上，可以适用《海商法》关于船舶碰撞的法律规定，但这是不同层面的问题。

73 钱国成：《共同侵权行为与特殊侵权行为》，载郑玉波、刁荣华主编：《现代民法基本问题》，台北：汉林出版社 1981 年版，第 59 页。

74 王利明主编：《民法•侵权行为法》，北京：中国人民大学出版社 1993 年版，第 354~357 页。

75 刘士国著：《现代侵权损害赔偿研究》，北京：法律出版社 1998 年版，第 85 页。

76 张新宝著：《中国侵权法》，北京：中国社会科学出版社 1998 年版，第 167 页。

77 李挚萍：《再论环境污染侵权无过错责任》，下载于 http://www.riel.whu.edu.cn/show.asp?ID= 608，2005 年 8 月 13 日。

78 李轶川：《油污损害因果关系之经济分析》，下载于 http://www.ccmt.org.cn/hs/explore/exploreDetial.php? s1d=11，2006 年 5 月 13 日。

染损害原因的观点人为地否定了船舶碰撞和漏油作为一个行为整体的客观联系。碰撞可能产生多种直接结果，漏油只是其中之一。船舶碰撞是行为人的作为或不作为造成，其中有主体意思的参与，但漏油却不包含人为的因素，漏油与否不取决于人的意志，而是由碰撞的程度决定的，它不同于人为的排污行为。所以，船舶碰撞才是燃油污染的原因行为。[79] 而船舶碰撞行为是碰撞各方共同实施的，尽管双方并不存在污染损害的共同故意，各行为人之间没有意思联络，但双方实施了污染的共同行为，因而构成共同侵权行为。

(3) 责任承担方式——连带责任

笔者认为，共同侵权行为的责任承担方式，除法律法规明确规定共同侵权人不承担连带责任外，共同侵权人的责任应适用《民法通则》第 130 条的规定承担连带责任。[80] 连带责任是船舶碰撞产生的燃油污染损害赔偿适用无过错责任原则的正确表现形式，理由在于：

首先，连带责任形式有利于保护受害人的合法权益。由碰撞的各方承担连带赔偿责任，可以减少出现因碰撞船舶中的一方破产或无能力清偿污染损害而造成受害人的损失无法得到或完全得到弥补的情况。

其次，连带责任形式符合无过错原则的基本要求。无过错原则不考虑碰撞各方的过失情况，无论有无过失，都应对实际造成的污染损害承担赔偿责任。一方完全赔偿受害人的损失后，可以依据其在碰撞中的过失比例，向其他各方追偿。有人会认为要求碰撞各方承担连带责任会加重航运企业的营运风险，影响航运业的发展，其实不然。航运业的发展不能以牺牲环境和他人合法权益为代价，连带责任的确立可以促使船舶所有人或经营人更加谨慎地经营。权衡利弊，笔者认为碰撞各方承担连带责任更为可取。

最后，无论是对共同侵权人还是对受害人，连带责任都充分体现了公平的价值取向，是一种值得提倡的船舶共同侵权责任制度，有将其适用所有船舶共同侵权行为领域的必要。[81]

2. 实证角度的分析

对涉及第三方的责任承担问题上，司法实践对碰撞船舶的所有人是否承担连带责任并不统一。由于船舶一般油类物质污染损害和船舶燃油污染损害的归责原则相同，因此笔者认为，对船舶一般油类物质污染损害责任承担问题的实证分析适用于船舶燃油污染损害的责任承担。

(1) 连带责任赔偿

---

79 杜以星：《船舶碰撞油污损害的民事责任形式——兼谈法律适用》，下载于 http://www.ccmt.org.cn/hs/explore/exploreDetial.php?s1d=261，2006 年 5 月 14 日。

80 《民法通则》第 130 条规定："二人以上共同侵权造成他人损害的，应当承担连带责任。"

81 邓瑞平著：《船舶侵权行为法基础理论问题研究》，北京：法律出版社 1999 年版，第 138 页。

1988 年 2 月 6 日，格伦纳符海运公司所属柯宁莎斯海运公司经营的“Vlacherna Breeze”轮与上海远洋运输公司所属的“潮河”轮在粤东海域碰撞，“符”轮漏油造成污染损害，污染受害人以共同侵权应承担连带责任为由起诉两艘船舶的船舶所有人和经营人。广州海事法院审理认为：“‘符’轮与‘潮河’轮在航行中发生碰撞，导致‘符’轮洞穿溢油，污染海域，致使我国粤东沿海地区的渔业和养殖业造成损害和损失，已构成共同侵权，被告对此应负连带责任，赔偿原告因油污损害所造成的经济损失。”[82] 该判决采用了连带责任赔偿的原则，有利于保护受害人的利益，比较可取。

(2) 漏油船舶单独赔偿

如 1998 年广州海事法院审理的“津油 6 号”轮污染案[83] 及 1999 年“闽燃供 2 号”轮污染案一审[84] 都是判决由造成污染的船舶所有人承担责任。

1998 年 11 月 13 日，中国籍“津油 6 号”轮和“建设 51 号”轮在广州港水域发生碰撞，造成“津油 6 号”轮油舱破损，所载 0 ＃柴油大量泄漏，对周围水域造成严重污染，而“建设 51 号”轮没有漏油。原告以两船船舶所有人共同侵权造成国家渔业资源损失为由提起诉讼，要求两船船舶所有人承担连带责任。广州海事法院经审理认为：本案的污染源是“津油 6 号”轮泄漏的 0# 柴油，污染环境的责任人是其船舶所有人，故“津油 6 号”轮船舶所有人应对国家损失承担全部赔偿责任。“建设 51 号”轮没有漏油，其船舶所有人在本案中不直接对国家损失承担责任。

1999 年 3 月 24 日，中国船舶燃料供应福建有限公司所属“闽燃供 2 号”轮在珠江海域与台州东海海运有限公司所属“东海 209 号”轮发生碰撞，“闽燃供 2 号”轮船体破裂、沉没，致使 2000 吨重油流入海域造成污染。一审法院认为，油污损害民事责任适用无过错责任原则，在此原则下油污损害是谁造成的，就应由谁负责，由漏油方单独承担赔偿责任，不考虑漏油方与第三方在碰撞事故中的责任。因此判令“闽燃供 2 号”轮船舶所有人承担油污赔偿责任。

漏油船舶单独赔偿的观点认为油污损害是一种特殊侵权行为，适用无过错责任原则，在任何情况下，漏油方都是唯一的责任主体，都要单独对受害方承担损害赔偿责任。但笔者以为，既然燃油污染损害是双方的碰撞行为造成的，完全由漏油方单独承担油污赔偿责任是不公平的，也掩盖了污染损害是漏油方和第三方共同造成的真相，既不利于保障受害方的利益，不符合保护海洋环境的价值取向。比如，两船碰撞导致一船漏油，而该漏油船舶沉没或者该漏油船舶根本没有强制保险或者财务保证时，坚持漏油船舶单独赔偿的原则，受害方的利益就得不到保障。

---

82 许光玉、周崇宇：《涉及多艘船舶造成油污损害的赔偿主体和责任的法律问题》，下载于 http://www.ccmt.org.cn/hs/explore/exploreDetial.php?sId=215，2006 年 10 月 12 日。

83 1999 广海法商字第 113 号。

84 1999 广海法事字第 047 号。

(3) 按碰撞责任比例赔偿

“闽燃供 2 号”轮的二审法院认为两船碰撞造成污染损害构成共同侵权，而碰撞造成油污损害属于第三人的财产损失，应由碰撞两船的船舶所有人按照过错责任比例承担赔偿责任。《海商法》第 169 条规定，双方互有过失造成的碰撞，碰撞船舶仅对第三人的人身伤亡负连带责任，对第三方的财产损失并不负连带责任，而是按照过失比例承担赔偿责任。因而判决被告按责任比例承担油污损害赔偿责任。

“闽燃供 2 号”轮的二审法院认同了碰撞船舶构成共同侵权的观点，但在责任承担上却采取了按碰撞责任比例赔偿的做法。按碰撞责任比例赔偿可以一次性解决受害人赔偿的问题和各方的责任划分问题，减少诉累，但却混淆了船舶碰撞和油类物质污染两个性质不同的侵权行为。船舶碰撞是一般的侵权行为，适用过错责任原则，受害人要获得赔偿，就要证明损害事实、碰撞双方的过失、过错与损害事实之间存在因果关系。而油类物质污染是特殊的侵权行为，适用无过错责任原则，受害人无须证明加害方是否有过错，造成了油类物质污染损害就应予以赔偿。在油类物质污染损害赔偿之诉中适用船舶碰撞的过错责任原则违背了无过错责任原则不考虑碰撞各方过失的基本特征，陷入适用无过错责任原则和同时又违背该原则的悖论。对受害人而言，只能按已确定的比例向各方追偿，增大了得不到赔偿的风险，显然不合适。

3. 立法建议

根据以上分析，笔者认为船舶碰撞产生的燃油污染属于共同侵权行为，其产生的是连带责任。建议我国立法参考美国《1990 年油污法》的内容，作如下规定：第一、发生事故的当事人之间的责任依据其过失比例进行划分。第二、造成污染事故的第三人对燃油污染损害赔偿承担连带责任。

（三）责任限制

《海商法》第十一章海事赔偿责任限制的规定是否适用于船舶燃油污染损害，存在争议。有观点认为，船舶燃油污染不能享受责任限制，原因在于，第一，限制责任不符合“严格责任制”的原则；第二，《海商法》第 208 条第 2 款规定，“中华人民共和国参加的国际油污损害民事责任公约规定的油污损害的赔偿请求”不能适用第十一章“海事赔偿责任限制”的规定，故油污损害属于“非限制性债权”；第三，《民法通则》没有关于责任限制的规定。

笔者认为，燃油污染可以依据《海商法》进行限制。理由：第一，“严格责任制”是归责原则，不影响责任限制制度；第二，燃油污染损害是典型的海事案件，符合《最高人民法院关于海事法院受案范围的规定》，实体法上应适用《海商法》第三，燃油污染损害并不是“非限制性债权”，而是因为相应的国际公约另有特殊的责任

限制制度，所以不适用《海商法》的有关规定。但是如前所述，燃油污染损害不属于我国加入的《国际油污损害民事责任公约》的调整范围之内，当然就应该适用《海商法》的规定；最后，《海商法》第 207 条第 1 款规定："在船上发生的或者与船舶营运、救助作业直接相关的人身伤亡或者财产的灭失、损坏，包括对港口工程、港池、航道和助航设施造成的损坏，以及由此引起的相应损失的赔偿请求，可以依照本章规定限制赔偿责任"。燃油污染损害应属于本款的范围。

（四）强制保险

强制保险可以从财务上保障责任人在事故发生后有赔偿能力。为了保护受害人，各国普遍采取强制保险的做法和措施。我国尚未建立完整的具有可操作性的强制保险制度，不利于保障受害人的利益。因此，笔者建议我国应尽早建立强制保险制度。

1. 强制保险或财务保证

在实体法上，我国仅在《海洋环境保护法》第 66 条规定："国家完善并实施船舶油污损害民事责任制度；按照船舶油污损害赔偿责任由船东和货主共同承担风险的原则，建立船舶油污保险、油污损害赔偿基金制度。"从这个原则性的规定可以看出，我国目前只是把船东和货主列为保险的有关当事人，而对保险的种类、保险的金额等均没有规定，不利于对受害人的保护。笔者主张借鉴《燃油公约》，规定船舶登记所有人的强制保险义务，同时鼓励其他船舶所有人积极投保，保险金额为该船舶可以享受的责任限制的金额。

2. 受害人直接诉讼

根据我国《保险法》的规定，保险人对责任保险的被保险人给第三者造成的损害，可以依照法律的规定或者合同的约定，直接向该第三者赔偿保险金。[85] 可见，如果没有法律的明文规定和合同的约定，受害人就不能直接向保险人要求赔偿保险金。但是，纵观我国法律，仅《海事诉讼特别程序法》第 97 条规定："对船舶造成油污损害的赔偿请求，受损害人可以向造成油污损害的船舶所有人提出，也可以直接向承担船舶所有人油污损害责任的保险人或者提供财务保证的其他人提出。油污损害责任的保险人或者提供财务保证的其他人被起诉的，有权要求造成油污损害的船舶所有人参加诉讼。"笔者认为，此条规定也应当适用于船舶燃油污染损害诉讼。但并没有相关的实体法律赋予船舶燃油污染损害的受害人直接向保险人请求保险金的权利，程序上的权利就没有现实的内容，无法实现对受害人利益的保障。因而，在立法时应明确规定受害人享有直接向保险人请求赔偿的权利。

直接诉讼在我国可能产生的困难是，如果船舶燃油污染责任人出具的是一般

85 《中华人民共和国保险法》第 50 条第 1 款。

保证，而不是连带保证，那么直接诉讼的权利会与我国关于一般保证的规定相冲突。按照我国《担保法》及《最高人民法院关于适用〈中华人民共和国民事诉讼法〉若干问题的意见》的规定，在一般保证情况下，债权人只能先向债务人索赔债务，在债务人不能清偿其债务的情况下，债权人才能要求保证人承担保证责任。这样，在保护受害人和一般财务保证人的权利这点上，法律陷入了两难境地：如果严格遵循一般保证的原理，受害人只能先向燃油污染责任人进行索赔而不能先直接诉讼财务保证人，那么受害人的利益得不到及时的救济；如果承认受害人直接诉讼比一般财务保证人的权利优先，那么一般保证的规则就被打破，一般财务保证人的利益就得不到保护。

因此，笔者认为，在一般财务保证人和受害人的权利产生冲突的情况下，唯一的办法是遵循一般的选择原则，即“两利相权取其重，两害相权取其轻”。从保护海洋环境和受害人的角度出发，应该认为受害人的直接诉讼权利优先。从法理上说，《海事诉讼特别程序法》和将来关于直接诉讼的实体法上的规定，是特别法的规定，应认为是《担保法》有关一般保证规则的例外。即使船舶所有人出具了一般财务保证，也应承认受害人向一般财务保证人直接提起诉讼的权利。[86]

如前所述，《海事诉讼特别程序法》第 97 条规定保险人或财务保证人在诉讼程序中有权要求船舶所有人参加，但学界对此时的船舶所有人在诉讼中的地位有不同的意见，多数人认为应当作为无独立请求权的第三人，也有人认为应当以共同被告的身份出现。在最高人民法院制订的《关于适用＜中华人民共和国海事诉讼特别程序法）若干问题的意见》中，将船舶所有人的诉讼地位规定为无独立请求权的第三人。[87]

四、结　语

尽管是《燃油公约》的体制并不尽如人意，[88] 甚至有评论认为《燃油公约》产生的问题和它解决的问题一样多，[89] 具体表现为：首先，取消应急反应者责任豁免，不利于鼓励救助人对危难船舶进行救助；其次，没有单独的责任限制制度解决燃油污染损害赔偿责任的限制问题，从而引起责任限制适用上的困难；最后，《燃油公

86　司玉琢主编：《海商法专题研究》，大连：大连海事大学出版社 2002 年版，第 442 页。

87　《关于适用〈中华人民共和国海事诉讼特别程序法〉若干问题的意见》第 69 条规定：“海事法院根据油污损害的保险人或者提供财务保证的其他人的请求，可以通知船舶所有人作为无独立请求权的第三人参加诉讼。”

88　Michael N. Tsimplis, The Bunker Pollution Convention 2001: Completing and Harmonizing the Liability Regime for Oil Pollution from Ships, *Llord's Maritime and Commercial Law Quarterly*, February 2005, p. 100.

89　New Convention on Liability and Compensation for Pollution from Bunkers, at http://www.isma-london.org/focus/focus06.html, 27 December 2005.

约》中存在不明确的地方，不利于公约的统一适用。另外，由于《燃油公约》规定的生效条件太高，[90] 不容易生效，所以在很长一段时间里，燃油污染的责任与赔偿需要国内立法加以规制。[91] 但总体上看，正如国际海事组织秘书长比尔•奥尼尔所言："《燃油公约》的通过，完成了 30 年前国际海事组织成立法律委员会时提出的任务——通过一套全面而统一的国际规则，为所有船源污染的受害人提供迅速和有效的赔偿。"[92] 不可否认，《燃油公约》规定的责任基础、责任主体、责任承担方式、强制保险、直接诉讼等填补了国际上船舶燃油污染损害赔偿的空白，其建立起来的赔偿机制将对各国的国内立法产生巨大的影响。

反观我国，一方面，随着我国对外贸易的扩大，各种类型的船舶数量不断增加，燃油污染事故频率逐年上升，船舶老化和技术差也不断增加发生污染事故的可能性。另一方面，我国没有关于燃油污染损害赔偿责任的专门立法，法院在审理案件过程中存在适用法律的困难，不利于对受害人利益和海洋环境的保护。因此，研究船舶燃油污染损害赔偿责任的有关国际公约，对于我国相关法律制度的建立和完善具有重要的意义。

---

90 《燃油公约》第 14 条规定："一、本公约应自有 18 个国家（其中 5 个国家各自拥有的合计总吨位不少于 100 万总吨）对批准、接受或核准作了无保留的签字，或已将批准、接受、核准或加入的文件交存于本组织秘书长之日起一年后生效。二、对于批准、接受、核准或加入本公约的每一国家，经满足第一款规定的生效条件，本公约将自该国交存相应文件之日起三个月后对该国生效。"

91 The New Bunker Convention, at http://www.gard.no/Publications/GardNews/Recentlssues/gn165/art_7.asp, 27 December 2005.

92 Suzanne Starbuck and Roger Overall, Conventional Wisdom, at http://www.worldbunkering.com/pages/Issue6_2conventional.htm, 26 February 2006.

海域使用权法律性质与价值功能的双重性

巩　固 *

内容摘要: 传统法学界对海域使用权仅从单一视角进行分析，导致了其理论的片面性与诸多争议。从经济学的视角看来，海域使用权具有产权性质，承载着私益与公益的双重价值，经济与环保的双重功能，以此为基础可推导出海域使用权在法律上兼具公权与私权的双重属性，在法律实践中通过权利行使的公益限制、保障权利人经济利益、合理使用海域使用金等措施有助于实现海域使用权的双重价值与功能的统一。

关键词: 海域使用权　产权　公权　私权　价值 功能

一、海域使用权法律性质的公私之辨

海域使用权是用海主体依法享有的，在特定期间内对特定海域进行排他使用的权利。海域使用权是《中华人民共和国海域使用管理法》（以下简称“《海域使用管理法》”）确立的一项新权利，也是我国公民关于海洋资源使用的基本权利之一。

关于海域使用权的法律性质，学界主要有两种不同的观点：公权与私权。公权论者主要以《海域使用管理法》的公法性质推导出其所规定的海域使用权的公权性质，或以该法“管理法”之行政色彩论证海域使用权的公权性；私权论者则以现代社会民事权利由公法确定的普遍性加以反驳，并从“海域”本身的财产性推导出海域使用权的财产性，得出私权结论。[1] 在私权说中，其又有自然资源权、准物权、特殊物权以及物权等不同观点。其中，海域使用权的物权说，尤其是用益物权说

---

*　巩固，中国海洋大学博士研究生，研究方向为环境资源法。本文系教育部人文社会科学研究规划基金项目《中国海域有偿使用制度研究》的阶段性成果，项目编号：D2120-3。

1　刘兰：《海域使用权法律性质探析》，载于《学术交流》2005 年第 1 期。

是学界较普遍的观点。[2] 甚至有学者直接称之为“海域物权”。[3] 另外，还有学者认为其应为与土地使用权并列的物权的上位概念。[4] 由是观之，海域使用权私权说是目前法学界的主流；私权，尤其是物权或类似于物权的权利是法学界对海域使用权的普遍观点。

但是，无论坚持海域使用权私权性的学者有多么充足的理由，其都不得不承认海域使用权与传统物权的不尽一致性：无论其客体的特殊性还是权利内容的特殊性，无论是权利出处的公法性还是权利行使的严格程序，都预示了其实质上与所谓的“私权”并不是那么完全吻合，其性质并非可以那么单纯而绝对地加以划分。正如尹田教授所指出的：“事实就是，要论证海域是一种不动产是不难的，而要论证海域不是一种不动产也是不难的；要论证海域使用权是一种用益物权是不难的，而要论证海域使用权不是一种用益物权也是不难的。关键是为什么要做这种论证，或者说，关键是制度应当如何安排才是合理的。”[5]

尹田教授的客观求实态度令人赞赏。对于一种全新权利而言，单纯套用任何传统理论都不可能得出令人信服的结论，我们必须结合该权利的实际，去发展真正合适的理论。而判断理论的正确性，应该从其与实践的契合性，从如何更有益于社会实践等角度来进行，而不能削足适履。先入为主的做法只会蒙敝真理；单纯讲究理论上的完善和自圆其说而不顾社会实效也不是负责任的做法。

因此，在对海域使用权进行任何研究之前，首先且主要应予关注的是其制度实效而非其与传统理论的契合度。本文不拟如通常论者那样一开始便直接立定某种法学立场，以特定理论的捍卫者姿态去论证，而欲先跳出法学之外，试用经济学的立场对海域使用权的社会功能作全面考查，并在此基础上从法学角度对其进行探讨。

二、海域使用权的产权性质及其价值功能双重性的体现

2 崔建远：《海域使用权制度及其反思》，载于《政法论坛》2004 年第 6 期；樊静、张钦润：《海域使用权问题研究》，载于《烟台大学学报》2004 年第 1 期；叶知年：《海域使用权基本法律问题研究》，载于《西南政法大学学报》2004 年第 6 期；税兵：《海域使用权制度价值浅析》，载于《中国海洋大学学报》2005 年第 2 期；毛亚敏：《海域使用权初探》，载于《杭州商学院学报》2004 年第 3 期；崔凤友：《海域使用权的物权性分析》，载于《政法论坛》2001 年第 2 期等。

3 如学者尹田的论文（《海域物权的法律思考》，载于《河南省政法管理干部学院学报》2005 年第 1 期）与著作（《中国海域物权制度研究》，北京：中国法制出版社 2004 年版）均直接使用海域物权的概念。

4 关涛：《海域使用权问题研究》，载于《河南省政法管理干部学院学报》2004 年第 3 期。

5 尹田：《海域物权的法律思考》，载于《河南省政法管理干部学院学报》2005 年第 1 期。

在经济学的分析框架中，产权是一个核心概念。产权是主体对客体的经济性权利的反映，包括对财产的占有、使用、支配和收益等权能，基本上等同于法律上的财产权概念，法律上的所有权、各种用益物权、债权、知识产权、股权等皆可囊括在内，但必须具备："排他性"、"有限性"、"可处分"等基本特性。

作为经济理论的核心概念，产权不仅内涵、外延不断变化，其价值目标、承载功能也在不断完善。最初产权仅作为财产权的代名词，适用于私有财产领域，以保障权利人合法权益为唯一价值目标；其功能为通过对私益的保障为权利人提供激励，实现经济发展。后来，随着"外部性"[6]"公地悲剧"[7]等一系列理论的提出，人们逐渐认识到产权对权利人以外的他人乃至社会的影响。此时的产权制度，其价值目标由纯粹私益转向兼顾公益；在功能上，已不仅仅是一种以经济效益的最大化为唯一目的的"营利工具"，其还承载解决外部性、提供公共物品的功能。新任务的加入并没有使产权制度的意义有丝毫减损，反而极大增强了其适用范围与生命力。[8]在现代社会，经济激励与生态保护被公认为是产权的两大基本职能，二者缺一不可、不可偏废。

（一）海域使用权的产权性决定其功能双重性

尽管在权利性质界定上存在极大争议，学者们对于海域使用权的基本内容却意见一致。一般认为，海域使用权包括以下权能：（1）排他使用。《海域使用管理法》第 2 条第 3 款规定："在中华人民共和国内水、领海持续使用特定海域 3 个月以上的排他性用海活动，适用本法。"第 23 条第 1 款规定："海域使用权人依法使用海域并获得收益的权利受法律保护，任何单位和个人不得侵犯。"第 44 条规定："阻挠、妨害海域使用权人依法使用海域的，海域使用权人可以请求海洋行政主管部门排除妨害，也可以依法向人民法院提起诉讼；造成损失的，可依法请求损害赔偿。"上述规定清楚地表明海域使用权人对特定海域所享用的"排他使用权"。（2）限制使用。对海域使用的限制，既表现为空间、时间上的限制，又表现为权利排他性上的限制。海域使用权是对经审查批准的特定海域的使用，具有空间上

6 所谓外部性，是指在生产和消费中，一个人的行为给他人带来未经当事人同意并以货币形式进行补偿的额外成本或收益的情形，其典型如企业生产所致环境污染。

7 公地悲剧理论是有效产权缺失状态下，人们出于私利而滥用公共物品造成共同损失乃至集体毁灭的悲剧。

8 产权制度的适用领域由单纯的私有财产领域扩展至传统理论所不包括的公共物品领域，由单一的经济功能扩大至环境保护等公益功能，其重要性不仅没有因环境问题的出现而有所减损，反而更加凸显，人们普遍认识到合理的产权制度对生态环境保护的重要价值。

的有限性；该法第 25 条规定了海域使用权的最高期限，又予以时间上的限制；[9] 同时该法第 23 条第 2 款规定："海域使用权人对不妨害其依法使用海域的非排他性用海活动，不得阻挠"，对其权利排他性也予以一定限制；(3) 可处分。《海域使用管理法》第 27 条的三款规定分别规定了海域使用权的入股、转让与继承三种处分方式。[10] 另外，许多学者也认为，海域使用权人还享有对海域使用权的抵押权。[11]

由此可见，与通常实践中往往被虚掷的自然资源权利不同，海域使用权具有实实在在的财产属性，且各项权能都符合产权的基本特性。无论其法律性质如何界定，在经济学视角下，称其为产权都毫无问题。既然如此，海域使用权也应兼顾私益与公益，承担产权的解决外部性问题的任务，实现海洋资源综合利用与海洋环境保护的双重职能。

（二）海域使用权客体的公共财产性决定其功能的双重性

权利客体是权利内容所具体指向的对象，它决定权利的内容和行使方式，是权利的基本要素。海域使用权的客体是海域，在私权论者眼中，海域是一种财产，由此海域使用权是一种财产权；进而在法律身份上转化为物权。但此种简单的论证思路只看到了海域与一般财产的共性，而忽视了其由于自身特点所致的特殊性，不免失之偏颇。从自然属性上看，海洋具有整体性、流动性、开发主体广泛性、资源共享性等特点，难以如传统物权之"物"那样为个别人所绝对控制、独占使用、自由处分。从社会属性上看，海域不仅是一种为个人带来经济利益之财产，其还是重要的环境要素与生存空间，是人类社会最重要的生态环境之一，具有重要的生态价值。同时作为蓝色国土和重要的"公共资源"，其也具有关系国家安危的战略价值。

上述"公"性质决定了海域不是一种普通的可自由处分的财产，而是典型的公共财产，极易出现外部性问题。因此，对海域的任何权利性规定都必须考虑到此点。我国海洋资源开发领域长期存在的"无偿、无序、无度"现象，正是外部性作用的典型表现，其既导致了海洋资源利用的浪费与低效，影响开发者个人利益的获得；又对整个海洋环境造成严重污染和破坏，威胁到全社会利益。因此，如何使海洋开发行为的外部性内在化是海洋治理的关键。对此，明晰产权，建立有效的经济

---

9 《海域使用管理法》第 25 条："海域使用权最高期限，按照下列用途确定：（一）养殖用海十五年；（二）拆船用海二十年；（三）旅游、娱乐用海二十五年；（四）盐业、矿业用海三十年，（五）公益事业用海四十年；（六）港口、修造船厂等建设工程用海五十年。"

10 《海域使用管理法》第 27 条："因企业合并、分立或者与他人合资、合作经营，变更海域使用权人的，需经原批准用海的人民政府批准。海域使用权可以依法转让。海域使用权转让的具体办法，由国务院规定。海域使用权可以依法继承。"

11 尹田主编：《中国海域物权制度研究》，北京：中国法制出版社 2004 年版，第 55 页。

约束机制十分必要。只有通过建立一种“只有保护好环境才能获利，环境越好、获利越多”的环保与利润统一的机制，诱使开发者自发地关心环境、保护环境，才能将个人利益与社会利益、经济利益与生态利益有机结合在一起，才符合经济、社会、环境协调发展的要求，实现海洋经济的可持续发展。海域使用权的确立，不仅意味着海域开发者可以排他地充分利用海域；还在赋予权利的同时，明确权利人对海域的义务与责任，方便管理，从而更好地实现对海洋环境的保护。

三、海域使用权法律性质的双重性及其体现

由上可知，作为海洋资源领域最重要的产权，海域使用权具有经济刺激与环境保护的双重功能，私益追求与公益保护的双重价值。对此，即便民法学者也不乏有识之士：“海域使用权的物上请求权的行使必须与海洋环境资源的保护结合起来，从宏观、微观两个层次着手，才能达到海域使用权的圆满状态。”[12]“当然也应该看到，海域使用权虽然为一项民事权利，但规制海域使用权的法律却是从社会公共利益出发，以保证海域的合理和可持续利用为立法目的的，海域使用权必须在社会公共利益得以维护的前提下赋予使用权人，而其行使也要受到行政机关的制约和限制，具有较强的公共性。”[13]

如果经济刺激的功能与私益追求的价值可以在海洋使用权的物权说中找到解答，那么其环保功能由谁承载、公益价值如何体现呢？由于现代民法理论的发展，私权承担一定的公益职能已是普遍情形，许多学者认为公益职能对海域使用权私权说并不构成冲击，而坚持其为一种公法上规定的具有较强公共性的私权。

但本文认为，虽然法律发展到现代，出现以“公法私法化”和“私法公法化”为表象的融合，为社会公共利益需要而对个人权利加以限制（如环境义务的普遍赋予）已是私法的应有之义，但在对公益、私益的关注程度和调整方式上，公法与私法仍有根本不同，并由此构成了其互相区别的基本分野和各自独立存在的价值所在。以个人为本位、以个人利益的维护为基本目标的私权，与坚持社会本位、以社会利益的实现为根本目的的公权在公益关注程度上不可同日而语。私权对公益的消极“配合”，替代不了公权对公益的积极追求；经济活动的“自我谦抑”满足不了环境保护的主动要求。尤其在“海域”这一具有极强公共性的特殊财产面前，法律的出发点绝不能只是开发者的一己私利，而必须着眼于社会利益之整体。对海洋资源的充分利用和海洋环境的保护同为《海域使用管理法》所积极追求的基本目标，二者不可偏废。因此，唯一合理的解释只能是：海域使用权具有双重性，

12 樊静、张钦润：《海域使用权问题研究》，载于《烟台大学学报》2004 年第 1 期。
13 刘兰：《海域使用权法律性质探析》，载于《学术交流》2005 年第 1 期。

即兼具公、私性质。

同一权利兼具公私两种对立之性质，似乎不可思议。但实际上，在与资源有关的领域，某些权利具有双重性或“公私重叠性”是一种普遍观点，如在关于水权性质的认识上，就有不少学者持公私混合权利的观点。[14]

海域使用权的公权性与私权性划分主要是根据其权利内容、法律效果、权利目的、价值着眼点、客观实效等不同方面加以划分的。海域使用权的私权性，内容上体现为海域使用权人对特定海域的“排他使用”；在海域使用权人与作为海域所有人的“国家”之间建立起一种民事法律关系；权利目的在于海洋资源的充分利用，保障权利人经济利益；着眼于海域的财产价值；客观上起到“物尽其用”的效果。对国家而言，以有偿方式出让海域的行为本身就是所有权行使的表现；而对于海域使用权人而言，权利的获得则使其对海域的权益获得强大保障。

海域使用权的公权性，内容上体现为海域使用权人所承担的行政义务或社会性义务，如权利获得的审批程序、开发利用方式的限制、公益原则的例外等；[15] 其与海洋行政管理机关之间不仅有物权性民事法律关系，更有因从事受行政机关管理的涉海行为所产生的行政法律关系；这些义务的最终目的在于海洋生态环境保护与可持续发展这一公益目的；着眼于海域作为生态环境、生存空间的生态价值和作为公共物品、“国民财富”的社会性价值；在客观上起到“环境与资源保护”的效果。对国家而言，海域使用权的确定使得海域的权责更为明确，从而大大提高管理效率；对权利人而言，排他使用权的获得将使其更为理性地开发海域，客观上也有利于海洋生态的平衡与海洋资源的持续利用。

因此，本文认为，海域使用权是一种兼具公、私属性的权利。海域使用权制度，既是海域物权制度的根本，又是海洋环境保护制度的重要组成部分。

四、海域使用权价值功能双重性之法律实践

海域使用权法律性质的双重性，要求我们在法律实践中必须兼顾公益与私益，实现海洋资源经济价值与生态价值的统一。在法律实践中，应注意以下几点：

（一）海域使用权受且仅受公益限制

---

14 如日本金泽良雄教授之《水法》、我国学者斐丽萍之《水权制度初论》中皆持此观点，参见崔建远著：《准物权研究》，北京：法律出版社 2003 年版，第 45~63 页。

15 《海域使用管理法》第 30 条规定：“因公共利益或国家安全的需要，原批准用海的人民政府可以依法收回海域使用权。依照前款规定在海域使用权期满前提前收回海域使用权的，对海域使用权人应当给予相应的补偿。”

首先，海域作的使用必须遵照有利于社会利益、重要的社会价值及保护生态环境的要求予以严格限制。公权性不仅表现为其法律渊源、权利获得方式、获得程序等的行政性，更重要的是权利获得后在权利行使中仍要受到公益目的的限制与约束，这种约束将贯穿海域使用权的始终。《海域使用管理法》第 23 条、第 24 条、第 28 条、第 29 条、第 30 条等条款分别从排他使用的例外、海洋基础科研行为的禁止与环境信息报告义务、海域用途的确定、海洋污染设施拆除、公益收回等方面规定了对海域使用的限制。同时还规定了海洋行政主管部门对海域使用的监督检查权，并规定了相应责任，这些都体现了公权性的要求。但需要注意的是，法律中对海域使用权人的环境责任未明确规定，是一大疏漏，有待法律修改完善。同时行政机关也应在此方面发挥积极性，不仅对海域使用和海域使用金的情况进行监督检查，对于海域的环境质量也应加强监督检查。

其次，海域作为一种“财产”，其使用权为一种物权性质的权利，能够给权利人带来强大的权益保障，非为社会公益目的，不受任何干预与限制。“排他使用”是海域使用权区别于其他临时性涉海权利的基本点，也是其核心内容所在。只有赋予海域使用权人排他使用的权利，才能真正符合产权的要求，发挥产权的基本功能。所以，除海域自然条件和使用时间等法定条件外，海域使用权只受公益要求的限制，不受任何单位和个人的干涉。

最后，应充分发挥海洋功能区划的作用。尽管海域使用权的行使受且仅受公益的限制，但公益的判定是一个难题。尤其对于面积广阔、流动性强、涉及主体众多的海洋而言，是否符合以及如何实现公益不是一个简单的问题，既要受社会条件的制约，又要受海域自然属性及科学技术条件的制约。对此，综合海域的自然条件和经济、社会发展的需要，在科学基础上建立的海洋功能区划的意义尤为重大。作为海洋管理制度的基础，一切涉海行为，都应以海洋功能区划为基础作出。海洋功能区划不仅是海域使用权人的开发利用活动的基础，还为海洋行政主管部门的“海域使用管理和海洋环境保护工作提供科学依据”，[16] 其在实践中的运用应该进一步加强。

（二）保障海域使用权人的经济利益

海域使用权人对海域使用权的获得与行使，其目的在于获得经济利益，这也是私权性海域使用权的主要价值。尽管我们基于海域的“公”性质可对海域使用行为予以限制与约束，但是对于海域使用权人的经济权益，应当予以充分保障。这要求我们尊重海域使用权的物权效力，既要尊重其权利行使的独立性，非为公益需要不得干涉；又要尊重其权利的排他性，特定海域一经划定，即不得再从事其

16 国家海洋局：《全国海洋功能区划》，2002 年 9 月 10 日。

他排他性用海活动，或妨害权利人依法用海的非排他性用海活动。同时，在出于公益目的，而不得不对权利行使作出限制甚至收回的情况下，也要给权利人以充分的经济补偿。

（三）海域使用金的合理使用

作为海域使用之“有偿性”的集中体现，海域使用金是海域使用权产生的前提与对价，是海域有偿使用制度的核心。但目前相关法律规定偏重于征缴，对海域使用金的分配与用途规定不足，不利于海域使用权双重功能的实现。

《海域使用管理法》第 33 条第 2 款规定：“单位和个人使用海域，应当按照国务院的规定缴纳海域使用金。海域使用金应当按照国务院的规定上缴财政。”国土资源部《关于〈中华人民共和国海域使用管理法（草案）〉的说明》对此进一步解释：“主要的考虑是海域属于国家所有，国家作为海域所有人应当享有海域的收益权，海域使用者必须按照规定向国家支付一定的海域使用金作为使用海域资源的代价。”“不仅有助于国家所有权在经济上的实现，而且有利于杜绝海域使用中的资源浪费和国有资源性资产流失。”由此可见，目前海域使用金相关规定主要集中于其征收上，其着眼点尚仅停留在海域使用权的私权性上，只从财产收益与资源利用的角度考虑，缺乏对海洋环境保护等公益的关注。

本文认为，对于海域使用金而言，重要的不仅是收取，更是如何分配与使用的问题。海域使用金作为国家收入全部上缴财政，并不能发挥其最佳功效。海域排他使用是以其他潜在用海主体的经济利益以及全社会的环境利益损失为前提的，与税收等纯粹经济收益不同，海域使用金不能简单看作国家的“收入”，其包含大量应予补偿的社会成本。法律应进一步明确海域使用金的分配和用途，将其中的相当部分作为专项基金用于海洋环境保护和生态补偿，才能充分发挥海域使用权的生态性功能，实现其公益价值。

保护海洋环境免受陆源污染全球行动计划第二次政府间审查会议综述

朱晓勤 * 董琳 **

内容摘要: 由联合国环境规划署倡导的《保护海洋环境免受陆源污染全球行动计划》旨在应对人类陆地活动所引起的对海洋及沿海环境的健康、繁殖及生物多样性的威胁。本文是对2006年全球行动计划实施情况第二次政府间审查北京会议及其成果的综述，目的在于方便读者了解联合国和中国在保护海洋环境免受陆源污染行动方面的最新动态。

关键词: 《保护海洋环境免受陆源污染全球行动计划》 联合国环境规划署 《海洋环境状况》 《中国保护海洋环境免受陆源污染国家报告》 《北京宣言》

一、背景介绍

由联合国环境规划署（以下简称“环境署”）倡导的《保护海洋环境免受陆源污染全球行动计划》（以下简称“全球行动计划”）于1995年在美国华盛顿召开的政府间会议上获得通过。我国是该计划的108个成员国之一。《全球行动计划》旨在应对人类陆地活动所引起的对海洋及沿海环境的健康、繁殖及生物多样性的威胁。该计划是全球唯一明确提出处理淡水、沿海及海洋水环境等问题的机构。它提出在由地方、国家、区域到全球各级参与的基础上采取统一的跨领域的行动举措。《全球行动计划》促使世界上很多国家建立了相应的制度，检查立法框架和环境政策以保护海洋和沿海地区环境的可持续发展。2001年全球100多个国家参加了环境署在加拿大蒙特利尔召开的全球行动计划实施情况第一次政府间审查会议。此次会议主要是审查各国对行动计划的实施情况，提出新的工作目标和措

---

* 朱晓勤，法学博士，厦门大学法学院副教授。本文根据国家环保总局网站《保护海洋环境免受陆源污染全球行动计划》专题资料和《中国环境报》2006年10月15日至23日相关报道整理而成。
** 董琳，厦门大学海洋与环境学院环境管理专业2005级硕士研究生。

施。会议通过了《蒙特利尔宣言》，对《全球行动计划》的发展起到了有利的促进作用，被公认为是推动海岸、海洋和岛屿的生态系统管理的有效途径。

2006 年 10 月 16—20 日期间，全球行动计划实施情况第二次政府间审查会议在北京召开。本届会议的重点是在国家、区域和国际各个层面推动执行《全球行动计划》，并表明其作为促进海洋、沿海地区和岛屿及其相关流域可持续发展的一项灵活的工具的价值。本届会议分为两部分：第一部分会议的与会者有政府代表和其他利益攸关者（会议前 3 天），其审议结果提交给第二部分会议；第二部分会议的与会者包括各国部长和其他高级别代表（会议后 2 天）。

为了配合会议的召开，环境署发布了一份名为《海洋环境状况》的报告，对近年来全球海洋环境保护的现状进行了全面分析和评估，并逐一评价了有关全球海洋环境保护的 9 大关键指标。

该报告指出，全球海洋环境保护在三个方面进展可喜。其一是持久性有机污染物。目前 12 种持久性有机污染物的生产、销售和使用受到《关于持久性有机污染物的斯德哥尔摩公约》的控制。其二是放射性物质。1993 年，向海洋倾倒低水平放射性废物的行为已经被《伦敦公约》禁止，但经授权向海洋排放来自核燃料装置的放射性废物的行动仍在一些地方继续。目前海洋中的放射性物质基本上都是天然形成的，控制人为污染的措施是有效的。其三是石油。总体而言，同上世纪 80 年代中期相比，目前泄漏进入海洋的石油更少，污染程度下降了大约 2/3。报告指出，全球海洋环境保护在两个领域喜忧参半。其一是重金属。大多数发达国家已经采取措施控制范围广泛的重金属污染，但由于工业化、采矿和为了电力和交通而燃烧矿物燃料，像汞这样的一些重金属正在进入海洋环境。在北极一些区域，环状海豹和白鲸体内的汞浓度要比 25 年前高 2 至 4 倍。但进入北海的铅、镉和汞已经降低了 70%，其他取得进展的地区包括东北大西洋和地中海。其二是沉积物流动，由于修建大坝、大规模灌溉、城市化、森林砍伐以及同农业相关的用地变化等，沉积物和土壤的移动正在被显著改变。

报告显示四大指标正在呈恶化趋势。第一是污水指标。进入地中海的污水超过一半没有经过处理。在中东欧，许多大城市直接排放未经处理的废水。排入里海的污水有大约 60% 未经处理；在拉美和加勒比这一数字是 85%；在东亚，这一数字接近 90%，东南太平洋地区超过 80%；在西非和中非，这一数字是 80%。全球每年需要增加 560 亿美元的投资来处理废水排放问题。报告指出，这有可能是《全球行动计划》框架内最严重的问题，也是取得进展最小的领域。第二是富营养化指标。自 1960 年以来，沿海“死亡区”的数量每 10 年增加 1 倍，这同来自农业肥料流失、施肥、废水排放和燃烧矿物燃料的营养物的增加有关。这一问题的出现曾经在很大程度上限于发达国家，但现在正向发展中国家扩展。第三是海洋垃圾指标。尽管各国和国际社会采取措施努力控制海洋垃圾，但这一问题仍然逐步恶化。海洋垃圾来源于市政、工业、渔船以及船舶排放，大部分垃圾是不可生物

降解的。大约 70% 的海洋垃圾沉到海床，15% 留在海滩，其余 15% 漂浮在海面。第四是自然改造和栖息地破坏指标。接近 40% 的世界人口生活在只占陆地面积 7% 的沿海，到 2025 年，沿海区域的平均人口密度将从 1990 年的每平方公里 77 人增加到 115 人。这种增长，对过度利用海洋资源、污染以及生态系统的破坏和损失方面，具有严重影响。

二、中国国际论坛

2006 年 10 月 18 日，中国保护海洋环境免受陆源污染行动国际论坛以本届政府间审查会议的边会的形式举行。该国际论坛的议程分成三部分：中国政府部门工作交流；国际经验交流和中国地方经验交流。国家环保总局、交通部、建设部、水利部、农业部、国家林业局、国家海洋局、全军环办八个部门分别从各自的角度做了主题报告。国际经验交流部分介绍了西北太平洋行动计划组织对《全球行动计划》的贡献、2005 年加勒比海地区合作项目——加强卡塔赫那公约执行和加勒比海环境项目的合作、减少陆源污染的地中海项目协议经验、加拿大保护海洋环境免受陆源污染国家行动计划。中国地方经验交流部分包括上海和厦门保护海洋环境的地方经验和渤海陆源污染控制经验。这里主要介绍渤海陆源污染控制的行动与成效。

渤海是我国近封闭内海，在政治、经济、国防等方面具有重要的战略地位。环渤海地区自北向南分布有辽宁省、河北省、天津市、山东省。随着环渤海地区及入海河流上游流域地区经济、人口的迅速增长，渤海环境压力越来越大，生态环境问题日益突出。

党中央、国务院早在“九五”时期就对该问题给予了高度重视，将渤海列为国家环保重点工作“33211”之一。为此，国家环保总局于 2000 年组织编制了《渤海碧海行动计划》，坚持陆海兼顾、海陆统筹，以整治陆源污染为重点，旨在恢复和改善渤海生态环境，确保环渤海地区的可持续发展。计划的行动时期为 2001—2015 年，陆域范围涉及环渤海三省一市辖区内的 13 个沿海地市；海域范围涉及整个渤海和部分黄海海域，总面积 9.5 平方公里。

2001 年，国务院批复了《渤海碧海行动计划》（国函 [2001]124 号），明确了国家有关部门的职责分工，指出渤海环境保护的主要职责在地方人民政府。“十五”期间是该计划实施的第一阶段，在国家有关部门、环渤海地区各级政府的共同努力下，计划得到了积极落实，取得了显著的效果。

目前，《渤海碧海行动计划》“十一五”修编工作已经完成，其将在把握“十五”实施成效、问题和经验的基础之上，力求为“十一五”期间渤海环境保护提供依据和指导，以更好地落实国务院批复精神。

新修编的《渤海碧海行动计划》强调，保护海洋环境防止陆源污染是一项长期艰巨的工作任务。中国四大海区均面临着沿海地区社会经济高速发展的压力。经过“十五”期间中央和地方政府共同努力，渤海陆源污染控制工作已取得一定的成绩，但是，渤海局部近岸海域还存在严重的污染和生态退化问题，需要不断加大污染治理和生态保护的资金投入。

计划建议，建立以市（区县）、省（直辖市）和国家对直排污染源、河流、海域监督的监测体系。监测内容主要包括入海污染物监测、近岸海域环境质量监测、生态环境质量监测以及专项监测计划。

三、国内成果

（一）《中国保护海洋环境免受陆源污染国家报告》

在此次国际论坛上，国家环保总局发布了《中国保护海洋环境免受陆源污染国家报告》，这一报告将成为今后我国编制《国家行动计划》的基础技术文件。该报告由国家环保总局主持，参与的其它部门包括：交通部、农业部、建设部、水利部、国土资源部、国家海洋局、国家林业局、国家旅游局、中国人民解放军环保绿化委员会等，编写单位包括：中国环境科学研究院及沿海 11 个省（自治区、直辖市）的省级环保局。

这一报告的主要内容有：中国海区基本状况；主要陆域活动对海洋环境的影响；保护海洋环境的现有主要行动；推进海洋环境保护的国家计划；海洋环境保护的政策法规与管理制度建设；科学研究与国际合作；控制陆源污染存在的问题与建议。

报告提到，中国近海海域划分为渤海、黄海、东海和南海 4 个海区，生态系统多种多样，主要包括河口、海湾、滨海湿地、红树林、珊瑚礁、海岛等具有典型性、代表性的生态系统。目前已建有国家级海洋自然保护区 29 个，面积约 2.5 万平方公里，此外还建立了 8 处海洋特别保护区，保护对象包括多种珍稀濒危海洋生物物种、典型海洋生态系统及海洋景观地貌和自然历史遗迹等多种有价值的海洋资源。同时，以服务为基础的海洋经济发展尤其迅速，海洋经济领域出现了由“资源”开发向海洋“服务”的转变。

报告显示，2005 年，全国大部分近岸海域水质良好，局部近岸海域污染严重，远海海域水质保持良好状况。近岸海域一、二类海水比例占 67.2%，与上年相比上升 17.6 个百分点；三类海水占 8.9%，下降 6.5 个百分点；四类、劣四类海水占 23.9%，下降 11.1 个百分点。与上年相比，四大海域近岸海水水质均有不同程度好转，黄海和南海水质总体上较好，渤海水质一般，东海水质较差。全国沿海各省、

自治区、直辖市中，海南、广西、山东和广东省（自治区）近岸海域海水水质较好，上海、浙江近岸海域水质较差。

该报告还从城镇经济社会活动、农业生产活动、海洋交通运输、海洋倾废与海上石油开发、海岸带土地资源开发活动、沿海军事区域活动等 7 个方面统计了这些主要陆域活动对海洋环境的影响。针对这些方面的影响，报告总结了保护海洋环境的现有主要行动，包括污染控制、生态保护和修复、开展环境监测和专项调查等。

目前有 60 个国家已经提出或正在制定各自的《国家行动计划》。中国是《全球行动计划》的成员国之一，也是西北太平洋行动计划、南中国海与泰国湾项目及黄海大海洋生态系统项目等区域性计划的成员国。在国家行动层面上，为应对《全球行动计划》的要求，在国家环保总局的组织协调下，交通部、农业部、建设部、水利部、国土资源部、国家海洋局、国家林业局、国家旅游局、中国人民解放军环保绿化委员会等部门正在抓紧编制《中国保护海洋免受陆源污染国家行动计划》（以下简称“中国国家行动计划”），以指导和推动全国海洋环境保护工作。目前编制工作进展顺利，已完成了中国国际行动计划现状报告、涉海部门报告和沿海省（自治区、直辖市）报告，预计在未来一年内可以完成该计划。

（二）防治陆源污染，保护海洋环境——中国的工作和成效

中国作为一个海洋大国，保护海洋环境免受陆上活动的影响，促进沿海地区经济社会可持续发展是中国政府的一项重要任务。同时，也是中国政府对国际海洋环境保护事业的一项重要贡献。中国政府高度重视陆源污染的防治工作，采取一切措施防止、减轻和控制陆上活动对海洋环境的污染损害，并且按照“陆海兼顾”和“河海统筹”的原则，采取一系列的政策和措施，坚持不懈地做好陆源污染的防治工作。

1. 加强法制建设，保护海洋环境

在海洋环境保护法制建设方面，中国继 1982 年颁布实施了《海洋环境保护法》后，又先后颁布和实施了《防止陆源污染物污染损害海洋环境管理条例》和《防止海岸工程建设项目污染损害海洋环境管理条例》等。此外，我国制定了《近岸海域环境功能区划》，并以局长令的形式颁布了《近岸海域环境功能区划管理办法》。《近岸海域环境功能区划》的实施为指导我国沿海地方政府，在可持续开发利用海洋资源过程中，强化海域环境实现目标责任制管理提供了科学依据。

2. 制定和实施《碧海行动计划》，努力改善海域生态环境

《渤海碧海行动计划》是经国务院批复正式实施，并纳入国家环境保护“九五”和“十五”计划中的环境综合治理重点工程。通过该计划中的城镇污水处理厂、垃圾处理厂、沿海生态农业、沿海生态林业、沿海小流域治理、港口码头的油污染防

治、海上溢油应急处理系统的建设以及“禁磷”措施的实施，初步遏止了渤海海域环境继续恶化的趋势。为保护和改善海洋生态环境，促进沿海地区的经济持续、快速、健康发展，目前沿海其他 7 省、市、自治区也正在编制本区域的“碧海行动计划”，制定陆源污染物防治和海上污染防治的具体措施。此外，鉴于长江口和珠江口及其邻近海域生态环境日趋恶化，赤潮频繁发生，并直接威胁长江三角洲和珠江三角洲社会经济的可持续发展，为改善长江口和珠江口及毗邻海域的生态环境，中国正在制定长江口和珠江口及毗邻海域碧海行动计划。

3. 以海域环境容量控制陆源污染物排海总量

为贯彻落实《海洋环境保护法》，实施陆源污染排海总量控制制度，加强陆源污染防治工作，促进近岸海域环境质量的改善，我国开展了辽东湾海域环境容量测算试点项目。经过 2 年多的努力，该项目完成了陆源污染物入海通量调查和估算、辽东湾海域环境容量测算模型系统、辽东湾海域环境容量总量控制规划和辽东湾海域环境信息系统等专项研究工作，制定了各排污口的主要污染物最大允许排放总量，提出了辽东湾陆源污染控制对策建议，形成了以近岸海域环境功能区环境保护目标确定陆源污染物最大允许排放量的陆源污染物总量控制管理技术路线。该项成果已应用在辽宁省碧海行动计划（2006—2010 年）的编制中。

4. 防止和控制沿海工业污染

随着沿海工业的快速发展和环境压力的加大，中国政府采取一切措施逐步完善沿海工业污染防治措施。一是通过调整产业结构和产品结构，转变经济增长方式，发展循环经济；二是加强重点工业污染源的治理，推行全过程清洁生产，采用高新技术改造传统产业，改变生产工艺和流程，减少工业废物的产生量，增加工业废物资源再利用率；三是按照“谁污染，谁负担”的原则，进行专业处理和就地处理，禁止工业污染源中有毒有害物质的排放，彻底杜绝未经处理的工业废水直接排海；四是加强沿海企业环境监督管理，严格执行环境影响评价和“三同时”制度；五是实行污染物排放总量控制和排污许可证制度，将污染物排放总量削减指标落实到每一个直排海企业污染源，做到污染物排放总量有计划的稳步削减。

5. 防止和控制沿海城市污染

中国自改革开放以来，沿海城市发展迅速，沿岸海域环境压力加剧。对此，中国政府采取有力措施防止、减轻和控制沿海城市污染沿岸海域环境，例如调整不合理的城镇规划，加强城镇绿化和城镇沿岸海防林建设，保护滨海湿地，加快沿海城镇污水收集管网和生活污水处理设施的建设，增加城镇污水收集和处理能力，提高城镇污水处理设施脱氮和脱磷能力等，从而使沿海城市的环境污染防治能力进一步加强。此外，政府也加强对沿海城市污染治理的监督管理，结合国家“城考”、“创模”和“生态示范区”建设，将沿海城市近岸海域环境功能区纳入考核指标，强化防止和控制沿海城市污染物污染海域环境的措施。

6. 防止、减轻和控制沿海农业污染

一些沿海省、市结合生态省、生态市建设，积极发展生态农业，控制土壤侵蚀，综合应用减少化肥、农药径流的技术体系，减少农业面源污染负荷。除此之外，我国还严格控制环境敏感海域的陆地汇水区畜禽养殖密度、规模，建立养殖场集中控制区，规范畜禽养殖场管理，有效处理养殖场污染物，严格执行废物排放标准并限期达标。

7. 流域污染防治和海域污染防治相结合

国家环保总局组织编制了《辽河水污染防治计划》、《海河水污染防治计划》、《淮河水污染防治计划》等防治陆源污染综合治理计划，经国务院批复正式实施。通过上述《计划》中的城镇污水处理厂、垃圾处理厂、生态农业、生态林业、小流域治理等污染治理和生态建设工程，有效地削减河流入海污染负荷。

8. 积极参与国际合作，推进《全球行动计划》的实施

中国在采取一系列措施保护沿海和海洋环境的同时，积极参与海洋环境保护的国际合作，为保护全球海洋环境这一人类共同事业进行了不懈的努力。中国已缔结和参加的涉及海洋环境保护的国际条约和协议主要有：《1982 年联合国海洋法公约》、《1992 年生物多样性公约》和《1971 年关于特别是作为水禽栖息地的国际重要湿地公约》等。

自 1995 年《全球行动计划》产生以来，中国政府高度重视《全球行动计划》的实施工作，积极参与《全球行动计划》的第一次政府审查会。在全球行动层面上，中国积极参加《全球行动计划》工作；在区域层面上，积极参与环境署的区域海项目。

在国家层面上，环境署 / 全球行动计划秘书处多次与中国国家环境保护总局磋商，于 2004 年 1 月支持中国在青岛召开了第一次研讨会。2005 年至 2006 年，在全球行动计划协调办公室的支持下，进一步研讨和准备《中国保护海洋环境免受陆源污染国家行动计划》编制工作的有关活动，先后组织中国涉海部门和沿海省（市、自治区）代表召开了长岛、湛江、北京和西宁 4 次工作会议。2006 年，中国 10 个涉海部门成立了领导小组，指导中国《国家行动计划》工作的开展。目前，编制工作进展顺利，已完成了中国保护海洋免受陆源污染国家行动计划现状报告、涉海部门报告和沿海省（市、自治区）报告。

9. “十一五”期间保护海洋环境的主要对策

(1) 积极组织制订了《全国海岸带和海洋生态环境保护规划纲要》，促进沿海地区社会经济与海岸带和海洋环境的协调发展。

(2) 完善法规，依法行政。加强法制建设，完善《海洋环境保护法》配套法规。积极协调有关部门尽快完善《海洋环境保护法》配套条例、办法、规定、标准的制定。例如，修订《防治陆源污染物污染损害海洋环境管理条例》。依法行政，加大执法力度，保证环境法律法规的有效实施，促进海洋和沿海地区的可持续发展。

(3) 大力推进《碧海行动计划》的实施，积极推进重点海域环境保护规划工作。

(4) 积极推进陆源污染物排放总量控制制度。按照河海统筹、陆海兼顾的原则，开展近岸海域环境容量研究，以近岸海域环境功能区环境保护目标为限制条件确定陆源污染物最大允许排放量，为实施排污许可证制度提供依据。

(5) 加强国际合作，推进《全球行动计划》的实施。积极发展同世界各国和国际组织在海洋环境保护方面的交流与合作，认真履行国际环境公约和有关协议，大力推进《全球行动计划》在中国的实施，制定《保护海洋环境免受陆源污染国家行动计划》，继续推进“西北太平洋”、“东亚海”等区域海项目的实施。

(6) 编制国家重大海上污染事故应急计划，加强应急能力建设。为应对海上发生特大溢油或危险化学品泄露污染事故，积极组织制定渤海海区、黄海海区、东海区及南海区和台湾海峡船舶的重大溢油事故应急计划。

(7) 加强近岸海域赤潮的监测、监视和预警，努力减轻赤潮灾害。加强赤潮监测、监视的能力建设，制订赤潮监测、监视、预报、预警及应急方案，并对重点近岸海域、水产养殖区和江河入海口水域进行特殊监测和严密监视，千方百计减少赤潮灾害的损失程度，保障人民的生命财产安全。

（三）中国将《全球行动计划》纳入国家主流发展规划工作情况报告

由于本届《全球行动计划》第二次政府间审查会议的重点之一就是将《全球行动计划》作为主流纳入国家发展规划和预算机制，借此来促进《全球行动计划》的执行，使海洋环境得到切实的保护。因此，中国国家环保总局在 2006 年 10 月 16 日下午向大会报告了中国将《全球行动计划》纳入国家主流发展规划的工作进展情况。鉴于中国目前尚处于《国家行动计划》的编制阶段，该报告按照全球行动计划秘书处的报告框架，先行介绍了中国《国家行动计划》的组织启动、工作基础、进展、计划的措施和评估体系五个方面的情况。

1. 工作的启动

根据中国国务院部门职能分工，中国《国家行动计划》的相关工作由国家环保总局牵头负责。成员单位包括国土资源部、建设部、交通部、水利部、农业部、国家林业局、国家旅游局、国家海洋局和中国人民解放军 9 个部门。已经于 2003 年开始启动了《国家行动计划》的编制工作，制定了《国家行动计划》的编制工作计划，并得到了相关参与部门的认同，组织成立了涉海各部门专家和沿海省市专家组成的《国家行动计划》编制工作专家组。

近 3 年来，国家环保总局组织召开了准备编制《国家行动计划》的多次研讨会，组织完成了国家、相关部门和沿海地区的现状工作报告。全球行动计划秘书处对总局在准备《国家行动计划》过程中也给予多方面的支持。按照工作计划，在今后的各阶段中，还将根据不同的议题选择不同的参会对象经常开展各种研讨活动。

2. 工作基础

报告指出，虽然到目前为止，中国尚未系统地开展陆源污染控制政策措施评价以及对全国整个海域系统地开展海洋环境问题、压力、机遇和能力建设需求的识别工作，但是，陆源污染控制的合作及与其相关的框架已经形成；法律和财政框架的评价工作也已经启动；并且，中国已经建立起较完善的海洋环境监测网络、评价和报告机制。在编制《国家行动计划》过程中，将可以充分对现有的数据和监测网络进行评估和利用。

“十五”期间，三河（淮河、海河、辽河）、三湖（太湖、巢湖、滇池）、渤海污染防治工程是国家确定的重点流域、海域污染防治工程，其污染防治计划得到了国务院的批准。计划的实施为减少陆源污染、遏制海洋环境进一步恶化、恢复和改善海洋生态系统起到了重要的作用。尤其值得提及的是通过《渤海碧海行动计划》的实施，渤海近岸海域总体水质状况已有所好转。

目前，三河、三湖、三峡库区及上游、黄河流域、南水北调、长江流域、渤海海域的“十一五”污染防治规划的制定工作正在进行中。国家正在组织有关部门开展编制《渤海环境保护总体规划》，力图更加全面系统地提出流域和海洋社会经济发展、资源可持续利用和环境保护方面的问题。长江口及毗邻海域、珠江口及毗邻海域的碧海行动计划也正在编制过程中。

这些计划，为中国《国家行动计划》的制定和实施提供了良好的工作基础。

3. 编制进展

中国已经制定了完成编制《国家行动计划》的时间表，计划在 2007 年完成编制工作。依据部门间的职责分工，目前已经完成了执行机构的组成，明确了各自在编制《国家行动计划》中的职责分工。编制完成后的《国家行动计划》将会根据中国现行的行政管理程序履行。

当前，确定的中国《国家行动计划》的总体目标是：到 2010 年主要污染物排海总量得到有效控制，近岸海域海水水质逐步改善；到 2020 年，海域环境质量和生态状况明显改善。编制中国《国家行动计划》的指导原则是：协调发展、互惠共赢；强化法治、综合治理；不欠新帐、多还旧帐；依靠科技、创新机制；分类指导、突出重点。

目前已经完成的工作有：针对重点海域制定了确定项目优先性准则和建立项目优先顺序；同样，针对渤海、长江口、珠江口等重点海域提出了明确的规划实施途径及确定近期或中期行动计划。全国海域陆源污染控制项目优先顺序、项目实施行动计划也在考虑之中。此外，《国家行动计划》将按照“国家国民经济和社会发展第十一个五年规划”、“国家环境保护‘十一五’规划”和各省市国民经济和社会发展第十一个五年规划的有关要求，分步骤、分阶段控制海洋环境污染。

根据中国的国情，《国家行动计划》中涉及的资金问题将会通过以下几种途径解决：中央财政支持、地方财政支持、国债资金、银行贷款、有关利益相关方投资等。

4．拟采取的措施

中国《国家行动计划》中将会明确实施保障政策，并且提出遵循和强化等各种机制。根据财务策略规定进行的资金分配以及规划活动，将会列入中国《国家行动计划》的实施计划，这些资金计划将按年度进行分配。中国《国家行动计划》将明确公众参与策略，并鼓励公众参与各种相关的活动。

将采取的控制污染的具体措施有以下几个方面：工业污染源控制、城市污水治理、船舶与港口污染防治与监控设施建设、海洋工程污染控制、非点源污染控制、生态养殖推广、海上污染应急工程建设、技术支持体系建设、宣传教育与公众参与、加强国际环境交流与合作。

5．建立监测、评估和修订体系

在《国家行动计划》的制定过程中，还将考虑建立《国家行动计划》实施的监测、评估和修订体系，将会根据主要目标和战略建立用于评估的具体指标体系。体系制定后，将纳入相关部门的日常工作程序。评估《国家行动计划》的评价和报告制度将会按照定期和不定期等多种方式进行，具体细节将会列入未来编制的中国《国家行动计划》。

四、《北京宣言》

本届《全球行动计划》第二次政府间审查会议的重要成果之一是通过了《关于推动执行〈保护海洋环境免受陆源污染全球行动计划〉的北京宣言》（以下简称“《北京宣言》”）。该宣言由 104 个政府及欧洲委员会的代表共同拟定，也得到了国际金融机构、国际和区域组织、私营部门、非政府组织以及其他利益攸关者和主要团体的支持和同意。

《北京宣言》涉及到了许多与海洋环境有关的问题，其中包括：海洋和沿海地区及其资源的重要性；低地沿海地区和小岛屿发展中国家的易受灾问题；沿海地区城市化问题；海洋生态系统问题；将环境问题主流化；海陆统筹；财政困难；能力建设问题；制定法律框架和环境政策；多重利益攸关者的伙伴关系等。

与会各国通过《北京宣言》共同承诺在 2007—2011 年间通过以下行动推动执行《全球行动计划》：一要采用生态系统的办法；二要评估沿海地区和各大洋提供的物产及服务的社会和经济成本效益价值；三要建立国家、区域和国际不同级别的伙伴关系；四要在区域和次区域两级开展合作；五要将《全球行动计划》作为主流事项纳入国家发展规划和预算机制；六要支持环境署全球行动计划协调办公室的相关工作。

《北京宣言》还将应开展的保护海洋环境免受陆源污染的行动分为 4 个部分来分别进行阐述，即国家行动、区域行动、国际行动和环境署的行动。

第一，关于国家行动。首先，强调的依然是将《全球行动计划》的各项目标主流化并承诺实现的问题。这表明，主流化在推进实施《全球行动计划》中的重要性。其次，提出改进各级间的合作，以综合的方式管理流域、海岸、海洋及其它重要区域。这实际上是运用基于生态系统的管理方法，摒弃按行政区划来割裂整体环境单元的做法。再次，提出应对海洋提供的各种物产及服务进行经济评估，并应为解决环境问题提供资金等方面的支持。最后，提出应建立和执行持久的机制，使各利益相关方能够参与进来。

第二，关于区域行动。制定和执行针对陆地污染源和活动的议定书，借此来稳步推动执行《全球行动计划》。对各重要区域采用整体的基于生态系统的方法，建立和加强战略伙伴关系。

第三，关于国际行动。与会各国呼吁将《全球行动计划》进一步纳入各重要机构、团体和多边环境协定的政策、计划和方案；呼吁各金融机构和捐助国提供财政和技术支持；并且强调主流化问题和建立各级伙伴关系。

第四，关于环境署的行动。核准《全球行动计划》2007—2011 年期间的工作方案，并为其向环境署理事会 / 全球部长级环境论坛争取更多的财政支持；提请环境署理事会和全球部长级环境论坛核准《北京宣言》及此次第二次政府间审查会议的成果。

《北京宣言》重申，各国要坚决执行《全球行动计划》，并使之成为促进海洋、沿海地区和岛屿可持续发展的灵活和有效的工具。与会各国决定于 2011 年召开《全球行动计划》的第三次政府间审查会议。

“小三通对大三通的启示”学术研讨会综述

江家栋 * 吴林涛 **

2006 年 10 月 19 日，由厦门大学海洋政策与法律中心主办的“小三通对大三通的启示”学术研讨会在厦门大学法学院召开。本次研讨会主要讨论的是《中国海域管理问题及两岸交往中的海事法律问题》课题下的子课题《“小三通”六年回顾与启示》。鉴于该论题的重大现实意义，本次研讨会得到了众多相关部门与行业的大力支持，与会专家包括了来自厦门市海洋与渔业局、厦门市港务局、厦门市水路运输管理处、厦门市航标管理处、厦门轮船总公司、金门县议会、金门县政府港务处、运营“小三通”的新金龙、泉州号的船东等实践部门的主管人员，以及厦门大学法学院、厦门大学海洋政策与法律中心等机构的专家学者。本次研讨会的主要目的在于全面审视现行“小三通”政策的实际效果，协助有关政府部门进一步改善“小三通”的法律环境，以便对未来“大三通”的法律和政策作出稳妥的制度性安排，因此，此次研讨论更加注重倾听来自实务部门及相关运营者的建议，具体包括：

1. “小三通”的经营现状和成绩；
2. “小三通”中存在的问题；
3. “小三通”值得未来“大三通”借鉴的经验；
4. 近期“小三通”进一步发展的思路和方向；
5. 未来“大三通”对两岸政治、经济、文化及安全等方面的可能影响。

本次会议由傅崐成教授主持，来自两岸的与会专家采用专题发言和自由评议等方式，就上述议题进行了深入的交流和探讨。现将本次研讨会的主要观点综述如下。

一、“小三通”的经营现状和成绩

* 江家栋，厦门大学法学院国际法专业 2004 级硕士研究生。
** 吴林涛，厦门大学法学院国际法专业 2005 级硕士研究生。

来自厦门市水路运输管理处的赖世威处长从运输管理方面对“小三通”的经营现状和成绩做了介绍。

赖处长首先介绍了福建沿海地区与台湾地区海上通航的模式及运营现状。目前，大陆与台湾地区之间海上通航存在多种不同模式，具体包括福建沿海地区与金门、马祖、澎湖间海上客货直航（简称“小三通”或“局部通航”），两岸集装箱班轮试点直航和两岸三地运输等 3 种。

在这三种模式中，第一种模式目前交流得最为顺畅，参航企业均为两岸拥有经营资质的船公司，参航船舶为在两岸注册的船舶，采取悬挂公司旗和另纸签注等方式；主要运载福建沿海地区与金门、马祖、澎湖间往来的两岸旅客和福建省输出到金门、马祖、澎湖的砂石等建筑材料，实现了船通、货通、人通，以及挂旗方式的突破。

第二种模式开始于 1997 年 4 月 19 日，参航企业均为两岸拥有国际航运经营资质的船公司，参航船舶为两岸注资的方便旗船舶（台湾地区称为“权宜轮”），进出对方港口的船舶均需升挂对方旗和查验船舶相关证书并签注；主要运载福建省出口到欧美的中转集装箱，所运载的集装箱均为中转贸易货物，而福建与台湾的直接贸易货物无法进入台湾本岛。目前状况为船通但货不通。

第三种模式也于 1997 年开始运作，参航企业均为两岸拥有国际航运经营资质的船公司，既有集装箱班轮运输，也有不定期散杂货运输，参航船舶也是两岸注资的方便旗船舶；主要运载福建省出口到台湾的直接贸易货物，参航船舶必须绕道日本石垣或香港转关换单后才能进入台湾本岛。目前状况为货通但船不直接通。

此外，赖处长还介绍了两岸通航取得的成绩。5 年多来通航的实践证明，“小三通”是卓有成效的，也为“大三通”打下了良好的基础。相对于未有实质性通航的试点直航和费时费力的两岸三地运输，“小三通”取得前所未有的进展，具体表现在：(1) 实现了局部范围内的船通货通；(2) 实现了旅客通畅往来；(3) 突破了船舶挂旗方式的障碍；(4) 实现了通航谈判方式的突破。因此，交通部对“小三通”的成功运作给予高度评价，并在会议中明确表示，现有的“小三通”模式将成为今后直接“三通”的模式。

来自金门港务局的张国土处长则回顾了两岸“小三通”的法律依据。台湾地区主要是依据《离岛建设条例》第 18 条和《试办金马与大陆通航实施办法》，以及《两岸人民关系条例》第 95(1) 条。台湾地区进行“小三通”遵循“安全、秩序、渐进开放”及“优先实施‘除罪化’及‘可操之在我’部分”的原则，政策目的是促进离岛地区的建设与发展，并增进两岸良性互动，改善两岸关系。因此，台湾地区将“小三通”基本定位于促进两岸交流，因此在航运、商品贸易、人员往来、金融邮务及农渔发展等方面制定了一系列的方案措施，这些措施在运行几年来取得了一些成效。

第一，航运方面：为客运开通 3 条客运航线（金门—厦门、金门—泉州、金门—湄洲）、9 艘班轮参与营运，航班增至金门厦门间每日往返共 20 航班、金门泉

州每日往返各 1 航班，载客量逐年稳步增长，2006 年前 9 个月份已有 454686 人次，接近上年全年的 518728 人次。在货运方面，开通 9 条航线，共有 45 艘货轮参与营运，载货量 2006 年前 8 个月份达 25 万吨，已超过去年一年的 23 万吨。

第二，商贸金融方面：在商品贸易方面，可以输入金马地区的大陆货品，经台湾主管机关同意的有 457 项；可以由金马地区输出至大陆的货品，则限于金马地区产制商品、台湾地区报纸、香芋及福建台商所需的台湾地区商品；进口金马地区销售免关税项目商品共 318 项。在金融方面，自 2005 年 10 月 3 日起，在金马地区试办新台币与人民币兑换业务，只要是符合“小三通”出入境资格的人民，均可向在金马地区许可的金融机构兑换台币、人民币，每次以 2 万元人民币为上限。

第三，人员往来方面：2002 年 8 月起，台商可经金马进出大陆，福建籍配偶可经金马进出大陆；2004 年 3 月起，福建籍荣民[1]可经金马进出大陆；2004 年 5 月起，旅台金马乡亲可经金马进出大陆；2004 年 12 月，大陆居民可正式以旅行名义来金；2005 年 2 月起，以 2000 年 12 月 31 日前设籍金马的台湾地区人民及其一定范围内的亲属，可以组团方式经金马进出大陆；2006 年 5 月起，2000 年 12 月 31 日前设籍金马的旅台乡亲及其一定范围内的亲属可以自由行的方式经金马进出大陆。目前台湾居民要来厦门必须专案申请，其中申请理由为宗教理由和交流活动，尚未允许除宗教外的交流。

来自金厦海运股份有限公司的杨肃元董事长认为，“小三通”已经通过实践产生了一定的影响力，能使两岸同时受益。原来大陆去台湾的观光客办证需要 1 至 2 个星期的时间，经过金门方面的努力，现在只需要 3 天。便利的措施也使旅客人数增加了，对金门的观光事业产生了推动作用。截至 2006 年 9 月，旅客人数已经超过 160 万人次，其中有 90％是台商；按人均消费 1 万台币来计算，拉动消费 160 亿新台币，折合约 40 亿人民币，经济效益甚为可观。“小三通”对大陆地区，尤其是厦门、泉州、福州等地，也很有好处。以厦门为例，金门和马祖的台商也会带来相应的经济拉动，如购买商品房等，其投资也超过了 300 亿。所以，“小三通”的实施对两岸是一个双赢的举措，在经济发展和民间交流方面产生了积极影响。

二、“小三通”实践中在船、人、货、港等方面的问题

金门港务局的张国土处长认为，“小三通”对金门经济的促进幅度不如对厦门经济的促进幅度大，是目前台湾方面不愿意深入开展“三通”的原因之一。同时，他还特别提出，由于台湾地区相关政策的严格限制，目前“小三通”的运营方案中

1 “荣民”是荣誉“国民”的简称，通常是指台湾地区的退伍军人，其具体范围可参见“‘行政院’国军退除役官兵辅导委员会荣誉‘国民’证制发作业规定”。

与原先设定的目的存在不小的距离：

第一，在旅客进出方面，金厦“小三通”海上客运的便利性已见成效，但适用对象受限，比如福建省外的荣民、大陆配偶、个别进出的旅台金门乡亲、台籍人士等均不得经金门进出大陆，未能进一步发挥更大的通航效益。

第二，囿于申照程序不便，大陆人士来金旅游的人次寥寥无几，无以带动金门观光产业的发展。

第三，在民生物质进口方面，程序冗长复杂不便，关税规费繁重，导致交易商通过常规进口的方式获取的利润空间有限，间接促使了走私现象日益隐蔽且频繁，低劣大陆商品充斥市场，严重影响了民众健康与安全。

第四，在原材料进口方面，可输入金马的大陆商品虽然品种繁多，但实际申请输入的却很少，并且局限于砂、石、建材等，其主要原因在于税费负担与进口程序的不便，未能发挥“引进大陆价廉原物料，带动离岛产业发展”的政策效果。

第五，在邮务往来方面，迄今尚未启动，不能直接通汇与邮务往来，这已严重影响了现行双边邮务运作。

第六，海运市场单向倾斜，金门福建海运市场日渐成长，但期货运流向单向输入，再加上台湾商品仍不得经金门输入福建，回运空载加重成本负担，遏阻了金门航运市场发展机会。

第七，对金门地区经济发展较具影响的“加工产业”、“两岸货品交易中心”等重大工商建设计划未能如期推进。

第八，大陆与台湾航行制度方面亦存在冲突：大陆航标的制式采取国际 A 制式（左红右绿），而台湾采取的是 B 制式（左绿右红）。

来自厦门海关的吴司达处长主要从货物通关的角度介绍了近几年“小三通”的运行情况。福州、厦门与高雄从 1997 年起开辟了一条通道，用以便利两岸之间的货物运输，但由于两岸特殊的政治关系，货物到台湾是不能落地的，仅仅作为中转而不能通关。所以现在只能通过福州、厦门、香港、日本等地进行中转，导致了巨大的经济损失，而日本方面仅需要盖章就可以收取很高的费用。现在厦门海关已经向中央反映了这个问题，争取进行变通。大陆方面一直在积极地给台湾各种关税优惠，如金门地区的旅客，原来仅仅只能随身携带 2 瓶金门高粱酒，现在已经增加为 4 瓶。诸如此类细微却实在的措施，对于像金门县这样的缺乏支柱产业，而靠“金门三宝”之类具有地方特色经济的地区，其实是产生了实质性的经济效益。

杨肃元董事长则从台湾船舶运营者的角度，介绍了目前“小三通”运行中的一些不对等现象。

首先，在相关费用方面，大陆的政策并没有给予台湾同胞一些优惠。比如厦门的船到金门，靠泊费不超过 2000 元；而金门的三条船靠泊厦门，包括在码头的费用在内，总费用需要约 8000 元。再如，大陆的船在金门卖出 1 万张票，金门是不收税的；但如果台湾方面在大陆卖出 1 万张票，相关的港务、码头则要收取

4.6%–8% 的营业税，而同样的税在台湾仍然需要交纳，这对运营者是很不合理和公平的。大陆到金门的船舶如果发生故障，金门港务处派的拖船都是免费，而金门方面的船要是出问题，厦门港的收费比高雄港的还要贵。

其次，金厦“小三通”被定位于“两岸的特殊航线”。大陆在“一个中国”的原则下是认为是国内航线，却比照国际标准的收费，而金门方面却是按照国内标准收费，两种做法迥异。其实台湾的船东都不同程度地畏惧“大三通”，因为目前大陆船员的工资只相当于台湾船员工资的 1/4；台湾方面的船长一个月工资大约是 2 万人民币，而大陆现在的情况大约是 7000~8000 人民币，这样就很难竞争。所以，“小三通”刚开始的时候，每天的乘客只有不到 200 位，“新集美”号甚至在金门的报纸打出了“一块钱就可以来回”的广告。由于大陆运营者是公营企业，金门私营的企业无法与之抗衡。所以现在“小三通”能维持一个稳定的市场价格已经很不容易，希望能继续保持。杨董事长进一步补充道，据统计，两岸的载运量，大陆约是 60%，而金门为 40%。他在“二次航班”上发现，大陆观光客到金门都坐大陆的船，因为大陆的船有优惠，这也是一个不对等的情况。如果金门方面的运营商也降价，则价格战不可避免。诸如这类，都亟待双方共同协商并及时改进。

对杨董事长提出的一系列问题，来自厦门轮船总公司的许跃峰船长做出了解释。他认为，之所以会出现台湾方面船东认为大陆方面收费过高的问题，主要是由于目前两岸存在着诸多障碍。例如，两岸对于海图的合作不顺畅，导致对方公司的船舶触礁，在相当程度上增加了运营成本。此外，大陆方面的实际消耗费用也比较高。由于台湾没有加入某些国际公约，而依这些公约要求，大陆方面的船舶配员至少需达 15 人方可开航，而台湾只需 8~9 人即可。同时，大陆对船舶的管制程度较高，对船舶的安全要求严格（如对船舶报废年限有严格的规定，台湾没有），使得大陆船舶的安全成本较台湾高出许多。由于大陆方面对船公司的政府干预力度较台湾方面大许多（大陆方面有 150 个左右的部门可以管理，而台湾方面仅有 30 个部门），且在管理体制和能力方面尚不成熟，职能交叉现象比较严重，这也导致了大陆的船公司在处理行政事务上的费用较多。

来自厦门市港口管理局的林明坚处长也介绍了目前厦门在开办“大三通”前亟待解决的问题。首先是管理体制问题。目前厦门港务局兼管漳州的三个管区，共管辖着八个管区，但在待遇上仅享受二级局的编制和待遇，导致人手不够，办公经费紧张。其次，在港口硬件方面，尽管厦门号称“天然良港”，实际上厦门港的自然水深不足 14 米，仅能容纳 2~5 万吨级船舶，5~10 吨级的船舶便无法顺利通行。同时，厦门港口陆域纵深浅，仅 400 多米，货物无处堆放，需要大量用地。厦门航道淤积严重（严重者 8 年内淤积了 8 米），且淤积速度很快，需要大量经费清理。今年拨款 25 亿元作为清淤预算，但仍然不够。

三、“小三通”对未来“大三通”的启示

林明坚处长还介绍了他在进行“小三通”工作时的一些心得和值得将来“大三通”借鉴的经验。

首先，林处长回忆了这 6 年中在厦金航线上所作的工作，深深地体会到了要坚持“从群众中来，到群众中去”、“相信群众，依靠群众”的工作方法。在设计厦金航线的具体方案时，无论是当初的航路设计、船舶选择，还是福建省交通厅最近出台的关于福建与台湾通航的一些规定，都是通过理论和实务部门，包括金门的各位同仁，共同配合、集思广益而来的。这种工作方法就是一种经验，在将来“大三通”时仍然可以适用，是放之四海而皆准的。

其次，诚信为本是将来“大三通”时需要借鉴的又一经验。当年林处长与金门的张处长谈判时，没有形成任何文件性的报告，最多是双方签定一些航班表。但正是靠着同为中国人的信念，靠着闽南人间的诚信，“小三通”实施至今，取得了巨大成功。正所谓“人无信而不立”，这一点在“大三通”时仍需保持和发扬。

第三，林处长认为两岸三通就是要解决两件事，一是亲情，二是通商。两岸血脉相通，“小三通”让分离 50 多年的亲人再度相聚，这是两岸人民盼望已久的事情，是人心所向、大势所趋。另外，目前“小三通”的乘客有 80% 至 90% 是来大陆投资的台商，若转道香港或澳门，则每趟行程要多增加 1 万新台币，“小三通”的开航无疑大大降低了台商往来两岸的成本。可见，亲情和经济上的利益正是“小三通”的生命力和存在基点。只要“小三通”不断完善，不断满足两岸民众的共同需要，它就会有市场，并最终促成“大三通”的顺利开通。

最后，林处长通过引用胡锦涛总书记和钱其琛同志的指示认为，两岸三通对等原则并不一定适用，大陆方面实际上也没有计较得失，反而单方面出台了一系列的优惠措施，便利了两岸的沟通和交流，这是指导搞好“小三通”乃至“大三通”的重要意见。

四、近期完善“小三通”的思路和方向

厦门市水路运输管理处赖世威处长认为，在目前“小三通”的基础上，厦门应充分配置港口与航运资源，充分发挥厦门港在两岸通航中的特殊作用和在港口竞争中的优势，举全省之力，推动以福建、厦门与台湾地区的两岸直航，改变海峡两岸航运格局。

按照以上思路，赖处长认为厦门市相关政府部门应采取以下措施：1. 明确厦门港的功能和定位，完善厦门港口规划布局；2. 推进区港联动，建立自由贸易港区；3. 优化通关环境，适应国际中转业务要求；4. 加快港口建设，提高通航靠泊能力；

5. 增辟加密航线，构建国际航运网络；6. 拓展港口腹地，吸引周边地区资源；7. 降低港口资费，扶持发展中转业务；8. 调整对台航运政策，争取有所突破。

同时，赖处长还建议积极向中央申请政策，在遵守两岸通航问题的“一个国家内部事务、直接双向、互惠互利”的原则下，借鉴“小三通”航运模式，实现两岸真正的直航，利用地缘优势，促进厦门对台航运地位的提升。凡两岸航线不挂方便旗（国际航线除外），货物在金门转单，使大陆货物经由金门直通台湾本岛。建议新增航线严格审批，从严控制，尽量往厦门港集中，并允许参照厦金直航模式，把厦门与金门的公共锚地作为第三地，实现两岸三地直航。将来开辟其他两岸航线时，也应当首先考虑厦门港。

金门港务局的张国土处长也进一步设想了“小三通”近期发展的重点：第一，金门福建之间应加大发展边贸经济的力度，包括商贸、金融、投资、技术、劳动和旅游，并推动“金闽台旅游发展圈”的建设和发展。

第二，除目前准由“小三通”往返大陆人员外，应积极建议扩大对象如下：1. 凡持有台湾地区护照的国民，均比照港澳模式，经由“小三通”自由进出大陆地区；2. 祖籍金门的华侨及亲属，准其适用“小三通”，并得由台湾返回侨居地；3. 在台非福建籍荣民、大陆配偶，得经金马进出大陆。

第三，在观光旅游方面，应全面开放大陆人士入台观光或参加专业活动经由金马入出，并简化手续，缩短申请时程；扩大团组，单、团证并行；外籍人士来台旅游，准其适用“小三通”往返大陆或台湾，推动金厦“边境旅游”。

第四，对于货物部分，应推动大陆地区小额小量农、渔、畜产品，在“免课征关税”、“简化检验、检疫程序”及“减免行政规费”操作下，进口金门市场，以消弭走私、防杜疫情引入的危险；同时输出大陆货品不再局限福建台商生产所需原物料，应以切合台商需求，较能符合物品经济效益，并增进货物流通，减少金门至大陆海运回程空载现象。

五、未来“大三通”对两岸关系的可能影响

杨肃元董事长畅谈了“小三通”未来的进一步发展，坚信“大三通”一定会实现。1993 年，在台湾，包括马英九，人人都认为“小三通”是天方夜谭；即使要通，也是台北、高雄直接通上海、厦门，不可能从金门先通。但现在这已成为现实，而且取得了显著成绩，所以对于“大三通”完全可以有信心。但谈到具体的时间表，杨董事长认为还需假以时日，短则三四年，长则七八年，都有可能。但春节包机这样的举措，都可以看作是在向“大三通”慢慢的过渡。“大三通”是一定会实现的，因为这是民意的主流，也是台湾经济形势的现实所迫。如果台湾不搞意识形态为纲，金厦是一个开发前景广阔的区域，这对海峡西岸经济区的建设，对两岸关系的

稳定发展，都是潜力巨大的。

附表：“小三通”经营中的相关统计数据[2]

1. **厦门—金门航线客运量统计月报表**

（2006 年 1 月至 2006 年 9 月）

公司名称	船名	载客定额	小计	厦－金	金－厦	总计	厦－金	金－厦
							小计	小计
厦门轮总海上旅游有限公司	同安	380	352	176	176	51114	20121	30993
三联船务有限公司	新集美	300	636	318	318	87678	42341	45337
厦门轮总海上旅游有限公司	鼓浪屿	150	302	151	151	21590	13170	8420
厦门轮总海上旅游有限公司	捷安	30	618	309	309	67546	37954	29592
大陆船公司小计			1908	954	954	227928	113586	114342
大荣海运股份有限公司	马可波罗	195	678	339	339	62221	30420	31801
坤龙航运股份有限公司	东方之星	300	718	359	359	81007	41194	39813
金厦海运股份有限公司	新金龙	282	384	192	192	45914	23044	22870
金厦海运股份有限公司	泉州	248	210	105	105	20837	10680	10157
台湾船公司小计			1990	995	995	209979	1053338	104641
总计			3942	1961	1961	444031	221985	2220406

2 以下相关数据，均由厦门市水路运输管理处提供，在此谨表衷心感谢。

2. 厦—金海上直航进出人、船次数年度统计表

（2001 年—2005 年）

年份	进出总人数	总艘次	厦金人数	厦金艘次	金厦人数	金厦艘次
2001	20835		10346		10489	
2002	53371	678	26415	339	26956	339
2003	160428	1493	80488	742	79940	751
2004	406131	3103	203639	1566	202492	1564
2005	518453	3722	257810	1861	260643	1679
合计	1138383	9023	568352	4508	570031	4333

3. 厦门—金门海上直航货运量统计月报表

（2006 年 1 月—2006 年 8 月）

月份	航次			货运量（吨）		
	小计	进	出	小计	进口	出口
1	5	0	8	6409	0	6409
2	5	0	2	1925	0	1925
3	5	0	4	4425	25	4400
4	12	0	12	18191	0	18191
5	5	1	4	6577	39	6538
6	2	0	2	3408	0	3408
7	10	0	10	15413	0	15413
8	11	0	11	16850	0	16850
大陆船公司小计	52	2	50	73198	64	73134
1	9	0	9	3992	0	3992
2	6	0	6	2569	0	2569
3	4	0	4	1579	0	1579
4	5	0	5	1868	0	1868
5	5	0	5	1848	0	1848
6	4	0	4	1485	0	1485
7	5	0	5	2350	0	2350
8	4	0	4	1451	0	1451
台湾船公司小计	42	0	42	17142	0	7142
总计	94	2	92	90340	64	90276

4. 1997—2005 年台湾航线箱量统计表

两岸直航	进口		出口		合计		总计
	重箱	空箱	重箱	空箱	重箱	空箱	
1997	21178	18183	46592	559	67770	18742	86512
1998	30838	46974	99223	908	136061	47882	177943
1999	27856	91772	149321	3236	177177	95008	272185
2000	24482	110778	144245	1272	168727	112050	28077
2001	27262	141549	184630	855	211892	142404	354296
2002	29084	151513	164222	2034	193306	153547	346853
2003	33925	132207	156231	2103	190156	134310	324466
2004	43485	132754	185363	503	228848	133257	362105
2005	73181	107497	167478	706	240659	108203	48862
两岸三地	进口		出口		合计		总计
	重箱	空箱	重箱	空箱	重箱	空箱	
1997	7665	694	7454	1249	15119	1943	17062
1998	244482	3951	17256	5122	41738	9073	50811
1999	27445	6743	23457	1475	50902	7948	58850
2000	30655	14129	36118	310	66773	14439	81212
2001	31466	13475	36083	797	67549	14272	21821
2002	44550	13515	46818	1593	91368	15108	106476
2003	39597	7866	43642	4022	83239	11888	95127
2004	41642	681	48939	4103	90581	10784	101365
2005	36708	8110	52555	1543	89263	9653	98916

国际法院解决海洋争端的最新发展

赵 伟 *

近两年来，提交国际法院解决的海洋争端共有两个，分别是 2004 年罗马尼亚诉乌克兰的“黑海划界争端案”和 2005 年哥斯达黎加诉尼加拉瓜的“圣胡安河航行和相关权利争端案”。这两个案件的程序还在进行中，其最终结果尚不明确，但是案件的事实以及其中体现的国际法问题对我们或有启示，因此这里对两个案件的情况作一简要说明和评论。

一、黑海划界争端案

2004 年 9 月 16 日，罗马尼亚就划定两国在黑海的海上界限，从而确定各自的大陆架和专属经济区的争端向国际法院起诉乌克兰。

（一）案由

罗马尼亚在起诉书中称：经过一系列复杂的谈判之后，罗马尼亚和乌克兰之间签订了《罗马尼亚和乌克兰合作和睦邻友好关系条约》(以下简称“《条约》”)，并通过两国外长换文的方式签订了一个《补充协议》，两者均于 1997 年 10 月 22 日生效。根据这两个条约，两国有义务缔结一个边界条约，[1] 并划定两国在黑海的专属经济区和大陆架的界限。同时，《补充协议》还规定了黑海划界中应该适用的原则。两国并作出承诺，在一定条件下，该争端可以提交国际法院解决。按照《联合国宪章》第 102 条的规定，这两个条约由罗马尼亚向联合国秘书处登记。

从 1998 年至 2004 年，两国就黑海划界问题举行了 24 轮谈判，但是没有取得任何成果。罗马尼亚认为继续谈判不能达成目的，因此将两国在黑海的大陆架和专属经济区的划界争端提交国际法院。

---

* 赵伟，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 此处的边界条约应是两国的陆地边界条约，即后来两国签订的《罗马尼亚和乌克兰关于边界问题管理、合作和相互帮助的条约》。

（二）法院管辖权

双方于 1997 年缔结的《补充协议》第 4 条规定，满足了以下两个条件，罗马尼亚和乌克兰任意一方政府可以将黑海大陆架和专属经济区划界的争端提交国际法院解决：

1. 谈判在合理期限内（但是不迟于缔约后 2 年）不能取得条约所期望的结果；

2. 两国的边界条约已经生效。但是，如果国际法院认为两国边界条约生效的延迟是另一方的错误所致，法院可以在边界条约生效之前就受理此案。

关于黑海划界的谈判时间已经远远超过第 4 条规定的 2 年期限。另外，《补充协议》中所指的边界条约——《罗马尼亚和乌克兰关于边界问题管理、合作和相互帮助的条约》已经于 2003 年 6 月 7 日签订并于 2004 年 5 月 27 日生效。

因此，《补充协议》中所列的两个条件已经具备，法院根据《国际法院规约》第 36 条第 2 款的规定对本争端享有管辖权。[2]

（三）准据法

由于案件正在进行中，法院最终适用的准据法尚不明确，这里所指的准据法指罗马尼亚所主张的法律依据。总的来说，准据法应该是 1997 年的《补充协议》中的相关条款、双方同为缔约国的 1982 年《联合国海洋法公约》（以下简称“《海洋法公约》”）以及其他对两国有拘束力的相关法律文件。

特别是，《补充协议》构成两国之间的特别法，法院应该按照《补充协议》第 4 条规定的两国在划界过程中应遵循的 5 项原则进行裁判。该 5 项原则如下：

1. 国家实践和国际司法判例中适用的《海洋法公约》第 121 条；[3]

2. 海岸相邻国划界的衡平距离原则和相向国划界的中间线原则；

3. 国家实践和国际法院判决中适用的衡平原则和对称方法；

4. 任何一方不得在争端地区侵犯另一方主权的原则；

5. 考虑争端地区特殊情况的原则。

罗马尼亚认为乌克兰在谈判中提出的在黑海争端地区划界的方法及其结果和

---

2 《国际法院规约》第 36 条第 2 款规定：本公约各当事国得随时声明关于具有下列性质之一切争端，对于接受同样义务之任何其他国家，承认法院之管辖为当然具有强制性，不须另订特别协定：（子）条约之解释；（丑）国际法之任何问题；（寅）任何事实之存在，如经确定即属违反国际义务者；（卯）因违反国际义务应予赔偿之性质及其范围。

3 《联合国海洋法公约》第 121 条规定：1. 岛屿是四面环水并在高潮时高于水面的自然形成的陆地区域；2. 除第 3 款另有规定外，岛屿的领海、毗连区、专属经济区和大陆架应按照本公约适用于其他陆地领土的规定加以确定；3. 不能维持人类居住或其本身的经济生活的岩礁，不应有专属经济区或大陆架。

本案应该适用的《补充协议》的条款不一致。乌克兰没有遵守该《补充协议》。另外，乌克兰的立场也不能在两国之间产生《海洋法公约》第 74 和 83 条所要求的衡平结果。

（四）案件进展

本案程序在进行当中。国际法院 2004 年 11 月 19 日要求罗马尼亚在 2005 年 8 月 19 日前提交正式的诉状，乌克兰在 2006 年 5 月 19 日前提交答辩状。2006 年 7 月 3 日，国际法院要求诉讼双方提交书面回复和反驳的期限分别是 2006 年 12 月 22 日和 2007 年 6 月 15 日。

二、圣胡安河的航行和相关权利争端案

2005 年 9 月 29 日，哥斯达黎加起诉尼加拉瓜，将圣胡安河的航行和相关权利争端提交国际法院。起诉书中，哥斯达黎加认为尼加拉瓜在圣胡安河的航行和相关权利上对其施加的限制措施违反了两国之间有效的法律文件。哥斯达黎加多次建议尼加拉瓜通过外交或者其他现有的和平解决方式解决争端，包括美洲国家组织的调停和国际仲裁，但是，尼加拉瓜政府拒绝了所有这些方式。因此，哥斯达黎加诉请国际法院解决该争端，要求尼加拉瓜停止妨害行为，采取补救措施。

（一）哥斯达黎加在圣胡安河主张的权利及其法律依据

1. 主张的权利

（1）哥斯达黎加船舶和乘客出于商业目的在河上永久自由航行的权利；

（2）除非两国政府作出明确规定，哥斯达黎加船舶具有不付任何费用而在河岸任何地点停靠的权利；

（3）按照《克里夫兰裁决》第 2 条的规定在河上航行的权利；[4]

（4）根据相关安排，哥斯达黎加政府船舶具有为提供给养、交换河右岸的边境哨所人员的目的在河上航行的权利，并可携带必要的装备，包括必要的武器和弹药以及出于防卫目的而携带的装备；

---

4 Cleveland Arbitral Award, Article 2: The Republic of Coast Rica under said Treaty and the stipulations contained in the sixth article thereof, has not the right of navigation of the River San Juan with vessels of war; but she may be related to and connected with her enjoyment of the “purposes of commerce” accorded to her in said article, or as may be necessary to the protection of said enjoyment.

（5）哥斯达黎加在有权航行的任何地点的航行不受阻碍和停滞的权利。

2. 主张权利的法律依据

（1）1858 年签订的《哥斯达黎加和尼加拉瓜边界条约》。该条约第 6 条规定圣胡安河的主权属于尼加拉瓜，同时承认哥斯达黎加在该河流所享有的永久自由航行权利；

（2）1888 年美国总统格列佛•克里夫兰所作出的仲裁裁决，即《克里夫兰裁决》。该裁决肯定并解释了哥斯达黎加在该河流所享有的权利；

（3）1916 年中美洲法院对哥斯达黎加诉尼加拉瓜案的判决。该判决再次肯定了哥斯达黎加的相关权利；

（4）《1949 年华盛顿友好条约第 4 条的 1956 年补充协定》；

（5）其他适用的国际法规则和原则。

（二）尼加拉瓜的限制措施

哥斯达黎加认为，尼加拉瓜已经，特别是自 20 世纪 90 年代后期以来，对哥斯达黎加在圣胡安河上航行的船舶和旅客施加了很多限制，违背了两国之间有拘束力的法律文件。这些限制措施包括：

1. 对哥斯达黎加的船舶和乘客收取费用；

2. 尼加拉瓜沿河的各个军事哨所对哥斯达黎加船舶和乘客进行检查；

3. 限制哥斯达黎加政府船舶根据《克里夫兰裁决》享有的河上航行权利；

4. 制定航行的时间表；

5. 限制哥斯达黎加船舶沿河岸自由停靠；

6. 对河上自由、迅速通航的其他限制。

哥斯达黎加称这些限制措施已经构成一种持续性的行为。尤其是 2005 年 9 月 28 日，尼加拉瓜议会通过了一项决议，威胁哥斯达黎加称其将对哥斯达黎将争端提交国际法院的行为进行经济制裁。该决议还附加了一个对原产于哥斯达黎加的所有货物和服务征收 35% 关税的法律草案。

（三）法院管辖权

哥斯达黎加认为法院依据下列文件而拥有对该争端的管辖权：

1. 根据《国际法院规约》第 36 条第 2 款的规定，法院因下面两个文件而有管辖权：

（1）双方接受法院管辖权的声明（哥斯达黎加和尼加拉瓜分别于 1973 年 2 月 20 日和 1979 年 9 月 24 日作出了这种声明）；

（2）双方于 2002 年 9 月 26 日签订的《图瓦尔—卡尔德拉协定》。两国按照

该协定达成了一个 3 年的停滞期，在这期间尼加拉瓜要保持其接受国际法院管辖的法律地位，哥斯达黎加也不得将争端提交国际法院。期满而不能达成目的时，双方可以将争端提交国际法院解决。哥斯达黎加指出，这期间两国在中美地区的很多重要问题上都能取得对双方有利的进展。然而，圣胡安河航行和相关权利的争端却始终不能解决。

2. 根据《国际法院规约》第 36 条第 1 款的规定，法院因 1948 年 4 月 30 日《波哥大公约》第 31 条而有管辖权。[5]

（四）案件进展

本案程序在进行当中。国际法院 2005 年 11 月 29 日要求哥斯达黎加提交书面诉状的期限是 2006 年 8 月 29 日，尼加拉瓜提交答辩状的期限是 2007 年 5 月 29 日。

三、案件的启示

这两个案件都在进行中，法院所可能适用的准据法以及最终的判决结果仍有待时日才能明了。但是，从案件本身的事实来看，我们仍然可以得到一些启示：

（一）随着人类对海洋开发和利用程度的加深，国家之间有关海洋的争端日益增加。这两个案件分别是国际法院在 2004 年和 2005 年受理的唯一案件，一个是海洋划界的问题，另外一个是关于界河航行的争端。第二个和海洋争端看起来关系并不明显，但是仍然会涉及到一般国际法原则和船舶航行的一般规则。现在关于海洋争端的解决，一般依赖《海洋法公约》的相关规定、一般国际法原则和国家之间的特殊情况考量。这些并不能解决海洋争端中的所有问题，而且，关于海洋的争端可能出现更多的新问题。因此，国际法在这些方面应该有进一步的发展，国际海洋法应该能够更好地规范各国的海洋权益并解决在利用海洋过程中产生的争端；

（二）国际法院在国际法的发展中有着重要的作用，国际法院的判决是适用国际法的过程，一定程度上也是国际立法的过程。国际法院的判决虽然不是国际法的直接渊源，但很明显的是，国际司法判例会对后来的司法实践起着指导作用。在海洋法的发展中，国际法院的判决也非常重要，海洋争端解决的一些原则和方法都是由国际法院的相关判例所确立的。在未来的发展中，国际法院在这个方面

---

5 《国际法院规约》第 36 条第 1 款规定：法院之管辖包括当事国提交之一切案件，及联合国宪章或现行条约或协定中所特定之一切事件。

的作用仍然值得瞩目；

（三）我国更应该重视和关注此类案件的进展。我国是个海洋地理相对不利的国家，所面对的海域都存在和相邻或者相向国家划界的争端，而且，将来也可能出现新的海洋争端。解决这些争端对于维护我国的海洋权益，保持周边地区的和平与稳定意义重大。正因为如此，我国在海洋争端的解决上也面临着很多困难和极大的压力。积极研究国际法的相关规定，关注海洋法相关的国际司法实践的进展，对我国有着明显的指导和借鉴意义。以本文中所列的黑海划界案来说，其意义就相当明显：

1.关于划界应该适用的原则和方法，罗马尼亚主张以两国之间的条约为依据，同时适用一般国际法原则。我国在处理同类问题时，可以首先考虑同相关国家之间展开谈判，达成一致的解决方法，在这个过程中充分考虑海洋争端解决的一般原则及其他一般国际法原则，并考虑相关问题的特殊情况。

2. 关于解决争端的途径，罗马尼亚通过国际法院来解决黑海划界争端同样对我国有借鉴意义。我国一贯坚持以外交方式来解决划界争端，但事实是，这种立场至今不能取得特别显著的效果，特别是中日两国关于东海划界的谈判毫无进展。现实的考虑是，这些海洋争端是不能无限拖延的，总是要找到有效的解决方法。黑海划界争端案证明通过国际司法或者国际仲裁的方式来解决这一争端具有可行性，不失为一种解决问题的方法。

3. 关于大陆架和专属经济区的划界问题，罗马尼亚特别要求划定一条界线来确定双方的大陆架和专属经济区。在东海划界问题上，我国也应该坚持类似的作法。自 1982 年《海洋法公约》生效后，有关大陆架和专属经济区划界的争端中就没有出现分别划定两条界线的实践。虽然在东海划界问题上，国内现在有学着提出分别划定中日两国大陆架和专属经济区的界线，但现实表明这种主张不符合国际社会的一般实践，并且会在将来产生更多的遗留问题和潜在争端。

2006 年中国海洋法学研究综述

本刊课题组 *

2006 年，我国海洋法学研究紧扣我国对外实践的需要，加强理论探索，取得了一定的成绩。本文将本年度国内关于海洋政策与法律方面的著述分为关于《联合国海洋法公约》的研究、海洋主权纠纷与划界、海域使用权问题、海洋污染与环境保护、港口管理与船运、水下文化遗产保护、海洋能源、海洋渔业、南北极问题、海洋科研与军事利用等 10 个专题进行综述，以利于学界及时把握相关论题的研究现状，进行跟踪研究，为我国海洋法学今后的发展提供方向。

一、关于《联合国海洋法公约》的研究

本年度国内关于《联合国海洋法公约》（以下简称“《公约》”）的研究相对丰富。在海洋安全方面，除了传统上的海洋安全威胁，海盗等非传统威胁因素愈发受到重视，东盟区域性的海上安全合作加快步伐，日本等国构建的多边海上安全合作机制亦引发了学界的思考。在大陆架划界问题上，学者跨学科、跨国别的论述加深了我国对《公约》相关制度的理解，为我国相关领土争端的解决提供了理论基础。此外，对《公约》创设的专属经济区、国际海底区域制度等制度的论述也有进一步的深化和发展。

（一）海洋安全

当今世界，海洋已经成为各国联系的纽带，是友好交往和国际安全合作的重要舞台，也是突出的利益交织点，海上安全成为国际关系焦点之一。为此，国际海事组织海上安全委员会第 81 届会议于 2006 年 5 月 10 日至 19 日在英国伦敦召开。除全会外，会议成立了海上保安、目标型标准和客船安全 3 个工作组，强制性文件修正案和综合安全评估 2 个起草组，以及涂层性能标准非正式专家组，最终通过了 14 项决议、批准了 49 份通函。[1]

---

* 本课题组由厦门大学法学院教授、博士生导师傅崐成指导，成员包括：陈智超、樊丹、黄珊、季烨、江家栋、李晖、李缘缘、郑净方。

1 出席国际海事组织第 81 届海安会代表团：《国际海事组织海上安全委员会第 81 届会议概况》，载于《中国海事》2006 年第 7 期。

中国负陆面海，是典型的大陆滨海国家，面临着较为复杂的海上安全形势。如何构建有效的海上安全体系，确保我国海上安全，已成为十分迫切的问题。张炜等三位学者认为，必须建设强大的海军，贯彻“积极防御”的军事战略方针，坚持“近海防御”的海军战略思想，走以信息化为主导、机械化信息化复合发展的道路，不断提高联合作战能力和海上综合保障能力。同时，以《联合国宪章》、《公约》、和平共处五项原则以及其他公认的国际法原则作为处理地区海上安全问题的基本准则，用综合手段应对地区海上的传统安全问题和非传统安全威胁，循序渐进地推进海上军事合作。[2]

季国兴教授亦提出了维护我海洋安全的参考路径，主张海洋安全首先要有安全的海疆，这就要求有明确的海疆线，解决与相邻和相向国家间的岛屿归属争议及大陆架和专属经济区的划界争议；要有一支以海军为主体的海上综合力量（包括商船队、海洋科研船队）为后盾，以保障油气和渔业资源的开发，海上运输线的安全，及有效防御来自海上的对我的武力威胁。[3] 在“综合安全观”的指导下，东盟亦对海上安全理论进行了重大调整：通过提高海空军作战能力，加强东盟内部海上安全合作，提升东盟整体海上防御能力和应对海上危机的能力；积极主导东盟地区论坛建设，巧妙实施大国平衡战略，确保东盟在亚太海上安全问题上的发言权。[4]

与此同时，海洋领域出现的恐怖主义、海盗以及海上武装抢劫、毒品和武器交易等跨国犯罪、化学武器以及大规模杀伤性武器的扩散、大规模海洋环境污染等非传统安全威胁受到较高重视。龚迎春博士认为，由于非传统安全威胁具有普遍性和跨国性以及和传统安全威胁相互交织、转化的特点，导致了以《公约》为主要内容的现有国际海洋法律制度乃至传统的军事同盟无法涵盖的安全空隙的出现。近年来，日本积极致力于在亚太地区构建以日本为主导、以海上共同执法为核心内容的多边海上安全合作机制，以帮助填补美国因政治等因素而无法直接军事介入南海以及马六甲海峡而导致的安全保障上的空白。对此，中国除应继续倡导共同安全、综合安全等新安全理念外，还应主动参与这一机制，以把握本地区海上秩序的走向，防止亚太地区的海上安全机制朝着准军事同盟的方向发展。[5] 针对“9•11”事件后东南亚海上安全新形势，东盟进一步加强了海上反恐、反海盗等一系列海上安全合作，努力推动东盟地区论坛向实质性方向发展，积极筹建“东盟安全共同

---

2 《构建有效的海上安全体系》，载于《光明日报》2006 年 1 月 11 日第 9 版。

3 季国兴：《解决海域管辖争议的应对策略》，载于《上海交通大学学报》（哲学社会科学版）2006 年第 1 期。

4 冯梁、汤贵友：《冷战后东盟海上安全理论与实践》，载于《世界经济与政治论坛》2006 年第 3 期。

5 龚迎春：《日本与多边海上安全机制的构建》，载于《当代亚太》2006 年第 7 期；龚迎春：《海洋领域非传统安全因素对海洋法律秩序的影响》，载于《中国海洋法学评论》2006 年第 1 期；龚迎春：《日本构建亚太地区多边海上安全机制的举措与进展》，载于高之国、张海文、贾宇主编：《国际海洋法的理论与实践》，北京：海洋出版社 2006 年版，第 256~269 页。

体”，在实现东盟安全一体化方向迈出了坚实步伐。[6]

针对当前海盗活动猖獗的现实，王秋玲副教授通过对《公约》规定的海盗罪的概念及构成条件与当今海盗罪案发特点的比较，主张现行国际公约中的相关规定已明显不适应实际需要，应将此罪的犯罪主体、行为对象以及犯罪地点等要素重新界定，建议放宽海盗罪的认定条件。[7] 王震、沙云飞两位学者通过比较加拿大、日本、俄罗斯等国家刑法中关于海盗罪的立法，提出了完善我国关于海盗罪的相关立法的建议。[8] “9 • 11”事件以来，针对东南亚地区的海盗活动呈现出与海上恐怖主义合流的新动向，王健、戴轶尘两位学者提出了加强内部合作、争取大国援助及利用国际组织整合资源的新的治理模式。[9]

周忠海教授认为，传统国际法中的紧追权的适用范围和对象通过《公约》得以发展和扩大，并成为沿海国海上有效执法的主要手段和形式，发生在沿海国的领海、毗连区、专属经济区，特别是专属渔区的违法违规的渔业事件及国际犯罪罪行，引发了越来越多的紧追权的行使。周教授还探讨了紧追过程中行使武力及因不当行使紧追权所引起的损害赔偿问题。[10]

随着科技的进步及能源的紧缺，核材料的国际贸易愈发频繁。王小晖硕士以《公约》中规定的航行自由与保护海洋环境以及人类生命安全利益的冲突与协调为出发点，从预警原则、事前通知要求以及国家责任等角度，就核材料海上秘密运输问题展开探讨，建议我国对该问题从国际法理论以及面临的潜在威胁出发，予以关注，并寻求保障核材料安全运输的合作方案。[11]

（二）大陆架问题

自然延伸的概念是大陆架定义中的关键参数之一。高健军博士通过对国际法院和国际仲裁及调解机构在处理海洋划界争端中的相关实践的考察，认为它们往往同时从地质学、构造学和地貌学的角度来分析划界区域是一个单一的大陆架还是存在自然延伸的中断，并似乎越来越注重地质上的延伸。[12] 针对日本国际海洋

---

6 冯梁、汤贵友：《冷战后东盟海上安全理论与实践》，载于《世界经济与政治论坛》2006 年第 3 期。

7 王秋玲：《海盗罪及其犯罪构成条件》，载于《大连海事大学学报》（社会科学版）2006 年第 2 期。

8 王震、沙云飞：《海盗罪及其在我国国内立法问题》，载于《中国海洋法学评论》2006 年第 1 期。

9 王健、戴轶尘：《东南亚海盗问题及其治理》，载于《当代亚太》2006 年第 7 期。

10 周忠海：《论海上紧追权的权利内涵及其实践》，载于《中国海洋法学评论》2006 年第 1 期。

11 王小晖：《核材料海上秘密运输的国际法问题》，载于《中国海洋法学评论》2006 年第 1 期。

12 高健军：《关于自然延伸中断地实证考察》，载于高之国、张海文、贾宇主编：《国际海洋法的理论与实践》，北京：海洋出版社 2006 年版，第 34 ～ 45 页。

法学说中的“自然延伸后退论”，张新军博士认为这种主张是对早期案例中自然延伸的消极适用的误读，既无视仲裁庭和法院不适用自然延伸作为划界的具体基准是建立在确认争端国家间事实上处于共架这一前提之下，也忽视了法院对海槽、大陆架地质情况的强调。[13]

张海文研究员对比分析了地质学和法学意义上的大陆架的概念，回顾了大陆架法律制度的四个发展阶段，认为《公约》第 76 条所规定的大陆架已经远远超出了地质学意义上的含义和范围，实质上是地质学意义上的“大陆边缘”，反映了拥有地质学上宽大陆架和大陆边缘国家的意见。[14] 方银霞、周建平两位学者指出，《公约》第 76 条所定义的法律意义上的大陆架是一个科学、法律与政治的结合体，也是不同政治利益集团之间妥协的产物，因此在具体操作中具有一定的复杂性，尤其是“洋脊”问题。因此，必须加强对第 76 条的法理和应用条件的研究，为我国 200 里外大陆架划界案提供参考。[15]

在大陆架划界方面，曲波博士主张体现了公平原则的《公约》第 56 条第 3 款规定对大陆架划界具有指导意义。《公约》第 83 条不是对协商原则的认定，公平原则才是大陆架划界的基本原则，其他的原则、方法只有在符合公平原则的基础上才能得以适用。[16] 董玉鹏博士在分析公法和私法的关系以及国际法与国内法关系的趋同性的基础上，参照国内民法领域的共同所有制度，提出不同于“搁置主权，联合开发”的大陆架争端解决方法，即以共有的形式解决大陆架所涉及的主权权利问题。该解决方式虽还不完善，但对于大陆架共有的种种设想，可以在相邻大陆架国家间，在外交关系良好、利益冲突相对较小的前提下逐步试点。[17]

（三）专属经济区问题

《公约》确立的专属经济区制度是对国际海洋法律制度的重大发展。学者尹年长从主权的概念出发，分析了沿海国家对专属经济区的主权权利，认为该权利是国家经济主权的组成部分，《公约》的规定是尊重国家主权的，主张应充分利用《公约》的规定，积极维护我国专属经济区的国家主权权利。[18]

沈盈姊认为，专属经济区是海洋大国和试图扩大国家渔业权的国家之间的一

---

13 张新军：《习惯法的认定与自然延伸原则》，载于高之国、张海文、贾宇主编：《国际海洋法的理论与实践》，北京：海洋出版社 2006 年版，第 46~60 页。

14 张海文：《地质学大陆架和法律学大陆架制度的对比研究》，载于高之国、张海文、贾宇主编：《国际海洋法的理论与实践》，北京：海洋出版社 2006 年版，第 16~33 页。

15 方银霞、周建平：《〈联合国海洋法公约〉大陆架的法理和应用条件》，载于《中国海洋法学评论》2006 年第 1 期。

16 曲波：《对大陆架划界的几个问题的思考》，载于《当代法学》2006 年第 4 期。

17 董玉鹏：《论大陆架共有》，载于《中国海洋法学评论》2006 年第 1 期。

18 尹年长：《论专属经济区的国家主权权利》，载于《湛江海洋大学学报》2006 年第 2 期。

次妥协，因此，《公约》在规定沿海国权利和其他国家的权利的同时，不可避免地留下了一些真空地带，从而产生了所谓的“剩余权利”问题。尤其是在专属经济区这一新区域内，沿海国的主权权利和专属管辖权与公海自由及其他国家的权利划分不是十分确定。现实中的国家实践显示出国家在专属经济区的管辖权及其内容的扩大趋向。[19]

李广义教授进一步指出，虽然其他国家在沿岸国专属经济区虽享有航行、飞越等有关军事利用的自由，但这不属于传统的公海自由，其上覆区域也不是国际空域，沿岸国和其他国家在专属经济区水体和海床军事利用权限的范围和程度上是有区别的。因此，任何国家，包括美国等非《公约》缔约国的任何形式的军事利用活动，都必须尊重沿岸国的主权和安全，只用于和平目的，禁止一切非法活动。[20]

（四）海洋争端及其解决

焦佩硕士以俄日“北方四岛”争议为例，主张随着《公约》的生效，传统的海岛领土之争已经演变为战略交通权、海疆拓展权、海洋资源开发权之争，建议在处理类似问题时，应当加强国际舆论宣传，在有条件的情况下实际占有，并加快发展海洋技术，最大限度地维护我国的海洋权益。[21]

季国兴教授认为国际上通常有三种途径来实现公正解决：谈判和相互让步、国际法院的裁决及第三者的仲裁和调停实现解决、搁置争议，共同开发或共同管辖。中国可参照上述三种途径来解决黄海、东海和南海海域的管辖争议。[22]

通过分析与比较《国际法院规约》、《公约》以及《国际海洋法法庭规则》的相关条款，刘雪飞硕士认为国际海洋法法庭和国际法院在咨询意见的请求者、咨询意见的发表者、可提请咨询的内容以及咨询管辖的目的等四个方面存在着明显的区别。我国应在深入了解两者的咨询管辖职能的基础上，充分重视并积极稳妥地通过间接的方式来获取其咨询意见，尽早解决与我国相关的国际争端。[23]

（五）国际海底区域制度

以人类共同继承财产原则为基础的国际海底区域制度是《公约》的又一重大成果之一。金永明博士回顾了“人类共同继承财产”概念的发展阶段，分析了当前

---

19 沈盈姊：《论国家在专属经济区域中的管辖权》，载于《当代经理人》2006 年第 18 期。
20 李广义：《论专属经济区军事利用的法律问题》，载于《当代法学》2006 年第 4 期.
21 焦佩：《从“北方四岛”问题看国际海权争端》，载于《理论探索》2006 年第 4 期。
22 季国兴：《解决海域管辖争议的应对策略》，载于《上海交通大学学报》（哲学社会科学版）2006 年第 1 期。
23 刘雪飞：《国际海洋法法庭与国际法院的咨询管辖比较》，载于《中国海洋大学学报》（社会科学版）2006 年第 4 期。

国际社会对此概念的性质之争，并指出了其发展趋势。[24] 任秋娟讲师从经济学上的产权理论出发，认为国际海底区域制度的有效运作不应刻板地按照经济学上的产权理论来进行，而是应将其定位于全人类共同继承财产。尽管在实践中会遭遇许多困难，但这应当是努力方向。[25] 金永明博士还系统阐述了国际海底管理局首部规范活动规章——《国际海底区域内多金属结核探矿和勘探规章》，重点指出了承包者和管理局的权利、义务及职权，以有利于我国正确合理实施勘探和开发“区域”内资源活动，推进我国深海事业发展。[26]

刘中民、黎兴亚两位学者在分析加拿大学者巴里•布赞的《海底政治》一书的内容的基础上，认为其思想对于研究当今国际海底制度及海洋法，乃至整个国际法都有重要的意义，并介绍了该书出版后 30 年来国际组织对国际海底制度的深刻影响，预测了发展中国家实力增强后的可能性冲突。[27]

总之，《公约》所建立的海洋法律制度第一次对国家海洋权益进行了系统而明确的规定，标志着世界海洋新秩序的确立和国际海洋事务新时代的到来。因此，我国应加强对《公约》的研究与应用，积极参与国际海洋事务，提高公众的海洋意识，完善我国的海洋法律体系。同时，我国还需要加强对争议海域的实际控制，积极准备海洋勘测资料及相关论证材料，以期全面维护我国的海洋权益。[28]

二、海洋主权纠纷与划界

本年度对海洋主权和划界问题的研究进一步深入，不仅有基础理论方面的研究，也有针对中国在海洋主权与划界问题的讨论。对于南海主权与划界问题的研究，学者主要依据国际法上的先占原则主张我国对南海诸岛的主权。[29] 随着中日两国政府代表相关谈判的陆续展开，中日东海划界问题也日益成为研究热点。该问题的研究主要集中在以下两方面：

（一）中日东海划界的原则与方法

---

24 金永明：《论国际海底制度与中国》，载于高之国、张海文、贾宇主编：《国际海洋法的理论与实践》，北京：海洋出版社 2006 年版，第 61~91 页。

25 任秋娟：《国际海底区域法律地位对经济学产权理论的反思》，载于《学术论坛》2006 年第 5 期

26 金永明：《国际海底区域资源勘探规章述评》，载于《海洋开发与管理》2006 念第 4 期。

27 刘中民、黎兴亚：《海底政治与国际法：巴里•布赞的〈海底政治〉述评——兼议国际海底政治的新发展》，载于《中国海洋法学评论》2006 年第 1 期。

28 薛桂芳：《〈联合国海洋法公约〉体制下维护我国海洋权益的对策建议》，载于《中国海洋大学学报》（社会科学版）2005 年第 6 期。

29 肖倩：《从国际法角度看南海诸岛主权归属》，载于《新疆职业大学学》2006 年第 1 期；刘继勇、李季云：《试以先占原则探析中国对南沙海域的主权》，载于《辽宁工程技术大学学报》（社会科学版）2006 年第 4 期。

东海的宽度不足 400 海里，中日在东海的海洋划界问题，既有专属经济区划界，也有大陆架划界，双方对划界的主张各不相同。中方坚持大陆架自然延伸至冲绳海槽，日本单方面提出了一条“中间线”，既是有意混淆专属经济区和大陆架的区别，也是以一条所谓的“中间线”，作为两个不同海洋区域的划界主张。[30] 张有份等三位学者认为，中方主张的大陆架自然延伸原则只涉及了问题的一个方面，这个原则不适用于东海专属经济区的划分，以此主张也不能起到否定日方采用所谓“中间线”划分东海专属经济区和大陆架的单一制度原则。采用单一制度划分东海海域，不仅有悖于现行国际海洋法法理，而且抑制了中方既得的地理优势，将让日方有机可乘，与中方争夺大陆架管辖海域。当务之急是划出一条既合法又合理的东海大陆架分界线公布于世，让对方乃至国际社会了解、理解和适应。[31]

对于中国坚持东海大陆架到冲绳海槽最大水深线的主张，贾宇研究员认为仅仅停留在主张的层面是不够的，需要有法律的和科学的依据来支持和完善，而超过 200 海里大陆架的外部界线应提交大陆架界限委员会（以下简称“委员会”）审查，因为中国根据自然延伸原则主张的大陆架超过了 200 海里。200 海里以外大陆架外部界限的详情及有关科学和技术资料，应按照《公约》的要求提交委员会审查。而且中国最晚应在 2009 年 5 月之前向委员会提交此审查的申请。同时，中国应该也可以通过向委员会提交申请案的方式，再次昭示和重申在东海的大陆架权利和主张。[32]

张新军博士认为明确大陆架权利和划界规则的关系在明确中日东海争端中的法律适用问题上具有重要的意义。从目前中日东海划界问题的谈判进展情况看，没有迹象显示双方会通过国际司法或仲裁方法解决在东海上的争端。但是，双方都坚信应该遵照国际法通过谈判解决问题。而法理上说，关于大陆架的争端的法律适用实际上分为两步，一是适用《公约》第 76 条对争议双方的权利主张进行判定。除非双方另有约定，只有在判定双方的权利主张为等价可对抗的情况下才会适用《公约》第 83 条的划界制度，到一个基于“公平原则”的解决方案。因此，中日东海划界争端中，首先应该解决的问题是双方的权利主张是否是等价可对抗的，从而导致权利主张重叠。否则，通过大陆架权利制度已经分出权利主张之优先顺序，划界将不成为问题，没有必要适用划界制度中要求的国际法下的公平原

30 贾宇：《中国东海二百海里外大陆架法律问题初探》，载于《中国海洋法学评论》2006 年第 1 期；梁咏：《从国际法视角看中日东海大陆架划界争端》，载于《法学》2006 年第 8 期

31 张有份、郁志荣、董奚戟：《中日东海管辖海域划分争议的法理分析》，载于《海洋开发与管理》2006 年第 1 期。

32 贾宇：《中国东海二百海里外大陆架法律问题初探》，载于《中国海洋法学评论》2006 年第 1 期。

则。[33]

另外，对于位于中日间有待划界的东海的钓鱼岛，王可菊研究员认为，钓鱼岛及其附属岛屿，不能维持人类居住，也不能维持其本身的经济生活，属于除领海及毗连区外，因此钓鱼岛在海洋划界中是属于不得拥有专属经济区或大陆架的情形。而钓鱼岛地处中间线附近，且面积很小，主权存在争议，在中日专属经济区大陆架划界中赋予零效力为宜。[34]

（二）中日东海划界问题争端解决方法

中日东海大陆架划界纠纷本质上就是对该大陆架上蕴藏的丰富油气资源的争端，正因为在中日东海油气争端问题上中日“和则两利，斗则两败”，尽管在地质构造和法理上我国对东海大陆架的权利主张都有充分依据，但目前的情况是，谈开发就不可避免要涉及对经济资源开发的专属性主权权利归属问题，如何在主权权利归属未定的情况下走出“争议解决不了，开发实现不了”的困境。

在中日东海划界问题上，我国官方立场是主张应当根据公认的国际法，考虑到不同海域的具体状况，通过友好协商来公平、合理地解决有关海洋划界问题的争议，不要使争议影响到中国同其他国家的双边关系；关于中国海洋政策问题，尤其在海洋划界存在争议时，中方主张“搁置争议、共同开发”。[35]

很多学者如刘中民、鞠海龙、张三保、金永明等均表示对中日东海划界争端问题“搁置争议，共同开发”立场的支持，[36] 并对共同开发的具体模式进行了探讨。[37] 学者梁咏认为采用“共同开发”的模式，或者通过国际司法判决或国际仲裁裁决的模式，都不妨是一种走出困境的方法。[38] 张新军博士认为该主张并没带来积极的结果，所以应该重视谈判中的法律主张，至少在法理上明确该立场的国际法依据，且“共同开发”只能作为暂定安排，不能影响中方东海大陆架自然延伸到冲绳海槽这一权利的主张。而“搁置争议、共同开发”的立场在法理上应该明确指出的是：如果确定大陆架权利制度中的自然延伸原则优先于距离基准，除非日方能另行

---

33 张新军：《中日东海争端中自然延伸原则的重要地位——基于权利和划界规则之间关系的视角》，载于《政法论坛》，2006 年第 4 期。

34 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。

35 《海洋划界争议应友好协商解决》，下载于 http://China.gansudaily.com.cn/system/2006/09/15/010132237.shtml，2006 年 12 月 10 日。

36 刘中民：《中日海洋权益争端的态势及其对策思考》，载于《太平洋学报》2006 年第 3 期；金永明：《论东海大陆架划界争议与发展趋势》，载于《政治与法律》2006 年第 1 期；鞠海龙、张三保：《对中日东海划界的现实思考—从邓小平“搁置争议、共同开发”和平解决国际争端的视角》，载于《社会主义研究》2006 年第 3 期。

37 鞠海龙、张三保：《对中日东海划界的现实思考—从邓小平“搁置争议、共同开发”和平解决国际争端的视角》，载于《社会主义研究》2006 年第 3 期。

38 梁咏：《从国际法视角看中日东海大陆架划界争端》，载于《法学》2006 年第 8 期。

主张中日共架，否则中日东海争端中将无划界问题，共同开发只是中方的行为而非义务适用划界制度的结果。由于共同开发的区域在中方的自然延伸之内，因此其范围由中方决定。反之，中日间划界如果有必要去进行“公平”解决的话，日方必须确认所提出的距离基准和自然延伸原则是等价的、相对抗的权利主张。退一步，即使如日本所主张，距离标准已取代自然延伸原则成为大陆架权利制度中的权原，双方将由于相同的距离基准主张而产生划界问题，仍有包括共同开发的“公平”解决的必要。在这两种情形之下，作为义务解决划界问题方法之一的共同开发，其范围只能限定在双方权利重叠的区域。[39]

而对于中日钓鱼岛主权问题的争端，张新军博士探讨了中日钓鱼岛争端与东海大陆架划界之解决的关系，捆绑式解决还是分体解决。关于钓鱼岛争端的解决程序或方式问题，对于中国来说，基于中国的文化传统、近代历史经历、目前的政局状况以及中国的国力现实，外交方式是“相对可行而不可取的”，而仲裁与司法等法律方式则是“相对可取而不可行的”。如果在目前状况下强行解决钓鱼岛争端，必然是通过外交方式，其结果很可能是中日分割钓鱼岛列屿。至于中国政府是否决定解决争端以及选择何种解决程序，将取决于中国政府对该争端之结局的接受程度。需要指出的是，钓鱼岛争端虽然是中日之间严重的领土争端，但并非中日关系的全部，甚至不是其主要方面。一旦影响到中日关系的整体，钓鱼岛争端就可能被双方搁置——事实上，“搁置争议，共同开发”乃中国处理领土与海洋划界问题的重要政策，虽然这种政策对中国来说并不是十分有利，钓鱼岛争端也不宜久拖不决。[40]

三、海域使用权问题

在全国人大法工委 2004 年 8 月提出的《中国物权法草案建议稿》中，“海域”第一次作为国家所有权的客体被列入河流、矿藏与土地之间。在立法者的发言中，第一次提到了“蓝色国土”的话语，这也引发了学术界对海域使用权的深入研究。本年度，学者继续探讨了海域使用权的法律性质，以及如何完善我国的海域使用权制度。

关于海域使用权的法律性质，海域使用权私权说是目前法学界的主流。冀渺一等学者认为，《海域使用管理法》的相关规定已创设了海域使用权这一全新的物权类型，这种新型用益物权随着社会发展科技进步正逐步形成。[41] 巩固博士生进一步提出，传统法学界对海域使用权分析的单一视角导致了其理论的片面与争议，

---

39 张新军：《中日东海争端中自然延伸原则的重要地位——基于权利和划界规则之间关系的视角》，载于《政法论坛》2006 年第 4 期。

40 宋玉祥：《中日钓鱼岛争端的解决方式问题》，载于《中国海洋法学评论》2006 年第 1 期。

41 冀渺一：《论海域使用权的用益物权性质》，载于《海洋开发与管理》2006 年第 1 期。

从经济学的视角看来，海域使用权具有产权性质，承载着私益与公益的双重价值，经济与环保的双重功能，以此为基础可推导出海域使用权在法律上兼具公权与私权的双重属性，在法律实践中通过权利行使的公益限制、保障权利人经济利益、合理使用海域使用金等措施有助于实现海域使用权的双重价值与功能的统一。[42]

亦有学者提出我国目前海域使用权制度的问题和不足。刘乔发庭长认为，立法上，《海域使用管理法》行政管理色彩浓厚、公法性较强，对海域使用人的权利规定不够完善，在海域使用权的取得及内容上，物权性尚有不足；实践中，《海域使用管理法》与相关法律之间存在冲突，海域使用金征收过低，出租、发包海域使用权牟取暴利的现象普遍存在，海域使用效率不高，行政主管部门监管力度仍不够，以及《海域使用管理法》及相关配套规定在现实中的地位仍然不高。[43] 税兵博士生提出应通过民事立法，提升海域使用权的效力和地位，将《海域使用管理法》建立的物权类型由物权基本法加以规定，使海域使用权的归属和流转完全适用物权基本法所确定的各种物权规则。[44] 刘乔发进一步设计一些具体的制度，使之在制度设计上遵行市场经济的基本规则，例如建立海域价值评估制度、海域使用权出让合同制度等。[45]

四、海洋污染与环境保护

在船舶油污损害赔偿问题方面，徐国平博士探讨了船舶油污损害赔偿法的基本框架和主要内容，探讨了船舶油污损害赔偿法形成和发展的制度基础和理论基础，并提出了我国船舶油污损害赔偿法律制度的构想，并在理论上予以论证，填补了国内空白。[46] 如何通过法律途径有效规制台湾海峡内由船舶所造成的污染，是当前迫切需要海峡两岸共同解决的重大问题之一，傅崐成、刘先鸣两位学者提出，海峡两岸政府之间的合作是有效控制船源污染的必要途径，并为两岸合作可能面临的困难提出了可供参考的合作方式和法律途径。[47]

随着全球治理理论的兴起，作为公共管理的分支领域，王琪、刘芳提出建立适合我国实践需求的政府、企业、公众间的网络治理模式是适应海洋环境管理由管理到治理的转变的必然要求，也是解决实践中出现的海洋环境管理主体间矛盾，

---

42 巩固：《海域使用权法律性质与价值功能的双重性及其实践》，载于《中国海洋法学评论》2006 年第 2 期。
43 刘乔发：《我国海域使用权制度的不足及完善》，载于《法治论丛》2005 年第 4 期。
44 税兵：《海域使用权制度价值浅析》，载于《中国海洋大学学报》2005 年第 2 期。
45 刘乔发：《我国海域使用权制度的不足及完善》，载于《法治论丛》2005 年第 4 期。
46 徐国平著：《船舶油污损害赔偿法律制度研究》，北京：北京大学出版社 2006 年版。
47 傅崐成、刘先鸣：《台湾海峡船源污染法律问题刍议》，载于《中国海洋法学评论》2006 年第 1 期。

有效治理海洋环境，实现海洋环境可持续发展的必然选择。[48] 国际海底区域是地球上尚未被人类充分认识和开发利用的潜在战略资源基地，是 21 世纪重要的陆地可接替资源。各国已经开始争相参与海底矿产资源的研究与开发。林朝进提出在开发利用国际海底区域资源时必须坚持海底资源开发与海洋环境保护并重，坚持可持续发展的道路，注意积极应用高新技术开发与保护深海海底资源。[49]

海洋特别保护区制度是我国在已有的海洋自然保护区制度的基础上建立的。海洋特别保护区融海洋资源合理开发利用和环境保护为一体的一种特殊类型的海洋保护区。但是，我国尚无一部规范海洋特别保护区的专门法规。刘惠荣等学者从多个角度系统说明了建立与完善海洋特别保护区管理法律制度的必要性和紧迫性，分析了该法律制度与相关国际法、国内法的合理关系，并设计了保护区基本管理制度。[50]

在我国渤海和日本濑户内海的环境问题上，李海清对中日两国适用渤海和濑户内海的国际法律制度、国内法律文件、环境保护的其他重要文件等进行了研究，并在此基础上对渤海和濑户内海环境立法进行比较分析，认为必须借鉴日本治理濑户内海的经验，建立渤海这一内海的特别法规体系和资源环境可持续利用的管理制度，这样才能从根本上保障渤海整治的综合效果和渤海的可持续利用能力。[51]

五、港口管理与船运

本年度，港口管理方面学界研究的热点集中在港口物流方面。学者们对港口物流进行了多方面的研究和探讨，涉及我国港口物流的整体发展现状、[52] 各个港口的发展现状和规划、[53] 港口物流园区的建设、[54] 对中外港口物流发展经验借鉴以

---

48 王琪、刘芳：《海洋环境管理：从管理到治理的变革》，载于《中国海洋大学学报》（社会科学版）2006 年第 4 期。

49 林朝进：《论海底资源开发坚持海洋环境保护原则的必要性》，载于《法制与社会》2006 年第 8 期。

50 刘惠荣、高威、杨益松：《海洋特别保护区管理法律制度探讨》，载于《法治论丛》2006 年第 3 期

51 李海清：《渤海和濑户内海环境立法的比较研究》，载于《海洋环境科学》2006 年第 2 期。

52 常江：《我国港口物流现状及发展策略》，载于《时代金融》2006 年第 9 期；何立居：《我国航运物流的现状分析及改进策略》，载于《物流科技》2006 年第 2 期。

53 黄国栋、林卫明：《浅析厦门港口物流现状及应对措施》，载于《集装箱化》2006 年第 10 期；张潜、张桂兰等：《泉州物流业发展现状与对策探析》，载于《物流技术》2006 年第 3 期；张席洲、张小亮：《青岛港现代化物流发展的探讨》，载于《特区经济》2006 年第 9 期；刘立辉：《威海市现代物流业发展研究》，载于《集团经济研究》，2006 年第 23 期。

54 贡云兰：《港口物流园区建设风险分析与评估》，载于《中国水运》2006 年第 9 期；顾亚竹、周溪召：《港口集装箱物流园区规模的研究》，载于《中国航海》2006 年第 36 期；鲁广斌：《港口城市发展物流园区的探讨》，载于《物流技术》2006 年第 5 期。

及国际合作，[55] 在进行详细的分析总结同时，学者也提出了进一步发展我国港口物流的对策。

2006 年 4 月，29 个沿海和内河港口城市负责人、企业界人士参加了由交通部、天津市政府等共同主办的“首届港口城市市长论坛”。对于港口的战略机遇，交通部李盛霖部长称，国家将制定全国沿海港口布局规划，通过优化布局和资源整合，形成布局合理、结构优化、层次分明、功能完善的现代化港口体系，加快我国沿海和内河水上煤炭运输大通道、30 万吨原油和 20 万吨以上铁矿石进口接卸码头建设，加快上海国际航运中心等国际集装箱枢纽港建设，加快港城一体化进程，促进港口城市物流中心地位的形成。重点加强长三角、珠三角、渤海湾港口群以及东南、西南沿海港口的建设，同时突出加强内河港口建设，带动中部崛起和西部开发，促进区域经济社会协调发展。[56] 在此大背景下，物流方面的法律的制定和完善也成为学者研究和讨论的热点问题。

在水运管理方面，由于安全事故增多，在全国加强公共安全的大背景下，水上安全的管理也得到了相当大的重视，交通部、公安部、国家安全生产监管总局联合下发《关于进一步加强水路公路危险化学品运输管理的通知》。

六、水下文化遗产保护

随着联合国教科文组织于 2001 年通过《保护水下文化遗产公约》，国内的相关研究虽然数量不多，却呈现出一定的系统性。下文将对近年来相关成果一并论述。

厦门大学海洋政策与法律中心自成立以来，一直非常注重对水下文化遗产保护相关法律问题的研究。“中心”主任傅崐成教授于国内较早展开对《保护水下文化遗产公约》的研究，对该公约和海峡两岸现行制度做了介绍，主张中国应该根据国际法上的对等、一致性的要求和《公约》第 149 条的规定，主张对原领海以外起源于中国的沉船或文物的优先权。[57] 2004 年，“中心”成功举办了国内首次“水下

---

55 胡振国：《关于深圳与香港物流业融合的几点思考》，载于《中国远洋航务》2006 年第 11 期；《欧洲现代化港口管理及物流考察》，载于《中国港口》2006 年第 1 期；《德国与比利时物流考察报告》，载于《中国物流与采购》2006 年第 4 期；《波罗的海三国港口与物流发展综述》，载于《中国水运》2006 年第 3 期；金新道、黄华林：《海峡两岸和香港物流共同化发展研究》，载于《中国水运》2006 年第 9 期；赵毅、郑文含：《香港港口物流发展初探》，载于《苏州城市规划》2006 年第 10 期；樊思远、徐梅：《国际物流发展现状及策略分析》，载于《市场周刊——理论研究》2006 年第 8 期；金汉信：《浅谈东北亚物流合作》，载于《市场周刊——新物流》2006 年第 10 期。

56 《首届中国港口城市市长高峰论坛在津举行》，下载于 http://www.022net.com/2006/4-19/47145029254 6368.html，2006 年 4 月 20 日。

57 傅崐成：《联合国教科文组织 2001 年通过的〈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 1~20 页。

文化遗产保护专家研讨会”，对我国水下文化遗产保护的现状、面临的问题以及可能的解决方案进行了探讨，并且讨论了《水下文化遗产保护公约》与我国《水下文物保护条例》的立法差异及协调。[58] “中心”的多位博士研究生亦展开专题研究，评析了公约有关沉没军舰和其他国家船舶的规定等问题。其中傅崐成教授所指导赵亚娟的博士论文，亦以此为主题。[59] 2006 年，傅崐成教授和宋玉祥硕士又联手推出了题为《水下文化遗产的国际法保护》的专著，对《保护水下文化遗产公约》进行了系统的介绍和分析，认为该公约连同其附件中的 14 项规章，已经成功地创造了一套有效保护世界水下文化遗产保护的机制，而且没有严重地侵入其它国际法，包括《联合国海洋法公约》的原本适用范畴。同时，该专著还针对海峡两岸的相关法令与公约规范的冲突，进一步地阐述了新公约可能会带来若干的潜在纠纷或困难。[60]

法国于 1989 年出台的《关于海底文化财产的法律》及其实施效果引发了学者的研究兴趣。郭玉军和向在胜两位学者认为，该法确立的“海底文化财产”这一新概念值得关注，对文化财产发现者的权利和义务作了修改，并将文物的所有权归于国家，从而突出了海洋文化财产的国家财产特征。该法及与之配套的 1991 年政令在保护海底文化遗址方面是令人满意的，它所采取的相关措施对于阻止有组织的偷盗海底文物的活动是一个有益的尝试，很多规定与后来的联合国教科文组织《保护水下文化遗产公约》的基本原则是一致的；但其有些规定，如奖励金制度，虽然主观愿望是好的，但实际效果却未必能够令人满意。[61]

张湘兰教授和朱强博士生合作的《〈保护水下文化遗产公约〉评析》也结合公约制定过程中的争论，对公约的背景、目的、原则、适用范围、公约与海难救助法的关系、管辖权和遗产保存制度进行了综合研究，并认为，尽管公约的最后文本受到了英美等海洋大国的非难，但毕竟实现了各方利益的协调，原则上与《联合国海洋法公约》保持了一致，为国际水下文化遗产的保护提供了基本法律框架。[62] 郭玉军教授和徐锦堂博士则认为，《保护水下文化遗产公约》没有对水下文化遗产的属性和归属问题做出规定，是巨大的遗憾；同时公约在水下文化遗产的保护和管理制度的可行性方面也存有一定的问题。两位学者主张水下文化遗产不能直接成为无主物以适用先占制度，也并非人类共同继承遗产，而应当认定为沉没物，并准用有

58 关于研讨会的主要内容，详见《水下文化遗产保护专家研讨会综述》，载于《中国海洋法学评论》2005 年第 1 期。

59 赵亚娟：《沉没的军舰和其他国家船舶的法律地位——以水下文化遗产保护为视角》，载于《时代法学》2005 年第 5 期。

60 傅崐成、宋玉祥著：《水下文化遗产的国际法保护》，北京：法律出版社 2006 年版。

61 郭玉军、向在胜：《法国法中海底文化财产的法律地位》，载于《时代法学》2005 年第 4 期。

62 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。

关遗失物的法律规定确定归属;在保护与管理方面,应当树立“保护第一”的观念,对水下文化遗产的开发利用进行严格控制,以真正实现对人类的最大功用。[63]

七、海洋能源

随着世界经济发展对能源需求的增长,海洋能源显得愈发重要。在此背景下,蔡一鸣、王诗成等学者指出,我国的经济发展迫切需要海洋提供更大、更新的资源和能源支撑。[64] 与此同时,中国石油学会测井专业委员会第四届测井高级论坛也注意到世界石油投资近几年持续增长,海洋石油投资所占比重持续增加;顺应发展需要,中国海洋石油总公司加强了对中国近海油气勘探开发的投资力度,油田生产规模的迅速扩大,为海上油田服务行业的发展提供了强劲的动力。[65]

张良福博士总结了我国的海洋邻国在争议海域油气开发活动的基本特征:邻国对争议海域的实际控制和油气资源勘探开发活动远远超过我国,彼强我弱的比例极为悬殊;在南海,周边国家已进入大规模的生产油气阶段,且勘探开发区已跨越我国传统海疆线,且不断伸入南沙群岛海域;继南海之后,东海从 2004 年开始成为我国海洋油气资源遭到严重威胁的又一重要领域。因此,有必要坚持领土主权和海域管辖权,明确我国海洋管辖权的具体范围,加强在争议海域的实际存在和经济开发活动,以及根据不同争议海域的具体情况,采取不同的共同开发措施。[66]

针对我国的石油船运受制于人的情况,李立新、徐志良两位学者指出,我国进口原油的 4/5 左右是通过马六甲海峡运输的,因此马六甲海峡是我国海上石油的生命线。但是,我国对马六甲海峡除了政治与外交影响,几乎没有军事影响能力。因此,与俄罗斯及陆地边境国家建立可控的石油运输通道,缓解马六甲困局,是权宜之计;从长远看,将有限的资金集中使用在海上力量的建设上,有步骤地实施海洋战略;在南方海域,以海南岛、西沙群岛为前进基地,将海上力量逐步布防到南沙群岛及其邻近海域,最终控制南沙群岛海上通道,制衡马六甲海峡才是长远的优选国策。[67]

饶丹珍从海权的角度对中国的海洋权益进行了探讨,认为我国的海权状况严

---

63 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;徐锦堂:《关于海底沉没物相关法律问题的几点思考》,载于《中国海洋法学评论》2005 年第 2 期。

64 蔡一鸣:《弘扬郑和精神树立新海洋观》,载于《中国港口》2006 年第 7 期;王诗成:《海洋石油开发战略与国家能源安全》,载于高之国、张海文、贾宇主编:《国际海洋法的理论与实践》,北京:海洋出版社 2006 年版,第 251 页。

65 《石油工业发展趋势》,载于《测井技术》2006 年第 3 期。

66 张良福:《关于争议海域油气资源共同开发的问题》,载于高之国、张海文、贾宇主编:《国际海洋法的理论与实践》,北京:海洋出版社 2006 年版,第 168 页。

67 李立新、徐志良:《海洋战略是构筑中国海外能源长远安全的优选国策——缓解“马六甲困局”及其他》,载于《海洋开发与管理》2006 年第 4 期。

重制约着石油安全，这要求中国成为海洋强国，否则，海洋资源将会遭到掠夺、海洋权益将会受到侵蚀，不利于中国海外利益的扩展，进而严重阻碍中国的崛起。[68]

在海洋石油合作开采方面，秦国辉针对适用于外国公司参与合作开采中国石油资源的中国海洋石油总公司标准合同的法律性质进行了论述，认为其符合格式合同的特征，但在海洋石油合同管制方面，存在如下缺陷：灵活性不足，降低对外方吸引力；增加中国海洋石油总公司旗下上市公司压力；加剧《合同法》第 41 条对海洋石油合同的不利影响；多头监管，职能冲突；与《行政许可法》的精神不符等，并主张放松管制，采取取消石油合同的审批制，实行备案制，统一协调部门职能，避免重复监管等具体措施。[69]

在我国大力发展对外合作开采海洋石油资源过程中，海事仲裁为中外当事人所能接受的解决合同争议或侵权争议的较为理想的方式。蔡鸿达归纳一些典型的瑕疵仲裁条款，并介绍了中国海事仲裁委员会推荐的标准条款，并主张作为一个海洋大国，中国在努力发展海洋石油工业的过程中，应该大力推动和普及海事仲裁工作，这需要政府部门、行业协会、企业领导发挥积极的作用。[70]

八、海洋渔业

渔业补贴方面，2004 年联合国环境规划署发表的一份报告指出，由于各国提供巨额渔业补贴，全球 3/4 左右的渔业资源已经枯竭或萎缩，并呼吁国际社会对渔业补贴进行改革。陈静娜、慕永通两位学者分析有关各方在世贸组织规则谈判小组的讨论中所形成的主要立场，认为目前的问题已经不是是否应通过国际合作来改革渔业补贴，而是如何通过国际合作来进一步推进渔业补贴改革。世贸谈判最有可能达成的结果可能是介于“信号灯法”和“差别和特殊待遇法”之间的一种混合方法。[71] 杨林、贾明秀回顾了美国、加拿大渔业补贴的演变历程，从渔业补贴对经济增长、国际贸易、可持续发展政策效应的视角评析了渔业补贴政策存在的合理性，并对我国渔业补贴政策调整提出有效建议，认为应当逐步取消“红箱类”补贴、把握好“黄箱类”补贴的度和用足用好“绿箱类”补贴。[72]

---

68 饶丹珍：《弱势海权对石油安全的影响》，载于《郧阳师范高等专科学校学报》2006 年第 5 期。

69 秦国辉：《CNOOC 标准合同的法律定性与海洋石油合同政府管制的反思》，载于高之国、张海文、贾宇主编：《国际海洋法的理论与实践》，北京：海洋出版社 2006 年版，第 229~239 页。

70 蔡鸿达：《海事仲裁：海洋石油开发国际合作的重要法律保障》，载于高之国、张海文、贾宇主编：《国际海洋法的理论与实践》，北京：海洋出版社 2006 年版，第 240~249 页。

71 陈静娜、慕永通：《世贸组织渔业补贴谈判——主要提案立场评析》，载于《中国渔业经济》2005 年第 5 期。

72 杨林、贾明秀：《从美国加拿大财政支渔政策演变历程看渔业补贴之存在性》，载于《中国渔业经济》2005 年第 5 期。

中国海洋渔业法律体系方面，王芳、王自力两位学者认为，中国已形成多层次、多门类、多形式的较完善的法律体系，但也存在着一些问题：首先，从立法精神上看，海洋渔业立法仍从属于渔业立法，未得以独立的发展与延伸，而现有的渔业法律体系中未充分体现世贸组织所要求的公平贸易制度体系；其次，从法律内容上看，涉及渔业管理和资源保护的较多，而水产业振兴与发展战略方面的法律法规则比较薄弱。作者建议应当参照世贸组织的有关规定，填补海洋渔业投入、保险救济等方面的立法空白，建立和完善我国的渔业贸易制度体系。[73]

海洋渔业是渔业生产的一个重要组成部分。海洋渔业的可持续发展关系到整个渔业的可持续发展。何捷明确了“渔业可持续发展”的概念和原则，说明了我国目前面临的渔业资源日趋衰竭、渔业水域污染严重及近海渔业作业范围缩小等困境，提出了我国海洋渔业可持续发展的策略：应更新观念，强化生态养殖理念；走综合开发之路，进一步调整和优化渔业的产业结构；保护资源，防治污染；加强渔业法制建设，实施海洋资源法制化管理；实施科技兴渔战略，应用科学技术更加合理地利用和开发渔业资源。[74] 卢布等学者针对我国海洋渔业资源耗竭、污染严重，市场饱和、质量下降，远洋实力较弱，加工升值尚少等问题，提出了深海远洋、增殖养殖和科技兴渔三大战略，并采用农业综合预测法，预测我国海洋渔业仍然会健康快速发展。[75] 同春芬也认为近年来我国强大的捕捞能力与脆弱的渔业资源矛盾日益尖锐，建议树立人海和谐的理念，合理配置渔业资源，引导渔民转产转业，发展休闲渔业，实现渔业资源合理开发与渔业社会的协调发展。[76] 郭文路、黄硕琳两位学者通过分析当前中、日、韩三国开发利用东海渔业资源的现状，论证了建立东海区渔业资源区域合作管理与共同养护的必要性与可行性，并提出了相关方案，值得关注。[77]

休闲渔业已成为现代渔业的重要组成部分，并在渔业资源保护、促进渔（农）民增收、调整渔业产业结构等方面都发挥着不可忽视的作用。然而，对于休闲渔业的规划、发展与管理，都是这项新型渔业所面临的深层次的问题。刘雅丹对国内外休闲渔业的发展现状进行了详细的描述。[78] 吴艳玲、葛晨霞认为休闲渔业是对渔业资源的综合利用，是娱乐旅游项目，并能够增加渔民收入，并就如何发展我国休闲渔业选择了几个突破口：发展城镇郊区的垂钓娱乐项目；创办一批海钓基

---

73 王芳、王自力：《对中国海洋渔业法律体系的审视》，载于《中国渔业经济》2005 年第 5 期。
74 何捷：《我国海洋渔业可持续发展的思考》，载于《水产科技情报》2006 年第 1 期。
75 卢布、杨瑞珍、陈印军：《我国海洋渔业的发展、问题与前景》，载于《中国农业信息》2006 年第 9 期。
76 同春芬：《海洋渔业社会的和谐发展》，载于《自然辩证法研究》2006 年第 8 期。
77 郭文路、黄硕琳：《东海区渔业资源的区域合作管理与共同养护研究》，载于高之国、张海文、贾宇主编：《国际海洋法的理论与实践》，北京：海洋出版社 2006 年版，第 206~220 页。
78 刘雅丹：《休闲渔业的发展与管理》，载于《世界农业》2006 年第 1 期。

地；积极发展沿海渔区旅游业；有条件的地区开办海上旅游观光活动；制定休闲渔业的发展规划。[79]

渔业权制度方面，王志凯提出渔业权是渔民的固有权益，渔业权的明晰需要渔业权制度建设的保障，作者认为可以参照农村土地产权明晰的实践路子，将集体所有或国家所有集体使用的水域像土地一样承包给渔民，再在承包的国家所有权的水域基础上，创设类似于永佃权（他物权）的永久渔业权。针对渔业权取得的程序及其流转问题，作者认为渔业权是通过政府发证的程序来明晰确认和保护的，而创设保护渔民利益的永佃权，并且在适当的时期改承包权为永佃权，可能是解决水域流转的一个可行办法。作者还探讨了渔业权流转中的收益分配和渔民利益补偿的问题，提出对征用水域的渔民进行征用水域的部分分配转租，让他们参与分享水域开发的长期收益，是一种有效的长期收益权机制。[80]

海洋渔业执法方面，朱孔文、孙承霞两位学者认为目前我国海洋渔业经济发展缺乏宏观指导，协调和规划海洋资源开发管理体制不够完善，渔民法律意识淡薄，渔业执法管理部门机构职责错误和缺位。两位学者建议强化执法，完善海洋渔业法律法规、加强海洋渔业队伍和监督机制、注重法律的宣传和理论研究等。[81]

九、南北极问题

本年度对于两极地区的研究主要集中在科学考察方面。2006 年 3 月，我国南极考察队历时 131 天的第 22 次南极科学考察活动圆满结束。在长城站，考察队完成了国际 GPS 联测、无冰区生态地质调查、海洋生态环境和生物多样性研究、气象常规观测；完成了长城湾码头工程勘察、老建筑设施处置勘察、6000 平方米建筑设施涂装工程、供水系统改造工程。在中山站，考察队首次利用直升机完成了对拉斯曼丘陵地区的航空摄影测量；恢复了中止 6 年的地球重力固体潮观测研究；高空大气物理观测取得一个太阳黑子周期 11 年的完整观测数据；通过中澳合作，在中山站和戴维斯站周边较大范围地开展了企鹅、海豹聚集地粪土层沉积采样工作；完成年度国际 GPS 联测、地磁、臭氧、海冰、气象等常规观测。为满足“十五”能力建设和今后发展的需要，在中山站站区进行了 1:500 地形图的精确测绘；确定了“十五”能力建设项目中山站高频雷达天线阵和油库场地选址，开展

79 吴艳玲、葛晨霞：《浅谈我国休闲渔业的发展》，载于《吉林农业科技学院学报》2006 年第 2 期。

80 王志凯：《渔业权制度与渔民权益保护》，载于《中国渔业经济》2005 年第 5 期。

81 朱孔文、孙承霞：《强化海洋渔业执法促进海洋渔业持续健康发展》，载于《江西水产科技》2006 年第 2 期。

了工程建设必需的地形地质调查，为后续工作的开展奠定了基础。[82] 同时，完成了涉及 3 条断面、范围达 400 多万平方海里的南印度洋浮游生物多样性调查，从而使我国拥有了世界上惟一一份调查范围广泛的南印度洋浮游生物样品，其中一些浮游生物样品在世界上绝无仅有，具有极高的科学研究价值。[83]

“十五”期间，我国极地测绘成果丰硕，我国完成了近 17 万平方公里覆盖面积的极地地图测绘，形成了满足考察所需的各类线划地图、影像地图和专题地图等。长城站高精度绝对重力基准点的测定，填补了我国在乔治王岛无绝对重力点的历史空白。从 2006 年 4 月 7 日结束的武汉大学“南极考察地区基础测绘项目验收会”上获悉，中国极地测绘科学考察在利用 3S 技术及其集成进行南极板块运动监测、极地冰盖环境变化和冰川运动监测、海平面变化，以及构建我国互联网极地空间信息和极地考察管理信息共享服务平台等方面取得了丰硕成果，为我国极地考察做出了重要贡献。[84] 以分别设在中山站和长城站的 2 个 GPS 卫星观测站为平台，我国测绘人员通过 1997−2005 年的精确观测，首次获得了南极板块运动情况：太平洋板块向西北运动，纳兹卡板块向东北运动，非洲板块向东北运动，南极板块向南美运动，印澳板块背离南极板块向北运动。南极大陆总体上在向南美方向运动。[85] 在中国第 21 次南极考察时，我国找到并测定了南极冰盖最高点和高程：南纬 80°22'00"、东经 77°21'11"，大地高程 4093 米。考察队员还在现场进行了人类有史以来首次人工冰原测图，测绘出国际上第一张 70 平方公里南极冰盖最高点冰穹 A 冰面的精确地形图，并在沿途设立了冰盖运动精密监测点，获得东南极长达 1250 公里中山站至冰穹 A 的高程剖面图和考察沿线冰盖运动速度矢量。[86] 中国南极冰盖队挺进南极内陆冰盖 1200 多公里，完成了人类历史上首次冲击南极冰盖之巅的神圣使命。[87]

此外，2006 年度“中国极地科学战略研究基金”项目申报评审工作顺利完成，涉及我国极地事业发展战略研究、重大科学考察项目、重要国际会议对策及跟踪研究和青年科学工作项目等 4 大类的 19 个项目获得总额达 220 余万元的资金支

82 极地办：《中国第 22 次南极考察活动圆满结束》，下载于 http://www.soa.gov.cn/jdsy/0331.htm，2006 年 3 月 30 日。

83 杨威：《我国南极考察队首次获得南印度洋大范围浮游生物样品》，载于《中国海洋报》2006 年 2 月 10 日第 1480 期第一版。

84 吴玲：《我国的极地基础测绘成果喜人》，载于《中国海洋报》2006 年 4 月 11 日第 1497 期第 1 版。

85 张继民、黎昌政：《我国测绘人员发现南极大陆在向南美方向运动》，载于《中国海洋报》2006 年 4 月 11 日第 1497 期第一版。

86 吴玲：《我国的极地基础测绘成果喜人》，载于《中国海洋报》2006 年 4 月 11 日第 1497 期第一版。

87 杨威：《人类首次登上南极冰盖之巅》，下载于 http://www.soa.gov.cn/jdsy/13781a.htm，2005 年 1 月 22 日。

持。[88]

十、海洋科研与军事利用

2006 年是我国落实“十一五”规划的第一年，国家相关部门已陆续启动相关工作落实规划中涉及海洋的部分。“863 计划”设立了海洋领域，“973 计划”、国家自然科学基金已将海洋科学作为重点学科予以重点支持。“海水淡化与综合利用成套技术研究和示范”、“重大海洋灾害预警及应急技术研究”、“极地科学研究”等项目已列入“十一五”国家科技支撑计划。“十一五”极地考察、大洋资源开发研究和近海调查专项及海洋系列卫星研制已经或将被国家批准立项。

在 2006 年 2 月 9 日国务院发布的《国家中长期科学和技术发展规划纲要（2006−2020 年）》所列的 7 个优先主题、一个前沿技术领域、一批相关基础研究发展重点、一个重大科技专项中，均有海洋科技内容。这对于海洋科技的发展来说既是一个巨大的推动力，也是一个极佳的机遇。

2006 年 8 月 25 日，中国海洋法学会 2006 年学术年会在哈尔滨召开。会议由中国海洋法学会和海军装备研究院联合主办，主题为“纪念《联合国海洋法公约》对我国生效十周年暨海军在维护海洋权益中的作用”。来自外交部、国家海洋局、中央军委法制局、总参、海军、海洋行政主管部门等机构的 60 多位代表围绕维护国家海洋权益的主题，就国际海洋法的理论及实践、海洋安全与战略、海军建设与发展等有关问题进行了广泛而深入的交流，对加强我国海洋法律制度建设和海防建设提出了有价值的意见和建议。

2006 年 9 月 4 日，由国家海洋局、科技部、国防科工委和国家自然科学基金委联合召开的首次全国海洋科学技术大会在北京召开，这是建国 57 年来首次召开的全国海洋科学技术大会。大会对《国家“十一五”海洋科学技术发展规划纲要》草案进行了充分讨论。结合大会代表所提的建议和意见，国家海洋局等四部委对《规划纲要》草案又做了进一步的完善，并最终印发了《国家“十一五”海洋科学和技术发展规划纲要》。这是我国首个国家海洋科学和技术发展规划，突出了“一个中心，两个突破，三种能力，四个统筹”的发展思路，突出了海洋科技研发的多学科、多技术综合的特点，确定“十一五”期间我国海洋科学技术发展的目标。全国海洋科技大会的召开和《规划纲要》的颁布实施，标志着我国海洋科技发展进入了全面、协调、创新发展的新的历史时期。[89]

---

88 张一玲：《2006 年度“中国极地科学战略研究基金”项目评审结果揭晓》，载于《中国海洋报》2006 年 7 月 25 日第 1525 期第 1 版。

89 《海洋局局长孙志辉就〈海洋科技规划纲要〉答问》，下载于 http://www.gov.cn/zwhd/2006-11/27/content_454531.htm，2005 年 1 月 23 日。

十一、其他

在海洋法制方面，从 20 世纪 80 年代初开始，我国在海洋领域大规模立法，涉及海洋权益、海洋资源、海洋环境、海洋科研、海上航运等方面。郁志荣认为我国海洋领域出台的法规数量多、领域广、层次高并体现了时代性，但也存在立法滞后、可操作性差、存在空白领域以及适用度低等缺点，建议加强理论研究，完善涉海领域组织机构。[90] 蒋平建议建立海洋法体系的原则，用有关海洋的综合性法律来协调单项法规，健全海洋法律制度，完善我国海洋法体系。[91]

关于海洋管理体制方面，陈艳、赵晓宏两位学者认为我国目前的海洋管理是一种分散型体制，海洋行政管理和海上执法都没有形成协调的机制。中央政府的海洋行政管理部门层次偏低，不能直接对国务院负责，缺乏权威性，难以协调在海洋开发过程中部门之间的矛盾和冲突，职责难以到位。在此基础上，他们提出“海洋综合协调管理系统”的概念。[92] 海上执法是现代海洋管理的重要工具。焦永科比较分析了世界上主要国家海上执法队伍的性质、体制职责和人员、装备及经费等情况，为我国在这方面的工作提供了有益的资料。[93] 孙海亦建议除应有强大的海军和边防力量，还有必要由海事部门牵头，建设一支强有力而协调性高的海事巡航力量。[94]

傅崐成教授在 2006 年中国国际法学会年会上强调，从人均海岸线长度、人均渔场面积、外大陆架面积等方面来看，我国都不是海洋大国。而在国际法上，海洋地理位置不利国家是与陆封国一样，应当享有极大权利的。因此，他极力呼吁向广大国民宣传“中国不是一个海洋大国，而是一个海洋地理位置相对不利的国家”的理念，这样才可以在国际上为我国争取更多的海洋权益。这一理念的提出对我国是海洋大国的传统认识是一个冲击，值得学界重视。[95]

---

90 郁志荣：《我国海洋法制建设现状及其展望》，载于《海洋开发与管理》2006 年第 4 期。
91 蒋平：《完善我国海洋法体系的探讨》，载于《海洋信息》2006 年第 1 期。
92 陈艳，赵晓宏：《我国海洋管理体制改革的方向及目标模式探讨》，载于《中国渔业经济》2006 年第 3 期。
93 焦永科：《国外海上执法力量的特点》，载于高之国、张海文、贾宇主编：《国际海洋法的理论与实践》，北京：海洋出版社 2006 年版，第 277-284 页。
94 孙海：《驰骋在 200 海里巡航线》，载于《安全》2006 年第 1 期。
95 尹丹阳：《国际法与构建和谐世界——中国国际法学会2006年学术年会综述》，载于《西安政治学院学报》2006 年第 3 期。

海域使用权管理规定

（国家海洋局 2006 年 10 月 13 日颁布，于 2007 年 1 月 1 日起施行）

第一章 总则

第一条 为了规范海域使用权管理，维护海域使用秩序，保障海域使用权人的合法权益，根据《中华人民共和国海域使用管理法》（以下简称“《海域法》”）等有关法律法规，制定本规定。

第二条 海域使用权的申请审批、招标、拍卖、转让、出租和抵押，适用本规定。

第三条 使用海域应当依法进行海域使用论证。

第四条 国务院或国务院投资主管部门审批、核准的建设项目涉及海域使用的，应当由国家海洋行政主管部门就其使用海域的事项在项目审批、核准前预先进行审核（以下简称用海预审）。

地方人民政府或其投资主管部门审批、核准的建设项目涉及海域使用的，应当由地方海洋行政主管部门就其使用海域的事项在项目审批、核准前预先进行审核。

第五条 县级以上人民政府海洋行政主管部门负责海域使用申请的受理、审查、审核和报批。

有审批权人民政府的海洋行政主管部门组织实施海域使用权的招标拍卖。

批准用海人民政府的海洋行政主管部门负责海域使用权转让、出租和抵押的监督管理。

第二章 海域使用论证

第六条 使用海域应当依法进行海域使用论证。

市、县两级人民政府海洋行政主管部门应当对选划的养殖区进行整体海域使用论证。单位和个人申请养殖用海时不再进行海域使用论证。但围海养殖、建设人工渔礁或者省、自治区、直辖市以上人民政府审批的养殖用海项目等除外。

第七条 通过申请审批方式取得海域使用权的，申请人委托有资质的单位开展海域使用论证。

通过招标、拍卖方式取得海域使用权的，组织招标、拍卖的单位委托有资质的单位开展海域使用论证。

第八条 海域使用论证资质单位应当在资质等级许可范围内承担论证项目，并对论证结果负责。海域使用论证资质单位的技术负责人和技术人员须持证上岗。

海域使用论证资质管理规定和资质分级标准由国家海洋行政主管部门制定。

第九条 海域使用论证应当客观、科学、公正，并符合国家有关规范和标准。

海域使用论证报告应当符合海域使用论证报告编写大纲要求。

第十条 有审批权人民政府的海洋行政主管部门或者其委托的单位组织专家对海域使用论证报告书进行评审。评审通过的海域使用论证报告有效期三年。

海域使用论证评审专家库管理办法由国家海洋行政主管部门制定。

第三章 用海预审

第十一条 国务院或国务院投资主管部门审批、核准的建设项目需要使用海域的，申请人应当在项目审批、核准前向国家海洋行政主管部门提出海域使用申请，取得用海预审意见。

地方人民政府或其投资主管部门审批、核准的建设项目需要使用海域的，用海预审程序由地方人民政府海洋行政主管部门自行制定。

第十二条 国家海洋行政主管部门应当按照本规定的用海项目审理程序，进行受理、审查、审核，出具用海预审意见。

第十三条 建设项目经批准后，申请人应当及时将项目批准文件提交海洋行政主管部门。

海洋行政主管部门收到项目批准文件后，依法办理海域使用权报批手续。

第十四条 用海预审意见有效期二年。有效期内，项目拟用海面积、位置和用途等发生改变的，应当重新提出海域使用申请。

第四章 海域使用申请审批

第十五条 受理海域使用申请的海洋行政主管部门为受理机关；有审批权人民政府的海洋行政主管部门为审核机关；受理机关和审核机关之间的各级海洋行政主管部门为审查机关。

第十六条 下列项目的海域使用申请，由国家海洋行政主管部门受理：

（一）国务院或国务院投资主管部门审批、核准的建设项目；

（二）省、自治区、直辖市管理海域以外或跨省、自治区、直辖市管理海域的项目；

（三）国防建设项目；

（四）油气及其他海洋矿产资源勘查开采项目；

（五）国家直接管理的海底电缆管道项目；

（六）国家级保护区内的开发项目及核心区用海。

上述规定以外的，由县级海洋行政主管部门受理。跨管理海域的，由共同的上一级海洋行政主管部门受理。

同一项目用海含不同用海类型的，应当按项目整体受理、审查、审核和报批。

第十七条 申请使用海域的，提交下列材料：

（一）海域使用申请书；

（二）申请海域的坐标图；

（三）资信等相关证明材料；

（四）油气开采项目提交油田开发总体方案；

（五）国家级保护区内开发项目提交保护区管理部门的许可文件；

（六）存在利益相关者的，应当提交解决方案或协议。

第十八条 受理机关收到申请材料后，应当组织现场调查和权属核查，并对下列事项进行审查：

（一）项目用海是否符合海洋功能区划；

（二）申请海域是否设置海域使用权；

（三）申请海域的界址、面积是否清楚。

必要时受理机关应当对项目用海内容进行公示。

符合条件需要报送的，应当在收到申请材料之日起十日内提出初审意见，并将初审意见和申请材料报送审查机关；符合条件不需要报送的，受理机关依法进行审核。

不符合条件的，依法告知申请人。

第十九条 审查机关在收到受理机关报送的申请材料后十日内，对下列事项进行审查后，提出审查意见报送上级审查机关或审核机关：

（一）项目用海是否符合海洋功能区划；

（二）申请海域是否计划设置其他海域使用权；

（三）申请海域是否存在管辖异议。

第二十条 审核机关对报送材料初步审查后，通知申请人开展海域使用论证、提交相关材料；收到论证报告后，组织专家评审；必要时征求同级有关部门的意见。

第二十一条 国家海洋行政主管部门受理的项目用海，由其征求项目所在地省级人民政府的意见；县级以上海洋行政主管部门受理并报国务院审批的项目用海，经审核报省级人民政府同意后，报至国家海洋行政主管部门。

第二十二条 审核机关对下列事项进行审查：

（一）申请、受理和审查是否符合规定程序和要求；

（二）是否符合海洋功能区划和相关规划；

（三）是否符合国家有关产业政策；

（四）是否影响国防安全和海上交通安全；

（五）申请海域是否计划设置其他海域使用权；

（六）申请海域是否存在管辖异议；

（七）海域使用论证结论是否切实可行；

（八）申请海域界址、面积是否清楚，有无权属争议；

对符合条件的，提请同级人民政府批准；不符合条件的，依法告知申请人。

第二十三条 海域使用申请经批准后，由审核机关作出项目用海批复，内容包括：

（一）批准使用海域的面积、位置、用途和期限；

（二）海域使用金征收金额、缴纳方式、地点和期限；

（三）办理海域使用权登记和领取海域使用权证书的地点和期限；

（四）逾期的法律后果；

（五）海域使用要求；

（六）其他有关的内容。

审核机关应当将项目用海批复及时送达海域使用申请人，并抄送有关人民政府及海洋行政主管部门。

第二十四条 海域使用申请人应当按项目用海批复要求办理海域使用权登记，领取海域使用权证书。

海域使用权证书是海域使用权的法律凭证。

第二十五条 海域使用权期限届满需要续期的，海域使用权人应当至迟于期限届满前两个月向审核机关提交下列材料：

（一）海域使用权续期申请；

（二）海域使用权证书；

（三）资信等相关证明材料；

第二十六条 因企业合并、分立或者与他人合资、合作经营，变更海域使用权人的，应当向审核机关提交下列材料：

（一）海域使用权变更申请；

（二）海域使用权证书；

（三）海域使用金缴纳凭证；

（四）企业合并、分立或者与他人合资、合作经营的有关证明文件；

（五）存在出租、抵押情况的，应当提交租赁、抵押协议；

（六）相关资信证明材料。

第二十七条 海域使用权人不得擅自改变经批准的海域用途；确需改变的，应

当以拟改变的海域用途按审批权限重新申请报批。

第二十八条 审核机关收到海域使用权续期、变更申请后，应当在二十日内提出审核意见，报原批准用海的人民政府审批。

续期、变更申请批准后的，由审核机关办理海域使用权登记、发证；不予批准的，审核机关依法告知申请人。

第五章 海域使用权招标、拍卖

第二十九条 海域使用权招标、拍卖应当遵循公开、公平、公正和诚实信用的原则，有计划地进行。

第三十条 同一海域有两个或者两个以上用海意向人的，应当采用招标、拍卖方式出让海域使用权。

除下列情形外，海洋行政主管部门可以采取招标、拍卖方式出让海域使用权：

（一）国务院或国务院投资主管部门审批、核准的建设项目；

（二）国防建设项目；

（三）传统赶海区、海洋保护区、有争议的海域或涉及公共利益的海域；

（四）法律法规规定的其他情形。

第三十一条 海洋行政主管部门根据海洋功能区划、海域使用论证结论、海域评估结果等，制定海域使用权招标、拍卖方案，报有审批权的人民政府批准。涉及有关部门和单位的，应当征求意见。

第三十二条 有审批权的人民政府海洋行政主管部门或者其委托的单位，应当根据批准的招标、拍卖方案编制招标、拍卖文件，发布招标拍卖公告。

第三十三条 标底、底价应当根据海域评估结果等确定，不得低于按海域使用金征收标准确定的海域使用金、海域使用论证费、海域测量费和海域评估费等费用总和。

标底、底价在招标、拍卖活动过程中应当保密，且不能变更。

第三十四条 以招标、拍卖方式确定中标人、买受人后，海洋行政主管部门和中标人、买受人签署成交确认书，并按规定签订海域使用权出让合同。

中标人、买受人应当持价款缴纳凭证和海域使用权出让合同，办理海域使用权登记，领取海域使用权证书。

第三十五条 中标人、买受人支付的履约保证金，抵作成交价款；未按成交确认书的要求缴纳成交价款的，履约保证金不予退还，成交确认书无效。

其他投标人、竞买人支付的履约保证金，海洋行政主管部门应当在招标、拍卖活动结束后五日内退还。

第三十六条 海洋行政主管部门应当在海域使用权招标、拍卖活动结束后十

日内公布招标、拍卖结果。

第六章　海域使用权转让、出租和抵押

第三十七条　海域使用权有出售、赠与、作价入股、交换等情形的，可以依法转让。

第三十八条　转让海域使用权应当具备下列条件：

（一）开发利用海域满一年；

（二）不改变海域用途；

（三）已缴清海域使用金；

（四）除海域使用金以外，实际投资已达计划投资总额百分之二十以上；

（五）原海域使用权人无违法用海行为，或违法用海行为已依法处理。

第三十九条　转让海域使用权的，转让双方应当向原批准用海的人民政府海洋行政主管部门提交以下材料：

（一）海域使用权转让申请；

（二）转让协议；

（三）海域使用权证书；

（四）用海设施所有权的合法证明材料；

（五）受让方资信证明材料；

（六）海洋行政主管部门要求的其他书面材料。

第四十条　海洋行政主管部门收到转让申请材料后，十五日内予以批复。

批准的，转让双方应当在十五日内办理海域使用权变更登记，领取海域使用权证书。不予批准的，海洋行政主管部门依法告知转让双方。

海域使用权转让时，其固定附属用海设施随之转让。固定附属用海设施转让时，其使用范围内的海域使用权随之转让。法律法规另有规定的，从其规定。

第四十一条　海域使用权出租的，承租人应当按照海域使用权证书确定的面积、年限和用途使用海域。

海域使用权出租、抵押时，其固定附属用海设施随之出租、抵押，固定附属用海设施出租、抵押时，其使用范围内的海域使用权随之出租、抵押。法律法规另有规定的，从其规定。

海域使用权取得时免缴或者减缴海域使用金的，补缴海域使用金后方可出租、抵押。

第四十二条　有下列情形之一的，海域使用权不得出租、抵押：

（一）权属不清或者权属有争议的；

（二）未按规定缴纳海域使用金、改变海域用途等违法用海的；

（三）油气及其他海洋矿产资源勘查开采的；

（四）海洋行政主管部门认为不能出租、抵押的。

第四十三条 海域使用权出租、抵押的，双方当事人应当到原登记机关办理登记手续。

第七章 罚则

第四十四条 海域使用论证资质单位有下列情形之一的，由国家海洋行政主管部门给予警告、暂停执业、降低资质等级或者吊销资质证书的处理，给国家或者委托人造成损失的，海域使用论证单位应当依照有关法律法规给予赔偿：

（一）越级或超越证书规定范围承担论证项目；

（二）在海域使用论证报告中使用虚构或者明显失实的数据资料；

（三）海域使用论证报告严重失实；

（四）其他虚构事实、隐瞒真相的行为。

第四十五条 未经批准改变海域使用用途的，依照《海域法》第四十六条的规定处理。

第四十六条 未经批准擅自转让海域使用权的，没收非法所得；有非法新建用海设施的，限期拆除，逾期拒不拆除的，依照《海域法》第四十二条、第四十七条的规定处理。

第四十七条 超面积填海的，收回非法所填海域，并处非法占用海域应缴纳海域使用金十倍以上二十倍以下的罚款。

第四十八条 未经登记擅自出租、抵押海域使用权，出租、抵押无效。

第四十九条 投标人、竞买人有下列行为之一的，中标、买受结果无效；造成损失的，依法承担赔偿责任：

（一）提供虚假文件隐瞒事实的；

（二）采取行贿、恶意串通等非法手段中标或者买受的。

第五十条 有下列情形之一的，对直接负责的主管人员和其他直接责任人员追究相应责任：

（一）超越批准权限非法批准使用海域的；

（二）不按海洋功能区划批准使用海域的；

（三）违反本规定颁发海域使用权证书的；

（四）颁发海域使用权证书后不进行监督管理的；

（五）发现违法行为不予查处的；

（六）对含不同用海类型的同一项目用海，分解受理、审查、审核和报批的；

（七）泄露、变更标底、底价的；

（八）未按规定时间退还履约保证金的。

第五十一条 海洋行政主管部门的工作人员徇私舞弊、滥用职权或玩忽职守构成犯罪的，依法追究刑事责任。

第八章 附则

第五十二条 填海造地项目在施工过程中应当进行海域使用动态监测。

审核机关应当对填海造地项目组织竣工验收；竣工验收合格后，办理相关登记手续。

填海造地项目的竣工验收程序另行规定。

第五十三条 县级以上人民政府海洋行政主管部门应当对所辖海域内的海域使用情况进行统计，并建立公开查询机制。

国家海洋行政主管部门负责全国海域使用统计工作，并定期发布海域使用统计信息。

第五十四条 海域使用论证报告编写大纲的内容、海域使用权证书以及本规定需要的文书格式由国家海洋行政主管部门统一制定。

本规定要求提交的海域使用申请书、海域使用权续期申请或者变更申请一式五份。

第五十五条 本规定自2007年1月1日起施行。2002年国家海洋局发布的《海域使用申请审批暂行办法》（国海发 [2002]5 号），自本规定实施之日起废止。

防治海洋工程建设项目污染损害海洋环境管理条例

（2006 年 8 月 30 日国务院第 148 次常务会议通过，自 2006 年 11 月 1 日起施行。）

第一章 总则

第一条 为了防治和减轻海洋工程建设项目（以下简称“海洋工程”）污染损害海洋环境，维护海洋生态平衡，保护海洋资源，根据《中华人民共和国海洋环境保护法》，制定本条例。

第二条 在中华人民共和国管辖海域内从事海洋工程污染损害海洋环境防治活动，适用本条例。

第三条 本条例所称海洋工程，是指以开发、利用、保护、恢复海洋资源为目的，并且工程主体位于海岸线向海一侧的新建、改建、扩建工程。具体包括：

（一）围填海、海上堤坝工程；

（二）人工岛、海上和海底物资储藏设施、跨海桥梁、海底隧道工程；

（三）海底管道、海底电（光）缆工程；

（四）海洋矿产资源勘探开发及其附属工程；

（五）海上潮汐电站、波浪电站、温差电站等海洋能源开发利用工程；

（六）大型海水养殖场、人工鱼礁工程；

（七）盐田、海水淡化等海水综合利用工程；

（八）海上娱乐及运动、景观开发工程；

（九）国家海洋主管部门会同国务院环境保护主管部门规定的其他海洋工程。

第四条 国家海洋主管部门负责全国海洋工程环境保护工作的监督管理，并接受国务院环境保护主管部门的指导、协调和监督。沿海县级以上地方人民政府海洋主管部门负责本行政区域毗邻海域海洋工程环境保护工作的监督管理。

第五条 海洋工程的选址和建设应当符合海洋功能区划、海洋环境保护规划和国家有关环境保护标准，不得影响海洋功能区的环境质量或者损害相邻海域的功能。

第六条 国家海洋主管部门根据国家重点海域污染物排海总量控制指标，分配重点海域海洋工程污染物排海控制数量。

第七条 任何单位和个人对海洋工程污染损害海洋环境、破坏海洋生态等违法行为，都有权向海洋主管部门进行举报。

接到举报的海洋主管部门应当依法进行调查处理，并为举报人保密。

第二章 环境影响评价

第八条 国家实行海洋工程环境影响评价制度。

海洋工程的环境影响评价，应当以工程对海洋环境和海洋资源的影响为重点进行综合分析、预测和评估，并提出相应的生态保护措施，预防、控制或者减轻工程对海洋环境和海洋资源造成的影响和破坏。

海洋工程环境影响报告书应当依据海洋工程环境影响评价技术标准及其他相关环境保护标准编制。编制环境影响报告书应当使用符合国家海洋主管部门要求的调查、监测资料。

第九条 海洋工程环境影响报告书应当包括下列内容：

（一）工程概况；

（二）工程所在海域环境现状和相邻海域开发利用情况；

（三）工程对海洋环境和海洋资源可能造成影响的分析、预测和评估；

（四）工程对相邻海域功能和其他开发利用活动影响的分析及预测；

（五）工程对海洋环境影响的经济损益分析和环境风险分析；

（六）拟采取的环境保护措施及其经济、技术论证；

（七）公众参与情况；

（八）环境影响评价结论。海洋工程可能对海岸生态环境产生破坏的，其环境影响报告书中应当增加工程对近岸自然保护区等陆地生态系统影响的分析和评价。

第十条 新建、改建、扩建海洋工程的建设单位，应当委托具有相应环境影响评价资质的单位编制环境影响报告书，报有核准权的海洋主管部门核准。

海洋主管部门在核准海洋工程环境影响报告书前，应当征求海事、渔业主管部门和军队环境保护部门的意见；必要时，可以举行听证会。其中，围填海工程必须举行听证会。

海洋主管部门在核准海洋工程环境影响报告书后，应当将核准后的环境影响报告书报同级环境保护主管部门备案，接受环境保护主管部门的监督。

海洋工程建设单位在办理项目审批、核准、备案手续时，应当提交经海洋主管部门核准的海洋工程环境影响报告书。

第十一条 下列海洋工程的环境影响报告书，由国家海洋主管部门核准：

（一）涉及国家海洋权益、国防安全等特殊性质的工程；

（二）海洋矿产资源勘探开发及其附属工程；

（三）50 公顷以上的填海工程，100 公顷以上的围海工程；

（四）潮汐电站、波浪电站、温差电站等海洋能源开发利用工程；

（五）由国务院或者国务院有关部门审批的海洋工程。

前款规定以外的海洋工程的环境影响报告书，由沿海县级以上地方人民政府海洋主管部门根据沿海省、自治区、直辖市人民政府规定的权限核准。

海洋工程可能造成跨区域环境影响并且有关海洋主管部门对环境影响评价结论有争议的，该工程的环境影响报告书由其共同的上一级海洋主管部门核准。

第十二条 海洋主管部门应当自收到海洋工程环境影响报告书之日起 60 个工作日内，作出是否核准的决定，书面通知建设单位。

需要补充材料的，应当及时通知建设单位，核准期限从材料补齐之日起重新计算。

第十三条 海洋工程环境影响报告书核准后，工程的性质、规模、地点、生产工艺或者拟采取的环境保护措施等发生重大改变的，建设单位应当委托具有相应环境影响评价资质的单位重新编制环境影响报告书，报原核准该工程环境影响报告书的海洋主管部门核准；海洋工程自环境影响报告书核准之日起超过 5 年方开工建设的，应当在工程开工建设前，将该工程的环境影响报告书报原核准该工程环境影响报告书的海洋主管部门重新核准。

海洋主管部门在重新核准海洋工程环境影响报告书后，应当将重新核准后的环境影响报告书报同级环境保护主管部门备案。

第十四条 建设单位可以采取招标方式确定海洋工程的环境影响评价单位。其他任何单位和个人不得为海洋工程指定环境影响评价单位。

第十五条 从事海洋工程环境影响评价的单位和有关技术人员，应当按照国务院环境保护主管部门的规定，取得相应的资质证书和资格证书。

国务院环境保护主管部门在颁发海洋工程环境影响评价单位的资质证书前，应当征求国家海洋主管部门的意见。

第三章 海洋工程的污染防治

第十六条 海洋工程的环境保护设施应当与主体工程同时设计、同时施工、同时投产使用。

第十七条 海洋工程的初步设计，应当按照环境保护设计规范和经核准的环境影响报告书的要求，编制环境保护篇章，落实环境保护措施和环境保护投资概算。

第十八条 建设单位应当在海洋工程投入运行之日 30 个工作日前，向原核准该工程环境影响报告书的海洋主管部门申请环境保护设施的验收；海洋工程投

入试运行的，应当自该工程投入试运行之日起60个工作日内，向原核准该工程环境影响报告书的海洋主管部门申请环境保护设施的验收。

分期建设、分期投入运行的海洋工程，其相应的环境保护设施应当分期验收。

第十九条 海洋主管部门应当自收到环境保护设施验收申请之日起30个工作日内完成验收；验收不合格的，应当限期整改。

海洋工程需要配套建设的环境保护设施未经海洋主管部门验收或者经验收不合格的，该工程不得投入运行。

建设单位不得擅自拆除或者闲置海洋工程的环境保护设施。

第二十条 海洋工程在建设、运行过程中产生不符合经核准的环境影响报告书的情形的，建设单位应当自该情形出现之日起20个工作日内组织环境影响的后评价，根据后评价结论采取改进措施，并将后评价结论和采取的改进措施报原核准该工程环境影响报告书的海洋主管部门备案；原核准该工程环境影响报告书的海洋主管部门也可以责成建设单位进行环境影响的后评价，采取改进措施。

第二十一条 严格控制围填海工程。禁止在经济生物的自然产卵场、繁殖场、索饵场和鸟类栖息地进行围填海活动。

围填海工程使用的填充材料应当符合有关环境保护标准。

第二十二条 建设海洋工程，不得造成领海基点及其周围环境的侵蚀、淤积和损害，危及领海基点的稳定。

进行海上堤坝、跨海桥梁、海上娱乐及运动、景观开发工程建设的，应当采取有效措施防止对海岸的侵蚀或者淤积。

第二十三条 污水离岸排放工程排污口的设置应当符合海洋功能区划和海洋环境保护规划，不得损害相邻海域的功能。

污水离岸排放不得超过国家或者地方规定的排放标准。在实行污染物排海总量控制的海域，不得超过污染物排海总量控制指标。

第二十四条 从事海水养殖的养殖者，应当采取科学的养殖方式，减少养殖饵料对海洋环境的污染。因养殖污染海域或者严重破坏海洋景观的，养殖者应当予以恢复和整治。

第二十五条 建设单位在海洋固体矿产资源勘探开发工程的建设、运行过程中，应当采取有效措施，防止污染物大范围悬浮扩散，破坏海洋环境。

第二十六条 海洋油气矿产资源勘探开发作业中应当配备油水分离设施、含油污水处理设备、排油监控装置、残油和废油回收设施、垃圾粉碎设备。

海洋油气矿产资源勘探开发作业中所使用的固定式平台、移动式平台、浮式储油装置、输油管线及其他辅助设施，应当符合防渗、防漏、防腐蚀的要求；作业单位应当经常检查，防止发生漏油事故。

前款所称固定式平台和移动式平台，是指海洋油气矿产资源勘探开发作业中所使用的钻井船、钻井平台、采油平台和其他平台。

第二十七条 海洋油气矿产资源勘探开发单位应当办理有关污染损害民事责任保险。

第二十八条 海洋工程建设过程中需要进行海上爆破作业的，建设单位应当在爆破作业前报告海洋主管部门，海洋主管部门应当及时通报海事、渔业等有关部门。

进行海上爆破作业，应当设置明显的标志、信号，并采取有效措施保护海洋资源。在重要渔业水域进行炸药爆破作业或者进行其他可能对渔业资源造成损害的作业活动的，应当避开主要经济类鱼虾的产卵期。

第二十九条 海洋工程需要拆除或者改作他用的，应当报原核准该工程环境影响报告书的海洋主管部门批准。拆除或者改变用途后可能产生重大环境影响的，应当进行环境影响评价。

海洋工程需要在海上弃置的，应当拆除可能造成海洋环境污染损害或者影响海洋资源开发利用的部分，并按照有关海洋倾倒废弃物管理的规定进行。

海洋工程拆除时，施工单位应当编制拆除的环境保护方案，采取必要的措施，防止对海洋环境造成污染和损害。

第四章 污染物排放管理

第三十条 海洋油气矿产资源勘探开发作业中产生的污染物的处置，应当遵守下列规定：

（一）含油污水不得直接或者经稀释排放入海，应当经处理符合国家有关排放标准后再排放；

（二）塑料制品、残油、废油、油基泥浆、含油垃圾和其他有毒有害残液残渣，不得直接排放或者弃置入海，应当集中储存在专门容器中，运回陆地处理。

第三十一条 严格控制向水基泥浆中添加油类，确需添加的，应当如实记录并向原核准该工程环境影响报告书的海洋主管部门报告添加油的种类和数量。禁止向海域排放含油量超过国家规定标准的水基泥浆和钻屑。

第三十二条 建设单位在海洋工程试运行或者正式投入运行后，应当如实记录污染物排放设施、处理设备的运转情况及其污染物的排放、处置情况，并按照国家海洋主管部门的规定，定期向原核准该工程环境影响报告书的海洋主管部门报告。

第三十三条 县级以上人民政府海洋主管部门，应当按照各自的权限核定海洋工程排放污染物的种类、数量，根据国务院价格主管部门和财政部门制定的收费标准确定排污者应当缴纳的排污费数额。

排污者应当到指定的商业银行缴纳排污费。

第三十四条 海洋油气矿产资源勘探开发作业中应当安装污染物流量自动监控仪器，对生产污水、机舱污水和生活污水的排放进行计量。

第三十五条 禁止向海域排放油类、酸液、碱液、剧毒废液和高、中水平放射性废水；严格限制向海域排放低水平放射性废水，确需排放的，应当符合国家放射性污染防治标准。

严格限制向大气排放含有毒物质的气体，确需排放的，应当经过净化处理，并不得超过国家或者地方规定的排放标准；向大气排放含放射性物质的气体，应当符合国家放射性污染防治标准。

严格控制向海域排放含有不易降解的有机物和重金属的废水；其他污染物的排放应当符合国家或者地方标准。

第三十六条 海洋工程排污费全额纳入财政预算，实行“收支两条线”管理，并全部专项用于海洋环境污染防治。具体办法由国务院财政部门会同国家海洋主管部门制定。

第五章 污染事故的预防和处理

第三十七条 建设单位应当在海洋工程正式投入运行前制定防治海洋工程污染损害海洋环境的应急预案，报原核准该工程环境影响报告书的海洋主管部门和有关主管部门备案。

第三十八条 防治海洋工程污染损害海洋环境的应急预案应当包括以下内容：

（一）工程及其相邻海域的环境、资源状况；

（二）污染事故风险分析；

（三）应急设施的配备；

（四）污染事故的处理方案。

第三十九条 海洋工程在建设、运行期间，由于发生事故或者其他突发性事件，造成或者可能造成海洋环境污染事故时，建设单位应当立即向可能受到污染的沿海县级以上地方人民政府海洋主管部门或者其他有关主管部门报告，并采取有效措施，减轻或者消除污染，同时通报可能受到危害的单位和个人。

沿海县级以上地方人民政府海洋主管部门或者其他有关主管部门接到报告后，应当按照污染事故分级规定及时向县级以上人民政府和上级有关主管部门报告。县级以上人民政府和有关主管部门应当按照各自的职责，立即派人赶赴现场，采取有效措施，消除或者减轻危害，对污染事故进行调查处理。

第四十条 在海洋自然保护区内进行海洋工程建设活动，应当按照国家有关海洋自然保护区的规定执行。

第六章 监督检查

第四十一条 县级以上人民政府海洋主管部门负责海洋工程污染损害海洋环境防治的监督检查，对违反海洋污染防治法律、法规的行为进行查处。

县级以上人民政府海洋主管部门的监督检查人员应当严格按照法律、法规规定的程序和权限进行监督检查。

第四十二条 县级以上人民政府海洋主管部门依法对海洋工程进行现场检查时，有权采取下列措施：

（一）要求被检查单位或者个人提供与环境保护有关的文件、证件、数据以及技术资料等，进行查阅或者复制；

（二）要求被检查单位负责人或者相关人员就有关问题作出说明；

（三）进入被检查单位的工作现场进行监测、勘查、取样检验、拍照、摄像；

（四）检查各项环境保护设施、设备和器材的安装、运行情况；

（五）责令违法者停止违法活动，接受调查处理；

（六）要求违法者采取有效措施，防止污染事态扩大。

第四十三条 县级以上人民政府海洋主管部门的监督检查人员进行现场执法检查时，应当出示规定的执法证件。用于执法检查、巡航监视的公务飞机、船舶和车辆应当有明显的执法标志。

第四十四条 被检查单位和个人应当如实提供材料，不得拒绝或者阻碍监督检查人员依法执行公务。

有关单位和个人对海洋主管部门的监督检查工作应当予以配合。

第四十五条 县级以上人民政府海洋主管部门对违反海洋污染防治法律、法规的行为，应当依法作出行政处理决定；有关海洋主管部门不依法作出行政处理决定的，上级海洋主管部门有权责令其依法作出行政处理决定或者直接作出行政处理决定。

第七章 法律责任

第四十六条 建设单位违反本条例规定，有下列行为之一的，由负责核准该工程环境影响报告书的海洋主管部门责令停止建设、运行，限期补办手续，并处 5 万元以上 20 万元以下的罚款：

（一）环境影响报告书未经核准，擅自开工建设的；

（二）海洋工程环境保护设施未申请验收或者经验收不合格即投入运行的。

第四十七条 建设单位违反本条例规定，有下列行为之一的，由原核准该工

程环境影响报告书的海洋主管部门责令停止建设、运行，限期补办手续，并处5万元以上20万元以下的罚款：

（一）海洋工程的性质、规模、地点、生产工艺或者拟采取的环境保护措施发生重大改变，未重新编制环境影响报告书报原核准该工程环境影响报告书的海洋主管部门核准的；

（二）自环境影响报告书核准之日起超过5年，海洋工程方开工建设，其环境影响报告书未重新报原核准该工程环境影响报告书的海洋主管部门核准的；

（三）海洋工程需要拆除或者改作他用时，未报原核准该工程环境影响报告书的海洋主管部门批准或者未按要求进行环境影响评价的。

第四十八条 建设单位违反本条例规定，有下列行为之一的，由原核准该工程环境影响报告书的海洋主管部门责令限期改正；逾期不改正的，责令停止运行，并处1万元以上10万元以下的罚款：

（一）擅自拆除或者闲置环境保护设施的；

（二）未在规定时间内进行环境影响后评价或者未按要求采取整改措施的。

第四十九条 建设单位违反本条例规定，有下列行为之一的，由县级以上人民政府海洋主管部门责令停止建设、运行，限期恢复原状；逾期未恢复原状的，海洋主管部门可以指定具有相应资质的单位代为恢复原状，所需费用由建设单位承担，并处恢复原状所需费用1倍以上2倍以下的罚款：

（一）造成领海基点及其周围环境被侵蚀、淤积或者损害的；

（二）违反规定在海洋自然保护区内进行海洋工程建设活动的。

第五十条 建设单位违反本条例规定，在围填海工程中使用的填充材料不符合有关环境保护标准的，由县级以上人民政府海洋主管部门责令限期改正；逾期不改正的，责令停止建设、运行，并处5万元以上20万元以下的罚款；造成海洋环境污染事故，直接负责的主管人员和其他直接责任人员构成犯罪的，依法追究刑事责任。

第五十一条 建设单位违反本条例规定，有下列行为之一的，由原核准该工程环境影响报告书的海洋主管部门责令限期改正；逾期不改正的，处1万元以上5万元以下的罚款：

（一）未按规定报告污染物排放设施、处理设备的运转情况或者污染物的排放、处置情况的；

（二）未按规定报告其向水基泥浆中添加油的种类和数量的；

（三）未按规定将防治海洋工程污染损害海洋环境的应急预案备案的；

（四）在海上爆破作业前未按规定报告海洋主管部门的；

（五）进行海上爆破作业时，未按规定设置明显标志、信号的。

第五十二条 建设单位违反本条例规定，进行海上爆破作业时未采取有效措施保护海洋资源的，由县级以上人民政府海洋主管部门责令限期改正；逾期未改正

的，处 1 万元以上 10 万元以下的罚款。

建设单位违反本条例规定，在重要渔业水域进行炸药爆破或者进行其他可能对渔业资源造成损害的作业，未避开主要经济类鱼虾产卵期的，由县级以上人民政府海洋主管部门予以警告、责令停止作业，并处 5 万元以上 20 万元以下的罚款。

第五十三条 海洋油气矿产资源勘探开发单位违反本条例规定向海洋排放含油污水，或者将塑料制品、残油、废油、油基泥浆、含油垃圾和其他有毒有害残液残渣直接排放或者弃置入海的，由国家海洋主管部门或者其派出机构责令限期清理，并处 2 万元以上 20 万元以下的罚款；逾期未清理的，国家海洋主管部门或者其派出机构可以指定有相应资质的单位代为清理，所需费用由海洋油气矿产资源勘探开发单位承担；造成海洋环境污染事故，直接负责的主管人员和其他直接责任人员构成犯罪的，依法追究刑事责任。

第五十四条 海水养殖者未按规定采取科学的养殖方式，对海洋环境造成污染或者严重影响海洋景观的，由县级以上人民政府海洋主管部门责令限期改正；逾期不改正的，责令停止养殖活动，并处清理污染或者恢复海洋景观所需费用 1 倍以上 2 倍以下的罚款。

第五十五条 建设单位未按本条例规定缴纳排污费的，由县级以上人民政府海洋主管部门责令限期缴纳；逾期拒不缴纳的，处应缴纳排污费数额 2 倍以上 3 倍以下的罚款。

第五十六条 违反本条例规定，造成海洋环境污染损害的，责任者应当排除危害，赔偿损失。完全由于第三者的故意或者过失造成海洋环境污染损害的，由第三者排除危害，承担赔偿责任。

违反本条例规定，造成海洋环境污染事故，直接负责的主管人员和其他直接责任人员构成犯罪的，依法追究刑事责任。

第五十七条 海洋主管部门的工作人员违反本条例规定，有下列情形之一的，依法给予行政处分；构成犯罪的，依法追究刑事责任：

（一）未按规定核准海洋工程环境影响报告书的；

（二）未按规定验收环境保护设施的；

（三）未按规定对海洋环境污染事故进行报告和调查处理的；

（四）未按规定征收排污费的；

（五）未按规定进行监督检查的。

第八章 附则

第五十八条 船舶污染的防治按照国家有关法律、行政法规的规定执行。

第五十九条 本条例自 2006 年 11 月 1 日起施行。

International Principles for Responsible Shrimp Farming

FAO, NACA, UNEP, WB, WWF

1. Background and Purpose

Introduction

Aquaculture production and trade in aquaculture products continues to grow at a fast pace, responding to increased global demand for fish，shrimp，mollusks and other aquatic products. In 2004，aquaculture production reached59 million tones，with a farm gate value of ＄70 billion. Developing countries dominate aquaculture production and trade，contributing over 80% of production and 50％ to the value of internationally traded aquatic products. Aquaculture is making an increasingly significant contribution to the global seafood trade，as well as to domestic consumption, and will continue to grow due to stagnating wild capture fisheries supplies.

With increasing volume of production, trade and consumption there is a concurrent and increasing demand for improved sustainability, social acceptability, and human health safety from the aquaculture sector. This is not only affecting the international trading environment and pressurizing producers to focus on production methods to address those issues, but also challenges producing countries to develop and implement adequate and appropriate policies and institutions that provide a conducive environment for responsible production and trade. To assist in achieving these objectives, the members of the Food and the Agriculture Organization of United Nations (FAO) in 1995adopted the Code of Conduct for Responsible Fisheries，providing a framework for responsible development of aquaculture and fisheries.

Shrimp Farming

Shrimp farming has been one of the fastest growing aquaculture sectors inAsia and Latin America, and recently Africa, but also one of the most controversial. Rapid expansion of shrimp farming has generated substantial income for many developing countries，as well as developed countries, but has been accompanied

by rising concerns over environmental and social impacts of development. Major issues raised include the ecological consequences of conversion of natural ecosystems，particularly mangroves, for construction of shrimp ponds, the effects such as salination of groundwater and agricultural land，use of fish meal in shrimp diets，pollution of coastal waters due to pond effluents，biodiversity issues arising from collection of wild brood and seed, and social conflicts in some coastal areas. The sustainability of shrimp aquaculture has been questioned by some in view of self-pollution in shrimp growing areas，combined with the introduction of pathogens, leading to major shrimp disease out breaks, and pathogens, leading to major shrimp disease outbreaks，and significant economic losses in producing countries. Due to the strong global interest in shrimp farming and the issues that have arisen from its development, a Consortium Program involving the World Bank, the Network of Aquaculture Centres in Asia-Pacific（NACA）, the World Wildlife Fund (WWF)，and the Food and Agriculture Organization of the United Nations（FAO）was initiated in 1999 to analyze and share experiences on the environmental and social impacts, and management of sustainable shrimp farming. The development of the work program for the Consortium benefited from recommendations of the FAO Bangkok Technical Consultation on Policies for Sustainable Shrimp Culture (FAO,1998)，a World Bank review on Shrimp Farming and the Environment (World Bank, 1998) and an April 1999 meeting on shrimp aquaculture management practices hosted by NACA and WWF in Bangkok, Thailand. The FAO Expert Consultation on Good Management Practices and Good Legal and Institutional Arrangements for Sustainable Shrimp Culture held in Brisbane, Australia in December 2000 provided further guidance to the Consortium process.

The FAO Committee on Fisheries Sub-Committee on Aquaculture in its second session held in Trondheim, Norway, in 2003 agreed that a set of “core” management principles should be developed to support sustainable development of aquaculture, with a priority to shrimp farming requiring improved management. The Consortium was requested to undertake this responsibility. During this meeting the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities of the United Nations Environmental Programme（UNEP/GPA) expressed its interest to join this initiative and subsequently the Consortium formalized the partnership through signing a collaborative agreement with UNEP/GPA. This recommendation and partnership provides the basis for development of an internationally accepted set of principles that can be widely

adopted.

Purpose

The purpose of the International Principles as mandated by the members of FAO and NACA, is to provide principles for management of shrimp farming that provide guidance in implementation of the FAO Code of Conduct for Responsible Fisheries in the shrimp aquaculture sector. The International Principles consider technical，environmental，social and economic issues associated with shrimp farming and provide a basis for industry and government management to improve the overall sustainability of shrimp farming at national, regional and global levels. The principles and associated guidance on implementation may be used by public and private sectors for development of locally specific Codes of Practice（COP)，better management practices (BMPs) or other management approaches for shrimp farming, suitable for adoption by farmers in particular social, economic and environmental contexts.

The International Principles provide the basis upon which stakeholders can collaborate for a more sustainable development of shrimp farming. For governments, they provide a basis for policy，administration and legal frameworks, that can be renewed（or formulated where there are none），adjusted, funded and implemented to address the specific characteristics and needs of the sector in order to protect and enhance the industry, the environment, other resource users and consumers. Typically, existing legislation and guidelines have been modified from those suitable for other industries and are not always applicable to aquaculture. Strengthening of institutional arrangements，capacity and partnerships is also important to ensure the cooperation and coordination of all relevant institutions with jurisdiction over natural resources, animal and public health. The International Principles also provide the basis for development of standards and certification systems. Further details on implementation and compliance to the International Principles will be available through another publication which is currently being prepared by the Consortium.

Principle 1-Farm Siting:

Locate shrimp farms according to national planning and legal frameworks in environmentally suitable locations, making efficient use of land and water resources and in ways that conserve biodiversity, ecologically sensitive habitats and ecosystem functions, recognizing other land uses, and that other people and species depend upon these same ecosystems.

Justification: It is clear from substantial worldwide experience that inappro-

priate and unplanned siting of shrimp farms has resulted in production failures, environmental degradation, land use conflicts and social injustice.

Thus, it is imperative that, during establishment of shrimp farms, due consideration is given to the environment, ecologically sensitive habitats, other land use in the vicinity, and the sustainability of the shrimp farming operations themselves.

Implementation guidance:

• Build new shrimp farms above the inter-tidal zone.

• No net loss of mangroves or other sensitive wetland habitats.

• Do not locate shrimp farms on sandy soils or other areas where seepage or discharge of salt water may affect agricultural land or fresh water supplies.

• Do not locate new shrimp farms in areas that have already reached carrying capacity for aquaculture.

• Retain buffer zones and habitat corridors between farms and other users and habitats.

• Obey land use and other planning laws and coastal management plans.

• Improve existing farms in inter-tidal and mangrove areas through mangrove restoration, retiring unproductive ponds and increasing

productivity of remaining farm areas above the inter-tidal zone.

Principle 2-Farm Design:

Design and construct shrimp farms in ways that minimize environmental damage.

Justification: With the increasing intensity and expansion of shrimp farming operations evident in recent years, suitable design and construction techniques should be used when establishing new shrimp farms. Advantage should be taken of improved techniques that take into account not only the requirements of the cultured shrimp and the management of the farm, but also integrate the farm into the local environment whilst causing the minimum possible disturbance to the surrounding ecosystems.

Implementation guidance:

• Incorporate buffer areas and techniques and engineering practices that minimize erosion and salination of surrounding areas during farm construction and operation.

• Minimize disturbance of acid-sulfate soils during construction and operation.

• Conserve biodiversity and encourage re-establishment of natural habitats in

farm design.

• Minimize creation of degraded areas such as unused soil piles and borrow pits.

• Design dykes, canals and infrastructure in ways that do not adversely affect hydrology.

• Separate effluent discharge points from inlet canal to reduce self pollution and maintain biosecurity.

Principle 3-Water Use:

Minimise the impact of water use for shrimp farming on water resources.

Justification: Minimizing the use of new water is an essential part of modern, environmentally responsible shrimp farming. Reducing water exchange benefits the farmer by lowering pumping costs and reducing the chance of introducing toxic compounds，pathogens，disease vectors or other undesirable organisms into the farm. It also benefits the environment by reducing the discharge of nutrients and organic matter from the farms and by reducing the utilization of precious freshwater resources. Recent innovations have shown that proper management protocols can reduce water exchange requirements, even in highly intensive systems, with no loss in shrimp performance. This has benefits for all parties and should be encouraged at all levels.

Implementation guidance:

• No use of fresh groundwater for salinity control.

• Use water efficiently through minimizing water abstraction.

• Minimize discharge of farm effluents and sediment to the environment.

• Aim to return water with lower concentrations of nutrients, organic matter and solids to the ecosystem than that taken out.

• Incorporate settlement and sedimentation ponds into the water inlet and outlet designs.

• Manage water and soil quality to maintain suitable environmental conditions in shrimp ponds.

• Obey national laws and guidelines on water use and effluent discharge.

Principle 4-Broodstock and Post larvae:

Where possible, use domesticated selected stocks of disease free and/or resistant shrimp broodstock and post-larvae to enhance biosecurity, reduce disease incidence and increase production, whilst reducing the demand for wild stocks.

Justification: Recent trends in shrimp farming have seen a change towards the use of domesticated stocks of animals, following the current agricultural paradigm.

Elimination of the need to source broodstock and/or post-larvae from the wild has allowed the industry to develop successful programmes for the enhancement of their shrimp stocks, in terms of both their reproductive and production characteristics. It has also lead to the development of some disease free and/or disease resistant stocks. Concomitantly, these developments have lead to reduced demands for wild stocks and hence reductions in unwanted by-catch and habitat losses involved with their collection. However, further work is required to achieve these advances for all currently cultured species. The problems with transboundary movements of non-indigenous species which brought new threats of disease transmission and reduced biodiversity must be addressed.

Implementation guidance:

• Avoid negative impacts on biodiversity from collection of wild caught broodstock or post-larvae.

Give preference to local and indigenous shrimp species.

• Adopt on-farm quarantine and biosecurity measures to reduce risks of disease introductions.

• Use domesticated stocks wherever possible.

• Stock good quality post larvae to improve chances of successful harvest.

• Comply with national，regional and international criteria controlling the movement and quarantine of animals.

Principle 5-Feed Management:

Utilize feeds and feed management practices that make efficient use of available feed resources, promote efficient shrimp growth, minimize production and discharge of wastes.

Justification: Control and rationalization of feeds and feeding in modern shrimp farming is of critical importance in maintaining a cost-effective and environmentally sound industry. This is due to many factors including:

Feeds and feeding account for 50~60% of the operational costs of semi-and intensive shrimp farming. Wasted（uneaten and unmetabolized）feed in addition to affecting pond water quality and predisposing shrimp to disease is also a major contributor to the discharge of nutrients and organic matter from shrimp farms leading to eutrophication of the environment. Increasing concern is also being expressed regarding the wasteful use of increasingly scarce resources of fishmeal going into shrimp diets for a net loss of protein resources and allied losses due to by-catch from the fishmeal industry.

Formulation of cost-efficient and high quality, low polluting diets, and proper

management of the feeding regime are thus crucial in attempting to optimize the efficient use of feeds in shrimp farming.

Implementation guidance:

- Use good quality formulated feeds.
- Make efficient use of shrimp feed resources.
- Minimize shrimp feed wastage.

Principle 6-Health Management:

Health management plans should be adopted that aim to reduce stress, minimize the risks of disease affecting both the cultured and wild stocks, and increase food safety.

Justification: Maintenance of the health of shrimp stocks in farming situations should focus on maintenance of a healthy environment in the ponds at all phases of the culture cycle in order to prevent problems in the ponds before they occur and reduce the likelihood of disease transmission outside the farms. Attempting to limit the introduction of diseases through use of disease free stocks, thorough preparation of the ponds before stocking, maintenance of optimal environmental conditions through management of stocking densities, aeration, feeding, water exchange and phytoplankton bloom control etc., routine monitoring and recording of shrimp health to detect any developing problems, and maintenance of biosecurity in quarantining and treating any diseased ponds are all critical elements in any health management plan.

Implementation guidance:

- Implement health management practices that reduce shrimp stress and focus on disease prevention rather than treatment.
- Maintain biosecurity and minimize disease transmission between brood-stock, hatchery and grow out systems.
- Implement management strategies that avoid spreading shrimp diseases within and between farms.
- Use veterinary drugs responsibly and minimize the use of antibiotics.

Principle 7-Food Safety:

Ensure food safety and the quality of shrimp products, whilst reducing the risks to ecosystems and human health from chemical use.

Justification: Increasing focus is being placed on the safety of foods being sold in the worlds' markets. These concerns include not only ensuring that foods for human consumption are free from excesses of harmful or undesirable chemicals, but also that the workers producing these foods and the environment surrounding

the production facility have been protected from negative effects of the use of these chemicals. Increasing calls for total traceability of food products are also affecting the food production industry such that consumers can be assured that the product has been produced without the use of transgenic technologies, without addition of undesirable or harmful chemicals or additives, and that all of the environments and ecosystems affected by the production facilities has not been compromised in any way.

Implementation guidance:

• No use of banned veterinary drugs and chemicals.

• Be responsible in use of permitted veterinary drugs and chemicals.

· • Apply quality control systems to produce safe and quality shrimp farm products.

• Implement measures for sanitary harvest, handling and transport of shrimp.

Principle 8-Social Responsibility:

Develop and operate farms in a socially responsible manner that benefits the farm, the local communities and the country, and that contributes effectively to rural development, and particularly poverty alleviation in coastal areas, without compromising the environment.

Justification: There are increasing demands for products which are produced through environmentally sustainable shrimp farming practices, but that have been produced by employees who were treated fairly, and that the enterprise that produced the product is a respected and active component of the society. It should be the responsibility of a civilized society that the benefits derived from shrimp farming are shared equitably.

Implementation guidance:

• Minimize conflicts with local communities that may result from shrimp farm development and operation and ensure that aquaculture developments are mutually beneficial.

• Take measures to ensure shrimp farming benefits the communities in shrimp farm areas.

• Ensure shrimp farm worker welfare and fair working conditions.

• Minimize risks to smallholders engaged in shrimp farming through training, extension and appropriate technical and financial support.

• Provide training to farmers and workers in responsible shrimp farming practices.

日本水产业协会法（三之二）

(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

第二章 渔业协会

第四节 设立

【发起人】

第五十九条 创立协会时，必须有将要成为协会成员者（据第 18 条第 4 项规定），具有协会成员资格者及经营特定种类渔业者的协会（以下称为“行业类别协会”）15 人以上作为发起人。

【设立准备会】

第六十条 1．发起人必须事先制作关于协会的事业、地区及成员资格的计划书，并在一定期限前将此计划书与设立准备会的日期及场所一并公告，召开设立准备会。

2．前项的一定期限，不得少于两周。

第六十一条 1．在设立准备会中，必须从出席的将要成为协会成员（除准协会成员）中选任适合制定规章的人（以下称为“章程制定委员”），并且必须规定地区、协会成员资格及其它制度章程的基本事项。

2．章程制定委员必须 20 人（行业类别协会为 15 人）以上。

3．设立准备会的议事，得到出席的将要成为协会成员者（除准备协会成员）过半数同意时，方可决定。

【创立总会】

第六十二条 1．章程制定委员制定章程后，发起人必须在一定期限内将此章

---

* 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。

程与创立总会的时间及地点一并公告，并召开创立总会。

2．前项的一定期限，不得少于 2 周。

3．承认章程制定委员制定的章程、制定事业计划及决定其它设立时必需的事项，必须遵守创立总会的决定。

4．创立总会可修改前项章程。但有关地区及协会成员资格的规定除外。

5. 创立总会的议事，在开会之日前向发起人提出同意设立的具有协会成员（除准协会成员）资格者半数以上自动出席，由其决议权的 2/3 以上决定。

6. 第 21 条第 1 项、第 49 条第 2 项及第 3 项、商法第 237 条之三第 1 项及第 2 项、第 243 条、第 244 条、第 1 项到第 3 项、第 247 条到第 252 条的规定，适用于创立总会。此时，同法第 237 条之三第 1 项及第 2 项中“董事长及监察”换读为“发起人及章程制度委员”同法第 243 条中“不适用第 232 条规定”，换读为“据水产业协会法第 62 条第 1 项规定的公告需如此”；同法第 244 条第 2 项中“记载成记录”换读为“记载、同条第 3 项中“董事长”换读为“发起人”；同法第 247 条第 1 项及第 249 条第 1 项（包含适用于同法第 252 条的时候）中“董事长”换读为“理事，经营管理委员”。

【对认可设立的申请】

第六十三条 1．发起人，必须在完成创立总会后立即向行政厅提交章程及事业计划，申请对设立的许可。

2．行政厅有要求时，发起人必须提交与协会设立有关的报告书。

【设立的认可】

第六十四条 行政厅在有前条第 1 项的许可申请时，除以下规定情形外，必须许可设立：

一、设立的手续、章程或事业计划的内容违反法令及基于法令的行政厅的安排时；

二、被认为对事业的进行缺乏必要的经营基础等，对于实现事业的目的存在很明显困难的情况。

第六十五条 1．在提出第六十三条第 1 项的许可申请时，行政厅在收到申请书之日起 2 个月内，必须向发起人通知许可与否。

2．行政厅在前项的期限内没有同项的通知时，被认定为在期满之日起许可设立。此时，发起人可向行政厅请求对许可的证明。

3．行政厅据第六十三条第 2 项规定要求提交报告书时，由此日起到报告书到达行政厅的期间，不算入第 1 项的期限。

4．行政厅在发出不许可的通知时，必须将理由记入通知书。

5．发起人上诉请求取消不许可的情况下，法院在判决取消时，被认为在判决之日即得到设立的许可。此时，适用第 2 项后段的规定。

【对理事事务的交还】

第六十六条 1．在得到设立许可时，发起人必须立即将事务交还给理事。

2．投资协会的理事，据前项规定接受交还时，必须立即要求交纳第一次投资。

3．实物投资者，在第一次缴纳的日期内，必须提交全部投资目的财产。但登记、注册、其它权利的制定以及因转移而对抗第三者的必要行为，可在协会成立以后进行。

【对认可设立的取消】

第六十六条之二 协会在得到第六十三条第 1 项的许可后，经过 90 天仍没有办理设立登记的，行政厅可取消对其的许可。

【成立的日期】

第六十七条 协会在其主要事务所所在地办理设立登记，并由此而成立。

【与设立相关的商法的适用】

第六十七条之二 商法第 428 条的规定适用于协会的设立。此时，同条第 2 项中“董事长”换读为“理事、经营管理委员”。

第五节 解散及清算

第六十八条 1．协会可因以下事由而解散：

一、总会的决议；

二、协会的合并；

三、协会的破产；

四、存在期满；

五、据第 124 条之二规定的解散命令。

2．解散的决议，如得不到行政厅的许可，则不具有效力。

3．有前项的申请时，适用第 63 条第 2 项、第 64 条（除第 2 号）及第“条规定。

4．除因第 1 项的事由外，协会也会因协会成员（除准协会成员）不满 20 人（行业类别协会为 15 人）而解散。

5．协会据前项规定解散时，必须立即向行政厅申报。

【合并的手续】

第六十九条 1．协会要合并时，必须在总会上就合并问题进行决议。

2．合并如得不到行政厅的许可，则不产生效力。

3．在提出前项中许可的申请时，进行第 11 条第 1 项第 4 号事业的协会适用第 63 条第 2 项规定，其它协会适用同项、第 64 条及第 65 条规定。

4．投资协会的合并，适用第 53 条及第 54 条第 1 项、第 2 项规定。

5．进行合并的投资协会，应根据适用于前项的第 53 条第 2 项规定，将公告登载于政府公报，及章程规定的刊载时事相关事项的日刊报纸，但无需该投资协会按照同项规定进行个别催告。

第七十条 1．由协会成员（除准协会成员）共同选任设立委员，制定章程、选任董事（因合并而设立的协会为第 34 条之二第 3 项的协会时，除理事），及其它设立的必要行为。

2．据前项规定从董事中选任理事时，适用第 34 条第 10 项的规定。选任经营管理委员时，适用第 34 条之二第 2 项的规定。

3．据第 1 项规定选任设立委员时，适用第 50 条规定。

【合并的时期】

第七十一条 关于协会的合并，合并后继续存在的协会及因合并而成立的协会，在其主要事务所所在地，依第 107 条规定进行登记，即产生效力。

【合并而产生的权利义务的继承】

第七十二条 合并后继续存在的协会及因合并而成立的协会继承因合并而消失的协会的权利义务（关于该协会所进行的事业，包含基于行政厅的许可、认可及其它处理的权利义务）。

【关于合并的商法及非诉讼事件手续法的适用】

第七十三条 商法第 415 条及非诉讼事件手续法（明治 31 年法律第 14 号）第 135 条之八的规定适用于协会的合并。此时，适用于商法第 415 条第 2 项、同条第 3 项和同法第 249 条第 1 项中的“董事长”可换读为“董事、经营管理委员”。

【清算人】

第七十四条 协会解散时，除因合并或破产而解散的情况，理事应当为其清算人。但在总会中另选他人的除外。

【清算事务】

第七十五条 1．清算人就职后，必须立即调查协会的财产状况，非投资协会须制作财产目录，投资协会须制作财产目录及借贷对照表，并制定财产处理的方法，提交给总会，即求得承认。

2．第 34 条之二第 3 项的协会的清算人，在谋求前项的承认时，对于非投资协会的财产目录及财产处理方法，投资协会的财产目录、借贷对照表及财产处理办法，必须事先得到经营管理委员会的承认。

3．清算人在得到第 1 项的承认后，必须立即向法院提交非投资协会的财产目录、投资协会的财产目录及借贷对照表。

第七十六条 1．清算人在完成清算事务后必须立即制作结算报告书，并提交给总会谋求承认。

2．第 34 条之二第 3 项的协会的清算人，在谋求前项的承认时，必须事先得到经营管理委员会对结算报告书的承认。

3．商法第 427 条第 3 项的规定，适用于第 1 项的承认。

【与解散及清算相关的商法等的适用】

第七十七条 商法第 116 条、第 124 条、第 125 条、第 129 条第 2 项及第三

项、第 131 条、第 417 条第 2 项、第 418 条、第 421 条道第 424 条、第 426 条、以及非诉讼事件手续法第 36 条、第 37 条之二、第 135 条之 25 第 2 项及第 3 项、第 136 条、第 137 条、到 138 条之三的规定适用于协会的解散及清算。第 35 条之二第 4 项及第 5 项、第 36 条之二第 3 项及第 4 项、第 37 条到第 40 条、第 47 条、第 47 条之三第 2 项到第 4 项、第 47 条之四及商法第 254 条第三项、第 254 条之二、第 258 条、第 259 条第 1 项、第 2 项及第 4 项、第 259 条之二、第 259 条之三、第 260 条之二、第 260 条之三、第 260 条之四第 1 项到第 3 项、第 261 条、第 267 条第 1 项及第 3 项到第 7 项、第 268 条到 269 条、第 272 条规定适用于协会的清算人。此时，第 37 条第 5 项中“商法第 2 “条第 2 项、第 3 项、第 5 项、第 7 项（除第 3 号）到第 9 项、第 10 项前段及第 17 项”换读为“商法第 266 条第 2 项、第 3 项、第 5 项”，第 40 条第 1 项中“事业报告书及”换读为“事务报告书”，“事业报告书、借贷对照书、盈亏计算书、剩余金处理方法及损失处理方案”换读为“事务报告书、借贷对照表”，同条第 3 项中“7 周”换读为“5 周”，同条第 4 项中“提出前项文件后 3 周内”换读为“定期总会日 3 周前”，同条第 8 项中“2 周”换读为“1 周”，“5 年内主要事务所、其副本给 3 年内非主要事务所”换读为“主要事务所”，同条第 10 项中“事业报告书、借贷对照表、盈亏计算书”换读为“事务报告书、借贷对照表”，同法第 254 条之二第 3 号中“本法”换读为“水产协会法、本法”，同法第 260 条之四第 2 项中“记载或记录”换读为“记载”，同法第 267 条第 4 项中“前 3 项”换读为“第 1 项及前项”，同法第 269 条第 2 项中“董事长”换读为“清算人（水产业协会法第 34 条之二第 3 项的协会中为经营管理委员）”。同法第 421 条第 1 项“通过政府公告进行公告”换读为“公告”，同法第 426 条 2 项中“自 6 个月前持续拥有总股东决议权 3%以上的股东”换读为“得到总协会成员（除准协会成员）1/5 以上同意的协会成员（除准协会成员）”。

第三章　渔业生产协会

【事业的种类】

第七十八条　渔业生产协会（以下本章中称为协会），可进行渔业及其附带产业。

【协会成员的资格】

第七十九条　具有协会成员资格者，据章程规定，为渔民。

【协会的事业同协会成员的关系】

第八十条　协会成员的 2/3 以上，必须是经常从事协会所经营事业的成员。

第八十一条　经常从事协会所经营事业的人员的 1/2 以上，必须是协会成员。

【投资】

第八十二条　1．协会成员，必须拥有一股以上的投资。

2．协会总投资股数的过半数，必须由经常从事协会所经营事业的协会成员持有。

【应记入章程的事项】

第八十三条 1. 在协会的章程中，必须记载第三十二条第一项第 1 号、第 2 号、第 4 号到第 6 号及第 8 号到第 12 号的事项。

2．在前项的章程中，适用第三十二条第 2 项及第 3 项的规定。

【理事同协会的合同等】

第八十三条之二 协会同理事签订合同时，监察代表协会。在协会同理事的诉讼中，同样。

【章程及其它文件的设置及阅览等】

第八十四条 1．理事必须将协会章程及规定配置于各事务所，将协会成员名册配置于主要事务所。

2．理事必须将总会的议事记录配置于 10 年来主要的事务所，将其副本配置于 5 年来的非主要事务所。

3．协会成员名册中，必须记载以下关于协会成员的事项：

一、第 39 条第 3 项第 1 号、第 3 号及第 4 号的事项；

二、加入的年月日；

三、不是经常从事协会所经营的渔业及其附带产业的人员时，其意见。

4．协会成员及协会的债权者，无论何时，都可以向理事要求阅读抄写第 1 项及第 2 项的文件。此时，理事若无正当理由不可拒绝。

【剩余金的分配】

第八十五条 1．协会在填补损失、扣除适用于次条第 2 项的第 55 条第 1 项的利益储备金及同条第 3 项的资本储备金前，不能分配剩余金。

2．剩余金的分配，据章程规定，在不超过年 10%的范围内，依据支付的投资额的比例及协会成员的从事协会事业的程度而定。

【使用规定】

第八十六条 1. 第 79 条到第 82 条的规定外，第 19 条第 3 项到第 5 项，第 20 条、第 21 条到第 1 项本文及第 2 项到第 6 项、第 23 条、第 26 条到第 31 条的规定，适用于协会的成员。

2．除 83 条到前条的规定外，第 23 条、第 34 条第 1 项、第 2 项、第 4 项本文、第 5 项到第 7 项、第 9 项及第 10 项、第 35 项、第 35 项之二第 5 项、第 40 条、第 42 条第 1 项及第 3 项到第 8 项、第 43 条、第 45 条到 47 条、第 47 条之三第 2 项、到第 4 项、第 49 条、第 50 条、第 53 条、第 54 条第 1 项及第 2 项、第 54 条之四、第 55 条第 1 项到第 6 项、第 57 条及第 58 条、民法第 60 条、第 61 条第 1 项、第 64 条及第 66 条、商法第 243 条及第 244 条第 1 项到第 3 项的规定，适用于协会的管理。第 37 条、民法第 44 条第 1 项、第 52 条第 2 项及第 53 条到第 55 条、商法

第 254 条第 3 项、第 256 条第 3 项及第 258 条第 1 项的规定适用于理事。此时，第 34 条第 2 项中“5 人”换读为“3 人”，同条第 10 项中“理事定数的至少 2/3”换读为“理事全体”，第 40 条第 1 项中“如不作出，并得到理事会及经营管理委员会的承认”换读为“如不作出”，同条第 6 项中“商法第 281 条之三第 2 项”，换读为“商法第 281 条之三第 2 项（除 11 号）”，第 42 条第 1 项中“1/5”换读为“1/3”，第 45 条第 2 项中“理事会的决议”换读为“理事的过半数”，第 46 条第 1 项“1/10”换读为“1/6”，同条第 3 项及第 47 条之三第 2 项中“理事会”换读为“理事”民法第 64 条中“第 62 条”及商法第 243 条中“第 232 条”换读为“适用于水产业协会法第 86 条第 2 项的同法第 47 条之五第 3 项”，同法第 244 条第 2 项中“记载或记录”换读为“记载”。

3．第 37 条、民法第 59 条及商法第 254 条第 3 项、第 256 条第 3 项、第 258 条第 1 项及第 278 条的规定适用于监察。此时，第 37 条第 4 项中“对应记入第 40 条第 1 项文件中的重要事项，作虚伪的记载、虚伪的登记或公告”换读为“对应记入监察报告书的重要事项，作虚伪的记载”“记载、登记或公告”换读为“记载”，同条第 5 项“商法第 266 条第 2 项、第 3 项、第 5 项、第 7 项（除第 3 号）到第 9 项、第 10 箱前段及第 17 项”换读为“据商法第 26 条第 5 项、同条第 18 项的规定换读并适用的同条第 7 项（除第 3 号）、同条第 8 项及第 10 项前段”。

4．第 21 条第 1 项、第 49 条第 2 项及第 3 项、第 59 条到第 61 条、第 62 条第 1 项到第 5 项、第 63 条到第 67 条、民法第 66 条及商法第 243 条及第 244 条第 1 项到第 3 项的规定，适用于协会的设立。此时，第 59 条中“20 人｛据第 18 条第 4 项规定，由具有协会成员资格且经营特定种类渔业者组成的协会（以下称为‘行业类别协会’）为 15 人｝”及第 61 条第 2 项中“20 人（行业类别协会，为 15 人）”换读为“7 人”，同法第 243 条中“不适用第 232 条规定”换读为“依据适用于水产业协会法第 86 条第 4 项的同法第 62 条第 1 项规定的公告，不需如此”。同法第 244 条第 2 项中“记载或记录”换读为“记载”，同条第 3 项中“董事长”换读为“发起人”。

5．第 68 条到第 74 条、第 75 条第 1 项及第 76 条第 1 项、民法第 73 条、第 75 条、第 76 条及第 78 条到第 83 条，商法第 131 条及非诉讼事件手续法第 35 条第 2 项、第 36 条、第 37 条之二、第 135 条之 25 第 2 项及第 3 项、第 137 条及第 138 条规定，适用于协会的解散及清算。此时，第 68 条第 4 项中“20 人（行业类别协会，为 15 人）”换读为“7 人”，适用于第 70 条第 2 项的第 34 条第 10 项中“理事定数的至少 2/3”换读为“理事全体”，民法第 75 条中“前条”换读为“适用于水产业协会法第 86 条第 5 项的同法第 74 条”。

第四章　渔业协会联合会

【事业的种类】

第八十七条 1. 渔业协会联合会（以下此章中称作“联合会”），可进行下列事业的全部或部分：

一、水产资源的管理及水产动植物的增值；

二、关于水产的经营及技术提高的指导；

三、直接或间接构成联合会（以下此章总称为“所属成员”），对其事业及生活必要资金的贷款；

四、对所属成员储蓄及定期租金的接受；

五、对所属成员事业必要物资的供给；

六、对所属成员事业必要的共同利用的设施；

七、对所属成员的渔业部货物及其它生产的搬运、加工、保管及贩卖；

八、与渔场利用相关的设施（为确保渔业的安定利用关系，利用间接构成联合会的人员的劳动力来促进渔场的综合利用的设施，也包含在内）；

九、船舶停存处，船只卸货码头、鱼礁及其它所属成员的渔业所必需设备的设施；

十、会员的检查及指导；

十一、与所属成员的防止遇难及遇难救助相关的设施；

十二、与所属成员的福利保健相关的设施；

十三、为谋求提高所属成员对联合会事业相关知识的教育及对所属成员提供一般信息的设施；

十四、为改善所属成员的经济地位而进行的团体协约的缔结；

十五、渔业保险协会的保险及渔业互助协会的互助的斡旋；

十六、前述各号事业的附带事业。

2. 不让会员投资的联合会（以下此章称为“非投资联合会”），尽量有前项规定，但不能进行该项第 3 号及第 4 号的事业。

3. 进行第 1 项第三号及第四号事业的联合会，尽量有同项的规定，除这些事业的附带产业及次项、第 5 项、第 6 项的事业外、不能进行其它事业。

4. 进行第 1 项第四号事业的联合会，为其所属成员，可进行下列全部或部分事业：

一、票据的贴现；

二、汇兑贸易；

三、(1) 债务的保证及票据的承兑；

(2) 有价证券的买卖等；

四、有价证券的贷款；

五、除以减价出售为目的以外的国债等的承兑，及与该承兑相关的国债等募集的办理；

六、证券（仅限于相当于国债等的证券及证券贸易法第 2 条第 1 项第 7 号、第

7 号之二中的证券）的私募的办理；

七、农林中央金库、其它由主管大臣指定的金融机构、及以此为标准的金融机构的业务代理；

八、国家、地方公共团体、公司等的收纳金钱及其它与金钱相关事务的办理；

九、(1) 有价证券、贵金属及其它物品的保管；

(2）转账业；

十、兑换；

十一、金融期货交易等的受托等；

十二、前面各号事业的附带产业。

5．同时进行第 1 项第三号及第四号事业的联合会，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 1 号及第 4 号中所载的有价证券，可进行同项第 1 号及第 4 号规定行为的事业（除按前项规定进行的事业）。

6．同时进行第 1 项第三号及第四号事业的联合会，在不妨碍这些事业实行的限度内，依据与金融机构信托业务的兼营等相关法律，可进行与信托业务相关的事业。

7．第十一条第 6 项规定，适用于联合会要进行第 4 项第五号事业中的办理募集的事业的情况。

8．第十一条第 7 项规定，适用于联合会据第 5 项规定，要进行同项中规定的事业的情况。

9．联合会据第 6 项规定，要进行与信托业务相关的事业时，适用于第十一条第 8 项规定。

10．联合会在进行第 4 项第八号事业时，适用第十一条第 9 项规定。

11．把全国的区域作为地区，并把进行同项第 4 号事业的联合会作为会员地进行第 1 项第十号中规定的会员的监察事业的联合会（次条中称为“全国联合会”）除同项第十号中规定的会员监察事业外，可进行第 41 条之二第 1 项（适用于第 92 条第 3 项、第 96 条第 3 项及第 100 条第 3 项的情况）中规定的对特定协会的监察事业。

12．据章程规定，联合会可让所属成员以外的人员利用其设施（在第 4 项第三号及第四号规定中的设施，只限于由主管省令规定的设施）。但，除去与同项第二号到第十号及第十二号、第 5 项及前项规定中设施有关的情况，在一经营年度中，所属成员及联合会所属成员以外的其他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及其他联合会的所属成员要利用的事业分量的总额。

13．下列各号中所在事业的利用相关的前项，及关于文件中规定的适用，该各号中规定的人员被视为所属成员：

一、第 1 项第三号事业对于所属成员同一户口者及不以营利为目的法人，作为其储蓄及定期租金的担保而贷款时的人；

二、第 1 项第四号事业与所属成员同一户口者及不以营利为目的的法人；

三、第 1 项第十二号事业与所属成员同一户口者。

14．联合会，尽管有第 12 项规定，在不妨碍实施为其所属成员而进行的事业的限度内，据章程规定，可以对下列所需资金进行贷款：

一、政令规定的对地方公共团体的资金贷款；

二、规定的作为不以营利为目的的法人，对地方公共团体为主要投资者或构成成分的机构，对地方公共团体筹款额占其基本财产额过半的机构，可进行资金贷款；

三、有政令规定，为提高港区域内产业基础及生活环境而必需的资金的贷款（除前 2 号中所载内容）；

四、对银行及其它金融机构的资金贷款。

【监察事业】

第八十七条之二 1．联合会要进行对前条第 1 项第十号中规定的会员的监察及对同条第 11 项中规定的特定协会的监察事业（以下此条中称为“监察事业”）时，必须用监察规则来规定监察的要领、实施方法，给予从事监察事业人员的相关服务事项，并得到行政厅的认可。与对此进行变更或废除时，同样。

2．进行监察事业的联合会，必须让对水产业协会的业务及会计有专门知识及实际业务经验，且具有农林水产省令规定的资格的董事或职员从事该事业。

3．全国联合会必须与对特定协会的监察相关的公认会计师及监察法人进行公认会计师法（昭和 23 年法律第 103 号）第 2 条第 1 项及第 2 项的业务的合同。

第八十七条之三 1．进行第 87 条第 1 项第四号事业的联合会，不能将下列登载的公司（限国内公司，第 4 项中称为“分公司对象公司”）以外的公司作为分公司（即适用于第 92 条第 1 项的第 11 条之六第 2 项中规定的分公司，以下此条及下一条中相同）：

一、银行法（昭和 56 年法律第 59 号）第 2 条第 1 项规定的银行中，依据与金融机构的信托业务的兼营等相关法律，来经营信托业务的公司；

二、(1) 证券交易法第 2 条第 9 项中规定的证券公司中，专门经营证券业（即经营同条第 8 项各号所载行为中任一项的行业，以下此条中相同）、同法第 84 条第 1 项各号所载业务及其它由主管省令规定的业务的公司（此项中称为“证券专门公司”）；

（2）证券交易法第 2 条第 12 项规定的证券中介业者中，专门经营证券中介业（即同条第 11 项中规定的证券中介业，以下此项中相同）、证券中介业的附带业务及其它由主管省令规定的业务的公司（此项中称为“证券中介专门公司”）；

三、经营下列业务的公司（经营从属业务中所载业务的公司主要限于为了该联合会所进行的事业及其分公司所经营的业务，而经营其业务的公司。经营金融关联业务中所载业务的公司中，经营证券专门关联业务的公司，只限于该联合会

的证券分公司等合计所拥有的该公司的决议权数量超过其分公司（除证券分公司等）所合计拥有的该公司的决议权数量的公司）：

A．从属行业；

B．金融关联业务；

四、作为开拓新事业领域的公司由主管省令规定的公司（该联合会的分公司中，主管省令规定的前号所载公司（此条第 3 项称为“特定分公司”）以外的分公司及该联合会，对该公司的决议权数量合计不超过同条第 1 项中规定的基准决议权数的公司）；

五、由主管省令规定的，只以前面各号中所载公司作为分公司的在个人独占禁止法第 9 条第 5 项第 1 号中规定的控股公司（包含将要成为该控股公司的公司）。

2．前项中用语的意义，依据下面各号的决定：

一、证券专门关联业务，由主管省令规定的专门附属于证券业的关联业务；

二、证券分公司等，作为进行第 87 条第 1 项第四号事业的联合会的分公司，及下列各公司：

A．证券专门公司及证券中介专门公司；

B．以证券专门公司及证券中介专门公司中的公司作为分公司的前项第 5 号中的控股公司；

C．由主管省令规定的，在作为该联合会分公司的证券专门公司及证券中介专门公司的分公司中的其它公司；

三、从属业务，由主管省令规定的，从属于进行第 87 条第 1 项第四号事业的联合会所进行的事业，及前项第 1 号中的公司、证券专门公司、证券中介专门公司所经营的业务的业务；

四、证券关联业务，由主管省令规定的附属于第 87 条第 1 项第三号、第四号的事业及证券业的相关业务。

3．第 17 条之二第 2 项的规定适用于第 1 项的联合会。此时，同条第 2 项“前项”换读为“第 87 条之三第 1 项”，“分公司对象公司”换读为“同项中规定的分公司对象公司”。

4．第 1 项的联合会，在将分公司对象公司中，同项第 1 号到第 3 号及第 5 号中的公司（除去专门经营从属业务（即第 2 项第 3 号中的从属业务，以下此项、第 10 项及次条第 1 项中相同）、附属于第 87 条第 1 项第三号及第四号的事业及由主管省令规定的关联业务的公司（经营从属业务的公司，仅限于主要为了该联合会的事业而经营业务的公司）。以下此条中称为“认可对象公司，’）作为分公司时，在排除依据适用于第 92 条第 3 项的第 54 条之二第 3 项及适用于第 92 条第 5 项的第 69 条第 2 项的规定而得到对适用于第 92 条第 3 项的第 54 条之二第 2 项中规定的信用事业的全部或部分转让及合并的认可的情况，必须事先得到行政厅的认可。

5．前项规定，不适用于认可对象公司以在第 1 项联合会及其分公司的担保权的实行中对股份及份额的取得以及其它由主管省令规定的事由为由，与成为该联合会的分公司的情况。但排除对于成为其分公司的认可对象公司将继续作为其分公司这一点得到行政厅的许可的情况，该联合会对于该认可对象公司自该事由产生之日起一年后不再作为分公司这一点，必须讲明所需的措施。

6．第 4 项的规定适用于，第 1 项的联合会要将作为其分公司的同项各号中的公司变成适合于该各号中及其他号中的公司（限于认可对象公司）的情形。

7．第 1 项的联合会，在据第 4 项规定要将认可对象公司作为分公司时，或据前项规定要将作为其分公司的第 1 项各号中的公司变为适合该各号中及其他号中公司（限认可对象公司）的分公司时，必须将其意见通过章程来规定。

8．第 1 项的联合会在将认可对象公司作为其分公司时，据主管省令规定，该联合会的理事必须将该认可对象公司的业务及财产状况报告给总会。

9．第 1 项的联合会，适合下列任一号时，据主管省令规定，必须向行政厅报告其意见。

一、要将第 1 项第三号及第四号中的公司（除认可对象公司）作为其分公司时（排除得到适用于第 92 条第 3 项的第 54 条之二第 3 项及适用于第 92 条第 5 项的第 69 条第 2 项规定中的认可，而欲继承或合并适用于第 92 条第 3 项的第 54 条之二第 2 项中规定的信用事业的全部或部分的情况）；

二、其分公司不再是分公司时（排除得到适用于第 92 条第 3 项的第 54 条之二第 3 项的规定中的认可，而转让同条第 1 项规定的信用事业的全部或部分的情况）；

三、适合认可对象公司的分公司变成不适合认可对象公司的分公司时。

10．第 1 项第三号及第四号中，公司是否主要经营联合会进行的业务及其分公司经营的业务，或为了联合会的事业而经营其从属业务的基准，由主管大臣规定。

【决议权的取得等的限制】

第八十七条之四 1．进行第 87 条第 1 项第四号事业的联合会或其分公司，对于国内公司（排除前条第 1 项第 1 号及第 2 号中的公司、专门经营从属业务及同条第 2 项第 4 号中金融关联业务的公司（经营同项第 1 号中证券专门关联业务的公司中，只限于该联合会的证券分公司等（即同项第 2 号中的证券分公司等，以下此项中相同）合计拥有的该公司的决议权数超过该联合会及其分公司（除证券分公司等）合计拥有的该公司的决议权数的公司）基同条第 1 项第 5 号中的公司。以下此项中相同）的决议权，其合计起来不能取得或占有超过其基础决议权数（即该国内公司的总股东等的决议权乘以 10%得到的决议权）的决议权。

2．第 17 条之三第 2 项到第 7 项的规定适用于前项的联合会。此时，同条第 2 项中“前项”换读为“第 87 条之四第 1 项”，“国内的信用事业公司的决议权在

其基础决议权数”换读为“国内的公司（即同项中规定的国内的公司。以下相同）的决议权在其基础决议权数（即同项中规定的基础决议权数。以下相同）”，同条第 3 项中“第一项”换读为“第 87 条之四第 1 项”，“国内的信用事业公司”换读为“国内的公司”，同条第 4 项中“第 1 项”换读为“第 87 条之四第 1 项”，“国内的信用事业公司”换读为“国内的公司”，同项第 1 号中“该协会”换读为“该联合会得到第 87 条之三第 4 项的认可，将同项中规定的认可对象公司作为分公司时，及”、“又”换读为“或”、“其”换读为“作为其分公司的日期及其”，同条第 5 项及第 6 项中“第 1 项”换读为“第 87 条之四第 1 项”、“国内的信用事业公司”换读为“国内的公司”，同条第 7 项中“前各项”换读为“适用于第 87 条之四第 1 项及同条第 2 项的第 17 条之三第 2 项到前项”、“第 1 项”换读为“第 87 条之四第 1 项”。

3．第 1 项及适用于前项的第 17 条之三第 2 项到第 7 项中，特定分公司作为开拓新事业领域的公司，对于主管省令规定的对公司决议权的取得及占有，被认为不适合第 1 项中联合会的分公司。

【会员资格】

第八十八条 具有联合会会员资格者，为章程规定的下列成员：

一、将该联合会地区的全部或部分作为地区的协会或联合会；

二、该联合会地区内拥有住所的渔业生产协会；

三、该联合会地区内拥有住所，并依据法律而设立的进行与前两号成员事业同类事业的协会；

四、以第一号的协会或联合会为主要投资者或构成成员的法人（除第一号及前号中的成员）。

【决议权及选举权】

第八十九条 1．会员各有一个决议权及对董事、总代表的选举权。但前条第三号及第四号规定中的会员（以下此章中称为“准会员”）不具有决议权及选举权。

2．尽管有前项规定，联合会遵循政令规定的基准，依据章程，当其会员为协会时，基于该协会成员（除准协会成员）的数量；当其会员为联合会时，基于直接或间接构成该联合会的协会成员（除准协会成员）数量及该协会在该联合会构成上的关联度，可给予该会员 2 个以上的决议权及选举权。

3．对于会员决议权及选举权的行使，适用第 21 条第 2 项到第 6 项的规定。

第九十条 删除。

【发起人】

第九十一条 设立联合会时，必须有 2 个以上的协会、渔业生产协会或联合会作为发起人。

【解散事由】

第九十一条之二 1．联合会依据下列事由解散：

一、总会的决议；

二、联合会的合并；

三、联合会的破产；

四、存在期满；

五、据第 124 条之二规定的解散命令；

六、没有会员（除准会员。以下此条及下一条（除同条第 1 项第 1 号）中相同）。

2．解散的决议，如得不到行政厅的许可，则不产生效力。

3．有前项申请时，适用第 63 条第 2 项、第 64 条（除第 2 号）及第 65 条的规定。

4．会员变成 1 人的联合会，除第 1 项的事由外，也据下列事由解散：

一、有下条规定中的权利义务的继承；

二、对于有适用于此条第 2 项及第 69 号第 2 项的许可申请，而得到不许可的处理时；

三、在此条第 3 项的期间内，没有适用于同条第 2 项的第 69 条第 2 项的许可申请。

5．联合会因无会员或前项第三号事由而解散时，必须立即向行政厅申报。

【联合会权利义务的总括继承】

第九十一条之三 1．作为会员变成 1 人的联合会会员的协会、渔业生产协会或联合会（以下此条中称为“协会等”）可继承该联合会的权利义务（关于该联合会所进行的事业，基于行政厅的许可及其它处理而拥有的权利义务亦包含在内）。但符合下列任一情况时除外。

一、该联合会为让会员投资的联合会，其会员中有准会员时；

二、该协会等在该联合会中所占有的份额，成为第三者权利的目的时。

2．关于前项规定中的权利义务的继承，适用第 50 条、第 69 条、第 71 条及商法第 380 条规定。此时，第 69 条第 3 项中“第 65 条”换读为“第 64 条第 1 项到第 4 项”。

3．适用于前项的第 69 条第 2 项的认可的申请，必须在该联合会会员变成 1 人之日起 6 个月以内进行。

4．根据第 1 项规定的权利义务的继承时，作为被继承人的联合会即消失。

【适用规定】

第九十二条 1．除第 87 条及第 87 条之二中的规定外，第 11 条之二到第 11 条之九，第 12 条到第 5 条及第 16 条规定，适用于联合会的事业。此时，第 11 条之二第 1 项中“前项第 1 项第 1 号”换读为“第 87 条第 1 项第 1 号”、“协会成员”换读为“所属成员”，同条第 3 项中“协会成员 2/3 以上”换读为“会员或以经营该渔业者为协会成员的会员的全部”，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 87 条第 1 项第 4 号”，第 11 条之三第 2 项中“1 亿日元（符合政令规定的包括协会成员（除第 21 条第 1 项但书中规定的协会成员）

的数量、地理条件及其他事项等的必要条件的协会，为 1 千万日元）”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 87 条第 1 项第 3 号及第 4 号”、“同条第 3 项到第 5 项”换读为“同条第 4 项到第 6 项”，第 11 条之五中“第 11 条第 12 项”换读为“第 87 条第 14 项”、“协会成员及其他协会的成员”换读为“所属成员及其他联合会的所属成员”，第 12 条第 1 项中“第 11 条第 1 项第 7 号”换读为“第 87 条第 1 项第 7 号”，第 16 条第 1 项中“第 11 条第 1 项第 14 号”换读为“第 87 条第 1 项第 14 号”。

2．除第 88 条及第 89 条的规定外，第 19 条到第 20 条及第 22 条到第 31 条的规定，适用于联合会的会员。

3．第 32 条，第 33 条，第 34 条第 1 项到第 3 项、第 4 项本文、第 5 项到第 7 项及第 9 项到第 12 项，第 34 条之二到第 40 条，第 41 条之二到第 47 条之五，第 48 条第 1 项到第 4 项，第 49 条到第 51 条，第 52 条到第 54 条之二及第 54 条之四到第 58 条之三的规定，适用于联合会的管理。此时，第 32 条第 1 项、第 40 条第 1 项及第 55 条第 1 项中“第 11 条第 1 项第 5 号到第 7 号”换读为“第 87 条第 1 项第 5 号到第 7 号”，第 34 条第 3 项、第 11 项及第 12 项、第 35 条之二第 1 项、第 41 条之二第 1 项、第 54 条之二第 1 项及第 2 项、第 55 条第 1 项及第 2 项、第 58 条之二第 1 项及第 58 条之三第 1 项中“第 11 条第 1 项第 4 号”换读为“第 87 号第 1 项第 4 号”，第 34 条第 6 项中“1 人”换读为“1 人（据第 89 条第 2 项规定，再给其会员 2 个以上选举权的联合会中，选举权 1 个）”，同条第 10 项及第 34 条之二第 2 项中“准协会成员以外的协会成员”换读为“所属成员（除准会员、准协会成员及他们的构成者）”、“提出同意设立的具有协会成员（除准协会成员）资格的人员”换读为“提出同意设立的具有会员（除准会员）资格的人员或其直接或间接的构成者（除准会员、准协会成员及他们的构成者）”，第 34 条第 11 项及第 12 项中“协会（除达不到政令规定规模的协会）”换读为“联合会”，同条第 11 项中“协会成员或作为该协会成员的法人”换读为“作为会员的法人”，第 41 条之二第 1 项中“协会（除达不到政令规定规模的协会）”换读为“联合会”，第 47 条中“除该协会成员的经营、或从事的渔业及该协会所属的渔业协会联合会或互助水产业协会联合会所进行的事业”换读为“除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联合会所进行的事业”，第 48 条第 1 项第 5 号及第 50 条第 3 号之二中“第 11 条第 1 项第 5 号、第 7 号或第 11 号”换读为“第 87 条第 1 项第 5 号或第 7 号”，第 52 条第 7 项及第 8 项中“事项”换读为“事项或据第 91 条之三的规定的权利义务的继承”，第 54 条之二第 1 项及第 2 项中“其他协会、进行第 87 条第 1 项第 4 号事业的渔业协会联合会”换读为“其他的联合会、进行第 11 条第 1 项第 4 号事业的渔业协会”，同项中“适用于第 92 条第 1 项、第 96 条第 1 项或第 100 条第 1 项的第 11 条之四第 2 项”换读为“第 11 条之四第 2 项（含适用于第 96 条第 1 项及第 100 条第 1 项的情况）”，第 54 条之四中“第 11 条第 2 项”换

读为“第 87 条第 2 项”，第 55 条第 7 项中“第 11 条第 1 项第 2 号及第 13 号”换读为“第 87 条第 1 项第 2 号及第 13 号”。

4. 第 91 条规定、第 60 条到第 67 条之二的规定，适用于联合会的设立。此时，第 61 条第 2 项中“20 人（行业类别协会，15 人）”换读为“2 人”，第 62 条第 6 项中“第 21 条第 1 项及第 49 条第 2 项、第 3 项”换读为“第 49 条第 2 项及第 3 项、第 89 条第 1 项”。

5. 前两条的规定、第 69 条到第 77 条的规定，适用于联合会的解散及清算。此时，第 69 条第 3 项中“第 11 条第 1 项第 4 号”换读为“第 87 条第 1 项第 4 号”，适用于第 70 条第 2 项的第 34 条第 10 项本文及第 34 条之二第 2 项本文中“准协会成员以外的成员”换读为“所属成员（除准会员、准协会成员及他们的构成者）。”，第 74 条中“及破产”换读为“、破产及第 91 条之二第 4 项第 1 号中所载事由”。

第五章　水产品加工业协会

【事业的种类】

第九十三条　1. 水产加工业协会（以下此章及下一章中称为“协会”），可进行下列事业的全部或部分：

一、对协会成员的事业或生活中必需资金的贷款；

二、对协会成员的储蓄或定期债金的接受；

三、对协会成员的事业或生活中必需物资的供给；

四、对协会成员的事业或生活中必要的共同利用的设施；

五、协会成员的生产物的搬运、加工、保管或贩卖；

六、对协会成员的产品、原料、材料或制造加工的设备进行检查的设施；

六之二与协会成员互助相关的设施；

七、与协会成员的福利保健相关的设施；

八、谋求提高关于水产物制造加工的经营、技术以及协会成员对与协会事业的知识而进行的教育，对协会成员提供一般信息的设施；

九、以改善协会成员经济地位而进行的团体协约的缔结；

十、前面各号事业的附带事业。

2. 进行前项第二号事业的协会，为了协会成员可进行下列事业的全部或部分：

一、票据的贴现；

二、汇兑贸易；

三、(1) 债务的保证或票据的承兑；

(2) 有价证券的买卖等；

四、有价证券的贷款；

五、国债等的承兑（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以及证券交易法第 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代理；

八、对国家、地方公共团体、公司等的金钱的收纳及其它与金钱有关的事务的办理；

九、(1) 对有价证券、贵金属及其它物品的报关；

(2) 转账业；

十、兑换；

十一、金融期货交易等的受托等；

十二、前面各号事业的附带事业。

3．同时进行第 1 项第 1 号及第 2 号事业的协会，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 1 号及第 4 号中的有价证券，可进行同项第 1 号及第 4 号中规定行为的事业（除据前项规定所进行的事业）。

4．同时进行第 1 项第 1 号及第 2 号事业的协会，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。

5．第 11 条第 6 项规定适用于协会要进行第 2 项第 5 号事业中关于募集办理的事业时的情况。

6．第 11 条第 7 项规定适用于协会据第 3 项规定要进行同项规定中的事业的情况。

7．协会据第 4 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。

8．协会要进行第 2 项第 8 号事业时，适用第 11 条第 9 项的规定。

9．据章程规定，协会可让协会成员以外的人员利用其设施（第 2 项第 3 号及第 4 项规定的设施中，仅限于主管省令的设施）。但，除与同项第 2 号到第 10 号、第 12 号及第 3 项规定的设施相关的情况外，一经营年度中协会成员以外人员可利用的事业分量的总额，不得超过该经营年度中协会成员利用的事业分量总额的 1/5（政令规定的事业，用政令规定的比例）。

10．关于与下列各号中所载事业的利用相关的前项组书中规定的适用，将该各号中规定的人员视为协会成员：

一、第 1 项第一号事业：对于与协会成员同一户口者或不以营利为目的的法人，以其储蓄或定期债金为担保而贷款给他们时的人员；

二、第 1 项第二号事业：与协会成员同一户口者及不以营利为目的的法人；

三、第 1 项第六号之二及第七号事业：与协会成员同一户口者。

11．尽管有第 9 项规定，在不妨碍为协会成员而进行事业的限度内，据章程规定，协会可对下列情形进行资金贷款：

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基金的贷款；

四、对银行及其它金融机构的资金贷款。

【协会成员的资格】

第九十四条 具有协会成员资格者，为章程规定的下列人员：

一、在该协会地区内有住所或事业场地的水产加工者；

二、平常使用的从业人数为 300 人以下或其资本额、投资总额为 1 亿日元以下的在该协会地区内有住所或事业场地的经营水产加工业的法人。

【投资】

第九十五条 协会成员，必须有一股以上的投资。

【依据公正交易委员会的判决而退会】

第九十五条之二 协会成员，除依据在第 96 条第 2 项中使用的第 27 条第 1 项各号中所载的事由外，也依据此条到第 95 条之五的规定，经由公正交易委员会的判决而退会。

【派出措施】

第九十五条之三 公正交易委员会，在认为据第 94 条第 2 号规定作为协会成员的法人其平常使用的从业人数超过百人而不是实质上的小规模的法人时，为实现此法律的目的，遵循下条中规定的手续，可将其法人从协会中退出。

第九十五条之四 前条的情况，适用个人独占禁止法第 40 条到第 42 条、第 45 条、第 46 条、第 47 条、第 48 条第 1 项、第 3 项及第 4 项、第 49 条第 1 项、第 50 条到第 53 之三、第 54 条第 1 项及第 3 项、第 54 条之三、第 55 条第 1 项及第 2 项、第 56 条、第 57 条、第 58 条第一乡、第 59 条到底第 61 条、第 64 条、第 66 条第 2 项、第 69 条到第 69 条之三、第 69 条之五到第 73 条之三、第 75 条到第 78 条、第 80 条到第 83 条规定。

【东京高等法院的管辖权】

第九十五条之五 1．关于与前条规定中公正交易委员会的判决有关诉讼，第一审判决权，归东京高等法院。

2．前项的诉讼事件，据个人独占禁止法第 87 条第 1 项规定，通过东京高等法院法官的协商形式来处理。

【适用规定】

第九十六条 1．除第 93 条规定外，第 11 条之三到第 16 条的规定适用于协会的事业，第 17 条之二及第 17 条之三的规定适用于协会的分公司等。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、第 11 条之九、第 11 条之十、第 17 条之二第 1 项及第 17 条之三第 1 项中“第 11 条第 1 项第 4 号”换读为“第 93 条第 1 项第 2 号”，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 93 条第 1 项第 1 号及第 2 号”，“同条第 3 项到第 5 项”换读为“同条第 2 项到第 4 项”第 11 条之五中“第 11 条第 12 项”换读为“第 93 条第 11 项”，“协会成员及其他协会成员”换读为“协会成员”，第 12 条第 1 项中“第 11 条第 1 项第 7 号”换读为“第 93 条第 1 项第 5 号”。第 15 条之二第 1 项及第 15 条之三到 15 条之四的规定中“第 11 条第 1 项第 11 号”换读为“第 93 条第 1 项第 6 号之二”，第 16 条第 1 项中“第 11 条第 1 第 14 号”换读为“第 93 条第 1 项第 9 号”，第 17 条之二第 1 项第 2 号中“第 11 条第 1 项第 3 号或第 4 号”换读为“第 93 条第 1 项第 1 号或第 2 号”。

2. 除第 94 条到前条的规定外，第 19 条第 3 项到第 5 项，第 19 条之二、第 20 条、第 21 条第 1 项本文及第 2 项到第 6 项、第 22 条到第 31 条的规定，适用于协会的成员。

3. 第 32 条到 34 条，第 35 条，第 35 条之二第 1 项，第 2 项及第 5 项，第 36 条，第 37 条到第 41 条之二，第 42 条第 1 项及第 3 项到第 8 项，第 43 条到第 47 条之三。第 47 条之四第 1 项，第 47 条之五到第 51 条，第 52 条到第 58 条之三的规定，适用于协会的管理。此时，第 34 条第 3 项，第 11 项及第 12 项，第 35 条之二第 1 项，第 41 条第 1 项、第 41 条之二第 1 项，第 54 条之二第 1 项及第 2 项，第 55 条第 1 项及第 2 项，第 58 条之二第 1 项，第 58 条之三第 1 项中“第 11 条第 1 项第 4 号，换读为第 93 条第 1 项第 2 号”，第 47 条中“渔业及”换读为“水产加工业及”，“渔业协会联合会”换读为“水产业加工协会联合会”，第 48 条第 1 项第 5 号及第 50 条第 3 号之二“第 11 条第 1 项第 5 号、第 7 号或第 11 号”换读为“第 93 条第 1 项第 6 号之二”，第 54 条之二第 1 项及第 2 项中“进行第 93 条第 1 项第 2 号事业的水产加工业协会”换读为“进行第 11 条第 1 项第 4 号事业的渔业协会”同项中“第 92 条第 1 项、第 96 条第 1 项或适用于第 100 条第 1 项的第 11 条之四第 2 项”换读为“第 11 条之四第 2 项（包含适用于第 92 条第 1 项及第 100 条第 1 项的时候）”，第 55 条第 7 项中“第 11 条第 1 项第 2 号及第 13 号”换读为“第 93 条第 1 项第 8 号”

4. 第 59 条到第 67 条之二的规定，适用于协会的设立。此时，第 59 条中“20 人（据第 18 条第 4 项规定，具有协会成员资格的经营特定种类渔业者的协会（以下称‘行业类别协会’）中，为 15 人）”换读为“15 人”。

5. 第 68 条到第 74 条，第 75 条第 1 项及第 3 项，第 76 条第 1 项，第 3 项及第 77 条规定，适用于协会的解散及清算。此时，第 68 条第 4 项中“20 人（行业类别协会，15 人）”换读为“15 人”，第 69 条第 3 项中“第 11 条第 1 项第 4 号”换读为“第 93 条第 1 项第 2 号”。

《中国海洋法学评论》稿约

《中国海洋法学评论》(*China Oceans Law Review*, 以下简称《评论》) 是全国性的海洋法领域优秀学术著述的汇辑，着重研究与海洋相关的法律与政策，秉承“海纳百川，有容乃大”的精神，力求吸取国内外该领域的一切先进成果。同时在现有法学学科划分的基础上，打破学科藩篱，将视野拓展到一切关于海洋的法学理论、司法实践以及法律运作实务。本刊对于理论探索与实证究并重，以期推动海洋相关法律科学的发展，为各位专家学者提供学术研究和交流的平台。

《评论》由厦门大学法学院以及厦门大学海洋政策与法律中心（Xiamen University Center for Oceans Policy and Law, XMU-COPL）主办，由（香港）中国评论文化有限公司出版，每年两期。为此，热忱欢迎各位学界同仁及实务界人士不吝赐稿，并立稿约如下：

一、来稿形式不限，学术专论、评论、判解研究、译作等均可，篇幅长短不拘，语言限于中文或英文，且须同一语言下未曾在任何纸质和电子媒介上发表。

二、来稿请注明作者姓名、学位、工作单位及职务、职称、研究领域和通讯方式等。编辑部在收到来稿两个月内将安排匿名审稿。届时未接到用稿通知者，作者可自做他用。来稿一律不退，请作者自留底稿。

三、来稿须严格遵守学术规范，来稿格式参见后附《〈中国海洋法学评论〉书写技术规范》。若文中引征网上文献资料，应将该页面另存为独立文档，发送至编辑部邮箱或者打印后寄送《评论》编辑部，以备查阅。

四、译作请附寄原文，并附作者或出版者的翻译书面授权许可。译者需保证该译本未侵犯作者或出版者的任何权利，并在可能的损害产生时自行承担损害赔偿责任。《评论》编辑部及其任何成员不承担由此产生的任何责任。

五、来稿文责自负，除非作者特别声明，《评论》编辑部保留对来稿进行技术性加工处理的权利。

六、《评论》实行双向匿名审稿制度。来稿一经刊用，即付稿酬，并提供样书两册，无需版面费。

七、凡向《评论》编辑部投稿，即视为接受本稿约。投稿时务请附电子稿（以软盘或 E-mail 传送）。

地址:中国福建厦门大学法学院
厦门大学海洋政策与法律研究中心《中国海洋法学评论》编辑部
邮编: 361005
电话:（86-592）-2187383；（86-592）-2187781
传真:（86-592）-2187781
E-mail: colr@xmu.edu.cn; copl@xmu.edu.cn

《中国海洋法学评论》编辑部 敬启

《中国海洋法学评论》书写技术规范

为了统一《中国海洋法学评论》来稿格式，特制定本规范：

一、书写格式

1. 来稿由题目（中英文）、作者姓名及简介、内容摘要、关键词和正文构成。
2. 来稿正文各层次标示顺序按一、（一）、1、（1）、①、A、a 等编排。

二、注释

1. 注释采用页下重新计码制：全文以页下脚注形式重新编排，注释码置于标点符号之后。

2. 引用中文著作、辞书、汇编等的注解格式为：

（1）傅崐成著：《国际海洋法——衡平划界论》，台北：三民书局 1992 年版，第 118 页。

（2）魏敏主编：《海洋法》（高等学校法学教材），法律出版社 1987 年版，第 24 页。——教材应列明为何种教材。

（3）国家海洋局政策法规办公室编：《中华人民共和国海洋法规选编》，海洋出版社 2001 年第 3 版，第 56 页。——不是初版的著作应注明“修订版”或“第 2 版”等。

3. 引用中文译著的注解格式为：

（1）巴里•布赞（Barry Buzan）著，时富鑫译：《海底政治》，三联书店 1981 年版，第 78 页。

（2）联合国新闻部编，高之国译：《〈联合国海洋法公约〉评介》，海洋出版社 1986 年版，第 67 页。

4. 引用中文论文的注解格式为：

（1）傅崐成：《中国周边大陆架的划界方法与问题》，载于《中国海洋大学学报（社会科学版）》2004 年第 3 期，第 5 页。

（2）司玉琢、朱曾杰：《有关海事国际公约与国内法关系的立法建议》，载于《海商法年刊》1999 年卷，大连海事大学出版社 2000 年版，第 5 页。

（3）傅崐成：《联合国教科文组织 2001 年〈水下文化遗产保护公约〉评析》，

载于厦门大学海洋法律研究中心编：《纪念〈联合国海洋法公约〉签署 20 周年学术研讨会论文集》（2002 年），第 58 页。——载于论文集中的论文。

（4）褚晓琳、傅崐成：《两岸合作开发南海渔业资源规划研究》，载于《中国海洋法学评论》2012 年第 2 期，第 7 页。

5．引用中译论文的注解格式为：

中川淳司：《生物多样性公约与国际法上的技术规限》（钱水苗译、林来梵校），载于《环球法律评论》2003 年第 2 期，第 248~249 页。

6．引用外文著作等注解格式为：

（1）Christopher Hill, *Maritime Law*, 3rd ed., London: Lloyd's of London Press Ltd, 1989, p. 69.

（2）Connie Peck and Yoy S. Lee ed., *Increasing the Effectiveness of the International Court of Justice*, Hague: Martinus Nijhoff Publishers, 1997, pp. 109~110. —— 编著应以 "ed." 标出。

7．引用外文论文的注解格式为：

Jonathan I. Charney, Compromise Clauses and the Jurisdiction of the ICJ, *American Journal of International Law*, Vol. 81, 1987, pp. 855~856.

8．引用网上资料的注解格式为：

（1）郭文路：《传统捕鱼权和专属经济区制度》，下载于 http://www.riel.whu.edu.cn/lunwenshow.asp?id=709，2004 年 5 月 11 日。（此处标明的日期为引用者上网查询的日期）

（2）John Hare, Maritime Law Update South Africa 2002, at http://www.ports.co.za/legalnews/article_0732.html, 14 May 2004.

9．引用报纸的注解格式为：

（1）王曙光：《海洋开发关乎民族复兴》，载于《人民日报》2003 年 4 月 28 日第 11 版。

（2）《中方重申钓鱼岛问题原则立场》（新华社北京 12 月 26 日电），载于《人民日报》2003 年 12 月 27 日第 3 版。

10．引用法条的注解格式为：

《中华人民共和国海洋环境保护法》第 11 条第 2 款。——条文用阿拉伯数字表示。

三、数字

1. 年、月、日、分数、百分数、比例、带计量单位的数字、年龄、年度、注码、图号、参考书目的版次、卷次、页码等，均用阿拉伯数字。万以下表示数量的数字，直接

用阿拉伯数字写出，如 1458 等；万以上的数字以万或亿为单位，如 9 万、10 亿等。

2. 年份一般不用简写，如：1996 年不应简作 96 年。

3. 表示数值范围的起讫用“～”表示，如第 10～15 页；表示时间的起讫用“－”表示，如 1980 年－ 1982 年，1990 年 7 月－ 8 月。

四、图表

1. 表格规范：表的顺序号用阿拉伯数字，表号与表题空一个汉字位置，表题末不加标点。表题置于表格正上方，表内数据用阿拉伯数字。

2. 图的规范：图的顺序号用阿拉伯数字，图号与图题空一个汉字位置，图题末不加标点。图题置于图的正下方。

《中国海洋法学评论》编辑部编订

专属经济区内的军事测量和液货过驳：未明确的沿海国权利

傅崐成 *

内容摘要：近几年来，“臭名昭著”的美国“鲍迪奇”号及其姐妹舰在印度和中国（主要是东海海域）专属经济区开展了多项军事测量。印度和中国均对此提出抗议并指出美国违反了《联合国海洋法公约》（以下简称“《公约》”）中科学研究的相关规定。此外，为了规避港口费和关税，如今有越来越多的外国船舶在沿海国专属经济区内进行液货过驳作业，给沿海国的海洋环境带来很高的风险。仔细分析《公约》后，笔者认为，因为公约立法意图明显是为非军事、和平目的，故而专属经济区内的军事测量和液货过驳权利以及其他未明确的权利应归属于沿海国。而且，由于《公约》已然成为习惯国际法，包括美国在内的非缔约国也应受其约束。

关键词：联合国海洋法公约　专属经济区　科学研究　军事测量　液货　未确定权利，习惯法

一、专属经济区的基本概念和沿海国明确享有的权利

各国的法律实践一直在促进专属经济区法律制度及其结构的不断演进。有关专属经济区确切定义及其未明确的权利的争议给国际社会带来了新议题和新挑战，这也使得本文具有一定的必要性。专属经济区是领海以外并邻接领海的一个区域，从领海基线量起，不应超过 200 海里。专属经济区受《公约》第五部分规定的特殊法律制度的限制，包括沿海国的权利和管辖权以及其他国家的权利和自由。[1]

根据《公约》的规定，沿海国和其他国家在沿海国专属经济区内分别享有一系列的权利和作为权利另一面的义务，总结如下：

沿海国享有的权利包括：[2]

(a) 主权权利——以勘探和开发、养护和管理海床上覆水域和海床及其底土

---

* 傅崐成，弗吉尼亚大学法学硕士、法学博士，厦门大学法学院教授，厦门大学海洋政策与法律中心主任。本文源于笔者于 2006 年 12 月 13 － 15 日在印度金奈举办的“印度洋区域海洋景观变化的国际研讨会：问题和观点的辩论”上的演讲。

1 《联合国海洋法公约》第 55 条

2 《联合国海洋法公约》第 56 条第 1 款。

的自然资源 (不论为生物或非生物资源) 为目的的主权权利，以及关于在该区内从事“经济性”开发和勘探，如利用海水、海流和风力生产能等其他活动的主权权利；

(b) 管辖权——《公约》有关条款规定对如下事项的管辖权；

1 人工岛屿、设施和结构的建造和使用；

2 海洋科学研究；

3 海洋环境的保护和保全；

(c) 本公约规定的其他权利和义务。

其他国家在沿海国专属经济区享有的权利包括：[3]

(a) 依《公约》第 87 条（公海自由）所规定的：

(1) 航行自由；

(2) 飞越自由；

(3) 铺设海底电缆和管道的自由；以及

(b) 与上述自由有关的海洋其他国际合法用途，诸如同船舶和飞机的操作及海底电缆和管道的使用有关的并符合本公约其他规定的那些用途。

为了方便实现“海洋其他国际合法用途”，《公约》规定，有关公海的第 88 至第 115 条以及其他国际法有关规则只要与有关专属经济区的《公约》第五部分不相抵触均适用于专属经济区。[4]

同时，对沿海国极具意义的是其在专属经济区海床和底土上享有的权利，应按照《公约》第六部分关于大陆架的规定行使。[5] 这一规定使得适用于距领海基线 200 海里以内大陆架的法律原则同时也适用于专属经济区。[6]

为了避免潜在纠纷，《公约》通过敦促各国相互尊重，试图进一步采取一种更加均衡全面的立场。虽然《公约》要求沿海国在专属经济区内行使其权利时应适当顾及其他国家的权利和义务，并以符合本公约规定的方式行事，[7] 但《公约》也规定其他国家应适当顾及沿海国的权利和义务，并应遵守沿海国制定的法律法规。[8]

当然，《公约》的起草人也清楚上述第 56 条和第 58 条存在不足。作为法律规范，“适当顾及其他国家的权利和义务”的表述的确太模糊、不易执行，也无助于减少对专属经济区内权利和义务相关条款的争议解释。因此，有必要达成另一套解决潜在冲突的原则。《公约》第 59 条规定，在本公约未将在专属经济区内的权利或管辖权归属于沿海国或其他国家而沿海国和任何其他一国或数国之间的利

---

3 《联合国海洋法公约》第 58 条。

4 《联合国海洋法公约》第 58 条第 2 款。

5 《联合国海洋法公约》第 56 条。

6 因此，在划定重叠的专属经济区界限时，为了最终可以公平解决，相关国家应援用《联合国海洋法公约》关于大陆架的法律原则，包括自然延伸原则。

7 《联合国海洋法公约》第 56 条。

8 《联合国海洋法公约》第 58 条第 3 款。

益发生冲突的情形下，这种冲突应在公平的基础上参照一切有关情况，考虑到所涉利益分别对有关各方和整个国际社会的重要性，加以解决。

与专属经济区（和大陆架）划界的规定一样，《公约》并未对“衡公平原则”做出法律解释。在中国，这种做法通常称为“锯箭法”（只锯掉伤口外的箭）。虽然外观看起来很平整，但是问题根本没有解决。然而，或许我们得容忍这一点，因为通过预先拟定、严格限定的条款去解决纠纷，这本身就超出了人类有限的智慧。因此，为了解决专属经济区内沿海国和其他国家之间潜在的权利或管辖权争议，“衡平原则”可能是目前唯一的方法。

二、习惯国际法和非缔约国在沿海国专属经济区的权利

长久以来，《公约》被视为世界海洋的宪章，是法治和国际海洋管理的基石。然而，作为当今全球最具实力的海洋强国，美国尚未加入《公约》。截至目前，美国对包括专属经济区制度在内的《公约》的立场一直是一种被动的接受，这并“不足以”保护其国家利益。[9] 此消极立场也给当今世界带来了大量难题。

2001 年 4 月 1 日，一架美国 EP-3 侦察机与中国拦截机在中国南海的专属经济区上空相撞。受损的侦察机之后降落在海南陵水机场。经过多番尖锐对峙，美国最终向中国发函致歉，其中三次提及“抱歉”或“非常抱歉”，此后中方将美侦察机返还。

近几年来，臭名昭著的美国“鲍迪奇”号军舰及其姐妹舰在印度和中国（主要是东海海域）专属经济区开展了大量的军事测量。2004 年 5 月，印度海军总部向印度国防部提交了一份有关“鲍迪奇”号 2002—2003 年间在印度专属经济区内活动的分析报告，该报告指出，“鲍迪奇”号违反了《公约》确立的有关科学研究的规则。[10] 中国政府也在诸多场合表示过对美国政府的强烈反对。

我们现在面临的问题在于《公约》有关专属经济区的条文是否已经构成习惯国际法。一些学者可能会说，既然美国目前仍未加入《公约》，那么公约条款将不得适用于非缔约方的美国，除非其已经具备习惯国际法的地位。

最近，一名中国的年轻学者 Martin Lishexian Lee 在《圣地亚哥国际法期刊》

---

9 Candace L. Bates, U.S. Ratification of the U.N. Convention on the Law of the Sea: Passive Acceptance Is Not Enough to Protect U.S. Property Interests, *North Carolina Journal of International Law and Commercial Regulation*, Vol. 31, Spring 2006, p. 748.

10 Ranjit Bhushan, Spying on the Seas, at http://www.outlookindia.com/full.asp?fodname=20040607&fname=navy+%28f%29&sid=1, 7 June 2004, cited from Jon M. Van Dyke, Recent Incidents and Developments: Their Implications for the EEZ Regime. 该文为 2004 年 10 月 28 － 29 日在中国上海举办的海洋法论坛上提交的论文。

上发表了一篇讨论有关《公约》及其与习惯国际法关系的文章。[11]《国际法院规约》第 38 条第 1 款明确规定："法院……裁判时应适用……国际习惯，作为通例之证明而经接受为法律者。"该规约确认了在特定情形下存在习惯的 2 个标准：⑴普遍的国家实践或国家的实际行为，和⑵实践被接受为法律，或法律确信，即确信该实践是习惯国际法的要求或者该实践得到了习惯国际法的允许。[12]

为了确认习惯国际法的存在，传统上这 2 个因素均须得以证明。就实际国家实践而言，应该考虑与实践性质相关的如下因素：实践持续的时间和重复性、各国对实践的依从性、统一性以及一致性。这些因素在论证中应依具体情况而具有灵活性。[13]

然而，根据 Lee 的观点，二战以来，习惯国际法规则的形成模式已经发生了很大的改变。这些改变使得国际法渊源和新创或发展习惯国际法的证据评价这些传统方式均被国际多边条约所取代。[14] 虽然判断一个特定条约条款是否已形成习惯国际法往往并非易事，但公约依然被视为制定法律的合法途径。同时，人们普遍认为，在某些情形下，公约能够形成习惯法，约束包括非缔约国在内的所有国家。[15]

国际法院已经确立了 3 种相对没有争议的国际公约可能与确定习惯国际法相关联的情形。这些情形分别是当公约：(1) 纳入了既存的习惯国际法；(2) 使习惯国际法具体化；以及 (3) 促使新习惯国际法的逐步发展。上述各情形中，各国对特

---

11 Martin Lishexian Lee, The Interrelation between the Law of the Sea Convention and Customary International Law, *San Diego International Law Journal*, Vol. 7, Spring 2006, p. 408.

12 Malcolm N. Shaw, *International Law*, 4th ed., Cambridge: Cambridge University Press, 1977, pp. 58~59; Robin Rolf Chuichill and Alan Vaughan Lowe, *The Law of the Sea*, Manchester: Manchester University, 1988; Alexei Zinchenko, The UN Convention on the Law of the Sea and Customary Law, at http://www.geocities.com/enriquearamburu/CON/col5.html, September 2005. See Martin Lishexian Lee, The Interrelation between the Law of the Sea Convention and Customary International Law, *San Diego International Law Journal*, Vol. 7, Spring 2006, pp. 408~409.

13 Malcolm N. Shaw, *International Law*, 4th edition, Cambridge: Cambridge University Press, 1977, pp. 58~59; See Martin Lishexian Lee, The Interrelation between the Law of the Sea Convention and Customary International Law, *San Diego International Law Journal*, Vol. 7, Spring 2006, pp. 411~412.

14 Louis B. Sohn, The Law of the Sea: Customary International Law Development, *American University Law Review*, Vol. 34, 1984, p. 273; Louis B. Sohn, Generally Accepted International Rules, Washington Law Review, Vol. 61, 1986, p. 1078. See Martin Lishexian Lee, The Interrelation between the Law of the Sea Convention and Customary International Law, *San Diego International Law Journal*, Vol. 7, Spring 2006, p. 412.

15 Kathryn Surace-Smith, United States Activity outside of the Law of the Sea Convention: Deep Seabed Mining and Transit Passage, *Columbia Law Review*, Vol. 84, 1984, p. 1035, note 10. Martin Lishexian Lee, The Interrelation between the Law of the Sea Convention and Customary International Law, *San Diego International Law Journal*, Vol. 7, Spring 2006, p. 417.

定国际协定的谈判和批准便是习惯国际法存在的证据。[16]

所有的这些途径都可以在《公约》及其相关协议中找到。此外，通过对“一揽子交易”理论的应用，《公约》已经新创了习惯国际法形成的第 4 种途径。因此，Lee 在其文章中认为，通过对这 4 种途径的综合应用，《公约》在很大程度上体现了习惯国际法，也因此《公约》对所有国家均有拘束力，规范着海上人类活动。

截至 2006 年 11 月 2 日，根据《签署、批准和加入公约及相关协定的时间顺序列表》，192 个联合国会员国中已有 152 个国家正式接受《公约》。[17] 包括美国在内的其他许多国家已经用行动表明，他们承认《公约》所确立的专属经济区法律制度是国际社会广泛接受的。

值得关注的是，美国国会虽然并未完成加入《公约》的法定程序，但美国法院已经援引了《公约》中反映习惯国际法的某些规定；一些美国法院直接援引《公约》，认为由于美国正在积极考虑加入《公约》，所以美国有义务“避免会有损《公约》目标和宗旨的行为”，[18] 因而这些法院便直接对《公约》进行适用。因此，可以直接将《公约》关于专属经济区的条款视为习惯国际法，约束美国和其他非公约缔约国。

毕竟，正是 1945 年 9 月 28 日的 2 份《杜鲁门宣言》公开宣布美国对海洋资源和沿岸渔业资源的控制超出领海范围，并掀起了各国对公海主张主权的狂潮。因为美国从专属经济区制度中获益颇丰，因此美国没有理由否定《公约》有关专属经济区制度的条款。事实上，现如今美国大多数相关学者都希望能尽快加入《公约》，然而美国一直受两大政党斗争的困扰。只有当美国清除这些不合理的国内政治障碍后，才能在参议院以宪法规定的三分之二的同意票加入《公约》。[19]

或许对美国而言，更准确地说对世界各国而言，面临的唯一真正问题是美国

---

16 Jonathon L. Charney, International Agreements and the Development of Customary International Law, *Washington Law Review*, Vol. 61, 1986, p. 971. See North Sea Continental Shelf (Federal Republic of Germany/Denmark & Netherlands), *I.C.J. Reports*, 1969, pp. 37~39; Wladyslaw Czaplinski, Sources of International Law in the Nicaragua Case, *International & Comparative Law Quarterly*, Vol. 38, 1989, p. 153. See also Martin Lishexian Lee, The Interrelation between the Law of the Sea Convention and Customary International Law, *San Diego International Law Journal*, Vol. 7, Spring 2006, p. 415.

17 At http://www.un.org, 6 November 2006.

18 John A. Duff, The United States and The Law of The Sea Convention; Sliding Back from Accession and Ratification, *Ocean and Coastal Law Journal*, Vol. 11, 2005/2006, pp. 4~5.

19 根据笔者于 2005 年 3 月在厦门大学同 John N. Moore 教授和 Myron Norquist 教授的交流，以及于 2005 年 10 月在北京与 Bernard Oxman 教授的交流。同时，Lugar 参议员也曾强调，在全球安全与领导力的大背景下，美方需要加入《公约》，“全球 140 多个国家都是《公约》的成员国，包括安理会的其他所有常任理事国，和所有（除了 2 个）北约成员国”，包括海上能源、航上运输和贸易、渔业以及造船业等在内的美国所有主要海洋产业均支持美国加入《公约》，因为公约条款有助于保护美国的重大经济利益，并且能为全球海洋企业的投资提供至关重要的确定性和稳定性。See John A. Duff, The United States and The Law of The Sea Convention; Sliding Back from Accession and Ratification, *Ocean and Coastal Law Journal*, Vol. 11, 2005/2006, pp. 4~5.

总是倾向于根据其当下的利益选择适用成文国际法或习惯国际法。这个问题并不是本次可以进行深入讨论的话题。

三、航行自由和飞越自由以及科学研究和军事测量的区别

有关沿海国专属经济区内航行自由和飞越自由的论述已经很多了，在此仅做简要介绍。

在 1994 年 11 月 16 日《公约》生效之前，也就是说 12 年前，专属经济区属于公海的一部分。但从那时起，各国原本享有的公海航行自由和飞越自由受到严重影响，尽管《公约》规定其他国家在沿海国的专属经济区依然享有传统的权利和自由。[20]

多年来，对大部分海洋强国而言航行自由一直都是海洋法的核心。而现如今，因为沿海国的实践，这些自由已经受到了严重限制。

其中，渔船受到了最大的限制，而且为了保护沿海国的渔业资源，渔船需要安装船舶远程监控管理系统，从而使船旗国和沿海国可以实时监控已获得捕鱼许可证的渔船在沿海国专属经济区捕鱼时的位置。如果渔船想要穿越其他国家的专属经济区，即便并非为了捕鱼，他们也通常必须忍受沿海国各种理由的登临。“911 事件”后，国家安全成为沿海国登临的新理由。

油轮以及其它装载危险货物的船舶必须遵守国际性、区域性以及国内规范，尤其是单壳油轮更是收到诸多规范。在经历了 2002 年的“威望号”油轮事件后，包括法国和西班牙在内的一些国家甚至不允许单壳油轮入港和停泊。

载有极端危险的放射性货物的船舶已经被诸多国家警告禁止进入其专属经济区，而这些船舶也确实选择了避开大多数专属经济区的运输航线。作为高放废物主要运输国之一的日本，过去曾罔顾《公约》第 23 条的精神，一直对高放废物的运输航线保密。[21] 然而，一些日本学者认为，安倍新内阁可能会改变长期以来的保密政策，将公开日本九大核电站废燃料的运输航线。[22] 如果这一举措可以施行，势必有助于改善日本的国际形象。

2001 年 9 月 11 日后，安全问题迅速增加，海上强国和军事大国开始普遍地

---

20 《联合国海洋法公约》第 58 条。

21 Kuen-chen Fu, Jurisdiction Over Environmental Violations in the Taiwan Strait Area – A Perspective from Each Side of The Strait, *University of British Columbia Law Review*, Vol. 27, No. l, 1993; 傅崐成、刘先鸣：《台湾海峡船源污染法律问题刍议》，载于《中国海洋法学评论》2006 年第 1 期，第 78~89 页。

22 据神户大学的 Shigeki Sakamoto 教授以及其他教授去年 10 月在清华大学法学院的发言。

主张在包括专属经济区的所有海域拦截和登临外国船舶，检查是否携带可疑物品的权利。

一项新的习惯国际法似乎已经诞生，即容许沿海国可以依据船舶及其货物的性质来规制穿越其专属经济区的航行活动。甚至传统上享有逮捕豁免权的军用船舶，也必须遵守保护海洋环境和沿海国人民安全的诸多规范。[23]

虽然美国依然坚持认为沿海国只对专属经济区内的自然资源享有基本权利，而其他国家依然在此海域享有飞越自由和航行自由，[24] 但是现在已很难说在其他国家专属经济区内的航行自由和飞越自由和公海上的自由是一样的。航行自由和其他国家的利益之间的平衡仍在继续发展，但在这一发展过程中，航行自由似乎正在逐渐消失。[25]

有学者可能想把航行自由和飞越自由进行区分，进而单独讨论飞越自由，但这 2 种自由面临的情形本就类似。如果船舶（逻辑上飞机也是）必须避开沿海国在专属经济区建立的人工设施附近的安全 / 缓冲地带，[26] 并遵守沿海国就其专属经济区设立的规则和规范，[27] 那么这些船舶则不再享有公海上的传统自由。在 Elizabeth Mann Borgese 和 Norton Ginsburg 合编的《海洋年鉴》第 3 卷中，将专属经济区上空的空域明确称为“专属经济区空域”，而非“国际空域”。国际空域只在专属经济区 200 海里界限外海域的上空存在。[28]

国际社会现在面临的难题在于美国等国家不时地违反沿海国就其专属经济区规定的法律法规。

正如上文提及的美国“鲍迪奇号”及其姐妹舰案，虽然印度和中国多次表示抗议，但美国坚持认为其在印度和中国专属经济区的活动只是军事测量，并非海洋科学研究。因此，不应适用《公约》的相关条款。[29]

---

23 Jon M. Van Dyke, Recent Incidents and Developments: Their Implications for The EEZ Regime，该文章提交在于 2004 年 10 月 28 － 29 日在上海举办的研讨会上。

24 George V. Galdorisi and Alan G. Kaufman, Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict, *California Western International Law Journal*, Vol. 31, Spring 2002, p. 235.

25 Jon M. Van Dyke, Recent Incidents and Developments: Their Implications for The EEZ Regime，该文章提交在于 2004 年 10 月 28 － 29 日在上海举办的研讨会上。

26 《联合国海洋法公约》第 60 条第 4 款规定：“沿海国可于必要时在这种人工岛屿、设施和结构的周围设置合理的安全地带，并可在该地带中采取适当措施以确保航行以及人工岛屿、设施和结构的安全。”《联合国海洋法公约》第 60 条第 6 款规定：“一切船舶都必须尊重这些安全地带 , 并应遵守关于在人工岛屿、设施、结构和安全地带附近航行的一般接受的国际标准。”逻辑上讲，不只是船只必须避开这些人工设施，飞行器，特别是直升机和热气球也应避开，从而保护这些设施的安全和专属经济区内至关重要的秩序和安全。

27 《联合国海洋法公约》第 73 条。

28 Michael A. Morris, Military Aspects of the Exclusive Economic Zone, in Elizabeth Mann Borgese and Norton Ginsburg eds., *Ocean Yearbook, Vol. 3*, Chicago: The University of Chicago Press, 1982, p. 326.

29 《联合国海洋法公约》第 56 条。

有人也许试图从英美归纳式法律思维来解释美国的态度。因为成文法并未明确禁止“鲍迪奇号”开展军事测量，所以除非有管辖权的法院作出明确判决，禁止军舰开展军事测量，否则“鲍迪奇号”军舰就有权开展测量活动。

可是，如果采取欧洲大陆演绎式的法律思维方式来解读对《公约》，那么便很容易理解“鲍迪奇号”无权开展军事测量的原因。无论从理论上还是实践上，《公约》都应被理解为世界海洋宪章，特别是在解释特定条款时更应如此。

虽然第 56 条第 1 款 (b)(ii) 指出，“沿海国（在专属经济区内）有本公约有关条款规定的对下列事项的管辖权：……（2）海洋科学研究……”，但是《公约》其他 2 个相关条款（第 88 条和第 246 条第 3 款）也有明确规定。前者规定所有公海活动都应当用于和平目的，后者规定所有的专属经济区（和大陆架）的海洋科学研究只能用于和平目的。

第 88 条规定：“公海应只用于和平目的。”这意味着，各国在公海享有的所有权利和自由（包括航行自由和飞越自由）都只能用于和平目的。正如文章第一部分所述，其他国家在沿海国专属经济区内的权利应该包括依《公约》第 87 条（关于公海自由）享有的航行自由和飞越自由。因此，专属经济区内的航行自由和飞越自由本就源起于公海自由，他们最初的法律性质就是这些自由只能用于和平目的。因此，在沿海国的专属经济区出于军事目的行使本应出于“和平目的”而行使的公海自由和权利是不合逻辑的，却，且有违《公约》规定的。

最后，同样重要的是，如果争端被提交至有管辖权的法院，美国可能提出的论据便是军事活动也可能为了和平目的。如果仔细阅读于 2002年发表在《西加利福尼亚国际法杂志》上的由美国退休海军上校 George V. Galdorisi 和美国海军犯罪调查局指挥官 Alan G. Kaufman 合著的《专属经济区内的军事活动：防止不确定性和化解冲突》一文文章标题，就会发现 2 位作者的观点十分明确，所有的这些得军事测量都是为了和平目的。[30]

笔者的反驳很简单。

当“鲍迪奇号”在没有印度事先许可的情形下驶入印度专属经济区并搜集印度的国家安全信息时，美国便是在印度享有专属管辖权和因时效而取得权利的水域对印度主权利益进行刺探。如果美国，或者其他国家“为了和平目的”试图通过自由解释《公约》条文来“化解冲突”，那么这些国家并不是在维护和平，而是在制造事端。而有关主权和国家安全利益的问题往往会导致实际冲突。在 21 世纪，这些自我界定的“军事行动”不能被视为具有和平目的。

各相关国家应对《公约》第 246 条进行考虑。该条第 3 款规定：

---

30 George V. Galdorisi and Alan G. Kaufman, Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict, *California Western International Law Journal*, Vol. 32, Spring, 2002, p. 253.

> 在正常情形下，沿海国应对其他国家或各主管国际组织按照本公约专为和平目的为了增进关于海洋环境的科学知识以谋全人类利益，而在其专属经济区内或大陆架上进行的海洋科学研究计划，给予同意。为此目的，沿海国应制订规则和程序，确保不致不合理地延迟或拒绝给予同意。

多年来，国际贸易货物被分为3大类：民用、军用和混用。类似地，“海洋科学研究”项目也可以被分为这3大类。显然，如果美国或其他国家需要在沿海国专属经济区开展混合型（兼具民用和军事用途）的海洋科学研究，但明确是为了和平目的，那么沿海国就应给予同意，并应制订规则和程序，确保不致不合理地延迟或拒绝。因此，公约第246条第3款明确赋予沿海国决定是否批注其专属经济区内研究项目的权力，规定这一制度是为了满足美国“为了防止不确定性并化解冲突”（亦即和平目的）而提出的潜在需求。任何人都很难为美国找到一个理由，使其可以像以往一样的任意行事。

在某种程度上，目前的问题或多或少有点类似于成文法的解释，如果成文法规定禁止所有店主将其商业标识悬挂在店铺前沿街的树上，那么精明的店主能否绕着店铺前的树搭一圈水泥柱，然后再将商业标识挂在水泥柱上呢？答案应该是否定的。因为如果法律禁止一些活动，你不能简单地通过其他途径或以不同的名目去做有违同一法律目的的事情。

总之，《公约》明确要求在沿海国专属经济区，所有这些公海航行自由、飞越自由以及其他自由只能为了和平目的行使。《公约》同样也明确做出如下规定：在沿海国专属经济区内实施的民用或军用“海洋科学研究”项目，只要完全是为了和平目的，就应该得到沿海国的许可。任何为了和平目的的军事海洋研究项目都应该得到沿海国的许可。只有沿海国才有权力对一项科学研究是否为和平目的做出判断，而不是意欲在该沿海国专属经济区开展科学研究的其他国家。这也是《公约》起草人对专属经济区这一法律制度的设计目的。因此，除非美国向沿海国申请为了和平目的的军用或民用研究项目并被否决，美国才能对依《公约》第十五部分规定的争端解决程序作出的判决提出辩解。

尽管我们在讨论这些问题，但是美国国会最近刚批准了一项向印度出售核武器的项目。[31] 或许，随着两国间友好联盟关系的确立，上述争端将不再需要进一步的法律安排也能够得到解决。因此，有时候我们不得不去评价政治学家的工作，而非律师的工作。

四、专属经济区内的液货过驳

31 《印度教徒报》（在印度国内发行的日报）2006年12月10日第1版。

海洋正在面临着越来越多的高风险污染损害。在众多污染损害类型中，石油泄漏最为严重。1999 年 12 月 12 日，马耳他籍油轮“埃里卡号”在法国海岸附近沉没，溢出 1.2 万到 1.5 万吨的燃油。人们对该事件的关注仅在同年和 2000 年持续了短暂的 2 年。3 年后，仅 2002 年一年内就发生了 2 起严重事故。“威望号”邮轮在西班牙海岸附近沉没，溢出约 1 万吨的石油；“塔斯曼海号”油轮在中国海岸附近沉没，约 205.924 吨轻质原油流入渤海湾。“塔斯曼海号”油轮案也成为中国首个由石油泄漏造成海洋环境损害赔偿的民事案件。中国公共和私人部门在中国法院共要求赔偿 1.7 亿元人民币，这一赔偿额也创造了中国民事诉讼之最。[32]

虽然，在很多不同场合均对石油泄漏做了讨论。但是在沿海国专属经济区还出现了另一个重要的关于环境保护的新问题，且该问题还可能涉及沿海国的国家税收，需要更加重视，这个问题就是沿海国专属经济区内的液货过驳。目前很少有关于这一问题的文献，但是在中国和其他一些沿海国，这一具有挑战性的新问题正引起越来越多的的关注。

人们可能想要了解沿海国对专属经济区的液货过驳拥有管辖权的合法性。的确，《公约》框架在很大程度上维持着一直以来海洋国家和沿海国之间对海洋和海洋活动管辖控制的平衡和张力。不可否认的是，沿海国主张的对船源污染的立法管辖与《公约》赋予这些国家的有限的立法管辖之间存在冲突。然而，这并不是说《公约》通过限制沿海国的立法管辖权，而在某种程度上禁止通过新发展的习惯国际法来扩大沿海国的（立法或执行）管辖权。在清楚自己不能够被既存的框架充分保护后，沿海国可能寻求通过习惯国际法原则来单方面地扩大其立法管辖权和执行管辖权，这将有损《公约》起草者希望保护的稳定和平衡。[33]

本文接下来的部分将讨论这种单边的国内立法及其合法性，以及规制沿海国专属经济区液货过驳的局限性。

石油和其他液货都具有爆炸性，会给环境、公共秩序和海洋安全造成严重损害。因此，许多沿海国已经制定了详细的法律法规来控制和规制这些液货过驳作业。在中国，液货过驳造成的灾难时有发生。2003 年 3 月 29 日，一艘新加坡籍油轮在大鹏湾附近的担杆岛与一艘马耳他籍油轮进行原油过驳，但这一在中国专属经济区进行的过驳作业并未取得中国深圳港务局许可。最终爆炸造成 1 死 3 伤，

32 陈海波：《“塔斯曼海”轮船舶碰撞海洋油污损害赔偿系列案评析》，载于《中国海洋法学评论》2005 第 2 期，第 85~102 页。

33 Christopher P. Mooradian, Protecting “Sovereign Rights”: The Case for Increased Coastal State Jurisdiction over Vessel-Source Pollution in the Exclusive Economic Zone, *Boston University Law Review*, Vol. 82, 2002, p. 768.

更遑论石油泄漏导致的严重海洋环境损害。[34]

当时中国并没有关于专属经济区货物过驳的具有法律法规。1996 年《液货船水上过驳作业安全监督管理规定》（以下简称“《规定》”）第 2 条第 2 款规定：本规定所称的中华人民共和国管辖水域，是指中华人民共和国的江河、湖泊、水库、运河等内河水域，以及沿海的港口、内水、领海和国家管辖的其他一切海域。未经交通部批准，外国籍船舶不得在我国非对外开放水域或港口进行过驳作业。[35]

想必“国家管辖的其他一切海域”应该包括专属经济区，尽管《中华人民共和国专属经济区和大陆架法》是在《规定》后 2 年（1998 年 6 月 26 日）才颁布。[36] 不过，中国当局一直未澄清这个问题。

1996 年《规定》颁布后，其中的“非对外开放水域或港口”的范围由交通部自由裁定。然而，在 2002 年 1 月 1 日《海域使用管理法》生效后，则分别由中央和地方政府决定可用于国内或外国船舶实施货物过驳的海域。[37]

从国际法的角度来讲，最基本的法律未决问题在于沿海国是否享有对其专属经济区内液货过驳作业进行调整的权利和义务。毕竟，《公约》第 56 条第 1 款 c 项只规定了沿海国有“本公约规定的其他权利和义务”。“塞加号”案和“塞加号”第 2 号案对解决这一问题具有借鉴意义。[38]

1997 年 10 月 27 日清晨，悬挂圣文森特及格林纳丁斯旗的供油船“塞加号”越过几内亚比绍和几内亚之间的海洋边界，驶入几内亚专属经济区。当天，“塞加号”在离几内亚恶魔岛约 32 海里的位置向 3 艘外国渔船供应燃油 , 并被几内亚政府发现。之后，几内亚炮艇追捕并向“塞加号”开火，最终将船拦截并逮捕。此后，关于逮捕合法性和迅速释放船舶和船员的诉讼被提交至国际海洋法法庭。

在本案判决中，海洋法法庭指出，沿海国专属经济区内的航行不同于公海上的航行。在一国专属经济区内给渔船供应燃油应被视为渔业活动，而根据《公约》第 55 条和第 56 条的规定，渔业活动是沿海国的主权权利。法庭进一步指出，几内亚有权为保护公共利益进行相关立法，这意味着在本案中，几内亚可以颁布海关法来向在其专属经济区的供油服务提供者征税。但是，根据《公约》第 58 条第 3 款的规定，这种立法权的行使必须适当顾及其他国家的利益。同时，几内亚的立法应以“必要性原则”为基础。换言之，国际海洋法法庭认为，如果在几内亚专属

---

34 《非法进行海上油类过驳作业两外轮在大鹏湾外爆炸起火》，载于《青岛新闻网》2003 年 4 月 1 日，下载于 http://www.qingdaonews.com/big5/content/2003-04/01/content_1189496.htm，2006 年 10 月 20 日。

35 《液货船水上过驳作业安全监督管理规定》于 1996 年 4 月 16 日由交通部颁布，并于当年 5 月 1 日正式生效。

36 《中华人民共和国专属经济区和大陆架法》于 1998 年 6 月 26 日在第九届全国人民代表大会常务委员会第三次会议上制定。

37 《海域使用管理法》于 2001 年 10 月 27 日在第九届全国人民代表大会常务委员会第 24 次会议上制定。

38 “赛加号”案的详细报告，下载于 http://www.itlos.org/start2_en.html，2006 年 11 月 25 日。

经济区执行海关法是保护其专属经济区利益的“唯一途径”，并且也“不会损害其他国家的利益”，那么几内亚就可以合法地执行。

遗憾的是，法庭并不认为本案存在必要性，并指出几内亚还有其他保护其专属经济区税收利益的途径。因此，最终法庭以 18 票赞成 2 票反对的投票结果判决几内亚向原告圣文森特及格林纳丁斯赔偿 2123357 美元。[39]

我们可以从国际海洋法法庭对“塞加号”案的判决看出，沿海国可以通过制订国内法律法规（包括征税）来规制在其专属经济区内的液货过驳作业，只要满足如下 2 个条件：

(1) 为沿海国公共利益；以及

(2) 符合必要性原则，即没有其他途径来保护沿海国专属经济区的利益，且不会损害其他国家的利益。

虽然在沿海国专属经济区内的液货过驳可能并不必然是为了商业目的，但现实情况是当今绝大多数发生在沿海国专属经济区的燃油过驳作业以及其他液货过驳均是为规避税费和港务费。中国已经有一些在领海、毗连区以及内水（不包括专属经济区）进行未经许可的油货过驳的判例，这些行为通常以走私罪进行处罚。[40]

那么，对此有何应对措施呢？

首先，在符合必要性原则的情况下，沿海国可修订其国内税法，对在载有液货在其专属经济区内进行过驳作业的本国和外国船舶征收营业税、关税、甚至环境税。这一点似乎得到了上述国际海洋法法庭判决的有力支持。

第二，在沿海国专属经济区（以及管辖内的其他水域）的液货过驳应取得沿海国事先许可。沿海国国内法律法规应对事先许可以及可以开展过驳活动的水域的做出规定。

第三，应适当公开特别敏感海域，违规者应依据沿海国法定条款予以严厉惩罚。

第四，沿海国应对政府船只开展的非商业性液货过驳单独做出特殊规定。如果外国政府船舶主张豁免，首先应认定该过驳作业是否为商业目的。商业性作业不应享受豁免。

第五，如果过驳的货物属于高放射性物质或者其他高度危险货物，应遵照相关国际规则和标准对其进行管理。此外，预防性控制十分关键，因为其比法律惩处或任何其他事后措施更重要。沿海国国内法律法规应要求申请货物过驳许可应

---

39 下载于 http://www.itlos.org/start2_en.html，2006 年 11 月 18 日。

40 唐元凯：《国际油价上扬：海上走私活跃》，载于《北京周报》2005 年 4 月 13 日，下载于 http://www.bjreview.com，2006 年 11 月 15 日；新华网，2005 年 4 月 13 日，下载于 http://www.xinhuanet.com，2006 年 11 月 15 日。

提交适当的材料和环境影响评估报告。[41]

第六，对已经加入世界贸易组织有关公约的沿海国而言，其专属经济区内的商业性液货过驳还应当考虑世界贸易组织相关规则。

第七，如果在沿海国专属经济区进行液货过驳的 2 艘船舶至少有 1 艘是外籍船舶，那么管理方法应与 2 艘均为本国船舶的有所不同。

第八，国内法律法规应对大型石油公司的责任做出特别规定。在规制大型石油公司污染活动方面，《防止船舶污染国际公约》已不再那么有效。[42] 在过去许多年里，防漏双壳船的普及过程十分缓慢，直到一些主要的港口国修改了其国内法拒绝单壳油轮入港，单壳油轮船东才开始重视这个问题。[43]

第九，沿海国国内刑法典应对刑罚做出规定，以更有效地预防其专属经济区内严重的故意污染海洋活动。对于沿海国水域内非法液货过驳所导致的环境灾难，应大大增加船东和经营者的刑事责任。[44]

最后，同样重要的是沿海国、港口国以及船旗国应当加强合作，共同打击专属经济区内的非法液货过驳。国际海洋制度很久之前就已经意识到了船旗国在保障船员和船舶安全以及环境保护方面的重要作用。虽然《公约》规定了船旗国、沿海国和港口国之间的合作关系，但是在应对潜在的海洋环境保护违规行为时，船旗国还是处于主导地位。然而毫无疑问，正如部分学者提出的，应该加强港口国的权力，而这一点也可以通过国内立法予以实现。[45]

五、结　论

---

41 MAYAGUEZANOS POR LA SALUD Y EL AMBIENTE, ET AL., Plaintiffs, Appellants, v, UNITED STATES OF AMERICA, ET ALL., Defendants, Appelees. No.99-1412, UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, 198 F. 3D 297; 1999 U.S. APP.LEXIS 33416; 49 ERC (BNA) 1889; 2000 AMC 2476; 30 ELR 20214, December 20, 1999, Decided. 巡回法官林奇的意见：1998 年 2 月 3 日，载有玻化高放核废料的英国籍“太平洋天鹅号”经过波多黎各岛和伊斯帕尼奥拉岛之间海域的莫纳海峡。船只从法国出发，途径巴拿马运河开往日本。一天前，一群来自波多黎各西岸的渔民和环保组织担心发生事故或海上灾难，提请禁令阻止该趟运输，直到美国根据美国《环保政策法》提交了环境影响评估报告。在双方均向法院提交裁决请求后，区法院拒绝禁令救济请求并驳回诉讼。参见 Mayaguezanos por la Salud y el Ambientev, United States, 38 F. Supp, 2d 168,178 (D.P.R.1999).

42 Emeka Duruigbo, Reforming the International Law and Policy on Marine Oil Pollution, *Journal of Maritime Law and Commerce*, Vol. 31, January 2000, p. 69.

43 Craig Welch, Oil Tankers Slow to Shift to Anti-Spill Double Hulls, *Seattle Times*, 5 May 2003.

44 David G. Dickman, Recent Developments in the Criminal Enforcement of Maritime Environmental Laws, *Tulane Maritime Law Journal*, Vol. 24,Winter 1999, pp. 4~5.

45 Jeremy Firestone and James Corbett, Combating Terrorism in The Environmental Trenches: Responding to Terrorism: Maritime Transportation: A Third Way For Port And Environmental Security, *Widener Law Symposium*, Vol. 9, 2003, p. 419.

上述论证可能会得出这些基本的结论：尽管人们可以通过适用习惯国际法的原则来试图解决目前的问题和困难，但《公约》的架构还是不能确保世界各国对专属经济区的和平利用。通过进一步的磋商，在今后《公约》的审议会议上对其进行修改也并非难事。

其中，如有可能应修改《公约》第 59 条，从而使衡平原则更加灵活。

对《公约》第 60 条第 6 款的修订是列入“飞行器”，以保护在沿海国专属经济区内设立的安全区或缓冲区。

应该在《公约》第五部分（第 56 条第 1(b)(ii) 款）或第七部分（第 246 条）规定“海洋科学研究”的定义。这样一来，专属经济区内和大陆架上的“军事”海洋科学研究也会被视为海洋科学研究，必须获得沿海国的同意并只能用于和平目的。

联合国大会应通过决议再次强调《公约》序言，以避免更多与沿海国专属经济区和平使用相关的争端。公约序言规定如下：

> 认识到有需要通过本公约，在妥为顾及所有国家主权的情形下，为海洋建立一种法律秩序，以便利国际交通和促进海洋的和平用途，海洋资源的公平而有效的利用，海洋生物资源的养护以及研究、保护和保全海洋环境。
>
> ……
>
> 相信在本公约中所达成的海洋法的编纂和逐渐发展，将有助于按照《联合国宪章》所载的联合国的宗旨和原则巩固各国间符合正义和权利平等原则的和平、安全、合作和友好关系，并将促进全世界人民的经济和社会方面的进展。
>
> 确认本公约未予规定的事项，应继续以一般国际法的规则和原则为准据。

最后，为了更好地保护世界海洋环境，沿海国应致力于颁布新的法律法规来规制专属经济区内的非法液货过驳。

（中译：王小伟）

The Issue of Conflict between Jurisdiction of Coastal States over Marine Scientific Research and Military Survey

ZHANG Haiwen*

Abstract: The evolution of the legal regime of marine scientific research reveals that international law of the sea accords coastal States increasing jurisdiction over many sea areas, including the jurisdiction over marine scientific research in a stricter manner. With the advent of modern science and technological development, it is hard to make a clear distinction between pure "marine scientific research activities" and "oceanographic measurement activities". In modern international relations, the international community has still not completely attained world peace where local military confrontation and war no longer exist. Against this background, it is hardly a convincing pretext for any maritime power to claim that data collected through "oceanographic measurements" (or "military survey") is only used for "peaceful purposes" or for the "benefit all mankind". Thus, it is necessary to support the claims of vast developing coastal States in order to maintain their national maritime rights and interests. That is, all activities that aim at acquiring knowledge of the ocean as well as its variations fall into the category of marine scientific research, and are supposed to obtain prior consent from coastal States.

Key Words: United Nations Convention on the Law of the Sea; Marine scientific research; Military survey

---

* ZHANG Haiwen, Ocean Development Strategy Research Institution, Researcher, Ph.D. in Law. This article is written based on his speech delivered at the Seminar "Recent Development in the Law of the Sea and China" held in Xiamen, China from 9 to 12 March 2005. For the original version, see Myron H. Nordquist, John Norton Moore and Kuen-chen Fu ed., *Recent Developments in the Law of the Sea and China*, Leiden: Martinus Nijhoff Publishers, 2006, pp. 317~331.

I. Introduction

For centuries, humans have been sailing, and exploiting the ocean and its natural resources. So far, the ocean remains one of the most mysterious areas of which humans remain less knowledgeable. The development of modern science and technology offers the necessary conditions and means for humans to have further knowledge and understanding, which definitely will benefit all mankind. However, it also generates conflicts and contradictions among people.

Survival and sustainable development of the human society has become increasing dependent on the ocean, making the ocean an indispensable and important space for geological, meteorological and space research. As a vital part of the earth, the significance of the ocean to humans has drawn more and more attention. In the area of technology, the ocean is not only the object of scientific research, but also a new scientific research space. It provides an amazing multi-dimensional space for the humankind, from the sea, the land, the air, the sky, the areas underneath the sea and the seabed, which enables humans to have an overall, deeper, and complete knowledge of the natural world for development of scientific technology. Thus, coastal States have paid increasing attentions to marine research, which also renders marine science a very important subject of comprehensive science. It is now a general term of research in physics, chemistry, geology, biology, hydrographic, meteorology, and other subjects relating to marine scientific environment on a worldwide basis.[1]

Humans have a long history of maritime navigation. Many navigators concerned themselves with the intricacies of marine survey, one of such was Zheng He, a famous Chinese navigator during the Ming Dynasty.[2] After the western world stepped into capitalism, the area and content of marine scientific research was steadily expanding with a highly developed industry and wide application of science and technology. Yet generally speaking, the history of marine scientific research in modern science actually began with the exploits of the British vessel *The Challenger* that conducted global scientific surveys during the 1870s, while

---

1 Liu Nanlai et al., *International Law of the Seas*, Beijing: China Ocean Press, 1986, p. 409. (in Chinese)

2 As early as in the first half of the fourteenth century, Zheng He "navigated the Atlantic Ocean seven times", through the South China Sea, the Indian Ocean, and the Red Sea, to the North Africa as the farthest point. He recorded hydrography, seawater movement, and variations of water depth of different places along his journey.

contemporary marine scientific research started after the 1940s. Marine scientific research has covered almost all branches of natural science, and has constantly explored new areas. With the rapid development of science and technology, humans have extended the scope of marine scientific research from the waters off the coasts to all of the oceans throughout the world, and have extended the content from description of natural geography to survey and research of the environment and its resources, in order to adequately exploit the ocean. Internationalism of marine scientific research brings legal issues, which give rise to the formulation of a series of conventions from those adopted at the Hague Peace Conferences in 1907 to 1982 United Nations Convention on the Law of the Sea ("UNCLOS"). And these conventions have gradually developed into a relatively complete legal regime of marine scientific research.

II. A Brief Review of the Evolution of the Legal System of Marine Scientific Research

A. Before the Year 1958

Before 1958, general international customs and usage encouraged marine scientific research. Vessels undertaking marine scientific research had a neutral position and enjoyed right of immunity.

In the early eighteenth century, there was the precedent that ships engaged in marine scientific research were under protection in the event of armed conflicts. A general international custom practiced at the time ensured that, the ships engaged in marine scientific research that did not conduct hostile activities enjoyed immunity.[3] Some countries even entrenched these customs into their domestic legislation. For example, Italian Commercial Ship Law (1877), Art. 247 states that, warships that are not belligerent are allowed to enter or stay at the port, or off the coast, as long as they carry out marine scientific research activities.

At the Second Hague Peace Conference in 1907, the Italian delegation proposed a couple of recommendations, such as: hostile vessels charged with scientific, religious, and charitable missions should be exempted from capture. After repeated discussions, all delegations involved reached a consensus on inserting

3 Liu Nanlai et al., *International Law of the Seas*, Beijing: China Ocean Press, 1986, p. 412. (in Chinese)

all the recommendations made by the Italian delegation into related conventions. For example, Hague Convention XI (Restrictions with regard to the Exercise of the Right of Capture in Naval War), Art. 4, prescribes that, Vessels charged with religious, scientific, or philanthropic missions are likewise exempted from capture. Hague Convention XIII (Convention XIII Concerning the Rights and Duties of Neutral Powers in Naval War) Art. 14 states that the 24-hour staying rule does not apply to warships devoted exclusively to religious, scientific, or philanthropic purposes, and scientific vessels of a neutral State that are employed or chartered by a hostile State are not deemed to be "conducting non-neutral obligations".

After the Second Hague Peace Conference, many States formulated neutral laws or regulations regarding capture correspondingly. For example, in 1914 (The Republic of China in its third year), the Beijing government promulgated the Neutrality Regulation, which provided that the belligerent warship charged with scientific research staying at Chinese ports were exempted from the 24-hour staying rule that was enforced concerning other warships, and exempted from restrictions that no more than three warships were allowed to stay simultaneously or to add supplies of necessity. In 1932 (The Republic of China in its twenty-first year), the national government published the Regulations Concerning Capture at Sea, which stated that hostile ships that were engaged in scientific research and did not conduct military activities shall not be subject to capture. Domestic legislations of many other States, such as Italy's Law of War in 1938 and the French order in 1934, have similar provisions.[4]

However, in that historical era, although the international customs or domestic legislations relating to the protection of marine scientific research ships at war had been developed, the rationale behind it was to evince the respect for science and religion, and also to take into account the practice of the norm of humanitarianism. At that time, the concept of freedom of marine scientific research had not yet been formed. In 1926, the International Law Association at the Vienna Conference once put forward the idea of the freedom of marine scientific research and freedom of navigation in juxtaposition, but the international community at the time had not yet accepted the concept of the freedom of marine scientific research.

---

4 Liu Nanlai et al., *International Law of the Seas*, Beijing: China Ocean Press, 1986, p. 413. (in Chinese)

B. Convention on the High Seas and Convention on the Continental Shelf in 1958

The International Law Commission drew up its final report on the law of the sea and passed the draft at its eighth session in 1956. In listing, "freedom of the high seas", it only referred to the freedom of navigation, the freedom of fishing, the freedom of laying submarine cables and pipelines, and the freedom of overflight; but did not include the freedom of marine scientific research.

The Convention on the High Seas in 1958 also did not list the freedom of marine scientific research as part of its provisions. However, International Law Commission made an illustration of the Convention on the High Seas, Art. 2, which revealed that, there was no limitation on the freedoms of the high seas listed by this Convention. The Commission merely mentioned the four main freedoms. It also particularly referred to the freedom of research on the high seas. The freedom as such would be subject to restriction only when any act violated the general principles and had a bad influence on the use of the high seas by citizens of other States.

It is only the Convention on the Continental Shelf that explicitly stipulated marine scientific research among the four Geneva Conventions in 1958. The passage of the Convention on the Continental Shelf marks that modern marine scientific research legal regime began to build up and that coastal States had jurisdiction over marine scientific research carried out within sea areas that are subject to their jurisdiction. However, there is no term of "freedom of scientific research" in provisions of the Convention on the Continental Shelf.

Convention on the Continental Shelf reserved the tradition of encouraging and supporting marine scientific research, by stipulating in Art. 5 (1) that, the exploration of the continental shelf and the exploitation of its natural resources must not result in any interference with the fundamental oceanographic research. On the other hand, the Convention also gave coastal States partial jurisdiction over marine scientific research, by stipulating in Art. 5 (8) that the consent of the coastal State shall be obtained in respect of any research concerning the continental shelf and undertaken there, that is, to establish a "consent regime". Actually, the Convention on the Continental Shelf made stipulations as such in an attempt to divide marine scientific research into two categories, that is, a pure scientific research on the basis of continental shelf's physical or biological features and research other than such pure scientific research; but later practice showed that the

interpretation and implementation of the articles were met with contentions.

C. UNCLOS

It may be said that there was no dispute on marine scientific research on the high seas, in theory or practice, before the Third United Nations Conference on the Law of the Sea. All States had the freedom of marine scientific research on the high seas. The dispute was merely about coastal States' jurisdiction over marine scientific research on their continental shelves.

Contention concerning marine scientific research at the Third United Nations Conference on the Law of the Sea was basically as eminent as before. The core issue was the "consent regime" of marine scientific research carried out in sea areas within national jurisdiction.

When discussing the issue of coastal States' jurisdiction over marine scientific research at the Conference, the Chinese government held the position that any State who expected to carry out marine scientific research within sea areas that were subject to jurisdiction of another coastal State shall obtain prior consent of that State and act in accordance with the laws and regulations of that State.[5] Economic zones and continental shelves were sea areas that were subject to jurisdiction of States by character. It was fairly reasonable for coastal States to exercise jurisdiction over marine scientific research conducted within such sea areas. Many developing countries claimed that any marine scientific research conducted in the exclusive economic zones should have obtained the prior consent of the coastal States concerned. Such claim was made after considering the maintenance of safety and justified maritime rights and interests of coastal States.[6] Scientific facilities placed within sea areas that were subject to jurisdiction of coastal States, unless with the consent of coastal States, had to be subject to jurisdiction of coastal States. States who install research facilities shall respect the coastal States' jurisdiction. It

---

5 For the Chinese representative's speech at the Third United Nations Conference on the Law of the Sea on 19 July 1974, see Official Records of the Third United Nations Conference on the Law of the Sea, Vol. II, p. 344.

6 For the Chinese representative's speech at the Third United Nations Conference on the Law of the Sea on 14 September 1976, see *File Set of Chinese Delegation Attending the United Nations Conference (July to December, 1976)*, Beijing: People's Press, 1977, pp. 183~184. (in Chinese)

was an important principle.[7]

Through over a decade's discussion on the matter, the UNCLOS has become the most comprehensive international convention on marine scientific research so far, although some provisions remain unclear and disputable. Part XIII and Part XIV of the UNCLOS stipulate marine scientific research and the transfer of marine technology respectively, which basically build a complete legal regime for marine scientific research.

First, the UNCLOS explicitly stipulates that the primary principle of marine scientific research is that: 1. It shall be carried out exclusively for peaceful purposes (Art. 240 (a)); 2. It shall be conducted with appropriate scientific methods and means compatible with this Convention (Art. 240 (b)); 3. It shall not unjustifiably interfere with other legitimate uses of the sea compatible with this Convention (Art. 240 (c)); 4. It shall be conducted in compliance with all relevant regulations adopted in conformity with this Convention (Art. 240 (d)).

Secondly, the Convention categorizes the regime of marine scientific research into two types based on the sea areas where marine scientific research is conducted:

1. The Regime of Marine Scientific Research Conducted in the Sea Areas within National Jurisdiction

Marine scientific research that is conducted in territorial seas (internal waters and archipelagic waters) shall obtain the "express consent" of coastal States (Art. 19 and Art. 245 of the UNCOS);

During transit passage in straits and archipelago, ships engaged in marine scientific research may not carry out any research activities without the "prior authorization" of the States bordering straits. (Art. 40 and Art. 54 of the UNCLOS)

Marine scientific research that is conducted within exclusive economic zones and continental shelves (contiguous zones) shall obtain the consent of coastal States (Art. 56, Art. 58, and Art. 246 of the UNCLOS); under normal circumstances, coastal States shall give their consent. Coastal States may however in their discretion withhold such consent to the conduct of marine scientific research project, if that project is of direct significance for the exploration for and exploitation of natural resources or under three other circumstances (Art. 246 (5) of the UNCLOS).

---

7 For speech of the Chinese representative at the Third United Nations Conference on the Law of the Sea on 17 April 1975, see *File Set of Chinese Delegation Attending the United Nations Conference (January to June, 1975)*, Beijing: People's Press, 1976, p. 76. (in Chinese)

2. The Regime of Marine Scientific Research Conducted in the Sea Areas beyond National Jurisdiction

High seas: the freedom of marine scientific research is explicitly included in the freedom of high seas (Art. 87 and Art. 247 of the UNCLOS);

International seabed areas: International Seabed Authority, all States, and all competent international organizations have the right to carry out marine scientific research. But the research has to be conducted for peaceful purpose and for the benefit of all mankind (Art. 143 and Art. 256 of the UNCLOS).

D. Conclusion

The history of the evolution of the legal regime of marine scientific research reveals that, coastal States went through the stage concerning jurisdiction over marine scientific research from asserting no jurisdiction to asserting jurisdiction; from encouraging such research by granting immunity to implementing stricter and clearer prior authorization regime.

The evolution of the legal regime of marine scientific research is in conformity with the historical development of international law of the sea. Long-term and serious contention resulted in the realization that coastal States have more and more sea areas within their jurisdiction, from the traditional measurement of 3 nautical miles of the territorial sea to 200 nautical miles of the exclusive economic zone, and possibly to over 200 nautical miles of the continental shelf. As a result, the areas of the high seas increasingly shrunk and the traditional norm of freedom of the high seas met with more and more restrictions. Coastal States assert more and more rights over the sea areas within their jurisdiction, from single traditional sovereignty over territorial seas to multi-sovereignty rights over natural resources in exclusive economic zones and continental shelves, in addition to jurisdiction over certain matters, including the jurisdiction over marine scientific research. In this regard, the legislative spirit of the marine scientific research legal regime in international law of the sea is in conformity with the development trend of the entire legal regime of international law of the sea. In summary, firstly, the exclusive economic zone is neither a part of the high seas nor the territorial seas, but belongs to the sea areas that are subject to jurisdiction of coastal States; secondly, international law of the sea gives coastal States more and more rights, with jurisdiction over marine scientific research within exclusive economic zones as one of such rights.

III. The Relations between Marine Scientific Research, Military Survey, and Other Activities

A. Relevant Terminology

The UNCLOS contains no definitions of marine scientific research, hydrographic survey, and military survey as well as other terms, which give rise to different interpretations and implementations in theory and State practice. Interpretations of such terms in associated reference books are as follows:

1. Hydrographic Survey

a. Hydrographic Survey Dictionary

(International Hydrographic Bureau, 1990)

Hydrographic survey is a type of survey used mainly for the purpose of obtaining an accurate measurement of water bodies. It is composed of measurements of one or several data, such as water depth, seabed shape and sediments, flow direction and rate, tides, water level, and fixture location for the purpose of survey and navigation.

b. CHIHAI

(Compact Edition, Shanghai Lexicographic Publishing House, 1999, p. 1130)

Hydrographic survey is a measurement and survey work on the ocean, river, lake waters as well as littoral areas for the purpose of safeguarding navigation. The main content focuses on measurement control, coastal topography, bathymetry, sweeping survey, hydrological observation, substrate survey, and sea area data survey. The data obtained from such survey are mainly used to prepare navigation publications.

c. Longman-Tsinghua English-Chinese Science & Technology Dictionary

(1996, p. 1625)

Survey, verb, a survey of related points or locations on the ground or in space, is used to draw horizontal and vertical relationships of natural and artificial elements on the picture on a scale.

d. Dictionary of Topography

(Editorial Committee of Dictionary of Topography ed.,

Shanghai Lexicographic Publishing House, 1981, pp. 551~552)

Hydrographic survey, also known as navigational survey, is a general term of underwater shape survey of the ocean, river, lake, etc. Its task is to measure

elements of cartography of related waters and to conduct sea area data survey, in order to offer data for drawing marine map, for making sailing directions, and for carrying out marine scientific research. It is divided into coastal, offshore, and ocean measurements, as well as river, lake, and port measurements, etc., and it is done on regional basis. Its main content includes measurement control, coastline topography survey, bathymetry survey, sweeping survey, substrate survey, hydrological observation, measurement of navigation aids, and sea area data survey. It is a combination of the survey or measurements as stated above, and also a combination of such measurements and scientific surveys. China has a long history in the field of hydrographic survey starting as early as the *Wuzi* era. *Wuzi* mentioned the relations between knowledge of water depth and military by stating that standing in high position to observe the water from all directions, one has to get a sound understanding of the situation concerning the water, in order to have a full knowledge of its width and depth, then he may defeat his opponent by a surprise move.

e. Dictionary of Oceans (Liaoning Press, 1998)

Hydrographic survey is measurement and survey of the ocean, river and lake for the purpose of ensuring the smooth operation of warships and navigation safety, including port, coastal, offshore, and deep sea measurements. The data collected is mainly used to draw marine maps. The main content of hydrographic survey is measurement control, bathymetry, sweeping, seabed material and coastal topography surveys, hydrological observation, navigational aid measurement, and sea area data survey. With the development of science and technology, oceanographic survey has expanded from hydrographic survey to a more comprehensive survey.

2. Oceanographic Survey

Dictionary of Ocean Topography (Topography Press, 1999, pp. 283~284)

Oceanographic survey is a general term of all types of surveys within sea areas and offshore areas. It mainly includes marine geodetic survey, bathymetry, seabed topography, marine project, marine gravity and magnetic surveys, as well as measurements and surveys in other field.

3. Military Survey

a. CIHAI (Popular Edition, Shanghai Lexicographic Publishing House, 1999, Vol. 1, p. 1070)

Military survey is a vocational and technical duty to obtain, handle, and offer military geodetic measurement results, image data, military map, and other military

geographic information, including (a) production, storage, and supply of military measurement results. They are mainly completed through astronomical geodetic measurement, topographic survey, ocean survey, and other types of technology, which turn out to be military topographic basic products in conformity to regulation requirements and have been checked and stored by specially designated persons, and would be supplied to the armed forces as required; (b) offering military topographic information and results to assist in military command, arms and military activities at war zones, scientific research on national defense, uses of weapons and equipment, troop movements, and etc., and to help conduct field training in connection with fast topography and military topography.

b. Dictionary of Oceans (Liaoning Press, 1998)

Military survey is an activity of collecting marine data within the ocean and coastal areas for military purposes. The data collected includes marine geographical, marine geological, chemical, biological, and acoustic data.

4. Military Activities

Dictionary of Oceans (Liaoning Press, 1998)

Military activities refer to normal ship operations, troop movements, aircraft taking off and landing, operations of military equipment, intelligence gathering, weapons drills, ordnance test, and military survey. In this sense, military activity includes military survey, in other words, the latter belongs to the former.

5. Oceanographic Survey

a. Great Britain Encyclopedia

(China Encyclopedia Publishing House, Vol. 3, August 1985, p. 663)

Oceanographic survey is a multi-discipline scientific work. Resource exploitation, maritime transportation, and national safety promote the development of oceanographic survey. Project and technology are the basis of oceanographic survey development.

b. CIHAI

(Compact Edition, Shanghai Lexicographic Publishing House, 1999, p. 1129)

Oceanographic survey is a survey on distribution of marine environmental factors and their variations. It includes marine hydrographic element observation, marine meteorological element observation, seawater chemical element survey, marine geological survey, marine biological survey, and marine physical observation. The methodologies employed in oceanographic survey are general, cross-section, continuous and auxiliary observations. The approaches used are aviation, satellite, ship, underwater, buoy automatic positioning observations and

automatic observation through floating stations. The data collected consist of numerical values, characters, images, objects, and other types of information. And such data may be contained in tables, tapes, magnetic discs, and CDs, etc.

c. Dictionary of Oceanographic Topography
(Topography Press, 1999, p. 288)

Oceanographic survey is an overall process of observation, measurement, sampling analysis, and preliminary processing of data. A marine hydrographic observation project generally involves depth, water temperature, salinity, currents, waves, transparency, color, and luminescence of the sea. At the same time, it is also supposed to obtain meteorological, chemical, acoustic, optical, geological, geophysical, biological, and other relevant information, including numeric values, characters, images and objects.

During the period from 1872 to 1876, the British ship, *the Challenger*, conducted a comprehensive marine survey on the Atlantic, Pacific, and Southern Oceans for the first time, sailing over 120,000 km. The survey covered marine meteorological elements, currents, water temperature, and chemical composition of seawater, marine biology, and seabed sediments. As a result, a masterpiece of fifty volumes with 29,500 pages and over 3,000 illustrations was published during the period from 1880 to 1895, which played an impartment role in the establishment of modern oceanography.

d. Dictionary of Oceans (Liaoning Press, 1998)

Oceanographic survey is a survey and research of the ocean in terms of physics, chemistry, biology, geology, geomorphology, meteorology, and others. It is generally divided into comprehensive survey and professional survey. The main tool used in oceanographic survey is marine survey ship, equipped with a variety of observation instruments to examine marine environment elements as well as its variations. The development of science and technology gives rise to a three-dimensional ocean observing system, encompassing survey ships, buoys, aircraft, satellites, submersibles, etc., to obtain comprehensive information on the marine environment from the air, surface, and underwater.

6. Marine Scientific Research

Dictionary of Oceans (Liaoning Press, 1998)

Marine scientific research, in a broad sense, refers to any research or scientific experiment that is sufficient to add human knowledge of marine environment, possibly covering research relating to marine geology, biology, physics, chemistry, hydrography, meteorology, tide and other disciplines.

It is the author's observation that, among all currently available reference books, very few of them contain interpretation of the terms as mentioned above. *CIHAI* and other important reference books generally do not include the term "marine scientific research", except for measurement, hydrographic survey, and oceanographic survey. Looking into interpretations of the terms as described above, it is self-evident for the purpose and role of military survey and military activities.[8] Although measurement, hydrographic survey, and oceanographic survey have particularly different purposes and goals, yet they could all serve certain economic, military and political ends, whether directly or indirectly. The only Chinese interpretation of "marine scientific research" that can be tracked so far is simple and broad, making it hard to essentially distinguish marine scientific research from marine measurement, hydrographic survey, and oceanographic survey. The United States is of the constant assertion that, "marine scientific research" does not include "hydrographic survey,"[9] but from the interpretations cited in the reference books above, it is highly likely that "marine scientific research" actually refers to "hydrographic" research. If we have to follow the assertions of the United States and other maritime powers, it could only come to the conclusion that "marine scientific research" does not include "hydrographic" research, or "hydrographic" research involved in "marine scientific research" is different from the research on "water depth, seabed shape and sediments, flow direction and rate, tides and water level" in hydrographic survey.

B. Relations between Marine Scientific Research, Military Survey and Other Activities

Marine scientific research is an important part of contemporary natural scientific research. Its object is the ocean as well as its surrounding environment

---

8 According to other schools of thought, military operations and activities can also be used for peaceful purposes, such as the operations of United Nations Peacekeeping Forces. Others also believe that using the most modern weapons and armed forces to attack Iraq, and grasping the president of a sovereign State to domestic court of another so-called "democratic State" for taking a trial and other actions are for peaceful purposes. However, the author could not fully accept views as such, though they do not belong to the discussion of this article.

9 At a series of conferences held by the Intergovernmental Oceanographic Commission, Advisory Body of Experts of the Law of the Sea, legal officials of the U.S. State Council held this position. The U.S. military and diplomatic department also harbored such position in dealing with China-related issues.

(marine atmosphere, coast, seabed, etc.). Marine scientific research is all-inclusive, mainly covering research relating to marine hydrography and meteorology, marine geology, marine biology, marine chemistry and marine physics, and other related subjects.

Traditionally, depending on the purpose, like natural scientific research in other disciplines, marine scientific research is divided into basic scientific research (also referred to as "pure scientific research") and applied scientific research. The purpose of basic marine scientific research is to gain a full understanding of ocean in order to reveal the most profound and universal laws of nature and to lay the foundation for practical application. The purpose of applied marine scientific research is to find out the most appropriate applied approach from objective laws known from basic research, with commercial exploitation and use of marine resources as the main objects.[10]

However, as similar as other scientific research, basic marine scientific research and applied marine scientific research distinct from but connect closely with each other, therefore, it is hard to find a sharp distinction between them. Especially when modern high-technology equipment and instrument and advanced scientific methods are being applied, the scope and goal of marine scientific research have already covered all-round dimensions, including the coast, space over the ocean, ocean surface, water body, seabed, and subsoil. People do all-level surveys on ocean surface and body through observation stations by the shore, space satellite and aircraft remote sensing. In addition to all types of professional survey ships, surveillance vessels, numerous volunteer ships, and random ships, a set of three-dimensional survey system has been established, including various types of buoy disposition, floating or fixed observation stations, seabed base which could go down to seabed and subsoil, deep diving device of 6000-meter of water depth, seabed laboratory and deep sea drilling platforms. Therefore, oceanographic survey is different from marine scientific research somehow in theory, whether from the equipment and instrument used in research and survey, technologies, methods employed to collect marine data, or from the objective of research and survey and the application of research results; but it already becomes very difficult to strictly distinct them in other respects, particularly in marine data that could be collected and the final application of research results.

To sum up, marine scientific research is a broad concept, while activities such

---

10 Wei Min ed., *The Law of the Sea*, Beijing: Law Press China, 1987, p. 316. (in Chinese)

as oceanographic survey or investigation belong to professional research, which only focus on some aspects. In essence, such activities are conducted to acquire more and detailed marine data, deepen people's understanding of the ocean, and exploit and use the ocean in a more effective manner. Accordingly, the so-called "pure basic marine scientific research" that is completely walking away from social practice and social objective does not exist in practice. The majority of developing coastal States are currently still of this view.[11]

Certain maritime hegemonic power made a major argument that data collected in oceanographic survey (military survey) activities is merely used for "peaceful purpose" to "benefit all mankind", when their military survey ships and military surveillance ships which entered into the sea areas within the jurisdiction of China to conduct illegal activities were met with protest and deportation by the Chinese government. Such excuses may be valid in theory, but are implausible in the maritime safety situation that China is currently facing, and in the current international relations where the international community has not completely achieved peaceful coexistence, containment and counter-containment between countries remain, and even local maritime military confrontation still exist.

C. Main Issues Existing

The deepening of human knowledge of the ocean help people to realize more and more the significance of the ocean, and the necessity of conducting more marine scientific research, in order to have a better understanding of the ocean for the benefit of all mankind. However, there remains the issue of imbalance between development and the needs arising from specific situations of all coastal States. On one hand, States with advanced technology have greatly strengthened their capacity of exploitation and use of the ocean through fast development of science and technology, and have become more desirous of conducting marine scientific research. On the other hand, a great number of developing countries with weak capacity of conducting marine scientific research due to limitations of

11 Intergovernmental Oceanographic Commission, Advisory Body of Experts of the Law of the Sea held a conference in Spain from 3 to 7 April 2006. At the conference, representatives from China, South Korea, Vietnam, the Philippines, Argentina, Brazil, Morocco, Portugal, and other coastal States all held this position, stating that their domestic legislation had provisions or were revising provisions that any marine survey and measurement activity conducted in the sea areas within their jurisdiction belonged to marine scientific research, which shall be carried out with the prior-consent of the coastal States.

technology, competent workforce, national strength, and other factors, have a sound understanding of the significance of the ocean to national security and sustainable social and economic development. In this sense, they steadfastly value and protect the sea areas that are subject to their jurisdiction, with the hope of gaining the capacity of exploitation and use of the ocean one day, while ensuring that their maritime interests may not be threated or impaired at the time when they lack the capacity to gain such interests. The issue of disproportionate development will remain, and will definitely continue to affect the field of marine scientific research.

Practical solutions have not been advanced in the current situation of disparate development of the human society, although the cause of the problem has already been identified. There is no other solution but to resort to efforts in other respects, including interpretation, application and adherence in good faith to the current the provisions of international law of the sea. After decades of joint efforts by States, the legal regime of marine scientific research with the UNCLOS as its core embodiment is yet still laden with problems in practice. The said problems all boil down to question as to whether military survey belongs to marine scientific research, or whether marine scientific research should be divided into pure marine scientific research and applied marine scientific research, etc. There exist also the problem of conciliation of the various legal regimes under the UNCLOS, such as the issue of jurisdiction over exclusive economic zones and the freedom of high seas, immunity of military ships within exclusive economic zones, and application and enforcement of other international legal rules in coastal States.

Looking back at the evolution of marine scientific research legal regime, the author believes that, whether from the creation of the regime, or from the debate existing in the formulating process of the relevant international conventions relating to such regime and their final stipulations, the issue is rather rooted in the uneven development of coastal States in terms of national strength, contrasting national interests and decision-making tactics, and unbalanced development of marine scientific technology and capacity. Accordingly, it is not hard to conclude that, the debate still exists and will prevail. The UNCLOS only provides the basic legal regime of marine scientific research, without the definition, content, approach, methodology, and other matters in connection with marine scientific research. In consequence, practice of coastal States, including legislation, administration, and execution, appears to be very important. It has a special significance in creating customary rules and laws relating to marine scientific research.

IV. Conclusion

With the development of science and technology and the use of high-technology equipment and instrument, it has already become hard to make a clear distinction between pure marine scientific research and applied marine scientific research, or to differentiate marine scientific research activity from hydrographic survey activity (military survey activity). The achievements obtained from these activities can be applied to scientific research, economy, military, and other aspects.

The UNCLOS has made a very clear legal regime of marine scientific research, that is, any entity intending to conduct marine scientific research within exclusive economic zones should obtain prior consent of coastal States. In the meanwhile, coastal States shall not deny the request of marine scientific research without any reasonable grounds. Some regrets still remain in other aspects of this issue. For instance, some relevant definitions are still missing. The current legal regime is practical and operational if all State parties are willing to enforce it. Though different views remain on this issue at present, it is necessary for all coastal States to strengthen communications and exchanges, in an effort to reach a consensus and understanding on issues such as marine scientific research and military survey, in order to promote joint exploitation, use, and protection of the marine resource and environment for peaceful purposes.

Translator: ZHANG Yue
Editor (English): Akorkor Kehinde Awoonor

A Basic Analysis of the Right of Maritime Self-Defense and Relevant Legal Issues

XING Guangmei*

Abstract: The navy is China's maritime-armed force. It assists law enforcement at sea, and is in charge of both resisting invasion by use of force when necessary, and maintaining maritime order. Possible use of force while enforcing the law is not the same as exercising the right of maritime self-defense, thus, a clear differentiation is needed for the sake of accurate enforcement. This is both an under-discussed theoretical question and a practical problem that guides naval operation. This paper aims to open research into the core of this issue − the characteristics and definition of maritime self-defense as well as its relevant legal issues. Finally, it puts forward, on the basis of analysis, suggestions for future actions.

Key Words: Maritime self-defense; Right of maritime administrative law enforcement; Use of force

Since the founding of the PRC, the navy has exercised the right of maritime self-defense twice. The first instance was China's Xisha defensive war in 1974 and the second was the naval battle which took place on 14 March 1988. Compared with the old days, we are now facing more severe maritime security threats. We have controversial disputes on maritime delimitation with eight of our maritime neighbors and disputes with four of them over the territorial sovereignty of 44 islands and reefs. We are also contending with these States for the jurisdiction in overlapping waters. With the increasing emphasis put on the strategic status of oceans by our neighbors, disputes are expected to become more intense, and military actions at sea are likely to increase in the future.

---

* XING Guangmei, Associate research fellow of the Institute of Naval Military Academic Studies, Doctor of Law. This paper consists of personal academic views and does not reflect the position of the institute.

The navy, as China's maritime-armed force, assists law enforcement at sea, and is in charge of resisting invasion by use of force when necessary and maintaining order at sea. Possible use of force in law enforcement and that involved in exercising the right of maritime self-defense are not the same, and a clear differentiation is needed to ensure accuracy in the execution of right. This is a both a theoretical question that has been barely discussed and a practical problem which serves as a guidance to the naval operation. This paper aims to open research into the core of this issue − the characteristics and definition of maritime self-defense as well as its relevant legal issues.

I. The Characteristics and Definition of Maritime Self-Defense

Assigning the right of self-defense separately to air, sea and land armed forces can effectively domesticate international law, and is the only feasible option given the situations of these forces. Exercising the right of self-defense, however, must be kept in accordance with general principles set by international law.

The right of maritime self-defense originates directly from Article 51 of the Charter of the United Nations (hereinafter "the Charter"), which states: Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[1]

A second legal reference of maritime self-defense can be found in the first and second sections of the general rules of the *San Remo Manual on International Law*

1 Zhou Hongjun et al. ed., *International Conventions and Traditions*, Beijing: Law Press China, 1998, p. 15. (in Chinese)

Applicable to Armed Conflicts at Sea.[2] These sections point out that exercising of the right of maritime self-defense should comply with regulations laid down by the Charter and general international laws.

Taking Article 51 of the Charter as a basis, and combining international judicial precedents with UN resolutions and academic writings, characteristics of the right of maritime self-defense can be summarized as follows:

A. Subject: Those Allowed to Exercise the Right of Maritime Self-Defense Includes Navy-Based Armed Forces of the Victimized State and Its Allied States

Three problems, in terms of those eligible to exercise of the right of self-defense, remain unsolved by Article 51. First, do non-members of the Charter or non-State entities have this right? Second, can other States, without permission from the victimized State, exercise the right of collective self-defense? Third, which institutions in a State are responsible for such actions?

As for the first problem, it is widely accepted that all States, except non-State entities, are entitled to the right of self-defense. First of all, as the right of self-defense is a conditional confirmation of States' inherent and natural rights by the Charter, although it only mentions "a Member of the United Nations", it is generally believed that "the basic rules of the Charter … are binding not only on the States Members of the United Nations but also the few States which have not become member of that organization".[3] Second, the right of self-defense, exercised between States, is given to nations by international law and thus non-State entities are excluded. In a civil war, no party can launch counterattacks in the name of self-defense nor can other States get themselves involved in said conflict under the excuse of exercising the right of collective self-defense.

---

2 Louise Doswald-Beck ed., translated by Ren Xiaofeng et al., *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Beijing: Haichao Press, May 2003 (in Chinese). This manual was drafted during a series of round-table conferences which were organized by the International Institute of Humanitarian Law and participated personally by experts of the international law and of naval affairs. Though constituting no legally-binding convention, it relates the general international laws applicable to modern maritime armed conflicts, serving as an important guide to States' naval operations in absence of an authoritative code for international maritime armed conflicts.

3 Stanimir A. Alexandrov, *Self-Defense against the Use of Force in International Law*, The Hague/London/Boston: Kluwer Law International, 1996, p. 136.

As for the second problem, the Charter, considering the important role played by regional institutions in maintaining local peace and security, grants allied States of the victimized State the right of collective self-defense. However, exercising of this right needs to be in accordance with the conditions required for a State to exercise individual self-defense. At the same time, the International Court of Justice clarified in its judgment (1986) of the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*,[4] that the lawfulness of the use of collective self-defense by the third State for the benefit of the attacked State also depends on a request addressed by that State to the third State.

With regard to the third problem, the international law gives no specific stipulations. The author contends that self-defense, as a national act, should be exercised by national agencies and not by an abstract nation. National authorities, authorized non-State or non-local political entities, and persons that exercise elements of governmental authority in relevant incidents are considered by Chapter II of the Draft Articles on Responsibility of States as agencies of States.[5]

Once the right of maritime self-defense is exercised, military conflicts are inevitable. So in the application of this right, "[t]he parties to an armed conflict at sea are bound by the principles and rules of international humanitarian law from the moment armed force is used."[6] The international humanitarian law, however, only considers members of armed forces as legitimized fighters, and states that "they have the right to participate directly in hostilities."[7] Therefore, State agencies allowed to act in the name of self-defense should be restricted to the armed forces of the State involved.

The 1949 Geneva Conventions and their additional protocols give a specific

---

4 See also Chen Zhizhong ed., *Case Study on International Law*, Beijing: Law Press China, 1998, p. 112. (in Chinese)

5 Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, Arts. 5~15, Quoted from He Qizhi, *Analysis of Laws on Responsibility of States and Relevant Judicial Precedents*, Beijing: Law Press China, 2003, p. 373. (in Chinese)

6 Louise Doswald-Beck ed., translated by Ren Xiaofeng et al., *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Beijing: Haichao Press, May 2003, p. 5. (in Chinese)

7 Wang Tieya et al. eds., *Archives of the Law of War*, Beijing: Chinese People's Liberation Army Publishing House, 1986, p. 431, Protocol Additional to the Geneva Conventions (Protocol I), Art. 43(2). (in Chinese)

definition of "armed forces."[8] "Armed forces", as defined therein, include regular armies and government-authorized "groups" and "organizations" that conform to the law of armed conflicts with unified command and internal discipline. The "groups" and "organizations" mentioned here refer to the "paramilitary or armed law enforcement agency" mentioned in Paragraph 3, Article 43 of the Protocol I. Whenever a party incorporates these institutions into armed forces, it shall so notify the other parties. It is thus deemed that "paramilitary or armed law enforcement agency" is authorized domestically, and recognized in legal terms during times of peace, but are only entitled to the right of self-defense when the hostile parties are informed.

Normally, States appoint certain organizations the right of self-defense on behalf of the nations in the form of domestic law. The United States' Standing Rules of Engagement[9] specify that the American army, which includes the US Coast Guard, is responsible for exercising the right of self-defense.[10] Japan's Self-Defense Forces Law stipulates that the Japanese Self-Defense Forces are commissioned to defend the State against external attacks, direct or indirect.[11] Articles 17 and 22 of the Law of the People's Republic of China on National Defense state that Chinese armed forces, including the reserve forces of the Chinese People's Liberation Army and the Militia, are in charge of consolidating national defense and resisting aggression.[12] As to the right of maritime self-defense, all members of the national armed forces are entitled to exercising this right. In reality, the decision of which type of army should be appointed the right of self-defense depends on the type adopted by the opposition. The navy is the most likely option, but self-defense and counter-attacks can also be coordinated with different branches of the armed

---

8 Wang Tieya et al. eds., *Archives of the Law of War*, Beijing: Chinese People's Liberation Army Publishing House, 1986, p. 206, First Geneva Convention, Art. 13; p. 229, Second Geneva Convention, Art. 13; p. 244, Third Geneva Convention, Art. 4; p. 431, Protocol Additional to the Geneva Conventions (Protocol I), Art. 43. (in Chinese)

9 Order 3121.01 from Chairman of the Joint Chiefs of Staff in the United States.

10 Jr. Walter Garry Sharpe, translated by Lyu Dehong, *Cyber Space And the Use of Force*, Beijing: International Culture Press/Changchun: Northern Women and Children Publishing House, 2001, p. 241. (in Chinese)

11 As to explanations of Self-Defense Forces Law, see Yang Fukun et al. eds., *Dictionary for Military and Legal Terms*, Beijing: National Defense University Press, 1993, p. 838. (in Chinese)

12 As to full edition of the Law of the People's Republic of China on National Defense, see also Central Military Commission Legislative Affairs Bureau ed., *Selected Collection of the People's Republic of China Military Regulations (1949-2002)*, Beijing: Chinese People's Liberation Army Publishing House, 2002, pp. 85~97. (in Chinese)

forces, though sometimes that responsibility falls solely on the navy. America's rules of naval engagement, China's PLA naval war fighting regulations, and Japan's maritime self-defense forces laws all specify that the navy (maritime self-defense force) is commissioned to combat maritime aggressions.

Armed executive institutions, which include Japan Coast Guard and China's maritime administrative executive forces, cannot exercise the right of self-defense without authorization from the highest national authority. However, they can defend themselves in the advent of an attack.

Therefore, the victimized State or its allied States are the subjects to exercise the right of maritime self-defense. It is also the State's responsibility to determine which armed force is to serve in self-defense. Generally, States will, in accordance with the international humanitarian law, grant this right to navy-based armed forces.

B. Object: The Right of Maritime Self-Defense Can Only Be Exercised against Specific Targets That Are under Jurisdiction of the Attacking States

Two problems, when it comes to the targets, remain unsolved by Article 51 of the Charter. First, must the right of self-defense be exercised exclusively against the attacking State itself? Second, can the right of self-defense be exercised against non-State entities such as terrorist organizations?

As for the first problem, few controversies exist in the academic world. It is agreed that the right of self-defense can only be exercised against the attacking State itself, and not a third State, unless the third State is militarily involved and considered to be using force.

The second problem, however, has drawn intense debate. Some scholars at home advocate that "self-defense is only justified when launched against the State or States that initiate armed attacks."[13] Others, with the intent to combat terrorism, include terrorists in the list of targets of self-defense. They consider unauthorized non-State entities such as terrorist organizations as acceptable recipients of the exercising of self-defense. They advocate that since the most severe terrorist attacks are akin to warfare and negatively affect the State as a whole, victimized States are

13 Huang Yao, *On the Principle of No Use of Force − Legal Analysis of Item 4, Article 2 of the United Nations Charter*, Beijing: Peking University Press, 2003, p. 295. (in Chinese)

entitled to defend themselves. The author thinks that when a terrorist attack causes the same level of destruction as war, the victimized State has the right to resort to force to ensure its safety. But this is just an exercise; instead of "the right of self-defense", of "judicial power", we will call this "judicial jurisdiction" for the time being.

If combating terrorism is included within the accepted application scope of self-defense, there may be a number of undesirable results. First, it will violate the Charter's underlying tenet that to maintain international peace and security. The right of self-defense is an exception to the principle that no force should be used in international relations, which is a manifestation of the underlying tenet. It is a supplement to the limitation on the system that guarantees UN safety, and thus should be monitored carefully. Once its scope expands, the above-mentioned principle and the underlying tenet will be challenged. Second, it will go against the general trend of history. Compared with the UN Security Council's joint security system, self-defense is a measure taken on the part of an individual State. From a historical perspective, a transition from self-protection to public power management does not in any way go against any national or international laws. Therefore expanding the scope of self-defense is considered a regression. Third, confusion may be caused by the accusations of international criminals. A State which launches an attack against another without permission from the UN Security Council would normally be accused of aggression,[14] which the subject of crime is a sovereign State. Under such a circumstance, Article 51 of the Charter grants victimized States special permission for the use of force in self-defense. It is more appropriate for a State to accuse either sovereign States or unauthorized non-State entities which cause disastrous terrorist attacks of crimes against humanity. However, in such a case no right of self-defense is granted by international law. Therefore, judicial measures are the only means of combatting terrorism. As for the effect of such judicial measures, the author thinks that legislation by itself is a compulsory force that, when necessary, can be augmented with the use of force in order to crush terrorism. In this respect, there needs to be another solution that dominated by UN institutions.

Altogether, sovereign States, and not unauthorized non-State entities, can initiate attacks, which means a counterattack is legitimate self-defense only when

---

14 Currently the international community has not yet settled on the definition the crime of aggression.

the original attack was initiated by a sovereign State. Attacks initiated by non-State entities should be considered crimes against humanity, and should be dealt with under the judicial jurisdiction.

The object against which maritime self-defense can be exercised is specific targets under governance of the attacking State, including attacking armed forces. Military objectives that are not involved in the attack but are important to the attacking State's military power, and persons or civil targets that are involved in the attack at the expense of immunity are included as well.

C. Condition: A Prerequisite for the Exercising of the Right of Maritime Self-Defense Is That It Should Be Preceded by an Armed Attack Aimed at or Initiated from a Maritime Area

In terms of qualifications, Article 51 of the Charter only mentions that member States could exercise self-defense only when achieving armed attacks, but without specific explanation of an "armed attack". This has become the biggest obstacle in deciding the legitimacy of the practice of self-defense.

The author believes an "armed attack" that constitutes legitimate self-defense should have the following four characteristics. First, the attack should be launched by a sovereign State. Second, the attack is intentional. This intention can be direct or indirect. Direct intention means positively implementing an armed attack with a clear idea of the results. Indirect intention, on the other hand, means letting the expected result happen. The difference between the two lies in the act and omission of the involved State. Accidents without subjective fault do not constitute an armed attack and thus the illegality of the State act could be excluded. Third, armed motive for the attacks should be to destabilize the sovereignty, territorial integrity or political independence of the State being attacked.[15] Fourth, proof of an armed attack, including the attack that has caused harm or that would cause harm if counterattack is not taken in a timely manner. For example, the former can be that a warship was hit, and the latter could be that a guided missile or torpedo is on the way, aiming at a particular warship. Some scholars consider self-defense against the latter kind preventive, and refuse its legitimacy. In this respect, at least two

15 See the Resolution concerning the Definition of Aggression, Art. 1, in Xi'an Politics Institute ed., *Collection of Articles of the Law of War*, Xi'an: Xi'an Politics Institute, 2001, p. 29. (in Chinese)

authoritative interpretations can be applied for the sake of clarity: first, the Caroline principle[16] which is applied in cases where "a necessity of self-defense is instant, overwhelming, leaving no choice of means, and no moment of deliberation"; second is the interpretation of Annam, the UN General Secretary, who, in his 2005 report on the UN reform draft, pointed out that "[i]mminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign States to defend themselves against armed attack."[17]

Circumstances in which the party in question is "providing weapons and equipment, rear services, financial or other support to domestic opposition factions,"[18] sheltering attackers, or attacking the citizens of the victimized State outside its territory, are not considered an "armed attack". The party in question can only be accused of unlawful use of force, resorting to the threat of force, or interfering with other States' domestic and foreign affairs.

It is thus understood that a maritime armed attack refers to an ongoing attack on or coming from a maritime area, and, includes actions that have caused harm and those which are going to cause harm if not counterattack in a timely fashion. Attacks must be intentional, directly or indirectly. Accidents with no subjective fault do not constitute armed attacks.

Documents that define what constitutes maritime armed attacks are the suggestion of formulating the definition of aggression and an agreement on it by the former Soviet Union at the 1933 General Assembly of the League of Nations, the Resolution 3314 concerning the Definition of Aggression passed by the UN General Assembly in 1974, and the judgment given by the International Court of Justice for the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. The Soviet Union's "suggestions" listed five forms of aggression: a declaration of war; the invasion by a State's armed force of the territory of another State without a declaration of war; the land, sea and air bombing of the ports or coasts of a State by the armed forces of another State; the landing or entering of a State's territory without official permission (or through ignoring the parameters of permission) by another State's (especially neighboring States) armed forces of sea, land or air; the blockade of the ports or coasts of a

16 It is the principle of appropriate behaviors, which will be discussed later.

17 At http://www.un.org/chinese/largerfreedom/part3.htm, para. 124, 15 November 2006. (in Chinese)

18 Sir Robert Jennings ed., translated by Wang Tieya, *Oppenheim's International Law (Volume 1)*, Beijing: Encyclopedia of China Publishing House, 1995, p. 309. (in Chinese)

State by another State's navy.[19]

Article 3 on the 1974 United Nations General Assembly Resolution concerning the Definition of Aggression[20] lists seven specific examples of acts of aggression. (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof; (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State; (c) The blockade of the ports or coasts of a State by the armed forces of another State; (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State; (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement; (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State; (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

The judgment given by the International Court of Justice in the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* indicates that the definition of an "armed attack" includes actions not only the crossing of national boundaries by armed forces, but also acts by armed bands where such acts occur on a significant scale comparable to armed attacks.[21]

It is usually agreed that aggression is comparable to an armed attack. Considering the characteristics of maritime battles, there are four types of armed attacks that come from or attack maritime areas: (a) attacks at sea: an attack by the armed forces of a State on the land, sea, or air forces, or merchant ship and civil aircraft of another State; (b) bombardment at sea: bombardment of the ports

---

19 Quoted in Liu Daqun, On Aggression, *International Law Review of Wuhan University*, Vol. 3, 2005, p. 6. (in Chinese)

20 Military Court of Shenyang Military Region ed., *Selected Archives of the Law of War*, Shenyang: Baishan Press, 1994, p. 14. (in Chinese)

21 Chen Zhizhong ed., *Case Study on International Law*, Law Press, 1998, p.112.

or coasts of a State by the armed forces of another State; (c) blockage at sea: the blockade of the ports or coasts of a State by the armed forces of another State; (d) invasion at sea: invasion of the territorial sea of another State without permission, or sabotage of permitting conditions. The fourth type involves the right of innocent passage of warships, which is relatively complicated, and thus analysis and explanation of this circumstance will be given in the latter part of this paper.

D. Time: The Right of Defense at Sea Must Be Exercised against Ongoing Armed Attacks before Any Necessary Action Is Taken by the United Nations Security Council

In terms of time, Article 51 of the Charter merely touches on the principle of "self-defense before sanction", and offers no clarification on "self-defense against ongoing attacks".

The so-called principle of "self-defense before sanction" requires that the right of maritime self-defense could be exercised only before any necessary action is taken on the part of the UN Security Council. Once the UN Security Council takes action, the State should stop its exercise of the right of self-defense unless the UN Security Council has permitted them to continue. This means that the right of self-defense is incorporated in the UN Security Council's collective security system as a temporary remedy measure, but ultimately the UN Security Council enjoys a status of priority and authority in maintaining international peace and security.

"Self-defense against ongoing attacks" requires that the right of maritime self-defense is exercised against ongoing attacks, instead of those that have ended or haven't started. We call the former "revenge". The 1970 Declaration on Principles of International Law specifies that "States have a duty to refrain from acts of reprisal involving the use of force." We call the latter "preventive self-defense," which is a kind of self-defense launched against "potential threats", e.g. the attack of Iraq's nuclear devices by Israel in 1981. Recently, some voices in Japan are advocating that preemptive self-defense should be taken against North Korea's nuclear base for it poses potential threat to Japan when North Korea test its missiles in the Sea of Japan.

The theory of "preventive self-defense" is most often proposed by States that are wary of the "potential threat" brought by the proliferation of weapons of mass destruction. This theory has become increasingly favored by users of force, and is considered by some scholars to be a new trend in the development

of the international law. Since no specific regulation can currently be found in international law, and no comprehensive international supervisory control system has been established on the global level, this theory is very likely to be abused by powerful States to perpetrate acts of aggression. In reaction to this, Annam, the UN General Secretary, claimed that "[w]here threats are not imminent but latent, the Charter gives full authority to the Security Council to use military force, including preventively, to preserve international peace and security."[22] A new plan for dealing with "potential threats" is put forward by Annam, which supports the UN Security Council in taking preemptive action (or delegating States to do so).

The author holds that obtaining a correct understanding of "self-defense against ongoing attacks" lies in being able to discern between armed attacks that are "ongoing" and those that have "yet not started/already ended". The former focuses on whether the attack has started; the preparation for an attack, which includes actions such as developing weapons for attack, mobilizing for war, or making battle plans, do not indicate the attack has started. According to this standard, an "ongoing attack" should be understood as an attack that has already started; for example, the victimized State has been destroyed through the bombardment of infrastructure, its territory has been invaded, or it is threated with immediate harm if no emergency measures are taken. For instance, there exists substantial evidence that the attacker's missile is on the way, aiming at specific targets within the victimized State. On the other hand, the boundary between attacks that are "ongoing" and those that have "already ended" lies in whether they have been fought off, whether the immediate threat is gone, and whether there is a danger that another attack will occur in a short term. "Attacks that have already ended" should stipulate that the attacker has given up the intention to attack again, or is unable to do so within the immediate future. Once the attack is fought off, the exercising of the right of self-defense should cease immediately. Otherwise it will constitute an illegal use of force.

E. Limits on Behavior: Any State, before Implementing Maritime Self-Defense, Must First Comply with the Principles of Necessity and Proportionality in Customary International Law

22 At http://www.un.org/chinese/largerfreedom/part3.htm, para. 125, 15 November 2006. (in Chinese)

Article 51 of the Charter gives no reference to the limitations on self-defense actions. In practice, States have adopted the customary law principle. This is the Caroline principle that was put forward by the US Secretary of State Daniel Webster in his letter to Britain in 1842, which refers to the *Caroline* affair[23]. It incorporates two concrete principles of necessity and proportionality.

The International Court of Justice recognized these two principles in both its 1986 judgment of the *Nicaragua v. America* and its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*. It has labeled them as customary international law ever since.

Section II of the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Armed Conflicts and the Law of Self-Defense, gives explicit explanation of this principle, and points out that the exercise of the right of self-defense is "subject to the conditions and limitations laid down in the Charter, and arising from general international law, including in particular the principles of necessity and proportionality." "The principles of necessity and proportionality apply equally to armed conflicts at sea and require that the conduct of hostilities by a State should not exceed the degree and kind of force, not otherwise prohibited by the law of armed conflict, required to repel an armed attack against it and to restore its security." "How far a State is justified in its military actions against the enemy will depend upon the intensity and scale of the armed attack for which the enemy is responsible and the gravity of the threat posed".[24]

Therefore, the exercise of the right of self-defense at sea should comply with these two customary law principles. The principle of necessity of self-defense at sea means that self-defense at sea can only be taken in cases in which "a necessity of self-defense is instant, overwhelming, leaving no choice of means, and no moment

---

23 In 1837, *Caroline*, an American ship, provided arms and ammunition to a group of rebel army from Canada, which was colonized then by Britain. The British armed force, crossing the American border, expeled the ship down to Niagara Falls, burnt it and shot two people on board to death. In face of accusations from the American government, Britain insisted their attack justified as an act of self-defense for they met no official opposition from the American government in invading the coastal line of Canada. Daniel Webster, then the US Secretary of State, in his letter written to Britain enumerated basic elements of self-defense, which were called "Caroline principles" and considered an authoritative explanation of situations where self-defense is legitimized. Quoted from Huang Yao, *On the Principle of No Use of Force − Legal Analysis of Item 4, Article 2of the United Nations Charter*, Beijing: Peking University Press, 2003, p. 282. (in Chinese)

24 Louise Doswald-Beck ed., translated by Ren Xiaofeng et al., *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Beijing: Haichao Press, 2003, p. 5. (in Chinese)

of deliberation."[25] If an ongoing armed attack can be stopped without resorting to force, the victimized State cannot take self-defense. For instance, facing blocking of the coast, the victimized State first has the option of attempting diplomatic solutions or asking for assistance from the UN Security Council. If the aggressor reacts positively and withdraws, then there is no need to exercise self-defense. But a circumstance in which warships of the victimized State are attacked at sea, and are at risk of sinking certainly merits self-defensive action, thus efforts to attain a peaceful solution are not required.

The proportionality principle of self-defense at sea means that the degree and scale of force used by those exercising self-defense at sea should stay proportional to the severity of the attack they are facing, and should be done so with the intent of stopping or fighting off the attack. If this line is crossed, or any punishment, revenge, occupation or plunder is the intent of such action, then it is considered to be an illegal use of force, and not legitimized self-defense. At the same time, the principle of proportionality also requires that States, when exercising the right of self-defense, abide by regulations that forbid or limit the use of certain methods in fighting and protect victims and their property under the international humanitarian law. It also says that they should avoid excessive use of force, and minimize, as much as they can, the destruction of armed conflicts. If the above-mentioned regulations are violated, the legality of self-defense at sea may be in doubt.

To summarize these five points, the "right of self-defense at sea" is a hypogyny concept of "the right of self-defense" as stipulated by international law. It refers to a State's right (or its allied States upon the request of the victimized State) to authorize naval-based armed forces to use force proportionally to prevent or fight off attacks on its maritime territory or coming from its maritime territory, until the Security Council has taken measures necessary to maintain international peace and security.

II. A First Exploration of Relevant Legal Issues Related to the Right of Maritime Self-Defense

A. Innocent Passage of Warships and the Exercise of the Right of Self-Defense at Sea

25 Robert Jennings ed., translated by Wang Tieya, *Oppenheim's International Law (Volume 1)*, Beijing: Encyclopedia of China Publishing House, 1995, p. 309. (in Chinese)

The issue of warship's innocent passage has posed a complicated and controversial problem within international law, both in theory and in practice. It reflects a long-term debate in the arena of oceans law between those insisting on the interests of coastal States and those defending freedom of navigation on the seas.

The 1982 United Nations Convention on the Law of the Sea (hereinafter "the Convention") defines "territorial sea" as an adjacent belt of sea to which the sovereignty of a coastal State extends, beyond its land territory and internal sea and, in the case of an archipelagic State, its archipelagic waters.[26] Territorial seas constitute a part of a State's territory and are under the command and governance of the sovereign State. The State exercises territorial jurisdiction over everybody and everything, except those that under diplomatic privileges and immunity in its territorial sea. This sovereignty extends to the air space over the territorial sea as well as to its seabed and subsoil.

But this sovereignty over one's territorial sea is not absolute and is limited by the right of innocent passage given to ships from other States.[27] The right of innocent passage refers to the right enjoyed by foreign ships that traverse coastal State's territorial sea, or proceed to or from its internal waters continuously and expeditiously, without disturbing the peace, good order or security of the coastal State.[28] "Innocence" refers to "not prejudicial to the peace, good order or security of the coastal State."[29] Article 19(2) of the Convention enumerates 12 activities that constitute prejudicial action on the part of a foreign ship seeking passage in the

---

26 United Nations Convention on the Law of the Sea, Art. 2(1).

27 United Nations Convention on the Law of the Sea, Art. 17: Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.

28 United Nations Convention on the Law of the Sea, Art. 18: 1. Passage means navigation through the territorial sea for the purpose of: (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or (b) proceeding to or from internal waters or a call at such roadstead or port facility. 2. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.

29 United Nations Convention on the Law of the Sea, Art. 19(1).

territorial sea of coastal State.[30]

States have long recognized this as a customary law that commercial ships are unconditionally entitled to the right of innocent passage. But controversy always exists when it comes to warships. Powerful maritime States such as Britain, America, France, and their allied States, advocate that warships should have the right of innocent passage in territorial sea of coastal States. Coastal powers that include China and various developing States claim that warships need additional conditions to gain innocent passage in other States' territorial seas. The opinions held by these coastal powers can be divided into two types: the first requires warships to ask for approval or give prior notification before passage. This is the opinion adopted by China, Iran and Pakistan. The second requires further conditions to be met before innocent passage is granted. For example, Holland requires government approval when more than three warships of the same State intend to pass its territorial sea at the same time. The former Soviet Union claims that foreign warships only have the right of innocent passage in its territorial waters in the Baltic Sea, the Sea of Okhotsk and the Sea of Japan.[31]

Due to the persistent argument between these two parties, both sides' opinions have been adopted in the paper entitled "Major Trends", which was written during the second session of the 1974 Third United Nations Conference on the Law of the Sea. But in the "Informal Single Negotiating Text" that was drafted in the third session of the conference, the term "advance approval or giving prior notification", which represents the interests of coastal States, was deleted, and the term "the rules of innocent passage shall apply to warships", which represents the interests of developed States, was preserved. In response to the vehement objection of coastal powers, the "Revised Single Negotiating Text", which was drafted during the fourth

---

30 These 12 activities include (a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations; (b) any exercise or practice with weapons of any kind; (c) any act aimed at collecting information to the prejudice of the defense or security of the coastal State; (d) any act of propaganda aimed at affecting the defense or security of the coastal State; (e) the launching, landing or taking on board of any aircraft; (f) the launching, landing or taking on board of any military device; (g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State; (h) any act of wilful and serious pollution contrary to this Convention; (i) any fishing activities; (j) the carrying out of research or survey activities; (k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State; (l) any other activity not having a direct bearing on passage.

31 The former Soviet Union called the territorial sea as territorial waters.

session of the conference, deleted this term. Since then, no specific description of warships' innocent passage has been included in any subsequent papers. In the seventh and ninth sessions of the meeting, developing counties including China tried in vain to re-include the term "advance approval or giving prior notification" in the document. In the eleventh session of the meeting, these developing States made a final effort, and it resulted in 46 States expressing approval of the proposal to maintain coastal States' interest, though more than 30 States expressed disapproval. To avoid a breakdown in negotiations, both sides, under the intervention of the chairman, agreed during the conference to state "[a]lthough the sponsors of the amendment in document A/CONF.62/L.117 had proposed the amendment with a view to clarifying the text of the draft convention, in response to the President's appeal they have agreed not to press it to vote. They would, however, like to reaffirm that their decision is without prejudice to the rights of coastal States to adopt measures to safeguard their security interests, in accordance with articles 19 and 25 of the draft convention."[32] Therefore, the 1982 Convention, just like the 1958 Convention on the Territorial Sea and the Contiguous Zone, does not provide whether the innocent passage apply to warships clearly. It also does not provide any guidelines for advance approval or giving prior notification, which makes it a controversial issue both in theory and practice.

In practice, coastal powers, have established in their national laws requirements for warships' innocent passage, according to the declaration in document A/CONF.62/L.117 which was drafted in the eleventh session of the third conference. For instance, Article 6 of the 1982 Law on the Territorial Sea and the Contiguous Zone of the People's Republic of China states "[t]o enter the territorial sea of the People's Republic of China, foreign military ships must obtain permission from the Government of the People's Republic of China". In May of 1995, China made a declaration upon ratification that "the provisions of the United Nations Convention on the Law of the Sea concerning innocent passage through the territorial sea shall not prejudice the right of a coastal State to request, in accordance with its laws and regulations, a foreign State to obtain advance approval from or give prior notification to the coastal State for the passage of its warships through the territorial sea of the coastal State."

In theory, the majority of academics in China think that the decision of

---

32 Shao Jin, General Rules about Innocent Passage of Foreign Warships in International Law, *Chinese Yearbook of International Law*, Vol. 1989, p. 132. (in Chinese)

granting foreign warships the right of innocent passage or requiring them to conform to additional requirements falls into the field of domestic affairs, and foreign warships should abide by relevant laws of the coastal State. For example, Shao Jin points out that "it is within the coastal State's rights to grant innocent passage to foreign warships or require them to conform to additional conditions such as advance approval or giving prior notification. Foreign warships passing through should comply with the coastal State's laws and regulations."[33] Zhao Jianwen points out that "according to the Convention and general international laws, the decision of granting foreign warships innocent passage is at the coastal State's disposal. Before entering another State's territorial sea, warships should make sure that their passage is allowed. If the coastal State requires notification or approval in the form of legislation or regulation, warships should abide by them. This is decided by the legal status of territorial sea and the special characteristic of warships. If, on the other hand, the coastal State forbids or makes impossible passage of foreign warships which are executing missions according to the international law, the flag State can take equivalent measures to balance interests."[34]

Due to the existence of two different kinds of legislation and two different forms of practice when it comes to warships' rights of innocent passage, there are therefore two views on the legal nature of warships' unannounced entrances into a coastal State's territorial sea. Maritime powers in favor of warships' rights of innocent passage hold that this does not constitute aggression (an armed attack), and thus the right of maritime self-defense cannot be exercised in this case. Only when the warship violates laws of the coastal State, can it be requested to leave, according to Article 30 of the Convention. On the other hand, coastal powers require notification, approval or other conditions before granting innocent passage to warships. They may most likely consider a warship's unauthorized passage in their territorial seas as an act of invasion and armed attack, which should be fought off by the exercising of self-defense. Therefore, a single action − a warship's entrance into another State's territorial sea − can elicit two contradictory responses due to the difference in internal legislation and practice. This forms a real-world problem for both the International Criminal Court which will define the crime of

33 Shao Jin, General Rules about Innocent Passage of Foreign Warships in International Law, *Chinese Yearbook of International Law*, Vol. 1989, p. 138. (in Chinese)

34 Zhao Jianwen, Analysis of Explanative Statements about Warships' Passage through Territorial Sea Made by Contracting Parties to the United Nations Convention on the Law of the Sea, *China Oceans Law Review*, No. 2, 2005. (in Chinese)

aggression in 2009, and the UN Security Council, which is in charge of determining the nature of an act of aggression.

In the face of clear divergence on this issue, our navy should act scrupulously in this respect. First of all, entrance into another State's territorial sea must follow the coastal State's legislation. When it comes to straits and waterways that are related to our major interests, the legality of the transit regime should be argued; as for straits and waterways that are governed by transit regime contradicting those of the Convention, diplomatic notes can be sent to the parties involved to state our stance or to make further negotiations. Second, intentional entrance of foreign warships into China's territorial sea is first and foremost considered a violation of our territorial sovereignty. Once defined as a hostile act and qualified within the conditions necessitating self-defense, the exercising of the right of self-defense against an attack is acceptable.

B. The Difference between Exercising the Right of Self-Defense at Sea and Assisting Maritime Law Enforcement

As China's armed force at sea, the navy will often need, under request of relative authorities, to assist law enforcement when maritime law enforcement agencies fail or are insufficient to stop the illegal actions of foreign ships or aircraft in the sea areas under jurisdiction. When doing so, the navy can take compulsory measures, such as boarding, examination on board and seizing commercial ships or civil aircraft, or requiring them to leave the territorial sea. In the face of violent resistant measures that jeopardize our personnel and equipment, the navy can use small arms and guns to signal a warning. When an attack comes from foreign warships, we can resort to force to counterattack. This brings up the following question: what is the difference between the navy's use of force when assisting law enforcement at sea and its exercising of maritime self-defense? The author has listed the following six points as possible answers to this question.

1. They are applied in different conditions. The right of self-defense is exercised when encountering maritime armed attack from other States, and occurs before any necessary measures are taken by the UN Security Council. The action of assisting maritime law enforcement is taken when relative departments ask for help when foreign commercial ships or civil aircrafts show violent resistance against laws in sea areas under China's jurisdiction.

2. The aggressors in each situation are different. Armed attacks are initiated

by the armed forces of the invading State, constituting an action against the territory and sovereignty of the coastal State. Violent resistance is usually exhibited by foreign commercial ships, civil aircrafts, or unauthorized non-government organizations as a kind of non-State behavior that forms an unlawful act against the coastal State.

3. They have different legal grounds. The right of maritime self-defense has its legal basis in national laws that were established in the spirit of a series of laws and conventions concerning armed attacks, with the UN Charter as the core. The act of assisting maritime law enforcement, on the other hand, is based on national laws that were formulated in accordance with the spirit of the Convention. Compared with the latter, the former is more strictly limited in its use of force.

4. They are different in terms of behavioral nature. The right of self-defense at sea is established under international law, and refers to the right of a State to decide to adopt the legal use of force when facing another State's armed attacks from or aimed at sea. The right of assisting maritime law enforcement, on the other hand, is sanctioned by national laws with the purpose of maintaining legal order in sea areas under national jurisdiction.

5. They have different purposes. Maritime self-defense aims to fight off or prevent armed attack and maintain a State's territorial integrity and politic independence. Assisting maritime law enforcement is aimed at maintaining the coastal State's legal order through bringing law breakers under the control of law-enforcing departments for punishments.

6. Their legality is judged by different institutions. The legality of the right of self-defense is decided by the UN Security Council, in accordance with Article 51 of the Charter. The legality of the use of force by the navy in assisting law enforcement at sea is determined by national institutions, in accordance with relevant national laws.

Therefore, in terms of using force, the exercise of the right of self-defense at sea is strictly limited, and attracts more attention and diplomatic response worldwide. When force is resorted to in assisting law enforcement, no specific prohibitive provisions are found in the international law, and thus it only needs to comply with relevant national regulations such as the principles of necessity and proportionality. From an international perspective, it is more common for the navy to resort to force when assisting law enforcement at sea.

It is also worth notice that in some cases, exercising the right of assisting law enforcement at sea can escalate into exercising of the right of self-defense at

sea. For instance, a foreign warship that has entered China's territorial sea with permission, but breaks the law during its stay. In this case, China's maritime law-enforcing departments, including the navy, can demand its obedience. If it ignores those demands, it will be asked to leave. If it uses force to refuse to do so, the navy can exercise the right of self-defense. In this case, the right of assisting law enforcement at sea has escalated to the right of self-defense at sea.

III. Reflections and Suggestions

1. The explanation and application of laws should prioritize national interests, and take the original intention of such legislation into consideration. This paper has discussed two legal interpretations, namely the right of self-defense at sea and the right of innocent passage for warships. As for the right of self-defense, this paper is of the opinion that restriction is key. This is not only in accordance with the UN's purpose and spirit, but also consistent with China's diplomatic stance. The prime purpose of the Charter is to maintain international peace and security. Its basic spirit lies in its effort to minimize the possibility of violence between States, which is in essence consistent with China's diplomatic stance − to maintain the authority of the UN and world peace and security, to pursue the peaceful resolution of international disputes, and to oppose the use of force or threats in dealing with international issues. As for the right of innocent passage for warships, this paper takes an explanatory approach. Adopting this stance on the right of innocent passage is instrumental in protecting the State's security interests in the sea areas under national jurisdiction. This is based on the fact that China's security strategy focuses on offshore defense, maintaining national security interests in sea areas under national jurisdiction, and, to a lesser extent, protecting the freedom of navigation.

2. Relevant studies should be intensified. First, fundamental research, to which type this paper belongs, should be carried out on a larger scale, and should maintain a higher quality. Second, prospective studies should also be improved. For instance, studies on the use of force in maritime law enforcement and in judicial jurisdiction. Third, practical studies (studies that combine fundamental and prospective studies with the actual practices of maritime military operations) should be improved to formulate feasible action plans with the purpose of maintaining and defending the State's interests through legal means.

3. Improve the legislative system. In terms of the right of self-defense at sea,

China's legislation, compared with that of the United States, is vague, abstract and lacking in feasibility which need to be refined. As for the issue of warships' entrance into territorial seas, China is still in need of laws that cover situations in which warships are at risk or providing rescue. China also needs procedures for the examination and approval process when granting the right of innocent passage. This has made it hard for China to accurately and effectively exercise self-defense at sea.

4. Build a maritime law-enforcement team that includes the navy. This will help explore the proper use of force for the navy in the process of assisting law enforcement, while making the navy's use of force uncontroversial. Finally, this can guarantee the effective implementation of the right of self-defense at sea under circumstances in which an individual crime turns into an armed attack on the nation.

Translator: LIU Ying
Editor (English): George Feldman

A Research Regarding Administrative Penalty on Chinese Pelagic Fishing Vessels

HAN Lixin* XUAN Xing** LIU Dongcheng***

Abstract: The distribution of administrative penalty power and the determination of the fine amount on the pelagic fishing vessels of China is a crucial matter in fisheries administration. This article analyzes the problem of punishment power distribution in various situations, and proposes on such basis, that the principle of "prohibition against double jeopardy" does not apply to pelagic fishing vessels. However, the entitlement to punishment power does not implicate that additional penalty must be fully imposed on the pelagic fishing vessels; rather, different factors shall be considered when examining their impact on the fine amount imposed on the pelagic fishing vessels breaching fisheries administrative order of China.

Key Words: Pelagic fishing vessels; Distribution of administrative penalty power; Fine Amount; Principle of "prohibition against double jeopardy"

I. Relevant Concepts and the Description of Problems

According to the Provisions for the Administration of Pelagic Fishery of the People's Republic of China (hereinafter referred to as the "Provisions for the Administration of Pelagic Fishery"), which went into effect on June 1, 2003, the pelagic fishing vessels refer to fishing vessels owned by the citizens, legal persons and other organizations of the People's Republic of China, which are engaged in pelagic fishing activities. Pelagic fishing, in accordance with the spirit of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and the international

* HAN Lixin, doctoral supervisor, doctor of law, and professor of maritime law at Dalian Maritime University,
** XUAN Xing, master candidate majoring in maritime aw of Dalian Maritime University.
*** LIU Dongcheng, master candidate majoring in maritime aw of Dalian Maritime University.

customs and usage, is commonly defined as fishing activities taking place far from the homeland basis and within the exclusive economic zone of other States or on high seas, as well as the economic activities which are affiliated to its pre-production, during-production and post-production service. Fishing activities refer to the catching of aquatic organisms or its preparing work, and the various activities supporting and serving such activities. Recreational fishing and the collection of aquatic products in the intertidal zone not yet cultivated or managed are excluded.

Since the mid-1980s, the pelagic fishing industry of China has been developing rapidly. Relevant statistics show that there are more than 90 pelagic fishing enterprises and 1,800 pelagic fishing vessels in China which are engaged in pelagic fishing activities in the exclusive economic zones of more than 40 countries and within the Atlantic Ocean, the Indian Ocean and the Pacific Ocean, with an annual production of approximately 1.1 million tons. Meanwhile, China has signed fishery agreements with some other countries, including the Sino-Japan Fisheries Agreement, the Sino-South Korea Fisheries Agreement and the Sino-Vietnamese Agreement on Fishery Cooperation in the Beibu Gulf.[1] In light of those agreements, in order to enter the sea areas under the jurisdiction of the countries neighboring China, Chinese pelagic fishing vessels have to be authorized by the governments of the countries concerned, pay the relevant fishing fees, and observe the laws and rules of such countries. According to Article 23 of the Fisheries Law of the People's Republic of China, as amended in 2000, "the State implements fishing license system on fishery industry... Fishing operations on sea areas under the jurisdiction of other countries shall be approved by fisheries administration department of the State Council, and abide by relevant treaties and agreements concluded or acceded to by the People's Republic of China and the laws of relevant countries." Following the Provisions for the Administration of Pelagic Fishery, the Ministry of Agriculture shall take charge of the pelagic fishery work throughout China, manage the planning, organization and administration of pelagic fishery, and supervise jointly with other relevant departments of the State Council the implementation of the State's relevant regulations and policies by pelagic fishery enterprises. The Ministry of Agriculture shall adopt a system on the examination, approval and administration of projects as well as on the accreditation of enterprise qualification to pelagic fishery, and shall supervise and manage pelagic fishing

1 Huang Jinling, International Law of the Sea and the Development of the Fishing Industry of China, *Marine Fisheries*, No. 2, 2001. (in Chinese)

vessels and seamen in accordance with the law.

Consequently, if a pelagic fishing vessel of China plans to engage in fishing activities in sea areas under the jurisdiction of other States, it shall apply for authorization from the Ministry of Agriculture of China and engage in fishing activities within the approved sea area and fishing season, follow the relevant treaties or agreements which China has concluded or acceded to, as well as the laws of the relevant States. However, in practice, pelagic fishing vessels of China frequently engage in fishing activities beyond the limited area under relevant treaties or agreements, or in the exclusive economic zone of other States without agreements. For example, according to the news of South Korea Yonhap News Agency, Mokpo, March 1, 2005, the Mokpo Sea Supervising Department stated on February 28 that in the last 12 days, 152 fishing vessels of China had been detained for suspected illegal fishing activities in "transitional sea areas" and the situation had been informed to China.[2] In practice, after the fishing vessels from China were punished for violating laws and regulations of coastal States, relevant authorities of such coastal States also requested the Chinese government to punish those illegal vessels. It requires us to decide whether or not to punish those vessels after they have already been penalized by the coastal State and if yes, how to punish the vessels. This article tries to analyze these practical problems on the basis of domestic law and international law, hoping to provide reference to relevant authorities of China.

II. The Distribution of the Power of Administrative Penalty over Chinese Pelagic Fishing Vessels

Under the general principles of international law, when vessels are in the territorial sea, exclusive economic zone, archipelagic waters, and other sea areas under the jurisdiction of other States, vessels are subject to the regime of such States consistent with the status of the sea area. Simultaneously, the vessels are also subject to the jurisdiction of the flag State. In other words, such vessels are subject to both territorial jurisdiction of coastal States and personal jurisdiction of the flag State. These vessels, while violating relevant laws and regulations of other States, may also have breached the administrative managing order of the fisheries industry

2 Ji Feng, Focusing on the Detainment of Chinese Fishing Vessels by Peru, *China Fisheries*, No. 1, 2005. (in Chinese)

in China. This concerns the distribution of penalty power between the departments in charge of fisheries administration in China and those in other countries, the determination of the fine amount, and a series of other legal questions.

The distribution of administrative penalty power varies under different circumstances, which can be shown mainly as follows:

A. The Circumstance Where Two States have Concluded a Fisheries Agreement

China has concluded bilateral fisheries agreements with several States. Fisheries agreements normally set out explicit provisions regarding the distribution of administrative penalty power. Following such provisions, both parties to the agreement would have the power to impose administrative penalty against the persons subject to fisheries administration.

For example, Article 9(2) of the Sino-Vietnamese Agreement on Fishery Cooperation in the Beibu Gulf provides: "when the authorized organ of one State Party finds nationals and vessels of the other State Party violating the rules of the Sino-Vietnam Beibu Gulf Fisheries Joint Committee in the co-fishing zone of its own side, it has the right to deal with the illegal act in accordance with the rules of the Sino-Vietnam Beibu Gulf Fisheries Joint Committee and notify the other State Party promptly of the relevant situation and result in a way decided by the Sino-Vietnam Beibu Gulf Fisheries Joint Committee. Arrested vessels and their crews shall be immediately released upon the posting of reasonable bond or other security." This article grants the power to impose administrative penalty on any acts inconsistent with the Sino-Vietnamese Agreement to relevant fisheries administrative department of Vietnam.

Article 9(4) of the Sino-Vietnamese Agreement provides: "According to their domestic laws, State Parties have the right to punish the vessels entering the co-fishing zone of their own side without a license or when they are conducting illegal activities other than fishing, even if they have a license". In accordance with this Article, the relevant fisheries administrative department of Vietnam may impose administrative penalty on the Chinese vessels which enter the sea area under Vietnamese jurisdiction without a license; in the same way, if pelagic fishing vessels enter the sea area under Vietnamese jurisdiction and conduct illegal activities other than fishing, the fisheries administrative departments of both China and Vietnam have the power to impose administrative penalty on the vessels in the

light of their respective domestic laws.

Another example could be found in Article 5(1) of the Sino-South Korea Fisheries Agreement, which stipulates: "In order to ensure nationals and fishing vessels of the other State Party comply with the preserving measures and other conditions for the protection of marine biological resources as prescribed by its domestic law and regulations, the State Party may adopt necessary measures in its exclusive economic zone in accordance with international law". This article entitles fisheries administrative department of South Korea to impose administrative penalty against any acts inconsistent with relevant regulations in its exclusive economic zone. Article 7(3) of the Sino-South Korea Fisheries Agreement prescribes, in "provisional sea area", if Chinese pelagic fishing vessels violate resolutions of the Sino-South Korea Fisheries Joint Committee, fisheries administrative department of South Korea does not have the power to impose administrative penalty but it shall notify China. Fisheries administrative department of China shall take necessary measures, including administrative penalty, and notify South Korea.

From the above it can be seen that different agreements contain different provisions regarding which country has the power to impose administrative penalty on pelagic fishing vessels. The power of penalty shall be distributed in accordance with a fisheries agreement, if any. Such distribution is legally based on the principle of *pacta sunt senvanda*, which refers to the fact that a treaty legally concluded must be performed in good faith during its term of validity. Its significance lies in providing the condition of mutual trust and respect in the international community, and thus ensures the stability of international relations and maintenance of international peace. The mutual fisheries agreement concluded between China and other countries fall into the scope of treaties and shall definitely follow this principle. Since the power of administrative penalty is distributed by relevant provisions in the agreements, the State Parties shall perform the agreement in good faith when the agreement is effective. Meanwhile, in accordance with domestic law of China, if any international treaty concluded by China contains provisions in conflict with those in its domestic law, the provisions of the international treaty shall prevail, which solves the problem of conflict between treaties and domestic law. Consequently, the punishment power shall be distributed in accordance with the treaty if such treaty contains relevant provisions. In the absence of such relevant provisions, a consensus shall be reached through consultation. If such consultation fails, the punishment power shall be distributed in the following way when there is no fisheries agreement.

B. The Circumstance Where Two States Fails to Conclude a Fisheries Agreement

The problem becomes more complicated, when Chinese fishing vessels enter a sea area under the jurisdiction of other countries with which China has made no fisheries agreement, and engage in fishing activities, in violation of relevant administrative law of such countries. The authors will analyze the problem from the following aspects.

1. The State Which Has Not Concluded a Fisheries Agreement with China Is a State Party to the UNCLOS

Since China is a State Party to UNCLOS, when the pelagic fishing vessels of China enter into and engage in fishing activities in the sea area of another State which has not concluded a fisheries agreement with China but is a State Party to the UNCLOS, relevant provisions of the UNCLOS shall be applied in priority.

First, if the pelagic fishing vessels of China enter into the exclusive economic zone of another State and are punished for the reasons other than causing marine environment pollution, the penalty power shall be distributed according to relevant provisions of Part V – Exclusive Economic Zone in the UNCLOS.

Normally, pelagic fishing vessels engaging in fishing activities in sea areas of another State are limited to the exclusive economic zone. Article 62(4) of the UNCLOS states: "Nationals of other States fishing in the exclusive economic zone shall comply with the conservation measures and with the other terms and conditions established in the law and regulations of the coastal State." It can be seen from this provision that, if pelagic fishing vessels of China violate relevant rules, other States have the power to impose administrative penalty. Following Article 73 of the UNCLOS, the coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the law and regulations adopted by it in conformity with the UNCLOS. Coastal State penalties for violations of fisheries law and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment. In cases of arrest or detention of foreign vessels the coastal State shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed.

The UNCLOS explicitly provides the legal basis for coastal States to have the power to impose administrative penalty. If pelagic fishing vessels of China violate the Fisheries Law, the Detailed Implementation Rules of the Fisheries Law and other laws and regulations of China, Chinese fisheries administrative department also has the power to impose administrative penalty. For example, Article 23(4) of the Fisheries Law stipulates: "Fishing operations on sea areas under the jurisdiction of other countries shall be approved by the fisheries administration department of the State Council, and abide by relevant treaties and agreements concluded or acceded to by the People's Republic of China and the laws of relevant countries."

Secondly, if pelagic fishing vessels of China have caused marine environment pollution in the sea area under the jurisdiction of other States, the administrative penalty power shall be distributed in accordance with the relevant provision of UNCLOS, Part XII - Protection and Preservation of the Marine Environment. This part includes detailed provisions regulating this problem, namely Articles 216, 217, 218, 220, 228, 230 and 231. Since this part does not aim at applying to pelagic fishing vessels specifically, particular analysis will not be given herein.

2. The State Which Has Not Concluded a Fisheries Agreement with China Is Not a State Party to the UNCLOS

If a State has neither concluded a fisheries agreement with China nor it is a State Party to the UNCLOS, the power to impose administrative penalty on pelagic fishing vessels shall be distributed on a case-by-case basis.

The authors argue that pelagic fishing vessels shall comply with both the laws of the flag State and the coastal State when engaging in fishing activities in the sea areas under the jurisdiction of other States. In accordance with the principle of administration by law in the administrative law of China, administrative departments have the obligation to execute and implement administrative obligation as provided by law in force. Illegal fishing of pelagic fishing vessels in the sea areas of another State infringes upon the natural resources and administration order of other States, and will definitely be punished by the State. If pelagic fishing vessels are also in violation of rules on pelagic fishing in the Fisheries Law of China, including the fishing license system or that fishing operations on sea areas under the jurisdiction of other countries shall be approved by the fisheries administration department of the State Council, fisheries administrative department shall impose administrative penalty on the illegal pelagic fishing vessels in accordance with current law and regulations of China.

III. Analyzing the Principle of "Prohibition against Double Jeopardy"

Based on the discussion above, it can be seen that when the pelagic fishing vessels of China violate both the laws of coastal States regarding fishing administration and relevant laws and regulations of China, the Chinese fishing vessels will be punished by the coastal State, and the fisheries administration department of China also has the power to impose administrative penalty on such vessels. In practice, sometimes, after the Chinese fishing vessels are imposed administrative penalty by the coastal State, its relevant authorities will still require the fisheries administration department of China to punish the illegal vessels again. Does the second imposition of penalty by the domestic administration department violate the principle of "prohibition against double jeopardy"? Under this situation, it is proposed that by following the principle of "prohibition against double jeopardy", the administration department of China does not need to punish the vessels after they have been penalized by the coastal State. However, the authors contend, the principle of "prohibition against double jeopardy" does not apply to this particular situation and thus the fisheries administration department of China also needs to punish the vessels.

The principle of "prohibition against double jeopardy" is a universally recognized principle in the field of administrative penalty and is also a principle of significance in modern legal system. The purpose of this principle is to prevent duplicate punishment, embody the principle of punishment identical to offense, and protect the legitimate interest of the parties involved.[3]

As for the implication and applicable scope of this principle, opinions in the academic circle vary. In general, the opinions can be summarized in two categories: one believes that the principle of "prohibition against double jeopardy" means that only one time punishment can be given against one illegal act of an offender. If the act has violated several rules or the criminal law, the principle that heavier offense incorporates minor offense would apply. Specifically, "for the same illegal act that has violated more than two rules of administrative law, the administrative

---

3 Office of State Law and Office of Administrative Law, Legislative Affairs Commission of the Standing Committee of the National People's Congress ed., *Lectures on Administrative Penalty Law of the People's Republic of China,* Beijing: Law Press China, 1996, p. 88. (in Chinese)

organ shall impose penalty based on the heavier punishment. For the act that has constituted a crime, the administrative organ shall no longer impose penalty."[4] Another point of view proposes the principle of "prohibition against double jeopardy" means that one administrative organ can only impose administrative penalty on an illegal act once, i.e. the principle of "prohibition against double jeopardy" only prohibits punishment more than twice against an illegal act by the same administration organ. Administrative penalty can be imposed twice if there are more than two illegal acts; or it can be imposed differently by other administrative organs for violating various rules of administrative law; the fact that certain acts violating criminal law are prosecuted for criminal liability does not preclude the administrative liability of the same illegal acts.[5]

The authors agree with the latter point of view. The basic constituent elements of the principle of "prohibition against double jeopardy" are "the same illegal act" and "the same reason" (i.e. the same legal basis). "The same illegal act" does not simply refer to the violation of the same law, regulation or one actual illegal fact; it refers to one illegal act which infringes upon the same administrative relationship protected by the law, which is a combination of the act infringing upon administrative relationship and the actual illegal fact. In general, the law that regulates one category of administrative relationship provides only one type of administrative subject with the power to exercise its administrative function and impose administrative penalties on law breakers. The same administrative organ generally serves as administrative subject in one category of administrative relationship. When punishing one particular illegal act of the law breakers based on either same or different administrative laws, the administrative organ only punishes one act which infringes upon the same category of administrative relationship. If the illegal act is punished twice or even more, it becomes double jeopardy. As for different organs imposing penalties on an illegal act based on either the same or different administrative laws, in general, the organs can impose administrative penalties of the same or different forms according to their respective functions. This is because under such circumstances, the illegal act infringes mostly upon different

---

4 Ying Songnian, *Administrative Acts Law – Theory and Practice of the Construction of Legislative System of Chinese Administrative Law System*, Beijing: People's Press, 1993, p. 469. (in Chinese)

5 Zhang Shanghua, *The Science of Administrative Law of China toward the Bottom – Review and Comments on the Science of Administrative Law of China*, Beijing: China University of Political Science and Law Press, 1991, p. 238. (in Chinese)

categories of administrative relationship, which does not fall into the scope of "one illegal act" as required by "the principle of "prohibition against double jeopardy".[6] This approach also reflects protection of different categories of social relationship by various administrative laws and regulations. If one illegal act of the perpetrator breaches two or more rules of administrative law and regulations, it means that the illegal act violates upon two or more rules of administrative law and regulations, and two or more categories of social relationship protected by administrative law will be infringed upon. The fact that different administrative organs punish the perpetrator respectively is consistent with the purpose and characteristics of the exercise of administrative power. Furthermore, the adverse consequences and harmfulness of such acts cannot be fully eliminated if certain acts are punished only by one administrative organ. For one illegal act which violates several rules of law, different administrative organs have the power to impose administrative penalties according to various rules of administrative law.

The Chinese pelagic fishing vessels, which infringe upon the law of coastal States, are in violation of two or more rules of administrative law and are subject to jurisdiction under two administrative organs: one domestic organ and one foreign organ. In this situation both the rules of laws and functions of administrative organs are overlapped, thus the principle of "prohibition against double jeopardy" no longer applies and double penalties may be imposed for the following reasons:

1. Different legal bases of punishment: As discussed above, the criteria of applying the principle of "prohibition against double jeopardy" are the same facts and the same reasons, and thus this principle does not apply to the circumstances where there are either different facts or the same facts based on different reasons. Illegal fishing in foreign sea areas conducted by Chinese pelagic fishing vessels is inconsistent with law; however, the administrative organs of foreign countries and of China impose penalties with different legal basis. That is to say, two administrative organs impose administrative penalties in accordance with the administrative law and regulations of their own country respectively, which is not inconsistent with the principle of "prohibition against double jeopardy".

2. Double illegalities of the offense: Illegal fishing within the foreign sea are of pelagic fishing vessels of China is in violation of administrative regulation and the management order with respect to fisheries of China. Simultaneously, it also

---

6 Liu Mianyi, The Debate on the Principle of "Prohibition against Double Jeopardy", *China Lawyers*, No. 9, 1996. (in Chinese)

infringes upon relevant administrative law, fishery resources and management order of the foreign State, and thus constitutes double illegalities. Such double illegalities determine that it deserves double penalties.

3. Complementarity of double punishment: Punishing the offense only once by applying the principle of "prohibition against double jeopardy" cannot fully eliminate all the harmful consequences and impact caused by such offense. Since various administrative organs are in charge of different administrative assignments, the application of the principle of "prohibition against double jeopardy" would easily hinder administrative subjects to fully perform their sanction function. A proper second penalty becomes necessary in order to avoid such defect. In other words, for the purpose of preventing the reoccurrence of similar incidents in the future, protecting the image of China and the authority of Chinese administrative law and regulations with respect to fishery, and better managing pelagic fishing vessels, such vessels may be imposed penalty for a second time.

In conclusion, when a single act of the perpetrator is in violation of several rules of the law and constitutes an overlapping of different rules of the law, the following principles shall be adhered to: first, when a single act is in violation of more than two rules of the law, penalties shall be imposed according to the different rules, following the principle of *nulla poena sine lege*; second, if an administrative organ has already punished the act of the perpetrator that is sufficient to repress such act, generally, other administrative organs shall not impose the same type of penalties again; third, when imposing penalties of different types, consideration could be given to the fact that the perpetrator has been punished so that lighter or mitigated punishment may be given.[7]

VI. Determination of the Amount of Administrative Fine on the Pelagic Fishing Vessels

The authors argue that when the pelagic fishing vessels of China violate domestic and foreign fisheries administrative laws, both domestic and foreign administrative organs have the power to impose administrative penalties. In practice, this would lead to the following problem: since the pelagic fishing vessels of China have already been punished by foreign administrative organs in

---

7 Li Yuan et al., *Practical Questions and Answers on Administrative Penalty Law of the People's Republic of China*, Beijing: Economic Science Press, 1996, p. 118. (in Chinese)

accordance with their domestic laws, whether the competent authorities of China still need to impose full administrative penalty on the vessels. The authors believe that the determination of the amount of administrative fine shall be distinguished from the entitlement to the power to impose administrative penalty; the latter does not imply that Chinese fishery administration necessarily has to impose administrative penalty on the illegal vessels. It shall be analyzed on a case-by-case basis, considering State policy orientation, human rights protection, diplomatic policy, etc. This article analyzes this problem from the perspective of jurisprudence, suggesting that administrative organs should reduce or exempt the amount of administrative fine for the following reasons:

A. The Inevitable Requirement of the Principle of Administrative Rationality

The rule of law, in its tradition, values the most the supremacy of law, emphasizing law-based governance. Modern understanding of the rule of law, while recognizing and adhering to the supremacy of law, does not stick to the literalism of the law but values more the spirit of the law. Only when the ultimate object of the law and the highest value the law represents are recognized, can the law be implemented and exercised truly in practice. Moreover, with the development and changes of the society, the situation in an individual case would be rather complicated. On the precondition that the principle of administrative legality is fully recognized, we value rationality more, because rationality is not only the value orientation of the law, but also the value that all the human beings and the whole society pursue. The principle of administrative rationality finds its expression in the principle of proportionality in the field of administrative law. The basic meaning of the principle of proportionality is the following: in implementing administrative acts, administrative organs shall give due consideration to both the realization of administrative goals and the protection of the interests of the persons subject to administration. When taking actions, the administrative organs shall balance comprehensively the relevant public and individual interests, adopt the method which limits or damages the individual interest to the least extent and ensure that the damage the administrative act causes corresponds to the object of administration pursues. The exercise of administrative discretion shall not only be limited by the law, but shall also be fair and appropriate. The obviously unfair administrative act belongs to improper administrative act, which will also cause

damage directly to the country and jeopardizes legitimate rights and interests of the collective and individuals.

The fisheries administrative department of China shall also follow this principle. Reducing the amount of administrative fine on the fishermen who have been punished by foreign organs satisfies the requirement of the principle of administrative rationality. It also conforms to current developing status of Chinese pelagic fishery industry and truly reflects the value orientation of fisheries administrative legislation of China.

B. The Inevitable Requirement Imposed by the Balance between Rights and Obligations of the Persons Subject to Fishing Administration and the Fisheries Administration Department

Modern administrative law, in its essence, is "equitable law" pursuing the overall balance between rights and obligations of the administrative organs and the persons subject to their administration. The core ideology of "the equitable theory" lies in revealing that modern administrative law shall be the legal system which adjusts in a balanced way the relationship of rights and obligations of administrative organs and civil citizens. Besides, considering that administrative organs are commonly believed to acquire its power for the purpose of safeguarding and promoting public interests while rights of citizens are generally regarded as originating from the necessity to protect private interests,[8] "the equitable theory" claims that modern administrative law should pursue to maintain a balance between public and individual interests. We cannot be obsessed with the priority of public interests over the individual ones. The law shall recognize and guarantee the personal interests of citizens and the justified interests of the law. The purpose of balancing different interests rests with maximizing the relevant interests and minimizing the damage to or conflict of interests.

In fishing administrative punishment cases, we should also take into account the balance between the interests of administrative subjects and the persons subject to their administration, especially for pelagic fishing vessels. A balanced point should be found in the amount of fine, which helps to balance the rights and obligations of such persons.

---

8 Sun Xiaoxia, *The Control over Administration by Law – A Nomological Interpretation of Modern Administrative Law*, Jinan: Shandong People's Press, 1999, p. 8. (in Chinese)

C. The Requirement Which Should Be Met in Order to Be Consistent with Practice

The pelagic fishing industry in China is still developing. Since relevant pelagic fishing enterprises are limited in scale, the purpose of administrative punishment shall not be overemphasized when punishing illegal pelagic fishing vessels. Based on the current rules, the amount of fine imposed on illegal fishing vessels by foreign countries are mostly higher than the one prescribed by Chinese laws. For instance, Micronesia imposes the criminal fine to a maximum of 800,000 US Dollars and the civil fine to a maximum of 5 million US Dollars for fishing vessels entering its sea area illegally; and its courts may order the confiscation of the fishing vessels, the fishing tools and the catches. The law of Argentina prescribes strict punishment on foreign vessels illegally entering its sea area and conducting fishing operations, including the confiscation of all the catches and a fine up to 500,000 US Dollars. As far as the purpose of administrative law is concerned, if the fine imposed by foreign organs has achieved the purpose of administrative penalty, another full punishment may be avoided. That is to say, reduction or exemption of administrative fine should be considered. This is because if additional administrative penalties are fully imposed on those vessels, a considerable number of pelagic enterprises may face bankruptcy. The purpose of developing fishing industry cannot be achieved at all from the perspective of values and objects.

V. Conclusion

In the distribution of administrative power to punish Chinese pelagic fishing vessels, fishing administrative organs shall exercise its power in light of specific conditions. If the foreign State has already imposed administrative penalties against the illegal fishing vessels according to its domestic administrative law, the fisheries administrative department of China should still have the right to impose additional administrative penalty according to relevant rules provided by the laws of China. However, such right does not mean that a second penalty has to be given to the fullest extent; rather, in light of the objectives of the legislations of China and concrete practices, lighter or mitigated punishment may be given against such illegal pelagic fishing vessels.

Translator: LI Zongyao
Editor (English): Alejandra Silva

On the Application of the Principle that "No One Should Be Punished Twice for the Same Cause" in Marine Administrative Punishment

CAO Yingzhi* ZHANG Zhihua** REN Jie***

Abstract: The principle that "no one should be punished twice for the same cause" is an important legal rule internationally, which derives directly from the principle of *ne bis in idem*. The principle that "no one should be punished twice for the same cause", as established in the Law of the People's Republic of China on Administrative Punishments, contains special meanings, which this paper will actively explore. The authors will take theoretical studies from both domestic and foreign law circles into consideration, and, by combining the principle that "no one should be punished twice for the same cause" and the practice in China's marine administrative punishment, briefly discuss the application of and exceptions to the principle that "no one should be punished twice for the same cause" in China's marine administrative punishment, as well as illustrate the enlightenment that the principle brings to China's marine administrative punishment.

Key Words: No one should be punished twice for the same cause; The rule against double jeopardy; Marine administrative punishment; Application; Exceptions

I. Deduction of the Principle that "No One Should Be Punished Twice for the Same Cause"

* CAO Yingzhi, an assistant research fellow with the National Maritime Data and Information Service (NMDIS) and master of international law of Ocean University of China.
** ZHANG Zhihua, Deputy-Section Chief of the Sea Area Office of the Sea Area Management Department under the State Oceanic Administration and master of law of Peking University.
*** REN Jie, master of international law of Ocean University of China.

A. The Principle of "Ne Bis in Idem" in the Ancient Roman Code

There is a time-honored principle in the Roman Code: "one should not twice institute legal proceedings for the same subject matter" (*bis de eadem re agi non potest*),[1] which is also the principle of "one case should not be filed twice" in judicial proceedings. But more accurately speaking, it means that one should not pursue the same issue in the same court twice, that is, she/he should not ask for the recognition of the same right on the basis of the same legal facts. Based on this, Roman jurists developed the principle of *non bis in idem*, which means that a litigant may not apply for a second trial for a case that has been officially adjudicated.

From a historical perspective, the principle of "*ne bis in idem*" derives from the theory of "the consumption of the right of action" in the ancient Roman Code.[2] The Romans, proceeding from naive materialism, regarded the right of action as physical. In their common sense, the motion of matter necessarily brought about matter consumption. Therefore, they believed that the exercise of the right of action would lead to the consumption of such right. The so-called consumption of the right of action means that the whole right of action will be consumed due to *lis pendens* and a second *lis pendens* shall not be allowed for the same right of action or right of claim, which represents the principle that "one case should not be filed twice".[3] If a right of action or of claim is only allowed to be litigated once, and even when the complainant seeks to litigate the same case, the defendant can raise a counterplea against the already adjudged case or against the second *lis pendens* to nullify the complainant's claim. At all events, once a case is in process, the complainant will not be able to litigate the case twice, which forms the principle of *ne bis in idem* in the Roman Code. That is to say, in the Roman Code, the principle of *ne bis in idem* takes effect once the case is in process, instead of waiting until the verdict comes out.

According to our research, a relatively mature explanation of the principle

---

1 Pietro Bonfante, translated by Huang Feng, *Istituzioni di Diritto Romano*, Beijing: China University of Political Science and Law Press, 2005, p. 81. (in Chinese)

2 Qiu Huiling & Huang Wenqing, The Principle that No One Should Be Punished Twice for the Same Cause and China's Criminal Retrial System, at http://www.studa.net/xingfa/04/012/113619.html, 12 October 2004. (in Chinese)

3 Zong Weiming, Could the Victim Ask the Employer for Mental Damage Compensation after the Traffic Accident Perpetrator Has Indemnified His Loss, at http://www.dffy.com/sifastijiam/at/200507/20050702/42438.html, 2 July 2005. (in Chinese)

of *ne bis in idem* can be found in Justinian's Digest around the first half of the 6th century, in which this principle is described as "the judge shall not allow a man to face criminal charges again for an act for which he has been acquitted".[4] Roman Procedural Law adopted the practice of "no complainant, no judge".[5] In the view of scholars studying the Roman Code, "adjudicated facts shall be held as factual", which is the so-called "*res judicata*". In the Roman Code, three factors are needed to qualify the principle of *ne bis in idem*: same case, same object of action and same litigants.[6] The principle that "no one should be punished twice for the same cause" exactly derives from the principle of *ne bis in idem* in the Roman Code[7]. After being extensively applied in civil actions, the principle that "no one should be punished twice for the same cause" has also been introduced into administrative proceedings. In fact, the principle that "no one should be punished twice for the same cause" in administrative proceedings bears a similar value orientation to that of the "*ne bis in idem*" principle, for repeated punishment for an offence would not only increase administrative costs, unnecessarily waste administrative resources and lead to the administrative organs being incapable of better maintaining public order or protecting the public interest, but would also harm the legitimate rights and interests of the party being punished.

B. Article 14(7) of the International Covenant on Civil and Political Rights

The *ne bis in idem* principle received its earliest international recognition in the International Covenant on Civil and Political Rights adopted by the United Nations in December 1966. Article 14, Paragraph 7, of the Covenant prescribes

---

4 Zhang Yi, *The Rule against Double Jeopardy in Criminal Procedure*, Beijing: People's Public Security University of China Press, 2004, p. 39. (in Chinese)

5 Xie Bangyu ed., *Roman Law*, Beijing: Peking University Press, 1990, p.382. (in Chinese)

6 Xie Bangyu ed., *Roman Law*, Beijing: Peking University Press, 1990, p.383. (in Chinese)

7 Wei Yong, On the Application of the Principle that No One Should Be Punished Twice for the Same Cause in Tax Administrative Punishment, at http://www.pux.com.cn, 5 December 2005 (in Chinese). The author also believes that the theory that no one should be punished twice for the same cause has developed into a principle that no one should be fined twice for the same cause in China. The article also points out that, although the conclusion deduced from the administrative punishment law has solved the issue of repeated penalties through the principle that no one should be punished twice for the same cause, it still lacks explicit interpretation on the core issue of how to apply this principle appropriately, that is, what is the so-called "same illegal act (cause)".

that "No one shall be liable to be tried or punished again for an offence for which he has already been convicted or acquitted in accordance with the law and penal procedure of each country".[8] This stipulation is often referred to as the *ne bis in idem* principle. Referring to this provision, General Comment 13 of the United Nations Human Rights Committee, paragraph 19, points out that "In considering State reports differing views have often been expressed as to the scope of paragraph 7 of Article 14. Some States parties have even felt the need to make reservations in relation to procedures for the resumption of criminal cases. It seems to the Committee that most States parties make a clear distinction between a resumption of a trial justified by exceptional circumstances and a re-trial prohibited pursuant to the principle of *ne bis in idem* as contained in paragraph 7. This understanding of the meaning of *ne bis in idem* may encourage States parties to reconsider their reservations to Article 14, paragraph 7."[9] Thus it can be seen that the principle in Article 14, Paragraph 7, of the International Covenant on Civil and Political Rights does not mean the prohibition of retrial. Its presence in the International Covenant undoubtedly bears great significance, for it reflects the developing trend of justice and efficiency in modern law, demonstrates the respect for the equal legal status of a nation, contains the ideal of human rights and makes the principle of *ne bis in idem* a universally-accepted international norm of the modern law.

However, every coin has two sides. To absolutize the positive significance of the principle of *ne bis in idem* will inevitably produce negative factors. As a result, many countries, while adopting this rule, have to take its negative aspects into consideration. For instance, in criminal trials, a two-tiered system[10] or three-

---

8 Chen Guangzhong ed., *The International Covenant on Civil and Political Rights and China's Criminal Procedure*, Beijing: The Commercial Press, 2005, p. 316. (in Chinese)

9 The principle of *ne bis in idem* is an important principle involving criminal, civil and administrative actions. Based upon actual needs in legal practice, General Comment 13 of the UN Human Rights Committee only sets rules for this principle in criminal proceedings. However, this does not mean that this principle is not applicable to civil and administrative litigation. See Yang Yuguan, *Human Rights Law – Research on the International Covenant on Civil and Political Rights*, Beijing: People's Public Security University of China Press, 2003 (in Chinese); Jin Weifeng, New Exploration to the Principle that No One Should Be Punished Twice for the Same Cause, *Administrative Law Review*, No. 4, 1997 (in Chinese); He Naizhong, On the Principle that No One Should Be Punished Twice for the Same Cause, *Modern Law Science*, No. 1, 1993. (in Chinese)

10 There are only a small number of countries in the world which still adopt the two-tier trial system. Apart from some small countries and states, only those countries that used to take the Soviet Union as their model still follow this system. Romania in 1990 changed its trial system to a three-tier structure. See Fu Yulin, Principle of the Construction of the Trial-tier System: a Civil Procedure Perspective, *Social Science in China*, No. 4, 2002. (in Chinese)

tiered system may be adopted. If new evidence is found to prove the innocence of the defendant or the evidence upon which the final judgment was based is proved to be forged, then an innocent citizen will be wronged if the principle of *ne bis in idem* is still observed unconditionally. Therefore, proceeding from the overarching goal of judicial justice, many countries do not follow the principle of *ne bis in idem* categorically. There are exceptions in the implementation of this principle, which takes both procedural and substantive justice into consideration and conforms to the requirements of the development of the society ruled by law. In this respect, it is a way of further perfecting the principle of *ne bis in idem* prescribed in the International Covenant on Civil and Political Rights by way of restricting it.

C. The Principle of Ne Bis in Idem in the European Convention on Human Rights

Article 4 of Protocol No. 7 to the European Convention on Human Rights adopted by the Council of Europe in Rome in November 1950, stipulates: a) No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State; b) The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case. c) No derogation from this Article shall be made under Article 15 of the Convention.[11] The principle that "no one should be punished twice for the same cause" emphasized in the European Convention on Human Rights has the following features: first, this principle is mandatory in the Convention. "No derogation" means any party to the Convention is forced to follow this principle. In fact, the contracting parties show great flexibility in applying this principle.

11 Chen Guangzhong ed., *The International Covenant on Civil and Political Rights and China's Criminal Procedure*, Beijing: The Commercial Press, 2005, p. 317. (in Chinese)

Countries like Russia have coded it into domestic law[12]; while in other countries, although they have not coded it into their domestic law, their citizens are allowed to make an application to the European Parliament or the European Court of Human Rights alleging that their countries have violated the Convention.[13] Second, this Convention does not exclude exceptions. "If there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case": the two qualifications in this sentence are not cumulative but alternative. As long as one of the two is relevant, then the principle that "no one should be punished twice for the same cause" will lose the basis for its application. This system has contributed tremendously to guaranteeing the human rights of European citizens.

D. The Civil Law System vs. the Common Law System on the Principle of Ne Bis in Idem

The principle of *ne bis in idem* in the civil law system directly absorbs the ancient Roman theory of *res judicata* and has developed it into the theory of judgment, which emphasizes the *res judicata* of an effective judgment and declines to accept cases where a judgment has already taken effect. However, the common law system inherited the essence of the principle of *ne bis in idem* from ancient Rome and developed it into "the rule against double jeopardy."[14] In the civil law

---

12 Russia is a contracting State to the International Covenant on Civil and Political Rights and the European Convention on Human Rights. Its criminal procedural code clearly prescribes that "recognized principles and norms in the national law and international conventions signed by the Russian Federation are components to legislation when the Russian Federation adjusts its criminal procedure. If the international conventions signed by the Russian Federation should contradict with this code, then the former would prevail." Therefore, in domestic legislation in Russia, rules and regulations that do not accord with the International Covenant on Civil and Political Rights and the European Convention on Human Rights are prohibited.

13 According to the European Convention on Human Rights, anyone who has received final judgment in a signatory State may apply, within six months, to the European Court of Human Rights, which provides a special recourse for European citizens to receive an effective judgment. But the Convention also stipulates that once an individual has submitted his application, he would need a statutory agent to attend the court hearing, which has brought some difficulty for parties in exercising their right of application. Because of that, the Council of Europe has established a legal assistance scheme to help those who are not able to hire a statutory agent.

14 Qiu Huiling & Huang Wenqing, The Principle that No One Should Be Punished Twice for the Same Cause and China's Criminal Retrial System, at http://www.studa.net/xingfa/04/012/113619.html, 12 October 2004. (in Chinese)

system, the *ne bis in idem* principle was, in the beginning, merely a basic principle of action. Prof. Sherman, a German scholar, believes that the principle of *ne bis in idem* refers to the fact that once an effective judgment has been made, no matter whether one is convicted or acquitted, he is not allowed to initiate another round of legal proceedings for the same act[15]. That the penalty power of the State has been depleted is the starting point of this principle. In modern times, this principle has become a deep-rooted litigation principle in civil law system countries. However, these countries, instead of adhering to this principle unconditionally, have improved and perfected it. For instance, they have added exceptions to the application of this principle. Article 622 of the French Code of Criminal Procedure prescribes that the retrial of a final criminal decision may be applied for in the interest of any person found guilty of a felony or misdemeanour under certain circumstances. Article 19 of the Germany's Law on the Contravention of the Order (*Gesetz über Ordnungswidrigkeiten*) stipulates that, if more than one law is violated, the amount of the fine should be determined according to the highest level provided by law, and meanwhile additional punishments provided for in other laws can also be imposed.[16]

In common law system countries, the principle of "*ne bis in idem*" is called "the rule against double jeopardy", that is, the defendant shall not be tried, judged or punished twice for the same offence.[17] This principle was accepted into the English Common Law during the bourgeois revolution period and was also represented in the written text of the 1789 Amendments to the US Constitution. The US Constitution and its amendments prescribe that, once the jury has decided the case, no court in the US can try the case again and the general principle should not be

---

15 Joachim Sherman, translated by Li Changke, *Foreword of the Chinese Version of the German Criminal Procedural Code*, in the *German Criminal Procedural Code*, Beijing: China University of Political Science and Law Press, 1995, p. 14. (in Chinese)

16 Germany and Austria are strict about the constitutive elements of acts which constitute offence against the administrative order. Article 10 of Germany's Law on the Contravention of the Order prescribes that "punishment is only imposed for an intentional violation of order; if the law expressly provides that fines should be imposed for a negligent act, such provisions should prevail." Article 5 of Austria's Administrative Penal Code stipulates that negligent acts qualify for punishment if there are no special stipulations concerning administrative responsibilities. A violation of order is considered negligent if the violator cannot prove his or her innocence in failing to comply with administrative laws, and no real damage or risk is needed to decide a punishment in this case. From this stipulation, one can see that Austria's administrative penalties are quite severe.

17 Chen Guangzhong ed., *The International Covenant on Civil and Political Rights and China's Criminal Procedure*, Beijing: The Commercial Press, 2005, p. 318. (in Chinese)

applied again. In later legal decisions, judges gave different classical interpretations to this principle and took it as representative of "a basic spirit in the constitutional tradition".[18] In fact, the rule against double jeopardy and the principle of *ne bis in idem*, despite sharing largely the same starting point, differ in their scope of application due to their different focuses. The former enjoys a slightly wider scope of application than the latter. But in general, the two principles share the same value orientation and have no essential differences.

E. Article 24 of the Law of the People's Republic of China on Administrative Punishments

Article 24 of the Law of the People's Republic of China on Administrative Punishments prescribes that "the defendant shall not be ordered to pay two administrative fines for one single offence".[19] This article aims to deal with the fact that in the practice of administrative punishment, different administrative bodies have distinct yet correlated functions, which inevitably creates a situation where multiple organs administer the same issue. As different bodies carry out administration according to different legal norms, it is inevitable that one illegal act would violate more than one administrative legal norm. According to the legislative interpretation to the Law of the People's Republic of China on Administrative Punishments, the principle that "no one should be punished twice for the same cause" could be defined as follows: the administrative body shall not, based on the same fact and the same legal basis, give the offender the same kind of (fines) administrative punishment twice for one illegal act, that is, the administrative body should punish the offender once only for his illegal act in accordance with the law.[20] In fact, when China enacted the punishment law, due to the fact that, first, China still lacked research on the principle that "no one should be punished twice for the same cause" and had not acquired mature legislative skills, and second, China had not yet been able to completely overturn the situation where all kinds of administrative punishments overlap in its laws and regulations and its systems

---

18 Peter. G. Renstrom ed., translated by He Weifang, *The American Law Dictionary*, Beijing: China University of Political Science and Law Press, 1998, p. 160. (in Chinese)

19 *The New Encyclopedia on the Conventional Laws and Regulations of the People's Republic of China*, Beijing: China Fangzheng Press, 2000, p. 344. (in Chinese)

20 Yang Qiongpeng and Zhou Xiao eds., *New and Exemplary Interpretations of the Administrative Punishment Law*, Beijing: Tongxin Press, 2000, p. 149. (in Chinese)

were yet to be perfected, the principle that "no one should be punished twice for the same cause" in Article 24 of the Law of the People's Republic of China on Administrative Punishments was only a provision on a superficial level.

For example, first of all, the application scope of the principle is limited. It only forbids repeated administrative punishment with fines but does not restrict repeated punishment in other ways, such as revoking business license or other licenses, and ordering the suspension of production or business operation or confiscating illegal incomes.[21] In future legislative practice, it would need completion and perfection.

Second, in the theoretical research and legislative practice in China, the principle that "no one should be punished twice for the same cause" has not yet been fully clarified which leads to confusion and contradiction in the practice of administrative management. With the development of the administrative legal system and the formulation of laws and regulations, along with the gradual refinement in their adjustment and the need to ensure protection of social relations, one act which violates the administrative management regulation may have harmed the interests of several social objects. In this case, there may appear to be several particular laws protecting the interests of different objects that could be applied and this leads to the phenomenon of more than one legal obligation and result. In other words, this involves competition and cooperation in the application of laws and regulations.[22] The principle in the Law of the People's Republic of China on Administrative Punishments does not provide applicable rules for dealing with

---

21 Li Xiaoqiu, How to Understand the Principle that "No One Should Be Twice Punished for the Same Cause" in China's Administrative Punishments, at http://www.hljda.gov.cn/show.aspx?newsid=46608Ltypeid=26, 21 February 2006 (in Chinese). The author contends that it is far too difficult to establish an all-inclusive principle that "no one should be punished twice for the same cause" in the process of formulating the law for China's administrative punishments. Article 24 of the Law of the People's Republic of China on Administrative Punishments states that "for the same illegal act committed by a party, the party shall not be given as an administrative penalty more than one fine." This can be considered the principle of "no double fine for one cause", as a part of the principle that "no one should be punished twice for the same cause".

22 Zhu Xinli, On the Principle that "No One Should Be Punished Twice for the Same Cause", *Science of Constitutional and Administrative Law*, No. 2, 2002 (in Chinese). The author asserts that the legal concurrence represents, in essence, the concurrence of constitutive elements of illegal act. Its features include: the counterpart only commits one illegal act (cause); this one illegal act violates several provisions due to the complicated rules of the law; the constitutive elements of these violations have overlapping and subordinate logical relations.

conflicts in the application of different regulations.[23]

Third, the principle specified in the Law of the People's Republic of China on Administrative Punishments does not provide legal guidance on such problems as who shall have the power of penalty when different administrative bodies possessing the same administrative functions are all entitled to impose penalty, and whether the same punishment is not allowed.[24] Some scholars even contend that the provision in Article 24 of the Law of the People's Republic of China on Administrative Punishments violates language norms in legislation.[25]

II. The Implication of the Principle that "No One Should Be Punished Twice for the Same Cause"

A. Meaning of the Principle That "No One Should Be Punished Twice for the Same Cause"

The principle that "no one should be punished twice for the same cause" is a subject that has aroused much discussion with wide divergences in administrative law circles in recent years. Scholars' differences mainly lie in the following aspects: what is the same illegal act; under what circumstances could or could not administrative punishment be carried out twice, or whether administrative punishment may never be given more than twice under any circumstances; the meaning and scope of the "penalty" in this principle, mainly the relational issue

---

23 Zhang Xi, Discussion of the Application of the Principle that No One Should Be Punished Twice for the Same Cause in Administrative Punishment, at http://lunwen,eduxue.com/Article/d/d16/d/607/200412/Article/1798.html, 21 December 2004. The author contends that with the development of the administrative legal system and the formulation of laws and regulations, along with the gradual refinement in their adjustment and the need to ensure protection of social relations, one act which violates the administrative management regulation may have harmed the interests of several social objects. In this case, there may appear to be several particular laws protecting the interests of different objects that could be applied and lead to the phenomenon of more than one legal obligation and result. In the opinion of the author of this paper, this can be termed the concurrent application of different rules and regulations.

24 Zhang Xi, Discussion of the Application of the Principle that No One Should Be Punished Twice for the Same Cause in Administrative Punishment, at http://lunwen,eduxue.com/Article/d/d16/d/607/200412/Article/1798.html, 21 December 2004 (in Chinese). The author believes that such a situation is another special form of the concurrence of different administrative punishment subjects.

25 Jin Huaiyu, Analyzing the Principle that No One Should Be Punished Twice for the Same Cause from a Legislative Perspective, *Gansu Agriculture*, No. 3, 2006. (in Chinese)

between administrative and criminal penalties.[26] This paper will not discuss views in academic circles regarding this traditional principle, but will mainly adopt the explanation in the Law of the People's Republic of China on Administrative Punishments, in which the principle that "no one should be punished twice for the same cause" means that the administrative body may not give the offender an administrative punishment more than twice for the same act violating the norms of administrative law. Such a restriction is applicable to cases where an act violates a norm and to cases where an act violates more than one norm. As long as the offender commits one illegal act, he shall be given an administrative punishment once only. Once an administrative body has carried out a punishment, other bodies may not punish the offender again. And the body that has carried out a punishment may also not punish him again. If it does, the punishment would be invalid. This is the principle that "only the first punishment is valid". The principle that "no one should be punished twice for the same cause" restricts repeated use of all kinds of administrative punishments, but it does not rule out the possibility of the application of administrative punishment, criminal penalty and other penalties of different nature in certain situations at the same time.

B. Basic Features of the Principle That "No One Should Be Punished Twice for the Same Cause"

First, according to the afore-mentioned point of view, the original intention of this principle is to avoid one person receiving repeated punishment for one illegal administrative act. When more than one administrative body has the power to impose penalty over the same illegal act, only one of them can carry out actual punishment. They should all follow the principle of "the one who discovers the unlawful act first is able to perform the punishment". Under the currently loose, punishment system in China, due to the fact that different administrative

---

26 Discussions on the principle that "no one should be punished twice for the same cause" can also be seen in Zhu Xinli, On the Principle that "No One Should Be Punished Twice for the Same Cause", *Science of Constitutional and Administrative Law*, No. 2, 2002 (in Chinese), in which, such issues as "what is one cause" and "can one cause be subject to repeated fines" are discussed in detail; Fang Haiwei, Rethinking on the Principle that No One Should Be Punished Twice for the Same Cause, at http://www.studa.net/faxuelilun/060620/17362444.html, 20 June 2006 (in Chinese); Zhou Xinmei, Also on the Principle that No One Should Be Punished Twice for the Same Cause, at http://www.duozhao.com/lunwen/dld/lunwen_57350.html, 9 January 2006. (in Chinese)

bodies differ in their powers of punishment, it would be rather difficult for different administrative organs to cooperate and carry out a single administrative punishment. Further, because the severity of punishment imposed by different administrative bodies varies, the offender of administrative legal provisions may suffer several different fines for the same illegal act. In the face of these problems, legislators, while choosing the principle that "no one should be punished twice for the same cause" as a basic norm in the Law of the People's Republic of China on Administrative Punishments, also hold that there should be only one administrative subject and one administrative punishment for any one illegal act. Such a legislative rule can, on one hand, ease the contradiction in the process of China's administrative punishment, but on the other hand, it causes the narrowing down of the meaning of this principle and makes the principle too conservative. This is the most eminent feature of China's principle that "no one should be punished twice for the same cause".

Second, this principle is transnational.[27] On one hand, States have all taken this principle as a basic norm in their domestic laws, which has become an important characteristic in modern international legislation; on the other hand, when an act violates laws of many States which all have jurisdiction, even though one of such States has punished the offender for this act, other States would not waive their right of jurisdiction over it. This is understandable for the right of jurisdiction is one of the four most crucial components of a State's basic rights.[28] The key is how to deal with the right of jurisdiction between different States. One way to tackle this issue is to conclude treaties or conventions, such as the International Covenant on Civil and Political Rights and the European Convention on Human Rights.

Third, the biggest attraction of this principle is that it is not absolute and that there are exceptions to its application. For example, it can be seen in the description of this principle in the European Convention on Human Rights. This requires us

---

27 In the article Application of the *Ne Bis in Idem* from the Perspective of Protecting *Res Judicata*, Prof. Yang Rongxin holds that for an effective judgment delivered by a country's court, the principle of *ne bis in idem* should be applied from a theoretical point of view. And this principle should also be recognized internationally. If both countries' courts have jurisdiction over the same case, then the verdict made by the country that has firstly accepted the case is valid. If the court of the other country argues that the former should not have accepted the case, then it should explain its opinion when accepting the case and should be allowed to file a lawsuit, otherwise the effective rule by the court of the former country should be recognized and implemented upon the application of the party concerned.

28 Tong Lianfa ed., *International Law Science*, Beijing: Peking University Press, 2003, p. 62. (in Chinese)

to be flexible when using this principle, for only by allowing the exceptions to the application of this principle to play a role in a scientific and reasonable manner could the fundamental status of this principle be established in China's legislation and a relatively ideal legislative system be constructed combining this principle and exceptions to its application.

C. The Legal Status of the Principle that "No One Should Be Punished Twice for the Same Cause" in the Law of the People's Republic of China on Administrative Punishments

First, for this principle to become an important norm in the Law of the People's Republic of China on Administrative Punishments not only depends on its afore-mentioned characteristics, but also lies in the fact that it conforms to the features of the principles of the Law of the People's Republic of China on Administrative Punishments. According to relevant jurisprudential theories, principles can be divided into basic legal principles and specific legal principles, based on their degree of abstractness. Basic principles constitute the guiding thought and starting point for the whole legal system. Therefore, they are fundamental and essential, occupying a relatively high legal status. Specific legal principles, derived from basic principles, form the basis of other legal principles and are relatively definite.[29] Fundamental principles of the Law of the People's Republic of China on Administrative Punishments form basic values which, stated and manifested by it, guide its formulation and implementation and represent its spirit.[30] Fundamental principles in the Law of the People's Republic of China on Administrative Punishments include: punishment should be legal, punishment should be open and just, punishment and education should be combined, the rights of the parties involved should be protected, and the power of punishment should be refined and restricted.[31] The principle that "no one should be punished twice for the same cause" is a specific legal norm that administrative bodies must follow in

---

29 Chen Jinzhao ed., *The Science of Law*, Beijing: Peking University Press, 2002, p. 90. (in Chinese)

30 Feng Jun, *New Theory on the Administrative Punishment Law*, Beijing: China Procuratorate Press, 2003, p. 101. (in Chinese)

31 Feng Jun, *New Theory on the Administrative Punishment Law*, Beijing: China Procuratorate Press, 2003, p. 103. (in Chinese)

implementing administrative punishment.[32] Specifically speaking, this principle can be derived from the principle of safeguarding the rights of the parties involved. But its status is slightly lower compared with basic principles. The principle that "no one should be punished twice for the same cause" serves also as a legal reference for a person subject to administration to claim legal rights, playing an important role in administrative punishment.

Second, along with other principles, the principle that "no one should be punished twice for the same cause" helps establish the relationship of rights and obligations on the part of administrative organs and administrative counterparts in China's administrative punishment system. In China, a mechanism for exclusive entitlement to the power of administrative penalty by administrative subjects, primarily administrative organs, is adopted. Thus administrative counterparts are relatively weaker and more vulnerable and this inequality in power sometimes leads to contradictions or even conflicts. Here the principle that "no one should be punished twice for the same cause" functions as a regulator or lubricant, defining

---

32 Controversies still exist in the jurisprudential circle as to whether the principle that "no one should be punished twice for the same cause" constitutes a fundamental principle or a practical one in the Law of the People's Republic of China on Administrative Punishments. Some scholars' works, for instance, Zhang Hongsheng ed., *A Must-read for Maritime Administrative Law Enforcement*, Beijing: China Ocean Press, 2004, p. 172 (in Chinese), state that fundamental principles of maritime administrative punishments include the principle of legality, the principle of justice and transparency and the principle that "no one should be punished twice for the same cause" and etc. The principle that "no one should be punished twice for the same cause" incorporates, specifically, principles guaranteeing the rights of maritime administrative counterparts and allowing the blending of education with punishment. Another example is found in Teng Zuwen ed., *Maritime Administration*, Qingdao: Qingdao Ocean University Press, 2002, p. 252 (in Chinese). The editor maintains that fundamental principles of maritime administrative punishments include the principle of maritime administrative legality, the principle of maritime administrative justice and transparency, the principle of relief from maritime administrative punishments, the principle that "no one should be punished twice for the same cause", the principle of penalties proportionate to offense and the principle of a separate judge and executor in punishments. In Teng Zuwen, Peng Tan and Min Qingfang, On Maritime Administrative Punishments, *Ocean Exploitation and Management*, No. 6, 2002 (in Chinese), the authors also consider the principle that "no one should be punished twice for the same cause" fundamental in maritime administrative punishment laws. The authors believe that, compared with practical principles, fundamental principles in administrative punishment laws enjoy a higher status of providing guidance and, embedded in the legal spirit and awareness necessary for those who execute the law, they are usually represented, as well as implemented, by individual laws and regulations. Seldom used as legal references in legal cases, fundamental principles are less powerful in the sense of regulation. From this perspective, the principle that "no one should be punished twice for the same cause" resembles more, and is more fit to be taken as, a practical principle, and thus those authors' views demand further reflection and discussion.

the rights and obligations of both parties to reach a state of balance[33] and harmony.

Third, the principle that "no one should be punished twice for the same cause" constitutes an integral part of the administrative punishment system. The General Provisions of Law of the People's Republic of China on Administrative Punishments dwell mainly on the purpose, foundation and applicable range of the law. It also elaborates on the rights of affected parties in administrative punishments and several basic principles (mainly the principles of legality, of transparency and justice, of penalties proportionate to offense, of combining punishments with education and of the concurrent application of administrative punishment and civil or criminal liabilities). Specific Provisions of the Law, on the other hand, relate to the classification and establishment of administrative punishments, the organs for implementation, the jurisdiction over and application of administrative punishments, as well as decision-making and other relevant procedures.[34] The principle that "no one should be punished twice for the same cause" derives from some basic principles laid down in the General Provisions and represents a meaningful supplement to China's administrative punishment legislation. As an integral part of the legal system, its presence can render China's administrative punishment system more comprehensive and complete.

---

33 In administrative law studies, there exist various theories such as "the theory of management", "the theory of service", "the theory of legal governance by the government" and "the theory of balance". Professor Luo Haocai from Peking University published his paper The Theoretical Basis for Modern Administrative Laws – On the Balance of Rights and Obligations between Administrative Organs and Counterparts on *China Legal Science*, No. 1, 1993 (in Chinese), arousing interest in and attention to "the theory of balance". This school contends that administrative laws develop along with the process of eliminating imbalances in rights and obligation between administrative organs and counterparts, and the existence of certain imbalances in legal relations is to achieve a balance on the whole in administration between the two parties. When it comes to legal means to achieve a balance of rights and obligations, "the theory of balance" advocates a fair allocation of rights and balance in legislation, promoting democracy and justice in law enforcement, lessening the color of forcefulness (order and obedience) through adopting milder administrative means such as administrative contracts and guidance, establishing an administrative litigation system which guarantees civil rights and supervising and maintaining administrative authority. Comments on and arguments about "the theory of balance" can be seen in Yang Jiejun, Analysis of Several Theories about the Theoretical Basis of Administration, *Peking University Law Journal*, No. 2, 1996 (in Chinese); Lyu Taifeng, An Attempted Analysis of the Second Reform of Administrative Legislation, *Academic Journal of Zhengzhou University*, No. 6, 1995 (in Chinese); Xiao Xia, On the New Rule of Administrative Law, *Translations and Comments Concerning Foreign Laws*, No. 2, 1996. (in Chinese)

34 *The New Encyclopedia on the Conventional Laws and Regulations of the People's Republic of China*, Beijing: China Fangzheng Press, 2000, p. 341. (in Chinese)

III. The Applicability of the Principle that "No One Should Be Punished Twice for the Same Cause" to Maritime Administrative Punishment

A. The Principle that "No One Should be Punished Twice for the Same Cause" is One of the Most Important Principles in China's Maritime Administrative Punishments

Legal principles are considered fundamental truths of legal systems, serving as bases or sources of other legal rules.[35] Legal principles reflect one's understanding of flexibility of laws, enhance the acceptability of laws in civil society and highlight the purpose of legislation. The basic principle of maritime administrative punishments, as a kind of basic code of conduct, provides general guidance in the determination and implementation of maritime administrative punishments. The basic principle of maritime administrative punishment originates from two factors: one being practices and legal precedents in maritime administrative punishment and the other being superior principles, which, to be specific, refer to basic principles defined in the Constitution of the People's Republic of China, China's Administrative Law and the Law of the People's Republic of China on Administrative Punishments, as well as other laws and regulations.[36]

The Law of the People's Republic of China on the Administration of the Use of Sea Areas constitutes the fundamental norms guiding the management on the use of sea areas. It sets out some provisions related to functional marine zones, application for and examination and approval of the use of sea areas, the right to and fees for the use of sea areas, supervision and inspection mechanisms and other basic regimes. Specific punishments are laid down for illegal acts including illegally occupying sea areas, approving the use of seas illegally or beyond the limits of one's authority, interfering with or obstructing the lawful use of sea areas by the holder of the right to use that area, continuing to use a sea area without following the relevant formalities at the expiration of the period of the right to use the sea

---

35 Chen Jinzhao ed., *The Science of Law*, Beijing: Peking University Press, 2002, p. 86. (in Chinese)

36 Legal principles can not only be concluded from individual cases but can also be deduced from more abstract upper values. This is no exception to the principle that no one should be punished twice for the same cause in China.

area, changing the purposes for which a sea area is used without authorization, failure by the original right holder to dismantle the facilities and structures for the use of the sea area in accordance with the law at the time of the termination of the right to the use, failure to pay the fees for the use of sea area on schedule, refusing to allow the supervision and inspection by the department in charge of maritime administration or refusing to give a truthful report or provide relevant information. It is thus can be said with safety that the Law of the People's Republic of China on the Administration of the Use of Sea Areas constitutes a widely applicable, thoroughly oriented and relatively superior legal document which represents the important principle that "no one should be punished twice for the same cause" in China's maritime administrative punishments.

China's Implementing Measures for Maritime Administrative Punishments was reviewed and adopted at the sixth ministerial meeting of the Ministry of Land and Resources on 12 December 2002. The Measures defines the functions and responsibilities held by Chinese maritime supervision organs in imposing administrative punishments and establishes standardized procedures for such punishments, ensuring legitimized and effective implementation of maritime administrative punishments. The promulgation of the Implementing Measures for Maritime Administrative Punishments bears great significance in enhancing maritime governance, improving supervision on maritime law enforcement and promoting administration by law. The Measures mainly embodies the principle of legality, the principle of effectiveness, the principle of transparency and justice and the principle of "penalties proportionate to offense" in maritime administrative punishments. Besides, the principle that "no one should be punished twice for the same cause" also stands as an important one incorporated in the Measures.

Moreover, maritime laws, regulations and rules such as the Marine Environmental Protection Law of the People's Republic of China, the Provisions of the People's Republic of China on the Administration of Foreign-Related Maritime Scientific Research and the Administrative Measures for Managing Marine Natural Reserves, the Provisions Governing the Laying of Submarine Cables and Pipelines, all incorporate the principle that "no one should be punished twice for the same cause".

B. Analysis of the Reasons for the Principle that "No One Should Be Punished Twice for the Same Cause" Being Important in Maritime Administrative Punishments

From a jurisprudential perspective, the reasons for the principle that "no one should be punished twice for the same cause" being important in maritime administrative punishments are as follows.

First, it is a requirement of the principles of honesty and credibility and of legitimate expectation.[37] The principle of honesty and credibility, originating from the Roman Code,[38] is common in private laws such as the law of contract and the law of obligations as a supplement to the intention of the parties involved. It is in essence the legalization of moral codes, requiring that we treat others as we want to be treated and fulfill our obligations.[39] Article 8 of China's Administrative Permission Law takes the initiative to establish the principle of legitimate expectation in Chinese legislation: "administrative permission obtained by citizens, corporations and other organizations in accordance with the law is protected by law and no administrative body is free to make alterations to such permission once it has taken effect." The principle of legitimate expectation applies mainly to cases where a beneficial administrative act is to be revoked. As such revocation will impair the involved administrative counterpart's interest, the considerations should include compensating the loss that has been suffered or will be suffered by the administrative counterpart for trusting the administrative subject.[40] The principle that "no one should be punished twice for the same cause" demonstrates a moral code to be complied with in the relations between the public and the State. The affected party believes that the State will not impose a second penalty for the same unlawful act; otherwise the principles of honesty and credibility and of legitimate expectation are violated.

---

37 The principle of legitimate expectation is widely recognized and applied in the administrative legal practice in many countries after the Second World War. Its rise follows the internal requirement of administrative ethics and the ideal of responsible government. In modern countries, no matter whether it is the exercise of power or the fulfillment of obligation, it is necessary not to harm the other party's expectation. According to this principle, if, after deliberate consideration of lawfulness and stability, and of public interests and personal interests, there is an expectation worth protecting, the administrative body must not revoke the illegal administrative action unless reasonable compensation has been given.

38 Shen Weixing ed., *Science of Civil Law*, Beijing: Peking University Press, 2003, p. 37. (in Chinese)

39 Liang Huixing, The Principle of Honesty and Credibility and Unattended Factors, in Liang Huixing ed., *Civil and Commercial Law Review (Vol. 2)*, Beijing: Law Press China, 1994. (in Chinese)

40 Meng Hongzhi ed., *Science of Administrative Laws*, Beijing: Peking University Press, 2002, p. 62. (in Chinese)

Second, it is a requirement in order to maintain the involved party's interests and to supervise administrative subject's exercise of its functions and powers. Article 1 of the Law of the People's Republic of China on Administrative Punishments, 1996, confirms that promoting effective administration, maintaining public interest and social order and protecting the legitimate interest of citizens, corporations and other organizations are the goal and purpose of its establishment.[41] On one hand, the law grants the administrative subject power to maintain social order and public interest; on the other, such power needs to be supervised and restrained, because it is inclined to deteriorate, become unduly extensive and thus impede individual rights. It also poses a challenge to the legislative purpose when it comes to the maritime administrative organs' response to a case where an unlawful act violates more than one law, regulation or rule at the same time.

Third, it is a requirement of proportionality and consideration. The principle of proportionality, the overriding norm in administrative law, emphasizes that the implementation of public power should be proportional to the purpose of administration.[42] For maritime administrative counterparts, their legal liabilities arising from their illegal acts should be tolerable, as disproportionate punishments will inevitably cause injury to them. Meanwhile, punishment suffered by maritime administrative counterparts is considered a payment for their faults. Taking personal freedom and human dignity into consideration, the State cannot initiate another round of punishment, rendering individuals victims of the State's power.

C. The Principle that "No One Should Be Punished Twice for the Same Cause" Effectively Solves the Problem of Multiple and Repeated Punishments in China's Maritime Management

---

41 Article 1 of Administrative Permission Law: "In order to regulate the establishment and implementation of administrative licenses, to protect the legitimate rights and interests of citizens, corporations and other organizations, to safeguard public interests and social order, to ensure and supervise the effective implementation of administrative management, the Law is formulated in accordance with the Constitution."

42 The principle of proportionality has not yet been included in China's administrative legislation as a legal term, but with administrative law theories ever improving and perfecting and the practice of administration encompassing ever more activities, this principle deserves to be given more thought in China's administrative legislation. In fact, the principle of proportionality has been incorporated into legal documents in many foreign countries, for instance, the German Federal Law on Administrative Procedures clearly establishes the principle of honesty and credibility, the principle of proportionality, the principle of legitimate expectation, the principle of public benefit, the principle of definiteness, the principle of equality and etc..

1. Forms of Punishment in China's Maritime Administration

Articles 42 to 51, Chapter 7 of the Law of the People's Republic of China on the Administration of the Use of Sea Areas specifically sets out the liabilities of administrative counterparts and maritime administrative organs.[43] Article 41 of the Implementing Measures for Maritime Administrative Punishments provides that "a serious maritime violation refers to any of the cases of maritime administrative punishments as described below: a) ordering the cessation of a submarine operation for the laying of submarine cables and pipelines that has been approved, ordering the cessation of foreign-related maritime scientific research activities that have been approved, ordering the cessation of the construction or production or use of maritime construction projects that have been approved, and ordering the cessation of any other operation that has been approved; b) canceling a permit for dumping wastes into the sea; c) revoking a certificate to use sea areas and withdrawing the right to use sea areas; d) imposing a maritime administrative punishment such as a fine of more than 5,000 yuan upon a natural person or a fine of more than 50,000 yuan upon an entity, etc.[44] To conclude, the forms of China's maritime administrative punishment are as follows:

a. Admonition Punishment

This includes warning and circularized criticism. Warning refers to a form of maritime administrative punishment which does harm to the administrative counterpart's reputation when a relatively minor unlawful act is conducted with no real harmful consequences produced. Circularized criticism, on the other hand, is given by the maritime administrative authorities in written form, pointing out the illegal act, denouncing and giving warnings against future attempts. This kind of punishment can be found in Article 85 of the Marine Environmental Protection Law of the People's Republic of China and Article 20 of the Provisions Governing the Laying of Submarine Cables and Pipelines.

b. Property Punishment

This includes imposing fines, confiscating property and ordering monetary or material compensation. A fine is a punishment imposed on the offender by the maritime administration in the form of the payment of certain amount of

---

43 Bian Yaowu, Cao Kangtai and Wang Shuguang eds., *Interpretations of Law of the People's Republic of China on the Administration of the Use of Sea Areas*, Beijing: Law Press China, 2002, pp. 129~131. (in Chinese)

44 Zhang Hongsheng ed., *A Must-read for Maritime Administrative Law Enforcement*, Beijing: China Ocean Press, 2004, p. 423. (in Chinese)

money. Stipulations about the amount of fines in legislation include the following instances: providing both upper and lower limits, e.g. Article 46 of the Law of the People's Republic of China on the Administration of the Use of Sea Areas: "… and he shall also be fined not less than 5 times but not more than 15 times the fees payable for the sea area during the period for which the purpose of the use of the sea area is illegally changed"; providing only an upper limit, e.g. Article 45 of the Law of the People's Republic of China on the Administration of the Use of Sea Areas: "…and may also be fined not more than RMB 10,000 yuan"; taking a certain amount as the base number, e.g. Article 91(2) of the Marine Environmental Protection Law of the People's Republic of China: "…, but should not exceed 300,000 yuan". Confiscation constitutes a form of punishment through which the maritime administration expropriates illegally acquired property and possessions of offenders. For instance, Article 42 of the Law of the People's Republic of China on the Administration of the Use of Sea Areas: "…illegally occupied sea areas shall be returned and restored to their original state".

c. Behavior Punishment

This involves the maritime administration restricting or forbidding the guilty parties from taking certain action, such as ordering the cessation of construction or production, and revoking or withholding certificates. Ordering the cessation of construction or production is a kind of maritime administrative punishment imposed on maritime administrative counterparts by maritime administrative authorities according to the law, forbidding them from carrying out engineering construction, operation or production or exploiting the marine areas for a certain period of time or for good. This kind of punishment can be found in the following legal provisions. Ordering the cessation of approved maritime engineering construction, operation or use is provided under the Marine Environmental Protection Law of the People's Republic of China. The Provisions Governing the Laying of Submarine Cables and Pipeline include provisions for ordering the cessation of approved activities for laying submarine cables and pipelines. The Provisions of the People's Republic of China on the Administration of Foreign-Related Maritime Scientific Research include provisions for ordering the cessation of approved foreign-related maritime scientific researches.[45]

Revoking or withholding certificates refers to the fact that maritime adminis-

45 The articles can be found in Zhang Hongsheng ed., *A Must-read for Maritime Administrative Law Enforcement*, Beijing: China Ocean Press, 2004. (in Chinese)

trative authorities may rescind or withhold, according to the law, maritime administrative counterparts' certificates granting them the right, or qualifying them, to perform certain activities. For instance, Article 46 of the Law of the People's Republic of China on the Administration of the Use of Sea Areas: "If he refuses to rectify the situation, the people's government that issues the certificate giving the right to use the sea areas shall revoke the certificate and the right to use the sea areas."

d. Other Means of Punishment Laid Down by the Law such as Administrative Detention, Re-education through Labor

For example, Article 12 of the Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China provides that "the People's Republic of China may, in the exercise of its sovereign rights to explore its exclusive economic zone and to exploit, conserve and manage the living resources there, take such necessary measures as visit, inspection, arrest, detention and judicial proceedings in order to ensure that the laws and regulations of the People's Republic of China are complied with".[46]

2. Several Cases of China's Maritime Administrative Punishment in Which the Principle that "No One Should Be Punished Twice for the Same Cause" Plays a Substantial Role

a) A maritime administrative counterpart violates a law, maritime administrative regulation or rule, which says nothing about double penalties. In this case, the administrative punishment must comply with the principle that "no one should be punished twice for the same cause".

b) A maritime administrative counterpart violates a law, maritime administrative regulation or rule, which admits double penalties (for instance, confiscation can be ordered as well as fines, or fines as well as revocation of licenses), then the principle that "no one should be punished twice for the same cause" is not applicable.

c) When a maritime administrative counterpart violates more than one law, maritime administrative regulation or rule, more than two punishments can be imposed upon the violator. But he can only be asked to pay one fine, with other punishments being the revocation of licenses, ordering the cessation of construction or production or the confiscation of illegally acquired possessions.

---

46 *A Selective Collection of Maritime Laws of the People's Republic of China*, Beijing: China Ocean Press, 2001, p. 13. (in Chinese)

d) When a maritime administrative counterpart violates one or more laws, maritime administrative regulations or rule and the act constitutes a crime, the maritime administrative authorities should hand the case over to the judicial organs to investigate criminal responsibility. If the maritime administrative authority handling the case, considers a maritime administrative punishment necessary, it is also applicable. When the people's court orders a fine, however, a corresponding amount should be deducted from the final payment if another fine has already been paid in accordance with the maritime administrative authority's decision.

3. Exceptions in Applying the Principle that "No One Should Be Punished Twice for the Same Cause" in Maritime Administrative Punishments

a. Analysis of the Reasonability of the Existence of Such Exceptions

As discussed above, the principle that "no one should be punished twice for the same cause" is fully respected and represented in maritime administrative punishments and it plays an instrumental role in handling all sorts of problems in China's maritime administrative punishments. Unfortunately, however, a majority of China's judicial theorists is reluctant to admit such legal principles as fundamentals of administrative law.[47] Maritime laws, regulations and rules such as the Law of the People's Republic of China on the Administration of the Use of Sea Areas, the Marine Environmental Protection Law of the People's Republic of China, the Provisions Governing the Laying of Submarine Cables and Pipeline and the Provisions of the People's Republic of China on the Administration of Foreign-Related Maritime Scientific Research all fail to include the principle that "no one should be punished twice for the same cause" in their texts, nor do they specify the applicable conditions or ranges of this principle. Thus the theory we are developing now is nothing but a presumption and derivative of this principle. For this reason, in practice, flexibility should be displayed in dealing with real cases, and, under the guidance of the Scientific Outlook on Development, the purpose

47 In the book *The Origin of China's Administrative Laws: Review and Restatement(I & II),* Ying Songnian and He Haibo compare twelve different legal textbook on administrative laws in China, including: Luo Haocai ed., *Science of Administrative Laws*, Beijing: China University of Political Science and Law Press, 1996 (in Chinese); Ye Bifeng, *Science of Administrative Laws*, Wuhan: Wuhan University Press, 1996 (in Chinese); Wang Lianchang ed., *Science of Administrative Laws*, Beijing: China University of Political Science and Law Press, 1997 (in Chinese); Fang Shirong ed., *Administrative Law and Law of Executive Accusation*, Beijing: China University of Political Science and Law Press, 1998 (in Chinese) and etc. It is found that a consensus has been reached about the origin of administrative law, that is, fundamental principles do not become principles of administrative law. In fact, the reverse situation may lead to confusion between legal origins and legal regulations.

and spirit of the legislation should be reflected on a more comprehensive level to realize the multiple values of law at minimum cost, promoting reasonable use of marine resources, as well as sustainable development of the marine economy. Here particular attention should be paid to exceptions in applying the principle that "no one should be punished twice for the same cause" in maritime administrative punishments.

It is noteworthy that there are good reasons for such exceptions to exist. First of all, from an objective perspective, the principle that "no one should be punished twice for the same cause" is restricted. For instance, as different administrative bodies are in charge of different administrative sectors, sticking with the principle that "no one should be punished twice for the same cause" in case of legal concurrence is likely to impede the full performance of different administrative bodies' sanctioning functions. Moreover, some punishments established by legislation in China, such as ordering the cessation of construction or production serve the purpose, apart from disciplinary sanction, of crime prevention, in which case applying the principle that "no one should be punished twice for the same cause" may hinder this purpose.[48] Second, the principle that "no one should be punished twice for the same cause" in continental law system represents, more than anything else, the *res judicata* of the verdict and it is only applicable when the verdict has taken effect, which means that neither should legal proceedings be instituted against the defendant again nor shall the defendant be tried for a second time afterwards. However, verdicts can be fallible: the innocent may be declared guilty or criminals not convicted; a person committing a demeanor may be declared as committing a felony. If this is the case, should the convictions be quashed and how to quash them? An unconditional insistence on the principle that "no one should be punished twice for the same cause" for the sake of *res judicata* will mean that the authority of the law will lead to even more injustice, which runs against the original intention of applying the principle that "no one should be punished twice

48 Wei Heping, An Analysis of the Principle that "No One Should Be Punished Twice for the Same Cause", at http://www.jcacc.com, 22 November 2005 (in Chinese). The author points out that offenders may get away without due punishment if the principle of once only punishment is abided by unconditionally, while, on the other hand, the administrative counterparts' legitimate rights are at risk, fairness and legitimacy impaired, and the reputation of administrative organs blemished if administrative organs which have judicial power over one unlawful act are allowed, without discretion, to impose more than one punishment. This is exactly why an analysis is needed to base on different situations where an unlawful act violates one or more laws.

for the same cause" - to protect the rights of the defendant.[49] Third, the principles of honesty and credibility, of proportionality and of consideration, are not absolutely supreme.[50] When they are in contradiction to other cherished legal values (including the principle of justice, order, freedom and equality), a balance of interest should be made to reach the wisest decision. Therefore, the principle that "no one should be punished twice for the same cause" does not deserve absolute obedience. Fourth, the principle that "no one should be punished twice for the same cause" is also referred to in criminal and civil proceedings. For instance, establishing the mechanism of retrial proves to be rather helpful in coordinating the contradiction between legal stability and the variety of real life. Fifth, similar provisions are also found in foreign legal documents. For example, Article 19 of Germany's Law on the Contravention of the Order (*Gesetz über Ordnungswidrigkeiten*) stipulates that "only one punishment can be imposed when a single act violates multiple laws or one law for several times. The supreme law should be applied when more than one law is broken. The violator should be kept informed if there is any additional punishment required by other laws." Article 22 of Austria's Administrative Penal Code (1950) goes as far as providing that "penalties should be imposed separately if an administrative defendant violated more than one laws with different acts or a single act can lead to conviction for multiple crimes."

b. Exceptions in Applying the Principle that "No One Should Be Punished Twice for the same Cause" in Maritime Administrative Punishment

First, administrative punishments and criminal penalties coexist. When an administrative counterpart violates not only laws, maritime regulations or rules but also the penal code, the principle that "no one should be punished twice for the same cause" is no longer applicable. For instance, Article 51 of the Law of the People's Republic of China on the Administration of the Use of Sea Areas stipulates that "Where the department in charge of marine administration under the State Council or under the people's government at or above the county level issues a certificate giving the right to use sea areas in violation of the provisions of this Law, or fails to conduct supervision after issue of the certificate, or fails to investigate and deal with the illegal activities it discovers, the persons directly

---

49 Qiu Huiling & Huang Wenqing, The Principle that No One Should Be Punished Twice for the Same Cause and China's Criminal Retrial System, at http://www.studa.net/xingfa/04/012/113619.html, 12 October 2004. (in Chinese)

50 Zhu Xinli, On the Principle that "No One Should Be Punished Twice for the Same Cause", *Science of Constitutional and Administrative Law*, No. 2, 2002. (in Chinese)

in charge and the other persons directly responsible shall be given administrative sanctions in accordance with law. The persons who engage in malpractice for personal gain, abuse their powers or neglect their duties, which constitute crimes, shall be investigated for criminal liability in accordance with law." According to the Interpretation of the Law of the People's Republic of China on the Administration of the Use of Sea Areas,[51] an administrative punishment can only be given when no crime is constituted. When a maritime administrative counterpart breaks both administrative laws and the penal code, such as engaging in malpractice for personal gain, abusing their powers or neglecting their duties, as mentioned above, maritime administrative authorities should hand the case over to judicial organs to investigate for criminal liability in accordance with law. Maritime administrative authorities can, as might be expected, order extra administrative punishments such as fines, confiscation of illegally acquired possessions and revocation of certificates.

Second, maritime administrative authorities order new administrative punishments. If the maritime administrative authority handling the case, finds its previous decision unjustified and proceeds to withdraw it in accordance with law, or the order to pay an administrative fine is vetoed by superior maritime administrative organs or by the people's court and a different administrative decision is demanded, the maritime administrative authority can order a new punishment. Under this circumstance, the principle that "no one should be punished twice for the same cause" is not considered flouted.

Third, two or more legal facts occur in a single case. The principle that "no one should be punished twice for the same cause" is only applicable when the parties, facts and reasons, and claims involved in the case are identical. When a new legal fact arises or more than one legal fact is found in a single case, the maritime administrative organs may make decisions on punishments based on different legal facts without defying the principle that "no one should be punished twice for the same cause".

Fourth, a single unlawful act involves more than one person. This includes the following three situations. First, an unlawful act conducted jointly will incur different administrative punishments and all involved can be punished separately; second, additional decisions on punishment can be made, in accordance with

51 Bian Yaowu, Cao Kangtai, Wang Shuguang eds., *Interpretations of Law of the People's Republic of China on the Administration of the Use of Sea Areas*, Beijing: Law Press China, 2002, pp. 115~117. (in Chinese)

different laws and regulations, on the basis of the severity or details of the violation and within reasonable limits even when a punishment has already been imposed by the maritime administrative organ; third, if administrative counterparts, with their various acts, commit a breach of different provisions in one law or regulation, the maritime administrative organ is allowed to make separate decisions on punishment and execute them concurrently.

Fifth, as to continuous and continued offenses, maritime administrative organs can order new administrative punishments against the unlawful act of the same kind when a discontinuance occurs in law. In this case, the previous punishment decision does not constitute a flouting of the principle that "no one should be punished twice for the same cause".

IV. Lessons from the Principle That "No One Should Be Punished Twice for the Same Cause" in Maritime Administrative Punishment

A. The Cohesive Relationship between Maritime Administrative Punishments and Criminal Penalties

Maritime administrative punishments refer to a kind of administrative act of punishment conducted by maritime administrative departments when the person subject to management (including citizens, legal persons or other organizations, foreign organizations and individuals) violates maritime administrative regulations and yet this is not serious enough to be considered the commission of a crime.[52] In a maritime administrative punishment, the subject imposing such punishment is national maritime administrative bodies and the object receiving such punishment is citizens and organizations which have no affiliation with the national maritime administrative bodies. Such punishment always follows the fact that a maritime administrative regulation is violated, and is aimed at calling the violator to administrative account. As a part of inflicting administrative punishment, maritime administrative punishments show distinctions in terms of the nature, applicable

52 Zhang Hongsheng ed., *A Must-read for Maritime Administrative Law Enforcement*, Beijing: China Ocean Press, 2004, p. 75. (in Chinese)

targets, and penal means.[53] However, both being legal sanctions for illegal acts, they share a cohesive relationship in terms of the severity of violation and punishment. The penalty embodied in the principle that "no one should be punished twice for the same cause" includes both administrative punishment and criminal penalty. Since the latter is more severe and coercive than the former, national legislation often makes it clear that these two cannot replace each other in practice and the principle that "no one should be punished twice for the same cause" has aroused more reflections on the application of administrative punishments and criminal penalties.

First of all, Article 28 of the Administrative Punishment Law of China, in introducing the assimilating mechanism for the criminal penalty with the administrative punishment, stipulates that administrative detention can be used to reduce, according to the law, the term of imprisonment and fines may be used to reduce the penal sum. This is meant to avoid repeated applications of administrative punishments and criminal penalties, while its applicable range is limited to personal and property punishment that can be assimilated to similar kinds of criminal penalties. In cases where the norms applicable to administrative punishment and those applicable to criminal penalty are different, for example, revocation of licenses and suspension of business or production, no provision leading to cohesion is yet found. The principle that "no one should be punished twice for the same cause" makes the relation between administrative punishment and criminal penalty even subtler. Second, the principle that "no one should be punished twice for the same cause" leads maritime administrative authorities to give more thought to the application and timing of these two different punishments, which shows respect for the rights of administrative counterparts, representing a positive exploration of building a State with an adequate legal system.

B. The Current Status of China's Maritime Administrative Law Enforcement Subject

Implementing the principle that "no one should be punished twice for the same cause" inevitably involves the issue of maritime administrative law enforcement subject in China. Maritime administrative law enforcement subject

53 Meng Hongzhi ed., *Science of Administrative Laws*, Beijing: Peking University Press, 2002, p. 223. (in Chinese)

refer to any organizations that are legally granted administrative power to govern the oceans and can perform administrative law enforcement activities, according to the relevant maritime laws and regulations, on behalf of the State and in its own name, and take the legal responsibility arising therefrom.[54] Thus it is obvious that maritime administrative subject is only qualified to impose administrative punishment when it is a body performing external administrative functions and is also legally granted the authority to impose such punishment.[55] According to the Law of the People's Republic of China on the Administration of the Use of Sea Areas, the Maritime Environmental Protection Law of the People's Republic of China and other maritime laws, maritime administrative departments at all levels are granted the power of administrative penalty, which means that the Chinese maritime surveillance bodies, which are affiliated to the maritime administrative departments, qualify as maritime administrative law enforcement subject. To this end, the State Oceanic Administration issued paper No.3 on Notifications about Chinese Maritime Surveillance Bodies' Collective Performance of Maritime Administrative Punishment. In the same year, the Ministry of Land and Resources issued the Implementing Measures of Maritime Administrative Punishment,[56] which states clearly that China's maritime surveillance bodies are in charge of performing maritime administrative punishments. China's maritime surveillance team, organized by the national maritime administrative departments, enforces maritime administrative laws. Governed by the State Oceanic Administration, it has set up maritime branches in three main oceanic areas, namely the northern, eastern and southern sea areas, and has different levels of branches in provinces, cities and counties.

At present, China's maritime surveillance team is, instead of an administrative

---

54 Teng Zuwen, Peng Tan and Min Qingfang, On Maritime Administrative Punishments, *Ocean Exploitation and Management*, No. 6, 2002. (in Chinese)

55 Zhang Huirong ed., *A Case Assembly of Maritime Administrative Law Enforcement (I)*, Beijing: China Ocean Press, 2006, p. 36. (in Chinese)

56 Article 3 of the Implementing Measures for Maritime Administrative Punishments: The department of maritime administration of the people's government at various levels above the county level is in charge of enforcing maritime administrative punishments according to law (hereafter referred to as "enforcing organ"). Where a maritime supervision section is established within the enforcing department, the work of maritime administrative punishments shall be specifically undertaken by the Chinese maritime supervision section affiliated thereto. Where no maritime supervision section has been established therein, the work shall be implemented by the maritime administration department on the same level. The Chinese maritime supervision organs enforce maritime administrative punishments in the name of the maritime administration department on the same level.

department subordinate to the State Oceanic Administration or a legally authorized organization, a public institution. In administrative punishment procedures, it functions in the name of an administrative authority, which supervises its branches' administrative actions as well as takes the legal responsibilities arising therefrom. Articles 18(2) & (3) of the Law of the People's Republic of China on Administrative Punishments stipulate that "the entrusting administrative organ shall be responsible for supervising the imposition of administrative penalty by the entrusted organization and shall bear legal responsibility arising from the imposition". "The entrusted organization shall, within the scope of authorization, impose administrative penalty in the name of the entrusting administrative organ, and may not further entrust any other organization or individual with imposing the administrative penalty." As can be seen, China's surveillance team, as an entrusted organization, cannot take legal responsibility on its own and thus further clarification of its punishment and governance range, and the limits of its power and status is needed.

C. Detailed Analysis of the Power of Punishment Enjoyed by Multiple Administrative Organs against a Single Unlawful Act

It is also common that a maritime administrative counterpart violates a law or maritime administrative regulation and is, as provided, supposed to be punished by two or more administrative organs. For example, when a party conducts illegal sea sand mining with no assessment or an unapproved assessment or without license to use sea areas, both administrative departments in charge of the management of sea area use and departments in charge of mineral resources can, according to Article 12 of the Interim Measures for the Assessment Management of Sea Area Use and

Sand Exploitation,[57] impose administrative punishments against the party involved. Though it seems to be complicated when it comes to deciding upon the specific kind of punishment, the ultimate principle is that decisions should be made on the basis of specific kinds of administrative punishments. Since the types of China's maritime administrative punishments have been listed above, the analysis below is made of this particular case and about two different situations to decide whether the administrative punishments are of the same kind or not.

Situation one: a maritime administrative counterpart violates a law, a maritime administrative regulation or rule, and is, as provided, supposed to be punished by two or more administrative organs with the same kind of punishment. Take the above case of illegal sea sand mining as an example, although both administrative organs have the power of punishment, they cannot, according to the principle that "no one should be punished twice for the same cause", order fines separately and instead, only one punishment can be decided, generally by the authority which looks into the illegal acts first. In theory, when disparity is found in the amount of fine ordered by an administrative department in charge of the management of sea area use and a department in charge of mineral resources, however, it is worth discussing which one should be adopted.

Situation two: a maritime administrative counterpart violates a law, a maritime administrative regulation or rule, and is, as provided, supposed to be punished by two or more administrative organs with different kinds of punishments. Again take the above case of illegal sea sand mining as an example, the maritime administrative authority may order a fine while the department in charge of mineral resources management decides to revoke the violator's exploitation license. In this case, since both punishments are justified within the two administrative organs' range of powers, there is no violation of the principle that "no one should be

---

57 Article 12 of the Interim Measures for the Assessment Management of Sea Use and Sand Exploitation: exploitation without or with unapproved assessment or without a license for the use of the maritime area will be punished, according to the Law of the People's Republic of China on Mineral Resources and Interim Measures for the Assessment Management of Maritime Use and Sand Exploitation. What is noteworthy is that, since the Interim Measures for the Assessment Management of Maritime Use and Sand Exploitation has been replaced by the Law of the People's Republic of China on the Administration of the Use of Sea Areas, and the "national license for the use of the maritime areas" has changed to "certificate for the right to use maritime areas", the Interim Measures are in urgent need of revision. In the practice of managing sea sand, however, administrative sectors in charge of both use of maritime areas and mineral resources have the authority to perform administrative punishments.

punished twice for the same cause".

In a word, the principle that "no one should be punished twice for the same cause", a time-honored law principle, has been preserved to this day due to the multiple orientation of the modern function of lawsuits. It is necessary and scientific as it represents the pursuit of values and ideals of nature, justice and governance by law.[58] To see the evolvement of mankind's legal systems as a whole, all systems that truly represent the "good faith and justice"[59] of law are established for this purpose. Also we have observed that with the development of society, to confirm, coordinate, approve, encourage, stimulate and promote social and economic development has become an increasingly important goal of legislation.[60] What is more important is that the valued purpose of modern lawsuits is not restricted in punishing and controlling unlawful acts, but extends to the protection of human rights. That is to say, the exercise of the State's power should not come at the expense of impairing individual rights and the procedures should be given further consideration so as to be as economical as possible. The principle that "no one should be punished twice for the same cause" gains its objective of protecting human rights and realizing the economic value of lawsuits through reasonable restrictions upon the State's power. In the theory and practice of maritime administrative law enforcement, further researches should be carried out to fully comprehend and improve the principle, so as to provide more comprehensive, better grounded and operable theoretical guidance to maritime administrative law enforcement and punishments for China.

Translator: LIU Ying
Editor (English): Chris Whomersley

---

58 Li Xiaoqiu, How to Understand the Principle that "No One Should Be Twice Punished for the Same Cause" in China's Administrative Punishments, at http://www.hljda.gov.cn/show.aspx?newsid=46608Ltypeid=26, 21 February 2006. (in Chinese)

59 Yang Zhenshan, Sandro Schipani eds., *DIRITTO ROMANO, DIRITTO CINESE E CODIFICAZIONE DEL DIRITTO CIVILE*, Beijing: China University of Political Science and Law, 2001. (in Chinese)

60 Théoddre Dézamy, translated by Huang Jianhua and Jiang Yazhou, *Code de la Communaute*, Beijing: The Commercial Press, 1982, p. 225. (in Chinese)

Research on Principles and Methods of the Interpretation of Maritime Law

GUO Ping*

Abstract: Maritime law, as *lex specialis* of civil law, is characterized by its foreign-related, specialized, technical and special-risk nature. Generally speaking, maritime law of China may be considered as a well-established legislation. However, certain provisions are drafted in reference to common law system and international conventions. In addition, some provisions under such international conventions have been misunderstood. This has caused problems and conflicts, which have been reflected in maritime and admiralty judicial practice. So far, works regarding interpretation of maritime law are rare. The article analyzes the basic principles and concrete methods that the interpretation of maritime law shall follow, taking into account the principles and rationale of civil law interpretation and special characteristics of maritime law.

Key Words: Maritime law; Principles of interpretation; Methods of Interpretation; Legal interpretation

I. Introduction

The Maritime Law of the People's Republic of China (hereinafter "the Maritime Law") has been in force for 13 years, since its implementation on 1 July 1993. The promulgation of the Maritime Law not only symbolizes the formation of the special legal system regulating the maritime transport relationship and ship relationship, but also constitutes a vital milestone in the history of the development of shipping industry of China. The promulgation of the Maritime Law is also of

---

* GUO Ping, Doctor of Laws, Professor and Master Supervisor at Law School of Dalian Maritime University. The article is part of the research results of the project "Research on Basic Theoretical Issues of Chinese Maritime Law" (No. 02SFB1016) funded by the Ministry of Justice.

significance to promoting the development of Chinese maritime adjudication. As *lex specialis* of civil law,[1] the Maritime Law has its own characteristics, mainly reflected in the following aspects: first, the Maritime Law is of highly foreign-related nature. This nature finds its expression in both the formation of the law which has incorporated and invoked international conventions and international usages as well as the foreign elements of the objects under its regulation. Besides, the Maritime Law applies not only to foreign ships in Chinese sea areas, but also Chinese and foreign ships in foreign sea areas. Secondly, the Maritime Law is highlighted by its highly specialized and technical characters. Since the Maritime Law involves maritime transport relationship and ship relationship, it would inevitably touch upon ships, crews, navigation, freight transport, shipping management and other expertise and techniques. Third, it has special risks. Maritime transport faces special risks for particular reasons, which consequently results in the formation of some special legal regimes, including the regimes for limitation of liability for maritime claims, mortgage of ships, maritime liens, security of maritime claim, salvage at sea and general average; these regimes could not be found in other fields of civil law.[2]

Despite that the Maritime Law is a well-established law which is reasonable, stable and clear,[3] at the time of drafting certain provisions, some concepts and content were derived from common law, while the civil and commercial law of China is based on statute law. In addition, legislators had a bit misunderstandings of some stipulations of the conventions, which resulted in ambiguity and vagueness of certain provisions of the Maritime Law; certain corresponding concepts or regimes cannot be found in basic civil law. This has caused problems and conflicts, which have been reflected in maritime and admiralty judicial practice. Therefore, interpretation of the maritime law is needed. So far, works regarding interpretation of maritime law is rare. The present article analyzes the basic principles and concrete methods that the interpretation of maritime law shall follow, taking into consideration of the principles and rationales of civil law interpretation and special characteristics of maritime law.

---

1 Si Yuzhuo et al., *New Edition of Maritime Law*, Dalian: Dalian Maritime University Press, 1999, p. 32. (in Chinese)

2 Si Yuzhuo et al., *New Edition of Maritime Law*, Dalian: Dalian Maritime University Press, 1999, p. 6. (in Chinese)

3 Si Yuzhuo et al., *New Edition of Maritime Law*, Dalian: Dalian Maritime University Press, 1999, pp. 34~36. (in Chinese)

II. Implication and Function of Legal Interpretation

Legal interpretation means the pursuit of true meaning of the law in order to clarify the meaning of legal provisions with reasonable methods, not necessarily obsessed by subjective views of legislators.[4] The purposes of legal interpretation lie in: first, to specify the meaning of the words. The meaning and purpose of the law can be more unequivocal through legal interpretation, which is the main function of legal interpretation. Second, to rectify sentences and wordings. Sentences and wordings of legal provisions are sometimes either too narrow or too broad and thus broadened or restrictive interpretation of the provisions is needed in order to conform to true meaning of the law. Third, to supplement meaning of the law. Since wording of legal provisions are normally rather abstract concepts, legal interpretation crystalizes its meaning to meet the requirements of practice.[5] The law cannot be applied without interpretation.[6]

Legal provisions can be interpreted either broadly or narrowly. Broad legal interpretation covers the narrow one, that is to say, interpretation for the specification of the content of legal provisions, also includes legal loophole supplement and value supplement for inconclusive legal concepts and general provisions.[7] Legal interpretation, in its narrow sense, refers to the behavior that competent State organs interpret wording and purpose of the law, in accordance with its legal authority and process and following certain standards and principles.[8] Subject to the research purpose, the article only probes into legal interpretation in narrow sense.

III. Methods of Legal Interpretation and Their Types

Scholars from different countries have classified methods of legal interpretation into different categories from various perspectives. For example,

---

4 Mei Zhongxie, *The Essentials of Civil Law*, Beijing: China University of Political Science and Law Press, 1998, p. 12. (in Chinese)

5 Mei Zhongxie, *The Essentials of Civil Law*, Beijing: China University of Political Science and Law Press, 1998, pp. 12~13. (in Chinese)

6 Wang Zejian, *Civil Law Theories and Case Studies*, Beijing: China University of Political Science and Law Press, 1998, p. 18. (in Chinese)

7 Liang Huixing, *Science of Interpreting Civil Law*, Beijing: China University of Political Science and Law Press, 2000, p. 209. (in Chinese)

8 Zhang Wenxian ed., *Jurisprudence*, Beijing: Law Press China, 1997, p. 374. (in Chinese)

from the perspective of interpreting means, Kaufman, a German scholar, has classified methods of legal interpretation into: literal or linguistics interpretation, ethnic or system interpretation, subjective or historical interpretation and objective or teleological interpretation. The Japanese scholar, Masami Ito, has divided the methods of legal interpretation into: literature interpretation, literal interpretation, broadened interpretation or restrictive interpretation, analogical interpretation or opposing interpretation and natural interpretation. A scholar from China Taiwan has classified the methods of legal interpretation into: literal interpretation and logical interpretation. Professor Liang Huixing, the scholar from China Mainland, has further subdivided the methods into: literal interpretation, logical interpretation, comparative interpretation and sociological interpretation. Among them, logical interpretation includes system interpretation, jurisdictional interpretation, broadened interpretation, restrictive interpretation, natural interpretation, teleological interpretation and constitutionalist interpretation.[9]

A hierarchical order does not exist among the methods of interpretation and more than one method should be applied in legal interpretation. This is because each of the methods has its own functions as well as limitations and one should not think in absolute terms. Several methods of legal interpretation shall complement each other and be used cooperatively in order to reach a reasonable interpreting result, solve disputes between the parties more reasonably and maintain justice of the law. Certainly, the methods of legal interpretation above have their internal relations. Mr. Wang Zejian has pointed out that, literal interpretation is the cornerstone of interpretation; only when clear meaning of the legal provisions fails to be confirmed by literal interpretation can other methods, including system interpretation, jurisdictional interpretation and teleological interpretation be adopted. If the methods of logical interpretation still fail to work out the meaning, comparative interpretation or sociological interpretation may be considered.[10]

As stated above, the Maritime Law is formulated based on existing international maritime conventions and the civil rules embodied in international maritime customs and practice. A great many of those conventions and rules originate from legal regimes under common law, which can be considered as a

---

9 Liang Huixing, *Science of Interpreting Civil Law*, Beijing: China University of Political Science and Law Press, 2000, p. 210. (in Chinese)

10 Wang Zejian, *Civil Law Cases Research – Basic Theories*, pp. 154!157, quoted from Liang Huixing, *Science of Interpreting Civil Law*, Beijing: China University of Political Science and Law Press, 2000, pp. 239~241. (in Chinese)

form of legal transplantation.[11] However, interpretation of legal provisions by this approach cannot be confined to simple comparison of legal provisions or regimes. The true meaning and background of foreign laws shall be understood and domestic laws cannot be substituted by directly invoking foreign laws. Meanwhile, consideration shall be given to the harmonization of the regimes of foreign laws and domestic laws; public policies and good morals of China and the basic spirit of the law cannot be breached. To support this contention, the words of Mr. Wang Zejian on the application of foreign legal precedents might be cited, i.e. "We cannot be confined to the concepts and terms in common law. The existence of certain rules, doctrines, or judgments under the law of the United States does not necessarily mean such rules, doctrines, or judgments have to be interpreted and applied in the same way in China. Rather, the method of interpretation shall enable the terms in common law to be incorporated in Chinese existing legal system and in consistent with current law. Law is an organism; parts shall reconcile to the whole for the purpose of realizing its function to regulation behaviors".[12] Consequently, the comparative interpretation serves a relatively prominent role.

IV. Basic Principles for Interpretation of Maritime Law

A. The Principle Corresponding to the Principles of Interpretation of Basic Civil Law

Maritime law belongs to *lex specialis* of civil law and thus general methods for interpretation of civil law also apply to maritime law. Besides, legal hermeneutics almost amounts to the theory of civil law interpretation. The methods of interpreting civil law can be universally applied. Therefore, methods of interpreting civil law constitute an important part and the basis of methods of interpreting maritime law.[13]

Moreover, maritime law finds its root in *Lex Oleron*, which is civil law. Judges

---

11 Zhang Wenxian ed., *Jurisprudence*, Beijing: Law Press China, 1997, p. 213, quoted from Liu Bing, Methods of Interpreting Maritime Law – Reflection of Special Characters of Maritime Law in the Practice of Interpretation, at http://www.ccmt.com.cn/hs/explore/exploreDetial.php? sId=256, 1 December 2006. (in Chinese)

12 Wang Zejian, *Civil Law Theories and Case Studies*, Beijing: China University of Political Science and Law Press, 1998, p. 18. (in Chinese)

13 Liu Bing, Methods of Interpreting Maritime Law – Reflection of Special Characters of Maritime Law in the Practice of Interpretation, at http://www.ccmt.com.cn/hs/explore/exploreDetial.php? sId=256, 1 December 2006. (in Chinese)

of maritime cases mostly conduct their judicial activities in accordance with relevant civil law. Consequently, general principles of interpreting civil law also apply to the interpretation of maritime law.[14]

In the treatises and works collected by the author in China concerning basic principles of interpreting civil law, Professor Zhang Wenxian has explicitly stated that, general principles of legal interpretation can be summarized as follows: (1) the principle of balancing the stability of the law and circumstances of the law, i.e. considering the stability and abstraction of the law simultaneously as well as the mobility and specificity of social activities; (2) the principle of examining historical background of legislation and conditions of judicial practice; (3) the principle of combining legislative intent with judicial purpose; and (4) the principle of reasonable distribution of the power to interpret legislation and the power to interpret judicial practice.[15] Besides the principles above, some scholars also opine that the basic principles of civil law also apply to its development, interpretation and execution.[16] Some scholars are even more explicit: "Basic principles of civil law are the criteria for interpreting and understating civil law. The application of any law cannot be separated from its interpretation and understating. Whether the understanding is correct or the interpretation is legal has to be measured by whether it is consistent with the basic principles. "[17]

Furthermore, according to the provisions in respect of basic principles under Chapter One of the General Principles of the Civil Law of China, some Chinese scholars have summarized the basic principles of civil law as: the principle of equal status of civil subjects, the principle of exchange at equal value, the principle of voluntariness and fairness, the principle of honesty and credibility and the principle of protecting civil rights by law.

Hence, the general principles of legal interpretation above and the basic principles of civil law are also applicable to the interpretation of maritime law. Additionally, the author notes that analyses regarding basic principles of interpreting contract law are comparatively intensive. While in maritime law, provisions on commercial contract occupy a considerable part, such as provisions

---

14 Prof. William Tetley, Q. C., Canadian Interpretation and Construction of Maritime Conventions, *R. G. D.*, Vol. 23, 1991, pp. 109~128.

15 Zhang Wenxian ed., *Jurisprudence*, Beijing: Law Press China, 1997, pp. 377~378. (in Chinese)

16 Tong Rou ed., *Chinese Civil Law*, Beijing: Law Press China, 1994, p. 22. (in Chinese)

17 Wang Liming ed., *Research on Chinese Civil Law Cases and Doctrines (General Principles Chapter)*, Beijing: Law Press China, 1998, p. 5. (in Chinese)

regarding contracts of carriage of goods by sea, contracts of carriage of passengers by sea, charter parties, contracts of sea towage, contracts of salvage at sea and contracts of marine insurance. Similarly, the author believes that the principles of interpreting contracts also apply to the interpretation of provisions in the maritime law relating to contracts. Principles of interpreting contracts generally include the principle of interpreting the terms and expressions as commonly understood, the principle of teleological interpretation, the principle of overall interpretation, the principle of customary interpretation, the principle of honesty and credibility and the principle *contra proferentem*.[18] The author will explain their application to maritime law on the basis of these basic principles.

1. The principle of interpreting the terms and expression as commonly understood, also known as the principle of "taking the literal meaning of contracts as a starting point, combining objectivism and subjectivism",[19] refers that a judge cannot interpret a contract according to the understanding of one party or the understanding of the drafter of the contract. A judge may only interpret a contract as a reasonable person. A reasonable person could be a person in the society, or a person who engages in particular transactions in a region or industry. In adopting this method of interpretation, attention shall also be paid to the confirmation of what belongs to the terms and conditions of contract. Because in the process of negotiating a contract, the parties may use contract notes, attachments, memorandums, letters, faxes, confirmation letter and other types of documents as well as advertisements published, all of which do not fall into the scope of the contract, such as "weather working day (WWD), Sunday holiday except (SHEX) and even if used (EIU)" and other terms usually employed in voyage charter party. According to the law of China, Saturday, Sunday and holidays are non-working days and thus even if the provision does not explicitly mention the exception of Saturday, in understanding this provision, Saturday shall be excluded from working days. Similarly, in understanding "even if used", Saturday shall be included.

2. The principle of teleological interpretation is to estimate the purpose of parties first. In accordance with the principle of *lex voluntatis*, the purpose of the parties to conclude a contract is to achieve the expected aim of the transaction and a contract is simply the means to achieve such purpose. This principle is of

---

18 Wang Liming, *Research on Civil and Commercial Laws (Vol. 5),* Beijing: Law Press China, 2001, pp. 384~403. (in Chinese)

19 Wang Liming & Cui Jianyuan, *New Theory of Contract Law – General Principles*, Beijing: China University of Political Science and Law Press, 1998, pp. 488. (in Chinese)

significance to the interpretation of contracts of sea towage and contracts of salvage at sea, i.e. dividing contracts by the purpose of the parties. For example, we should look into whether the object to be towed is in danger, if so, the contract concluded between the parties is a contract of salvage; if not, the contract signed between the parties is a contract of sea towage. Hence, whatever the title of the contract says, the type of a contract shall be determined by the purpose to carry out certain acts.

3. The principle of overall interpretation, also known as "system interpretation", means that various provisions and sections of a contract shall be considered as a whole. The meaning of a disputed provision shall be determined by the interconnection among each provision and each section of the contract, the relationship between the disputed provision and the contract as whole, the status of the disputed provision in the contract and other factors. For instance, a time charter party explicitly provides that charterer is obliged to afford and pay the fees of fuel oil and port charges. The contract also stipulates that when the agreed events take place, the charterer may suspend the payment of rent. But during the period of suspension, is the charterer still under an obligation to pay the fees of fuel oil and other costs? This depends on whether there are explicit provisions with regard to this problem, for example under the provisions of standard form of contract of NYPE'46, the leaser bears the burden of payment. Under this situation, the problem shall be solved by what the parties have agreed. However, if there is no such explicit provision as in standard form of contract of NYPE'46, the charterer is still obliged to pay the fees above following the interpretation under the context.

4. The principle of customary interpretation means that when the wordings or provisions of a contract is ambiguous, its meaning shall be determined by customary business practice; when the loophole of a contract has made the rights and obligations of the parties unclear, reference could be made to customary business practice. Customary business practice is the customary practice generally accepted by people at a particular time and place or in certain business, certain transaction relationship, which are not against public order and good morals. For instance, the rate of loading and unloading is clearly specified as Customary Quick Dispatch (CQD) in voyage charter party. The understanding of "customary" has to be interpreted with comprehensive consideration of the port affiliated, ship type, type of the cargo to be loaded or unloaded, package form of the cargo, machinery used for loading or unloading, sailing season of the ship and other factors usually affecting cargo loading or unloading. For instance, loading 10,000 tons of corn at the speed of 3,000 tons per hour at Port A and the speed at 1,000 tons per hour at

Port B does not necessarily mean the loading or unloading in Port B is inefficient or inconsistent with the contractual provisions.

5. The principle of honesty and credibility is a crucial basic principle in contract law, which also applies to contract interpretation. Especially in the field of supplementing contract loopholes, if the contract of the parties lacks provisions or the provisions are vague, interpretation shall be conducted from the perspective of a reasonable choice of a person with honesty and credibility.

6. The principle of *contra proferentem*, or the principle of against the beneficiary party, originates from "interpretation shall be against the drafter of the provision when it is under dispute" in Roman law. Similar provisions could be found in the Contract Law of China, but limited to standard form of contract. The author argues that this principle shall apply to all types of contracts. This is because from the perspective of interest balance, the drafter of contractual terms has given sufficient consideration of its interests at the time of drafting. On the other hand, in consideration of faults, the drafter has more obligations to check contractual terms at the time of drafting. In maritime practice, bill of lading is used as transport document in large quantity in cargo transportation contract. Since bill of lading is printed by the carrier in advance and normally the shipper cannot modify the form of such bill of lading, many scholars contend that the contracts evidenced by bills of lading falls into the scope of standard form contract as provided by the Contract Law of China. Consequently, the interpretation of terms contained in bill of lading shall follow this principle if the terms are unclear in order to protect cargo interests, including the shipper's interests. Besides, what cannot be ignored is that in charter parties, contracts of salvage at sea and contracts of sea towage, parties tend to choose standard contract formulated and recommended by international agencies in line with shipping customs and usage. However, the author does not consider such contract as standard form of contract under the Contract Law of China, since *lex voluntatis* could still be embodied during the process of negotiation and execution of the contract. It is just that parties adopt standard edition of contract for the purpose of saving time and efforts, which belongs to model contract form. Still, international organizations representing interests of different parties will inevitably view problems from a party's perspective and tend to protect interests of one party in formulating and drafting the contract. Therefore, the author argues, even if these contracts do not belong to standard form terms or contracts within the meaning of the Contract Law of China, the principle of *contra proferentem* shall still apply.

B. The Principle of Embodying and Highlighting Special Regimes of Maritime Law to a Limited Extent

The specificity of the regimes of maritime law is reflected in the following aspects: first, given the particular risk at sea, special legal regimes have been formed for a long time, including the regimes for limitation of liability for maritime claims, ship mortgage, maritime liens, security of maritime claim, salvage at sea, general average and etc. The interpretation of the regulations under these special legal regimes cannot indiscriminately imitate interpretation of the relevant regulations under Chinese civil law regimes; rather, consideration must be given to the background and historic reasons of the formation of these special regimes. For example, the Maritime Law provides that registration of ship mortgage should be effective against third parties, while in Chinese civil law, mortgage registration should be effective once the mortgage is registered. If interpretation of maritime law has to follow principles of civil law, it will cause legal disorder and conflict. Secondly, in comparison with other Chinese domestic laws, the Maritime Law of China, at the time of drafting and formulating, has made more references to international conventions and international customs. As pointed out by Prof. William Tetley, a Canadian professor, "since maritime law of various countries has learned much from international conventions, general principles of international treaty interpretation shall also be applied".[20] Moreover, since these international conventions and customs mostly originate from common law system, reference shall also be made to principles of interpretation of common law when interpreting their contents.

Article 31 of the Vienna Convention on the Law of Treaties provides general rule of interpretation of treaties and Article 32 provides supplementary means of interpretation of treaties. General rule of interpretation under Article 31 can be summarized as follows: first, any international treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Secondly, in interpreting a treaty, besides treaty text, including its preamble and annexes, the following shall also be taken into account: any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

---

20 Prof. William Tetley, Q. C., Canadian Interpretation and Construction of Maritime Conventions, *R. G. D.*, Vol. 23, 1991, pp. 109~128.

any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. Thirdly, there shall be taken into account, together with the context: any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; any relevant rules of international law applicable in the relations between the parties. Fourthly, a special meaning shall be given to a term if it is established that the parties so intended. The supplementary means of interpretation under Article 32 mainly refer to that: recourse may be had to the preparatory work of the treaty and the circumstances of its conclusion, when the interpretation according to Article 31 leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable. With regard to its substantial content, it is not separate from the methods of legal interpretation as described above.

Literal rule, golden rule and mischief rule are the three rules of statutory interpretation traditionally applied by English courts. When meaning of legal provisions are uncertain and vague, English judges normally would apply one of these three rules to interpret such provisions. In some complicated and knotty cases, since different rules of legal interpretation would result in different conclusions, the choice of the interpretation rule becomes vital.[21] The literal rule, or the plain meaning rule[22] is the most significant and basic rule of interpretation among all the principles of legal interpretation in the UK. According to this principle, if the meaning of legal text is clear, even the literal meaning would lead to absurd result, judges shall abide by the literal meaning of the text. The literal rule is actually the rule of "non-interpretation", namely, when the meaning of the legal text is explicit, no interpretation is needed.[23] The author understands this rule of interpretation as similar to the principle of literal interpretation discussed above. This rule has been adopted by English judges in (1868) *Whiteley v. Chapell*, (1946) *London & North-*

21 Wei Wei, Application of Three Major Principles of Interpretation in British Law, *Application of Law*, Vol. 2, 2002. (in Chinese)

22 Liu Bing, Methods of Interpreting Maritime Law – Reflection of Special Characters of Maritime Law in the Practice of Interpretation, at http://www.ccmt.com.cn/hs/explore/exploreDetial.php? sId=256, 1 December 2006. (in Chinese)

23 Wei Wei, Application of Three Major Principles of Interpretation in British Law, *Application of Law*, Vol. 2, 2002. (in Chinese)

Eastern Railway v. Berriman and (1970) *Wallwork v. Giles* and other cases.[24]

The golden rule means that, if interpretation of statute law in accordance with literal rule leads to inconsistent, absurd or inconvenient result, judges could adopt other common meaning of the words, adjusting their literal meanings. It is in essence a "deviation" from literal rule to some extent. This principle has been reflected in English cases such as (1872) *R v. Allen*, (1964) *Adler v. George*, (1978) *Meah v. Roberts* and (1995) *R v. Lynsey*. The mischief rule, also known as the defect rule, indicates that judges shall give due consideration to remedying a defect in legal system when interpreting statute law and attempt to remedy defects which the Parliament intends to rectify when it passed the law. Although the UK is a common law State in tradition, the original common law system faces insurmountable difficulties with the development and progress of society. The only way to overcome such difficulties is to formulate statute law to remedy the "mischief" in common law. This principle has been adopted in (1959) *Elliott v. Grey*, (1972) *Alphacell v. Woodword*, (1983) *Bradford v. Wilson*, (1992) *R v. Pawlicki* and other cases. For this reason, in interpreting common law, in particular British laws, the above principles of legal interpretation traditionally employed by English courts shall be considered.

The "limited" reflection and highlight of special regimes in maritime law means that for the mere purpose of highlighting and reflecting the special regimes in maritime law or merely applying legal interpretation principles contained in international conventions or common law, we cannot completely discard interpretation principles and legal system of Chinese civil law, not to mention violating public order, good morals, the Constitution or other laws of China. The view of Mr. Wang Zejian on the application of foreign legal precedents, as stated above, is the best explanation and understanding for the word "limited". As pointed out by Mr. Lu Xun, in line with the spirit of borrowlism, we need to discard the negative aspects and take advantage of the positive ones.

C. The Principle of Reconciling with Principles of Interpreting Basic Civil Law

In considering special legal regimes in maritime law, the fact that maritime

---

24 Case names are quoted from Wei Wei, Application of Three Major Principles of Interpretation in British Law, *Application of Law*, Vol. 2, 2002. (in Chinese)

law is *lex specialis* of civil law cannot be avoided. In interpreting maritime law, emphasis must be given to the consistency with basic principles of interpreting civil law. For example, in the regulations concerning Time Charter Party under Chapter VI of the Maritime Law, Article 141 provides that in case the charterer fails to pay the hire or other sums of money as agreed upon in the charter, the shipowner shall have a lien on the charterer's goods, other property on board and earnings from the sub-charter. According to maritime transportation usage and normal practice, if a charterer subleases the ship by voyage charter party or time charter party, the sub-freight or sub-hire should be collectively referred to as sublease income. According to the General Principles of the Civil Law and the Guaranty Law of China, if the lien holder seeks to realize his lien, he should first possess the property under lien. If he fails to possess such property, he will lose his lien too. The lien on the sublease income cannot be realized at all. Since the sublease income is paid by the sublease charterer to the charterer. The lessor in the original lease contract is not involved in any direct contract relationship with the sublease charterer. The sublease charterer has no obligation to pay any fees to the original lessor. Then how does the original lessor exercise his lien when he fails to possess the relevant property? May the exercise of lien on the sublease by the lessor not be subject to possession due to the special character of maritime law? Such interpretation would only lead to the disorder of legal concepts. The essential reason is that makers of the Maritime Law have translated the word "lien" from the expression "lien on sub-freight or sub-hire" in English directly to " 留置权 " in Chinese. "Lien" has different meanings in English. The lien mentioned herein does not implicate any possession; it refers to a right enjoyed by the lessor to withhold the relevant fees before they are paid to the charterer in the original contract by the sublease charterer, by requesting a court to issue an order in legal process. Hence with respect to interpretation of "lien" in Article 141 of the Maritime Law, consideration must be given to its source and background. This lien may be interpreted as a special right and we cannot take it for granted that "lien" in maritime law is not subject to possession simply due to English translation reasons. In conclusion, while recognizing and maintaining special legal regimes and concepts of maritime law, it must be reconciled with basic civil law system and relevant concepts in China, which is an aspect of "limited extent" in the second principle.

The three principles above are not irrelevant to or separated from each other. They are mutually supplementary and shall be applied comprehensively. From the discussion on general theories of principles and methods of legal interpretation

above, it can be seen that the principle corresponding to the principles of interpretation of basic civil law is most significant. Under this premise, special legal regimes of maritime law can be highlighted and reflected to a limited extent.

V. Exploring Interpretation Methods of Maritime Law

Several methods mentioned above shall completely apply to interpretation of maritime law. In applying one particular method, consideration shall be given to certain unique characters of maritime law. Additionally, due to the foreign-related, specialized, technical and special-risk nature of maritime law, certain interpretation methods which have given due regard to the special nature of maritime law should be employed in conjunction with the ten methods above when interpreting maritime law. A detailed analysis will be followed.

A. Issues Requiring Attention When Applying General Methods of Interpretation to Interpret Maritime Law

Literal interpretation is the most basic and important method of legal interpretation. Consideration shall be given to the following aspects when interpreting maritime law through literal interpretation:

1. Literal interpretation shall be done in conjunction with specialized interpretation and technical interpretation, which is determined by the technical and specialized character of maritime law. Legal provisions with respect to maritime transportation and ships definitely involve expertise and techniques in connection with ships, crews, navigation, cargo transportation and management. For instance, when it comes to ships, their structure, performance, equipment and safety conditions are concerned; when it comes to crews, their qualification, training and certification are involved; when it comes to navigation, ship-handling, route design, radar observation, use of navigation books, meteorological report, rules of preventing collisions at sea and turbine operation are related; when it comes to cargo transportation, special characters of cargo and its allocation, loading and unloading, custody, tending and etc. are concerned. The Maritime Law is closely related to navigation technique and shipping business, which is one of the special

characters of the Maritime Law differing it from other laws.[25] Another example can be found in the seaworthiness obligation before and at the beginning of the voyage.[26] Here, the wording "at the beginning of the voyage" cannot be understood solely from legal perspective, it refers to the time when loading or unloading is finished, when ship engines begin to preheat, or when anchors are weighed or dissembled. According to authoritative case judgments of the UK, it is usually considered as the time when anchors are weighed or dissembled.[27]

2. Take into account of both Chinese interpretation and English interpretation. The interpretation of domestic law of one country is supposed to be done in its native language. However, in formulating the Maritime Law of China, its several chapters and sections are drafted with reference to generally accepted international conventions. Some legal terms cannot even find an equivalent in Chinese and thus has to be translated directly from English terms under the conventions. Also, what cannot be ignored is that in maritime transportation practice, parties involved adopt a large number of form contracts or documents written in English. For example, content and terms of bill of lading, provisions of charter party and contracts of salvage at sea are almost all prepared in English. Therefore, the correct understanding of such conventions and contracts in English help to reveal the true meaning of the legal provisions. For instance, when describing the standard of seaworthiness obligation of the carrier under the Maritime Law of China, the term due diligence (" 谨慎处理 " in Chinese) is adopted. In the Chinese civil law, the term due diligence does not exist. It is clearly translated from due diligence in English. Based on interpretation in English and referring to case law of the UK, it can be roughly understood that following objective standard, the carrier is required to conduct as a person with common technique and due care and take measures as reasonably required under a particular circumstance. If latent defect cannot be discovered even after such measures have been taken by the carrier, the fact that ship is not seaworthy does not result in the carrier's violation of his seaworthiness obligation. Although the article requires the comparison of English and Chinese interpretations of a legal provision, it does not imply any denial of effect of

---

25 Liu Bing, Methods of Interpreting Maritime Law – Reflection of Special Characters of Maritime Law in the Practice of Interpretation, at http://www.ccmt.com.cn/hs/explore/exploreDetial.php? sId=256, 1 December 2006. (in Chinese)

26 Article 47, Maritime Law of the People's Republic of China. (in Chinese)

27 Si Yuzhuo et al., *Detailed Studies in Maritime Law*, Dalian: Dalian Maritime University Press, 1995, p. 120. (in Chinese)

interpretation in Chinese, rather, by comparing and referring to interpretation in English, the legal provisions in Chinese may be better understood.

Moreover, the interpretation methods above shall be adopted individually or collectively upon comprehensive and flexible considerations. For instance, Article 22 of the Maritime Law stipulates: "claims for salvage payment are entitled to maritime liens". Based on system interpretation, in the Chapter of Salvage at Sea, Article 172 defines the "salvage payment" as any reward, remuneration or special compensation. Considering the purpose and effects of the regimes of maritime liens in conjunction with relevant international conventions, it can be interpreted that only maritime requests for salvage reward is entitled to maritime liens, while special compensation or remuneration is not. Consequently, in understanding "salvage payment" under Article 22, the method of restrictive interpretation shall be adopted. Regarding the understating and interpretation of the provisions under Article 22, after taking into account the points analyzed above, the author proposes that the methods of system interpretation, restrictive interpretation, teleological interpretation and comparative interpretation and sociological interpretation shall be applied comprehensively.

B. Special Methods of Interpretation of Maritime Law

In interpretation of maritime law, besides the general methods of legal interpretation, reference shall also be made to the methods of interpretation used by other countries for interpreting maritime law, especially when it involves transnational contracts of carriage by sea, charter parties, contracts of sea towage, insurance contracts and other contracts involving business activities. This is because parties to the above contracts usually adopt format contract or version in English, and sometimes such contracts even explicitly state that "controversies or disputes arising out of the contract is governed by foreign law, and decided by a foreign court or arbitration institution". The foreign law mentioned therein usually refers to law of the UK. When interpreting these contracts in this situation, principles of interpretation of common law which are different from those of the contract law of China shall be consulted and considered.

The principles of interpretation of contract law in common law system can be stated as follows: 1) the principle of *contra proferentem*, 2) the principle of strict construction of exception clauses; 3) the principle of precedence of handwritten over printed words; 4) the principle of respecting custom and usage; 5) the principle

of considering surrounding circumstances; 6) the principle of considering small-print clauses; 7) the principle of *ejusdem generis*.[28] Among them, the principle of *contra proferentem*, the principle of respecting custom and usage and the principle of considering surrounding circumstances have been analyzed above, other principles will be explored in the next paragraphs along with the special nature of maritime law.

Courts of common law countries adopt the principle of strict interpretation for exception clauses. Interpretation is even stricter for exceptional clauses and clauses on limitation of liability under contracts. Apart from the literal meaning of clauses, the nature, purpose and reasonable expectation of parties at the time when a contract is concluded and other factors affecting the interpretation of the contract shall be taken into account.

The principle of precedence of handwritten over printed words indicates that in format contracts, contractual terms are usually printed in advance, while during the process of negotiating contracts, parties may delete, add and amend the contractual provisions. Therefore, the following points concerning this principle need to be emphasized: (1) the precedence of typed over printed words; (2) the precedence of written over typed words; (3) the precedence of special over general clauses; and (4) the precedence of additional or rider clauses over clauses in the body.

English format contracts sometimes contain small-print clauses. Especially in bills of lading evidencing contracts of carriage of goods by sea, small-print and illegible words and clauses usually appear on the reverse side. There is even no note reminding a party to pay attention to the small-print clauses on the reverse side of the documents or contracts. Courts of common law countries are hostile to those small-print clauses. They believe if the clauses have to be read with the assistance of magnifying glass, they shall not be considered as part of the contract and cannot protect the carrier unless the carrier has already reminded the shipper to read the clauses printed on the reverse side.[29] Courts of common law countries warn the carriers that if they intend to exempt from their responsibilities by invoking the clauses contained in a bill of lading, they must make it clear in words, which enables a cautious person not to neglect the existence of the clause when reading

---

28 Prof. William Tetley, Q. C.，*Seven Rules of Interpretation (Construction) of Bills of Lading*, Antwerp: Liber Amicorum Robert Wijffels, 2001, pp. 359~379.

29 Paterson, Zochonis & Co. v. Elder, Dempster & Co., *Lloyd's Law Reports*, Vol. 13, 1922, p. 517.

the document.[30]

When interpreting the contract laws of common law countries, courts would normally apply the principle of *contra proferentem*, namely when certain general terms and words are used in a contract, in case that such terms and words only have particular meanings, according to the principle of *contra proferentem*, they cannot be understood based on of their broad and literal meanings but their specific meanings in the specific context. For instance, in the case of *Foscolo Mango v. Stag Line*, when the appeal court of the U.K. interpreted the expression "call at any ports in any order, for bunkering or other purposes" in the liberty clause under the bill of lading, it believed that "other purposes" cannot be interpreted to cover the liberty to deviate from the navigation route in order to send two engineers to the coast in order to verify the superheater of the ship. It must be noted this principle only applies to the situation where a word with specific meaning appears before a general term falling under certain category; if such specific meaning in the category is absent, the general term will not be subject to the word appearing before it with specific meaning. For instance, in the case of *Effort Shipping Co. Ltd. v. Linden Management S. A. (The Giannis K)*, Judges of the Privy Council of the U.K. asserted that in interpreting "goods of an inflammable, explosive or dangerous nature" in the Hague Rules. Goods of "dangerous nature" cannot be interpreted by applying the principle of *ejusdem generis* to cover only "inflammable, explosive" goods which have specific meaning, instead, they shall be understood on the basis of their general meanings.[31]

In conclusion, after examining the general principles and methods of legal interpretation, especially those of contract law, together with international conventions and relevant provisions of foreign countries, the author analyzes the principles and methods of interpretation of maritime law and presents his own views on this issue. It has to be admitted that the author's thoughts and opinions are not well-founded in many aspects. However, the author wishes to throw out a minnow to catch a whale and encourage Chinese scholars to put greater efforts in the research of basic theoretical issues of maritime law.

Translator: LI Zongyao

---

30 *Crooks v. Allan*, (1879) 5 Q. B. 38, p. 41.

31 Prof. William Tetley, Q. C., *Seven Rules of Interpretation (Construction) of Bills of Lading*, Antwerp: Liber Amicorum Robert Wijffels, 2001, pp. 359~379.

The Liability for Compensation for Bunker Oil Pollution Damage

LIN Minghua*

Abstract: The adoption of the International Convention on Civil Liability for Bunker Oil Pollution Damage ("Bunker Convention") has filled in gaps in international laws related to compensation for bunker oil pollution damage. The provisions about liability, subject of liability, assumption of liability and compulsory insurance contained in the Bunker Convention have preliminarily built an international regime of compensation for bunker oil pollution damage in connection with ships. However, the regime under the Bunker Convention is not perfect. The lack of special legislation in respect to compensation liability for bunker oil pollution damage in China is unfavorable to the protection of the interests of the party who suffers such damage and the marine environment. This paper mainly reports on research on the international convention on compensation for bunker oil pollution damage in connection with ships by using comparative and empirical analysis, based on which it explores relevant issues in China and gives legislation-related suggestions.

Key Words: Bunker oil pollution; Subject of liability; Assumption of liability; Limitation of liability; Compulsory insurance

I. Introduction

Oil pollution is the most common and hazardous type of pollution damage to the marine environment caused by ships. In order to protect the marine environment and reduce the considerable damage caused by oil spills from ships, the International Maritime Organization (IMO) has developed a full set of international conventions to determine the liability for oil pollution damage. The International

* LIN Minghua, Master of Laws, a lecturer of Xiamen Administration Institute.

Convention on Civil Liability for Oil Pollution Damage, 1969 (CLC 1969) and the Protocol of 1992 (CLC 1992), the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 (FUND 1971) and the Protocol of 1992 (FUND 1992) have jointly established the international regime of compensation for pollution damage caused by bulk oil carried by oil tankers. The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substance by Sea, 1996 (HNS 1996), has established the international regime of compensation for pollution to the marine environment caused by hazardous and noxious substances.

IMO statistics show that bunker oil loaded on non-oil tankers exceeds the cargo oil on oil tankers.[1] After analyzing pollution claims, the UK P&I Club indicated that, compared to oil tankers, non-oil tankers are more likely to cause pollution resulting from oil spills: the number of oil spills incidents caused by non-oil tankers are much more than that caused by oil tankers, and the amount of oil spilled from non-oil tankers are much more than that spilled from oil tankers. More than half of pollution claims result from accidents caused by non-oil tankers.[2] In addition, it is normally more complicated and expensive to deal with bunker oil pollution than crude oil pollution because it is particularly difficult to remove bunker oil.[3] However, despite the prevalence of bunker oil being shipped in non-oil tankers and the higher cost of dealing with bunker oil spills, no due attention has been paid to issues regarding liability for compensation for pollution arising from spilled bunker oil. Because CLC 1969 is only applicable to the pollution caused by cargo oil carried by oil tankers, liability for compensation for pollution damage arising from ship bunker oil is still in an unexamined area. During the period of drafting the CLC 1992, some countries advocated that the bunker oil pollution

---

1 Suzanne Starbuck and Roger Overall, Conventional Wisdom, at http://www.worldbu86nker ing.com/pages/Issue6_2 conventional.html, 26 February 2003. In addition, according to the statistics of Oil Spill Intelligence Report (OSIR), there are about 130 million tons of cargo oil shipped by the oil tankers sailing on the sea across the world, while at the same time, as many as 140 million tons of bunker oil in total is loaded on ships around the globe.

2 Statistical data put forth by an Australian representative in the 75th session of the IMO Legal Committee showed that during the period from 1975 to 1996, 83% of oil pollution events in the sea waters adjacent to Australia were caused by non-oil tankers, and the costs for removing bunker oil pollution accounted for 78% of total costs for removing oil pollution.

3 New Convention on Liability and Compensation for Pollution from Bunkers, at http://www.isma-london.org/focus/focus06.htm, 27 October 2005.

caused by "all ships" should be subject to the regulation of CLC 1992. However, due to the significant differences between "cargo oil or bunker oil of oil tankers" and "bunker oil for general ships", to avoid excessive complications that would cause concerns and affect the adoption of CLC 1992, only "bunker oil pollution caused by oil tankers" was provided for in CLC 1992. Regulations relating to "bunker oil pollution caused by general ships" were not included.

The absence of an international regime for liability for compensation for bunker oil pollution has resulted in difficulties in identifying the subject of liability, assumption of liability and limitation of liability when the party who suffers damage caused by pollution makes a claim for compensation. Recognizing the importance of establishing a regime of compensation for bunker oil pollution damage, some countries, e.g. the UK, have extended the application scope of the regime under the CLC 1992 to compensation for bunker oil pollution damage.[4] Some other countries have adopted some regulations to deal with oil pollution from a variety of ships, e.g. the USA's Oil Pollution Act of 1990 ("OPA 1990"). However, due to the absence of a unified international regime, more and more countries are creating their own provisions independently.

In order to deal with the issue of the absence of an international regime of compensation for pollution to the marine environment resulting from bunker oil leakage from ships, the IMO adopted the International Convention on Civil Liability for Bunker Oil Pollution Damage ("Bunker Convention") in 2001, which regulates the subject of liability, assumption of liability, compulsory insurance and other aspects, and preliminarily builds an international regime of compensation for bunker oil pollution in connection with ships.

Bunker oil pollution damage occurs on the dynamic seas, and such damage is diversified, special and complex as a result of different nationalities and types of involved ships and the reasons causing damage. In addition, there is no special legislation in connection with compensation for damage arising from bunker oil pollution in China. All these lead to the phenomenon that juridical practice related to liability in this regard is not unified.

Therefore, the author believes that an in-depth study of issues surrounding the subject, assumption and limitation of liability related to cases of bunker oil pollution caused by ships is of positive significance for the establishment of

---

4 The UK Merchant Shipping (Oil Pollution) Act 1995, Art. 151(1) provides for that "oil" means oil of any description and includes spirit produced from oil of any description.

suitable compensation regime for these types of accidents occurring in China. It will also contribute to the creation of legislation relating to marine environmental protection so that this type of pollution can be dealt with in an impartial and fair way. For that purpose, the author analyzes issues regarding the subject of liability, the assumption of liability and compulsory insurance relating to bunker oil damage caused by ships. He also expresses opinions on the establishment of a regime of liability for compensation for this type for bunker oil pollution damage in China.

What needs to be clarified is that this paper does not explore all issues involving compensation for bunker oil pollution damage in connection with ships, and it only selects certain relevant legal issues for discussion.[5]

II. Comparative Study of the Bunker Convention

A. Subject of Liability

The subject of liability is an important element constituting a regime of damage compensation liability and the assumption of liability is preconditioned on the identification of the subject of liability. Although relevant international conventions and China's legislation do not make specific distinction for the subject of liability, the author contends that it can be divided into direct subject of liability and potential subject of liability. A direct subject of liability means one who is expressly defined in the Bunker Convention and China's legislation on bunker oil as the individual or entity who is bound to assume the liability for pollution caused by bunker oil. A potential subject of liability means a person or entity other than the direct subject of liability who may cause bunker oil pollution. The Bunker Convention and China's bunker oil legislation do not explicitly stipulate

---

5 Bunker oil has different legal status for different ships, therefore, it is necessary to define a ship first. The Bunker Convention, Art. 1(1) provides that: "ship" means any seagoing vessel and seaborne craft, of any type whatsoever. In addition, Art. 4(1) provides for that "this Convention shall not apply to pollution damage as defined in the Civil Liability Convention, whether or not compensation is payable in respect of it under that Convention." The "pollution damage" as defined in the Civil Liability Convention refers to the pollution damage in connection with ships (which is referred as "oil tankers" for the convenience of this paper) as defined in the CLC 1992. Therefore, to differentiate from the CLC 1992, ships as defined in the Bunker Convention refer to non-oil tankers, and the Bunker Convention governs bunker oil pollution caused by non-oil tankers, while the bunker oil pollution caused by oil tankers is subject to the CLC 1992. Unless otherwise specified, ships referred to herein refer to those as defined in the Bunker Convention.

the liability for pollution that a potential subject of liability is bound to assume, neither do they explicitly exclude the possibility for a potential subject of liability to assume the liability for bunker oil pollution. The difference of legal status between direct and potential subjects of liability leads to the distinction of claims for compensation filed by the party who suffers damage caused by pollution. For a direct subject of liability, the party who suffers damage caused by pollution makes a claim for compensation against the subject directly in pursuance of the Bunker Convention and China's bunker oil legislation. For a potential subject of liability, the party who suffers damage caused by pollution abides by laws other than the Bunker Convention and China's bunker oil legislation.

1. Direct Subject of Liability

In accordance with provisions of the Bunker Convention, the ship-owner at the time of an incident shall be liable for pollution damage caused by any bunker oil on board or originating from the ship; if an incident consists of a series of occurrences having the same origin, the liability shall attach to the ship-owner at the time of the first of such occurrences.[6] However, the ship-owner can be exempted from the liability for pollution damage under the circumstance that bunker oil pollution damage is caused by war, force majeure, an act done with the intent to cause pollution damage by a third party or the party who suffers damage caused by pollution.[7] Thus, the direct subject of liability as provided for in the Bunker Convention is the ship-owner, which is basically consistent with the provisions of the CLC 1992, but the two conventions have significant differences from each other in terms of specific determination.

Firstly, the definitions of a ship-owner are different. In pursuance of the CLC 1992, Art. 1(3), a ship owner means the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship. In the case of a ship owned by a State and operated by a company which in that State is registered as the ship's operator, "ship-owner" shall mean such company. However, ship-owner as defined in the Bunker Convention, Art. 1(3) has a much wider scope, including the registered owner, bareboat charterer, manager and operator of the ship. Therefore, under the Bunker Convention, the ship-owners, including the registered owner, manager of the ship, operator of the ship and bareboat charterer, are direct subjects of liabilities and liable for bunker oil

6 The Bunker Convention, Art. 3(1).
7 The Bunker Convention, Art. 3(3).

pollution damage.

Secondly, compensation regimes are different. The CLC 1992 sets forth channeling provisions[8] where the registered owner is liable for compensation for oil pollution damage while persons other than the registered owner are not liable for compensation for oil pollution damage under this Convention or otherwise.[9] However, a channeling provision does not mean that the registered owner is the only person liable, because the CLC 1992 is supplemented by the FUND 1971. If the place of the occurrence of pollution is also a State Party to the FUND 1971, the International Fund for Compensation for Oil Pollution Damage (IOPC) can act as a supplement to the compensation. Contrarily, the Bunker Convention does not have a fund at the second level to provide a supplement to the compensation, so it provides for that the registered owner, bareboat charterer, operator and manager of the ship are direct subjects of liability in order to broaden the approach in which the party who suffers damage caused by pollution can make a claim for compensation.

a. Registered Owner

Different opinions were expressed at the 79th Session of the IMO Legal Committee in respect to whether the registered owner is liable for bunker oil pollution. The first opinion holds that the models as defined in the CLC 1992 and HNS 1996 shall be adopted and the registered owner of the ship shall be the direct subject of liability who shall be liable for bunker oil pollution. According to the second opinion, in most cases the registered owner of the ship does not participate in the operation and management of the ship in modern ship operation and management, and in that case, it is unfair for the registered owner of the ship to be liable. Furthermore, to be consistent with the "polluter pays principle," only the person or persons who actually control the ship shall be liable. The third opinion argues that, the registered owner of the ship shall assume joint liability with the manager and operator of the ship and bareboat charterer.[10] Finally, the Bunker Convention included the registered owner of the ship as a direct subject of liability. The author believes that the decision to include the registered owner of the ship as a direct subject of liability in the Bunker Convention is made based on the following considerations:

---

8 "Channeling Provision" means a provision in which liability is concentrated on or limited to one person.

9 CLC 1992, Art. 3(4).

10 IMO Legal Committee-79th Session, at http://www. comitemaritime.org/news/n11999.html, 12 December 2006.

Firstly, this is in compliance with traditional stipulation of laws in respect of liability and obligation. The registered owner, as the individual enjoying ownership of the ship, ought to assume liability for damage caused by pollution arising from the ship.

Secondly, making the registered owner the direct subject of liability facilitates the prompt claim for compensation by the party who suffers damage caused by pollution. It is easier to identify the registered owner of the ship than to identify the operator and manager of the ship or the bareboat charterer who actually controls the ship. Therefore, holding the registered owner liable is conducive to the prompt receipt of compensation by the party who suffers damage caused by pollution.

Thirdly, this is an objective requirement of compulsory insurance. In practice, it is not realistic to require the person or persons who actually control the ship to maintain compulsory insurance because they are unstable and unpredictable. Therefore, it is necessary to define the registered owner as a direct subject of liability and the policyholder of compulsory insurance in order to make compulsory insurance effective.

b. Bareboat Charterer

Whether a bareboat charterer is a direct subject of liability for damage caused by bunker ship oil pollution differs under the Bunker Convention, the provisions of the CLC 1969 and the provisions of CLC 1992. Under the Bunker Convention, a bareboat charterer is a direct subject of liability,[11] because in most cases, the bareboat charterer is the person who actually controls the ship. In contrast, a bareboat charterer may not be held liable under CLC 1969 or CLC 1992. The CLC 1969, Art. 3(4) stipulates that, "No claim for pollution damage under this Convention or otherwise may be made against the servants or agents of the owner." Thus, it can be seen that the servants or agents of the ship-owner do not assume liability under the CLC 1969 or otherwise. However, a charterer is generally not considered as a servant or agent of the ship-owner, so in pursuance of the CLC 1969, a charterer (including a bareboat charterer) is a potential subject of liability, and it is possible for him to assume joint liability with the ship-owner. This differs from the provisions of the CLC 1992. As per Art. 3(4) of CLC 1992, a bareboat charterer is excluded from the subject of liability by the channeling provision, and the party who suffers damage caused by pollution cannot make a claim for compensation against a bareboat charterer on basis of any law.

---

11 The Bunker Convention, Arts. 1(3) and Art. 3(1).

It may be concluded that the bareboat charterer bears much greater liability under the Bunker Convention than that under the CLC 1969 and the CLC 1992. This also shows the trend of international legislation which protects the marine environment and the party who suffers damage caused by pollution.

c. Operator and Manager of the Ship

Differently from the CLC 1969 and the CLC 1992, the Bunker Convention explicitly provides that the operator and manager of the ship are included in the definition of the ship-owner and they are direct subjects of liability.[12] Both the operator and manager of the ship are considered the persons who actually control the ship because of their involvement in its operation. Holding the operator and manager liable would help to improve their awareness of liability in operation and to prevent bunker oil leakage. Furthermore, making the operator and manager liable promotes prompt action after bunker oil leakage to reduce potential pollution damage. The damage arising from bunker oil pollution is directly connected with the operation of a ship; hence it is reasonable to attach the liability to the party who is liable for the daily operation of the ship. However, the Bunker Convention does not expressly define "operator" and "manager" of the ship. This may lead to difference of interpretation in juridical practice by countries, which is not conducive to the unified application of the Bunker Convention or the prompt settlement of any dispute.

The scope of the term "operator of the ship" may vary. The United States Coast Guard indicated in their report of implementation of the Water Quality Improvement Act that "Any person, including but not limited to the ship-owner, bareboat charterer or the contractor who is liable for the operation of the ship, and the person who is liable for the building, repair, collision or sale of the ship, is within the scope of the operator."[13] US courts, on the basis of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) which regulates the liability for leakage of hazardous substance, give a broad interpretation of the "operator of the ship" that the "operator of the ship means the person or persons who are legitimately authorized to be liable for the daily operation of pollution equipment, including the persons or organizations that are liable for repair, maintenance, navigational matters, onboard crew, contracting

12 The Bunker Convention, Arts. 1(3) and Art. 3(1).

13 Charles B. Anderson and Colin de la Rue, Liability of Charters and Cargo Owners for Pollution from Ships, *Tulane Maritime Law Journal*, Vol. 26, 2001.

and general management of the ship."[14] Further official interpretation of this term is that "the operator of the ship does not include the individual who is not in charge of the operation of the ship at all." For example, a pilot is not an "operator" because he does not equip the ship with crew or supply materials to the ship, although he is fully in charge of the navigation of the ship during a short period of time. In the *United States v. Fleet Factors Corp.* case, the lending bank which held real rights granted by way of security in the company's assets was considered as an "operator" because it could be involved in the financial management of the borrower and imposed influences.[15] Similarly, a parent company which exerts extensive control over the operation of a subsidiary or branch which has ships is also likely considered as the operator of the ships, and thus it assumes the liability of the operator of the ships. For instance, in the *United States v. Kayser-Roth Corp.* case, in pursuance of the CERCLA, the defendant was liable for the expenses arising from removing hazardous wastes originating from its subsidiaries because it exerted pervasive control over the activities of its subsidiaries, such as collection of accounts, budgeting, government contracts, real estate lease and purchase and sale, arrangement of the positions of high-ranking employees and directors, etc.[16]Except those mentioned above, explicit definition of "operator of the ship" is rare whether in the legislation in relation to oil pollution or the cases involving liability for oil pollution.

2. Potential Subject of Liability

As mentioned above, the CLC 1992 limits the subject of liability to the registered owner of ship. According the CLC 1992, the servants and agents of the ship-owner, the charterer, manager and operator of the ship do not assume the liability for bunker oil pollution against the party who suffers damage caused by such pollution under this Convention and other laws, unless such pollution incident is caused by them intentionally.[17] However, the ship-owner has the right of recourse against such persons and other person liable in accordance with other laws and contracts. In fact, the CLC 1992 limits the approach to claim for compensation in connection with liability for pollution to the "back-to-back" way of recourse, in

---

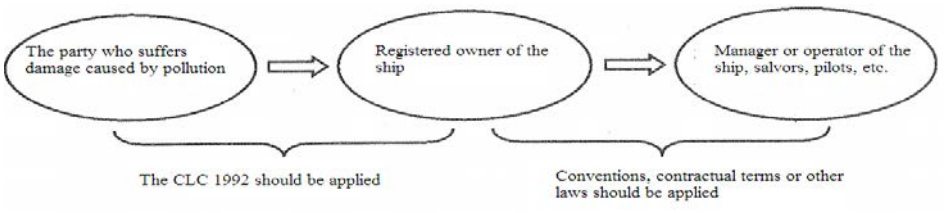
14 However, the CERCLA does not define the "operator." It only gives general description that the "operator" means any person who owns, operates or leases a ship or equipment.

15 *United States v. Fleet Factors Corp.*, 901F.2d 1550, 1557-59 (1.1st Cir. 1990).

16 *United States v. Kayser-Roth Corp.*, 910F.2d 24 (1st Cir. 1990).

17 Similar provisions can be found in the CLC 1992, Art. 3 and the HNS 1996, Art. 7(5), respectively.

which the party who suffers damage caused by pollution cannot directly make a claim for compensation for damage against anyone other than the registered owner of the ship. The approach to claim for compensation is shown in the following figure:



The purpose of such channeling provision is to prevent situations in which those suffering damage attempt to circumvent the CLC 1992 by making a compensation claim according to their own national laws against parties who are not direct subject of liability according to the Convention. National laws may force the subject held liable to assume greater liability than CLC 1992. However, in practice, the channeling provision of the CLC 1992 encounters the following difficulties:

Firstly, at the time of occurrence of an incident, a charterer may have multiple identities, such as the owner and operator of a loading and discharging dock, etc.[18] In that case, the party who suffers damage caused by pollution may file a lawsuit against the charterer as the owner and operator of the loading and discharging dock, and thus, the effect of the aforesaid "channeling provision" is nullified.

Secondly, the wording of "any charterer" means any type of charterers, including time charterer, voyage charterer and bareboat charterer rather than other identities which the charterer might have. Therefore, if the charterer is also the owner of the other ship which collides with this ship in the incident, it is uncertain whether he can invoke the "channeling provision" to exclude any liability due to his identity of being the owner of the two ships concerned.

Thirdly, the "channeling provision" may be invalid under a certain circumstance. If a claim for compensation for loss or damage is made beyond the scope under relevant conventions, or a lawsuit is filed against a non-State party to the conventions, it is possible that the persons other than the registered owner of the ship assume liability for bunker oil pollution arising from ships directly in

18 Charles B. Anderson and Colin de la Rue, Liability of Charters and Cargo Owners for Pollution from Ships, *Tulane Maritime Law Journal*, Vol. 26, 2001.

pursuance of applicable laws.

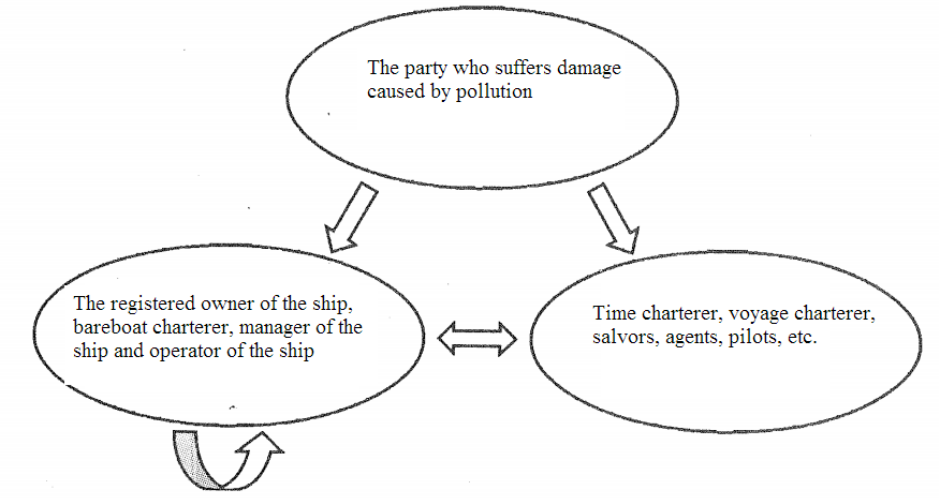
Finally, the "channeling provision" faces new challenges after the Erika Incident.[19] The European Community strongly criticized this provision and the United States refused to join the CCL 1992 mainly because of it. Both believed that the exclusion of charterers, operators and managers from the subject of liability would reduce motivation for those parties to operate ships carefully and maintain ship quality.[20]

The Bunker Convention abandoned the use of the "channeling provision" because of the above-mentioned difficulties in practice of this provision. Therefore, the party who suffers damage caused by pollution can make a claim for compensation not only against the ship-owner directly in pursuance of the Bunker Convention, but also against the persons other than the ship-owner, i.e. time charterers, voyage charterers, salvors, agents, pilots, etc., in accordance with the conventions or laws other than the Bunker Convention. The persons other than the ship-owner may have the right of recourse against the ship-owner in pursuance of relevant laws. Ship-owners may also have the right of recourse against each other. Their approach to direct claim for compensation and recourse is quite wide, as shown in the following figure:

---

19 On December 12, 1999, *Erika*, a tanker fully loaded with 31,000 tons of heavy oil, sank in the sea waters 70 kilometers to the south of Brest Harbor and caused leakage of a large quantity of heavy oil, severely polluting surrounding sea waters and coast areas. On the west coast of France, over 300,000 sea birds fell victim to the pollution to the sea caused by the leakage from the oil tanker *Erika*. The claim for compensation made by French farmers, merchants and the persons involved in the tourism industry substantially exceeded the limits of liability of 1.35 billion SDR as provided for by the FUND 1992. News from IOPCF, Autumn Meetings - 23-27 October 2000, at http://www. Comitemaritime.org/news/n12000. html, 6 November 2006.

20 Chao Wu, Liability and Compensation for Bunker Pollution, *Journal of Maritime Law and Commerce*, Vol. 30, 2002, p. 558.



The reason the Bunker Convention sets forth such a provision is to maximally facilitate claims for compensation by those who suffer damage caused by pollution and protect the legitimate interests of these persons. However, due to the lack of protection by the "channeling provision," non-bareboat charterers and emergency responders, as potential subjects of liability, might assume the liability for bunker oil pollution under other laws.

a. Non-bareboat Charterer

A non-bareboat charterer is not a direct subject of liability. The party who suffers damage caused by pollution cannot make a compensation claim against a non-bareboat charterer in pursuance of the Bunker Convention, but it can make a compensation claim in accordance with the laws other than the Bunker Convention (e.g. a country's national laws).

As provided for by the OPA 1990, any person owning, operating or chartering by demise the ship causing oil pollution shall be liable for costs of removal and certain damage.[21] Thus, the direct subject of liability under the OPA 1990 is the ship-owner, operator of the ship and bareboat charterer. In our opinion, the OPA 1990 only provides that a bareboat charterer is included in the direct subject of liability. There is no mention that time charterers or voyage charterers are also within the scope of charterer, which implies that neither time charterers nor voyage charterers are included in the direct subject of liability. However, it is entirely

21 OPA 1990, 33 U. S. C.§2702(a).

possible for a non-bareboat charterer to become a potential subject of liability and assume liability for bunker oil pollution for the following reasons:

First, neither the OPA 1990 itself nor its legislation history, expressly defines a non-bareboat charterer (time charterer or voyage charterer) or provides further interpretation. As a result, it is possible that a non-bareboat charterer (time charterer or voyage charterer) will be interpreted as an "operator." In the *Slaven v. BP America, Inc.* case, the plaintiff argued that the time charterer should assume liability as the owner/operator of the ship.[22]

Second, since the OPA 1990 in the United States does not take precedence over oil pollution acts of states, different states have enacted their own pollution legislations, which are parallel to the federal OPA 1990. Most legislation provides that the subject of liability is the party who has caused pollution or any person who cause leakage directly or indirectly. In this case, a non-bareboat charterer (time charterer or voyage charterer) becomes a potential subject of liability and assumes joint liability for oil pollution (including bunker oil pollution) with the owner of goods and the ship-owner.

Third, in accordance with the negligence theory of the common law, a time charterer or a voyage charterer may be held liable to a third party who suffers bunker oil pollution.[23] In pursuance of the general maritime law, negligence is an actionable fault and the defendant should act discreetly as an ordinary person.[24] The OPA 1990 implied the recognition of this concept by providing that the United States Attorney General is empowered to file a lawsuit against any liable party or any other person who is bound to be liable in pursuance of any law in order to make up for the compensation paid by the Fund.[25] Therefore, in theory, if a time charterer or a charterer violates his duty of care, which directly leads to bunker oil pollution damage to a third party, the ruling will be made that the charterer is liable for such damage.

The control factor plays a decisive role in determining whether a time charterer or a charterer violates his duty of care and thus shall assume liability for bunker oil pollution. In the *In re P&E Boat Rentals, Inc.* case, the Fifth Circuit

---

22 See 786 F. Supp. 853, 1993 AMC 455 (C. D. Cal. 1992).

23 Colin De La Rue and Charles B. Anderson, *Shipping and the Environment*, London: Lloyd's of London Press, 1998, p. 221.

24 Thomas S. Schoenbaum, *Admiralty and Maritime Law*, Berkeley: West Information Pub Group, 2001, pp. 173~174.

25 OPA 1990, 33 U. S. C.§ 2715(b).

Court of the United States Court of Appeals established the rule of determining the control factor, "if there is no indication of intention to the contrary, the time charterer does not control the ship and he is not liable for the unseaworthiness of the crew or the ship." In this case, the time charterer acted with negligence, commanding the ship to sail at high speed in dense fog. This caused the collision of the ship and subsequent damage and casualties. Therefore, the ruling was made that the time charterer was liable on basis of the theory of negligence.[26] The same court further interpreted the meaning of "control" in a subsequent personal injury lawsuit. In the *Williams v. Central Gulf Lines* case,[27] the court held that "control means the operational control over the ship rather than ultimate control over the destination port or the cargo." The aforesaid rule of determining control factor was also confirmed by the Ninth Circuit Court of the United States Court of Appeals in the *Alexander v. United States* case.[28]

b. Emergency Responder

An emergency responder refers to any person who takes preventive measures, which generally refers to a salvor and a pollution removal contractor. At the 79th Session of the IMO Legal Committee, great dispute arose during the discussion of whether to add the exoneration from liability for emergency responders to the Bunker Convention as it is in the CLC 1992. Representatives from some countries and international organizations called for exoneration from liability to be granted to emergency responders by the Bunker Convention, including the International Tanker Owners Pollution Federation (ITOPF), the Baltic and International Maritime Conference (BIMCO), the Comité Maritime International (CMI), the International Association of Independent Tanker Owners (INTERTANKO), the International Chamber of Shipping (ICS), the International Group of P&I Clubs (IG), the International Salvage Union (ISU), etc.[29] They indicated that the addition of this term was in compliance with precedents of the CLC 1992 and HNS 1996 as well as the legislative intent of the Bunker Convention, which would bring more benefit than harm. Salvors and the ISU also insisted that the Bunker Convention should set forth such a term. They argued that salvors were normally experienced and well equipped, but often should face unpredictable risks and conduct salvage operation

---

26 872 F. 2d 642, 1989 AMC 2447 (5th Cir. 1989).
27 Williams v. Cent. Gulf Lines, 874 F. 2d 1058, 1989 AMC 2634 (5th Cir. 1989).
28 63 F. 3d 820, 1996 AMC 303 (9th Cir. 1995).
29 IMO Legal Committee-79th Session, at http://www.comitemaritime.org/news/n11999.html, 12 December 2006.

the results of which cannot be predicted with exactness.

In summary, there were three main reasons for advocating the exoneration from liability for emergency responders: firstly, emergency responders were likely to cause bunker oil pollution damage during salvage. For example, in order to raise a wrecked ship or to prevent the breakage of the salvaged ship which might cause greater pollution, salvors would intentionally release oil from the stranded ship.[30] However, the salvors aimed to take effective action to reduce pollution, so they were not the same as the party which actually caused the pollution incident. Secondly, it was difficult to solve the issue regarding exoneration from liability by abiding by national laws, because some countries had no relevant legislation. Even if a country's national laws provided for the exoneration from liability for emergency responders, such national laws might not be applicable. Thirdly, if the Bunker Convention cancelled the provision exonerating the salvors from liability, salvors may face potential increase of risks and hence may be unwilling to salvage the ships causing bunker oil pollution. This would negatively influence the salvage operation and the prevention of pollution. On the contrary, salvors should be encouraged to take active measures to prevent and reduce environmental pollution damage.[31]

Some countries held that it is not appropriate to set forth the issue of exemption of emergency responders from liability in the Bunker Convention, as the issue should be resolved in national laws of countries. Australia and the U.K. made it clear that their national laws to which the Bunker Convention was applicable would include a term in respect of "exoneration for emergency." In addition, they suggested a resolution be adopted in the Diplomatic Conference and called for countries to give consideration to granting exoneration from liability for these people in enacting their national laws.[32] The main reasons for objection to the inclusion of exoneration in the Bunker Convention were: firstly, on basis of the "polluter pays principle," no one should be able to escape from his liability for oil pollution; secondly, the issue of exoneration from liability could be solved by a country's national legislation and the adoption of a resolution to

---

30 The New Bunker Convention, at http://www.gard.no/Publications/GardNews/Recentlssues/gn165/art_7.asp, 27 February 2006.

31 Fu Guomin and Xu Qingyue, Review of the International Convention on Civil Liability for Bunker Oil Pollution Damage, *Chinese Journal of Maritime Law*, No. 7, p. 97. (in Chinese)

32 IMO Legal Committee-79th Session, at http//www.comitemaritime.org/news/n11999.html, 12 December 2006.

urge countries to make appropriate stipulations; thirdly, in view of the inclusion of the bareboat charterer, manager and operator of the ship in the definition of the ship-owner, it might cause confusion to extend the term of exoneration from liability to be applicable to these three kinds of persons; fourthly, the cancellation of the exoneration from liability would not lead to any risk which the salvors who took appropriate actions might face; on the contrary, this would prompt the ship-owner to enter into oil pollution prevention contracts in advance with salvors and emergency organizations.[33]

In the end, the Bunker Convention did not set forth the "channeling provision," and thus it did not grant exoneration from liability to emergency responders. Undoubtedly, this increases the risk of liability which emergency responders may face, which means that the party who suffers damage caused by bunker oil pollution may make a claim for compensation against emergency responders for any loss as a result of negligence of the responders when they are taking actions to prevent and reduce pollution damage. Although a resolution was adopted in the Diplomatic Conference of the Bunker Convention in order to urge countries to consider the introduction of the exoneration from liability for emergency responders when applying the Bunker Convention, it is of limited effect and national laws of countries must be resorted to.

B. Assumption of Liability

In juridical practice, cases brought to the court in connection with damage arising from bunker oil pollution mainly fall into two categories. The first is disputes over compensation for damage arising from pollution caused by improper discharge related to the operation of the ship, for example, damage arising from bunker oil pollution as a result of the failure to add bunker oil in pursuance of relevant regulations by the ship-owner or relevant manager of the ship. The second is disputes over compensation for damage arising from bunker oil pollution as a result of such marine incidents as collision, stranding, breakage of hull, fire or explosion. Generally, bunker oil pollution as a result of improper discharge in connection with the operation of the ship and bunker oil pollution as a result of marine incident caused by a single ship only involve a single subject of liability

33 Song Chunfeng, Review of the International Convention on Civil Liability for Bunker Oil Pollution Damage, *Chinese Journal of Maritime Law*, No. 5, p. 27. (in Chinese)

and the way to assume liability is relatively simple, while bunker oil pollution as a result of marine incidents caused by two or more ships is more complicated.

1. Assumption of Liability by a Single Subject of Liability

In accordance with the Bunker Convention, Art. 3(1), the ship-owner at the time of an incident shall be liable for pollution damage caused by any bunker oil on board or originating from the ship. If an incident consists of a series of occurrences having the same origin, the liability shall attach to the ship-owner at the time of the first of such occurrences. Art. 3(2) provides that "where more than one person is liable in accordance with paragraph 1, their liability shall be joint and several." As the Bunker Convention, Art. 5 sets forth the assumption of liability for incidents involving two or more ships, the author asserts that the several and joint liability therein is specific to the pollution caused by one ship.[34] For example, where bunker oil pollution is caused after the ship is chartered by demise, the ship-owner (including registered owner and bareboat charterer) shall assume joint and several liability for compensation against damage caused by bunker oil pollution.

One of the reasons why the Bunker Convention sets forth such a provision is that the regime of liability for compensation under the Bunker Convention does not have a compensation fund at the second level. In this connection, only the assumption of joint and several liability by all the ship-owners can ensure that those who suffer damage caused by pollution receive adequate compensation. The other reason is that this will help guarantee the interests of the party who suffers damage caused by pollution, who can make a claim for compensation against any one of the ship-owners, regardless of whether the ship is chartered, operated or managed by others, or whether the registered owner commits negligence for bunker oil pollution. Therefore, the provision can be considered as a deviation from the internationally recognized "polluter pays principle."[35]

However, the Bunker Convention does not expressly provide a specific way to assume such joint and several liability. In particular, after the ship is chartered by demise, and if both the registered owner of the ship and bareboat charterer maintain compulsory insurance, must the liability under the Bunker Convention be assumed by all the parties meeting the definition of the "ship-owner" in a joint

---

34 Michael N. Tsimplis, The Bunker Pollution Convention 2001: Completing and Harmonizing the Liability Regime for Oil Pollution from Ships, *Llord's Maritime and Commercial Law Quarterly*, February 2005, p. 89.

35 Si Yuzhuo ed., *Monographic Study on Maritime Law*, Dalian: Dalian Maritime University Press, 2002, p. 407. (in Chinese)

and several way? How should the liabilities be allocated between all such parties and their insurers? These issues may lead to disputes among subjects of liability and thus slow down the process of emergency response and compensation.[36] The author believes that the joint and several liability under the Bunker Convention shall be assumed by the ship-owner. Joint and several liability is statutory liability, so the party who suffers damage caused by pollution has the right granted by law to choose the object against whom the claim for compensation is made. Therefore, the party who suffers damage caused by pollution can make a claim for compensation against the registered owner of the ship, bareboat charterer, operator or manager of the ship, and one, two or more of their respective insurers.

2. Assumption of Liability among Several Subjects of Liability

a. Assumption of Liability Regulated by the Same Conventions

The Bunker Convention, Art. 5 provides that "when an incident involving two or more ships occurs and pollution damage results therefrom, the ship-owners of all the ships concerned, unless exonerated under article 3, shall be jointly and severally liable for all such damage which is not reasonably separable." This provision concerning the assumption of liability among several subjects of liability under the Bunker Convention is the same as that of the CLC 1992.[37] Some scholars claim that the subject of liability for oil pollution as provided for in the CLC 1992 only refers to the owner of the ship whose oil leaks to the sea actually. This means that in an incident involving two or more ships and causing pollution damage, only the owner of the ship whose oil leaks to the sea is liable for compensation to the party who suffers damage caused by such pollution, while the owner of the ship whose oil does not leak should not assume the liability for compensation.[38] If this point of view is applicable to bunker oil pollution, an inference can be made that under the Bunker Convention, in an incident in which one ship leaks bunker oil but another does not, this damage is reasonably separable. Therefore, the owners of these two ships do not assume joint and several liability. Only when oil leakage occurs to

---

36 LEG/CONF.12/9, 18 January. 2001, quoted from Chao Wu, Liability and Compensation for Bunker Pollution, *Journal of Maritime Law and Commerce*, Vol. 30, 2002, p. 559.

37 The CLC 1992, Art. 4 provides for that "when an incident involving two or more ships occurs and pollution damage results therefrom, the owners of all the ships concerned, unless exonerated under Article III, shall be jointly and severally liable for all such damage which is not reasonably separable."

38 Yu Xiaohan, Subject of Liability for Oil Pollution as a Result of Collision Caused by Mixed Faults of Ships, in *Annual of China Maritime Law (Vol. 2000)*, Dalian: Dalian Maritime University Press, 2001, pp. 198~205. (in Chinese)

both ships involved can the circumstance where the liability may not be reasonably separable exist.[39]

The author contends that the view described in the preceding paragraph is a one-sided. Comparing relevant terms of the CLC 1969 and the CLC 1992,[40] it is clear that under the CLC 1992, the subject of liability does not assume joint and several liability on the condition of escape or discharge of oil by the ship. Firstly, the CLC 1969 emphasizes that when damage is caused by the escape or discharge of oil from both two or more ships and such damage is not reasonably separable, the ship-owners of all ships concerned shall be jointly and severally liable. The CLC 1992 does not mention the requirement of "escape or discharge of oil from both the two or more ships." It only requires that the damage is caused by the incident involving two or more ships and such damage is not separable. Secondly, logically, if the condition emphasized by the CLC 1992 is the same as that by CLC 1969, joint and several liability is only assumed when damage is caused by the escape or discharge of oil from both the two or more ships. In that case, it is not necessary for the CLC 1992 to make any change to the wording because it could increase unnecessary misunderstanding. Finally, the purpose of joint and several liability is to better protect the benefits of the party who suffers damage caused by pollution. If the principle under the CLC 1969 is still rigidly adhered by, its purpose of protecting the benefits of the party who suffers damage caused by pollution will not be bettered achieved. Therefore, the author holds that under the Bunker Convention, several subjects of liability should assume unlimited joint and several liability only when the following conditions are satisfied: firstly, all the ships to which an incident occurs are those under the regulation of the Bunker Convention. Secondly, it is unable to distinguish in a reasonable way which ship causes damage. Thirdly, none of the ships involved are exonerated from liability, which means that each ship is jointly and severally liable for pollution damage regardless of actual oil leakage from the ships to which collision occurs, except those for which exoneration from liability is provided for by the Bunker Convention. Because the assumption of joint and several liability is limited to legal situations, the owners

---

39 Si Yuzhuo ed., *Monographic Study on Maritime Law*, Dalian: Dalian Maritime University Press, 2002, p. 406. (in Chinese)

40 The CLC 1969, Art. 4 provides for that "When oil has escaped or has been discharged from two or more ships, and pollution damage results therefrom, the owners of all the ships concerned, unless exonerated, shall be jointly and severally liable for all such damage which is not reasonably separable."

of the ships concerned which do not meet the conditions do not assume joint or several liability under the Bunker Convention.

b. Assumption of Liability Regulated by Different Conventions

If the ships to which an incident occurs causing bunker oil pollution are regulated under different conventions, e.g. damage arising from bunker oil pollution caused by the collision between an oil tanker carrying cargo and a general cargo ship, do the owners of these ships assume joint and several liability? This can only be decided by national laws of countries because joint and several liability is limited to legal situation and the Bunker Convention does not prescribe this.

C. Limitation of Liability

Limitation of liability for maritime claims is a legal regime specially designed for international maritime law and different from general principle of compensation for damage of civil law; it is a special protection given to the persons liable granted by legislation.[41] The International Convention Relating to the Limitation of the Liability of Owners of Sea-going Ships, 1957 (LLOSS 1957), the Convention on Limitation of Liability for Maritime Claims, 1976 (LLMC 1976) and its Protocol of 1996 all set forth provisions in respect of limitation of liability for maritime claims.

There is significant difference between the regime of limitation of liability for compensation for oil pollution damage and the regime of limitation of liability for maritime claims. Generally, the two are independent. In maritime substantive law, limitation of liability for maritime claims does not include the limitation of liability for oil pollution damage under the regulation of conventions or national laws in general. For example, the limitation of liability for compensation for oil pollution damage as provided for by the OPA 1990 of the United States is independent from the Shipowners' Limitation of Liability Act, 1851.[42] The independent regime of limitation of liability for oil pollution as provided for by the CLC 1992 is also

---

41 William Tetley, Shipowners' Limitation of Liability and Conflicts of Law, *Journal of Maritime Law and Commerce*, Vol. 23, 1992, p. 585.

42 The result of judgment and ruling of the two cases of the United States Jahre Spray Ii K/S, et al, Limitation Proceedings, M/V Jahre Spray and In Re: Metlife Capital Corp., etc. Commonwealth of Puerto Rico, et al. v. M/ V Emily S., et al was that the liability for compensation of the person liable for oil spill should not be limited in pursuance of the Shipowners' Limitation of Liability Act 1851 but rather in pursuance of the provisions on limits of liability for compensation under the Oil Pollution Act 1990. See AMC, 1998, pp. 635~644. (in Chinese)

different from the regime of limitation of liability for maritime claims.

Different from the CLC 1992 and OPA 1990, the Bunker Convention does not have an independent regime of limitation of liability. It only prescribes in Art. 6 that "nothing in this Convention shall affect the right of the ship-owner and the person or persons providing insurance or other financial security to limit liability under any applicable national or international regime, such as the Convention on Limitation of Liability for Maritime Claims, 1976, as amended." Therefore, under the Bunker Convention, the limitation of liability for bunker oil pollution is dependent on national laws of States parties or provisions of the conventions relating to limitation of liability.

1. Applicability of Conventions Relating to Limitation of Liability

The above-mentioned provision of the Bunker Convention reflects the efforts of the international community to avoid excessive special regimes in regard to limitation of liability which could influence the establishment of a unified regime of limitation of liability. In addition, this provision also creates difficulty in how to apply relevant conventions relating to limitation of liability and how to deal with issues like the relationship between the Bunker Convention and other conventions relating to limitation of liability. Therefore, it is necessary to review the conventions relating to limitation of liability currently in effect to see whether they are applicable to claims for compensation for bunker oil pollution damage. Great controversy exists in the academic community and among practical departments with regard to this issue. The author believes that analysis should be conducted on a case-by-case basis.

a. Applicability of the LLMC 1976 to Bunker Oil Pollution Damage

It is widely believed that the LLMC 1976 has provided for limitation of liability for pollution caused by bunker oil leakage. However, International Group of P&I Clubs indicated in its proposal to the Diplomatic Conference that this point of view was not absolutely right. According to the provision of the LLMC 1976, Art. 2(1), the claim for compensation for damage to or loss of property and loss as a result of infringement is subject to limitation of liability. However, if no tangible damage to property and no infringement to a certain right are caused as a result of bunker oil pollution, is this subject to limitation of liability in pursuance of the

provision of the LLMC 1976, Art. 2(1)? This is considerably questionable.[43]

The LLMC 1976, Art. 2(1) provides that:

> *Subject to Articles 3 and 4, the following claims, whatever the basis of liability may be, shall be subject to limitation of liability:*
>
> *(a) claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbor works, basins and waterways and aids to navigation), occurring on board or in direct connection with the operation of the ship or with salvage operations, and consequential loss resulting therefrom (hereinafter referred to as Claim (a), and so forth for other items);*
>
> *(b) claims in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage;*
>
> *(c) claims in respect of other loss resulting from infringement of rights other than contractual rights, occurring in direct connection with the operation of the ship or salvage operations;*
>
> *(d) claims in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship;*
>
> *(e) claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship;*
>
> *(f) claims of a person other than the person liable in respect of measures taken in order to avert or minimize loss for which the person liable may limit his liability in accordance with this Convention, and further loss caused by such measures.*

The above provisions show that the LLMC 1976 does not expressly indicate that limitable liability includes liability for oil pollution; if damage caused by bunker oil pollution is to be subject to the limitation of liability under the LLMC 1976, it needs to prove that relevant claims are included in the above-mentioned scope.

The following paragraphs will discuss whether the limitation of liability under

---

43 Patrick Griggs, International Convention on Civil Liability for Bunker Oil Pollution Damage 2001, at http://www.bmla.org.uk/documents/imo-bunker-convention.html, 12 December 2006.

the LLMC 1976 is applicable to the claims arising from bunker oil pollution. Based on experience of the CLC 1992, claims for compensation for oil pollution damage generally include those for pollution removal costs and other removal measures, substantial loss, pure economic loss and reinstatement of the impaired environment.

Firstly, pollution removal costs and other removal measures: under circumstances (d) and (f), claims in respect of pollution removal costs and other removal measures are subject to limitation of liability in pursuance of the LLMC 1976. Under circumstance (f), only emergency responders "other than the person or persons liable" can make a request for limitation of liability to the fund for limitation of liability. Obviously, this prohibits the ship-owner who is the person directly liable for bunker oil pollution caused by the ship from making a request in respect of limitation of liability to the fund for limitation of liability. The CLC 1992, Art. 5(8) provides that "claims in respect of expenses reasonably incurred or sacrifices reasonably made by the owner voluntarily to prevent or minimize pollution damage shall rank equally with other claims against the fund." This provision is beneficial to encouraging ship-owners to take prompt action to minimize or prevent pollution after oil leakage resulting in pollution and thus it is of critical importance to successful minimization of further pollution to the marine environment caused by the oil pollution. The HNS 1996 has a similar provision. However, this important characteristic of the HNS 1996 and the CLC 1992 is reflected neither in the Bunker Convention nor in the conventions relating to limitation of liability. The author contends that the reason why the Bunker Convention does not have such a provision is that under the CLC 1992 and HNS 1996, there is a supplementary regime of compensation fund contributed by owners of cargo. When the ship-owner appears as an emergency responder, he can make a claim for compensation from the fund established by the cargo owners, thus encouraging emergency response. The Bunker Convention does not have such a supplementary compensation regime.[44] It only has the fund established by ship-owners. Naturally, ship-owners cannot request compensation for their expenditure by using the fund that they have established.

Secondly, substantial loss: substantial loss is a traditional category of damage caused by infringement of rights, including loss of life or personal injury, damage to property and consequential loss resulting therefrom. Loss of life or personal

---

44 Because bunker oil as the fuel of ships is different from the bunker oil as cargo, it is impossible to require the owner of the cargo to contribute to this compensation fund.

injury caused by bunker oil leakage includes injury and death of person or persons due to falling into the polluted sea; damage to property caused by bunker oil leakage includes destruction of fishing nets and grounds, costs to update damaged or polluted fishing nets and grounds and the economic loss arising from unusable fishing nets and grounds. The claims for such loss can be considered as under Claim (a) and subject to limitation of liability.

Thirdly, pure economic loss: it is also referred to as "loss of economic property," meaning that the loss of capital occurring to the claimant because of the reasons other than physical loss of or damage to the property.[45] For example, although ashore hotels and restaurants are not polluted when bunker oil pollution caused by a ship spreads to the coast, owners of these hotels and restaurants suffer loss of profit due to decrease of tourists and suspension of business of restaurants caused by pollution to the coast.

Courts in common law countries only recognize physical damage to property and do not compensate pure economic loss in principle, but they have started to apply the "principle of reasonable proximate cause"[46] to decide whether to compensate pure economic loss.[47] Many civil law countries hold that "if property or other property interests are infringed, they shall be compensated, but pure economic loss is not property, hence it shall not be compensated." In most cases, laws consider pure economic loss as a factual issue and courts use discretion to apply general legal principles for infringement of rights.[48] The Bunker Convention recognizes the compensability of pure economic loss; however, pure economic loss fails to meet the conditions specified in Claims (a), (b), (d), (e) and (f) because it is not physical damage to property. In Claim (c) under the LLMC 1976, "claims in respect of other loss resulting from infringement of rights" require the damage

---

45 Guidelines on Oil Pollution Damage of Comité Maritime International, Part II, Art. 3(c).

46 Whether compensation is paid is determined by deciding whether pure economic loss is closely related to oil pollution damage. See Guo Jie, On Pure Economic Loss in Connection with Oil Pollution Damage, *Annual of China Maritime Law (Vol. 1994)*, Dalian: Dalian Maritime University Press, 1995, p. 258. (in Chinese)

47 The United States did not pay compensation for the pure economic loss which did "not arise along with damage to material" in principle before the enactment of the OPA 1990; after the enactment of the OPA1990, payment of compensation to certain extent was permitted for loss of profit and income arising from environmental impairment. See Guo Jie, On Pure Economic Loss in Connection with Oil Pollution Damage, *Annual of China Maritime Law, (Vol. 1994)*, Dalian: Dalian Maritime University Press, 1995, p. 251. (in Chinese)

48 Liao Yifan, Pure Economic Loss to a Time Charterer in Ship Collision, *Annual of China Maritime Law (Vol. 1993)*, Dalian: Dalian Maritime University Press, 1994, pp. 228~229. (in Chinese)

occurring along with physical damage to materials, but pure economic loss is not caused along with physical damage to materials, in this connection, claims for pure economic loss is not in compliance with the conditions required by Claim (c). Therefore, the person liable cannot limit his liability by applying the LLMC 1976 to claims for pure economic loss.[49]

Fourthly, environmental impairment: the Bunker Convention, Art. 1(9) provides that "… compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken …" Thus, under the Bunker Convention, only the costs of measures of reinstatement of the impaired environment can be compensated, and environmental impairment itself is not included as "loss" in the claims for compensation subject to limitation under the LLMC 1976. Therefore, environmental impairment is not entitled to limitation of liability under the LLMC 1976.

In conclusion, except claims for compensation in connection with substantial loss which can be subject to limitation of liability in pursuance of the LLMC 1976, other liability for damage caused by bunker oil pollution which ship-owners shall assume in pursuance of the Bunker Convention are not limitable under the LLMC 1976.[50]

b. Applicability of the LLOSS 1957 to Bunker Oil Pollution Damage

The LLOSS 1957, Art. 1(1) provides that:

The owner of a sea-going ship may limit his liability in accordance with Article 3 of this Convention in respect of claims arising from any of the following occurrences, unless the occurrence giving rise to the claim resulted from the actual fault or privity of the owner:

(a) loss of life of, or personal injury to, any person being carried in the ship, and loss of, or damage to, any property on board the ship;

(b) loss of life of, or personal injury to, any other person, whether on land or on water, loss of or damage to any other property or infringement of any rights caused by the act, neglect or default of any person on board the ship for whose act, neglect or default the owner is responsible or any person not

---

49 Chao Wu, Liability and Compensation for Bunker Pollution, *Journal of Maritime Law and Commerce*, Vol. 30, 2002, p. 563.

50 Chao Wu, Liability and Compensation for Bunker Pollution, *Journal of Maritime Law and Commerce*, Vol. 30, 2002, p. 564.

on board the ship for whose act, neglect or default the owner is responsible: Provided however that in regard to the act, neglect or default of this last class of person, the owner shall only be entitled to limit his liability when the act, neglect or default is one which occurs in the navigation or the management of the ship or in the loading, carriage or discharge of its cargo or in the embarkation, carriage or disembarkation of its passengers;

(c) any obligation or liability imposed by any law relating to the removal of wreck and arising from or in connection with the raising, removal or destruction of any ship which is sunk, stranded or abandoned (including anything which may be on board such ship) and any obligation or liability arising out of damage caused to harbor works, basins and navigable waterways.

It can be seen that the claims for compensation as provided for by the LLOSS 1957 are basically similar to those provided for by the LLMC 1976. For this reason, it is also difficult to limit liability under the LLOSS 1957, just as under the LLMC 1976. In addition, Claim (f) as provided for in the above-mentioned LLMC 1976, Art. 2(1) does not exist in the LLOSS 1957, henceforth, the liability of the person liable for pollution removal costs and removal measures can only be limited under the circumstances where the ship is sunk, stranded or abandoned.[51]

In conclusion, the person liable faces unconquerable difficulty in limiting his liability by applying the LLMC 1976 or the LLOSS 1957. Therefore, the author argues that the provisions of the Bunker Convention in respect of limitation of liability are not stable, which is unfavorable for the person liable to limit his liability and also hinders the prompt and reasonable settlement of disputes over claims for compensation.

2. Independence of the Fund for Limitation of Liability for Bunker Oil Pollution

In maritime practice, other properties of the person liable are often detained as security by the court in order to ensure compensation for damage will be paid smoothly. Hence, the person liable must establish a fund if he wants to be entitled to limit his liability with his other properties free from any compulsory measure taken by the court. To establish the fund, the person liable may offer a special

51 Chao Wu, Liability and Compensation for Bunker Pollution, *Journal of Maritime Law and Commerce*, Vol. 30, 2002, p. 564.

fund to the court handling the case or any other competent authority, which will be deposited into a bank under the name of the court or such competent authority as the custodian; alternatively, the person liable may also provide a letter of guarantee which is recognized by the court or such competent authority. Establishing a fund for limitation of liability is beneficial to safeguarding the interests of both the party who suffers damage caused by pollution and the person liable.

Damage as a result of a maritime incident generally includes damage arising from bunker oil pollution, destruction or loss of ships and the cargo on board, loss of life or personal injury, etc. In a lawsuit relating to claims for compensation caused by maritime incident, if there is only bunker oil pollution damage, establishing a fund for limitation of liability for compensation in pursuance of applicable national laws or international regimes is free from obstacle. However, if a claim both for compensation for bunker oil pollution and for compensation for other damage (for example, freight loss and damage) is involved, certain things are unclear, i.e., whether the aforesaid claims are included in the fund for limitation of liability which is established in pursuance of applicable laws (e.g. the LLMC 1976). In other words, does the ship-owner have to establish a separate fund for limitation of liability for bunker oil pollution in addition to the fund for limitation of liability for maritime compensation relating to claims for compensation for freight loss and damage in order to be entitled to the limitation of liability for compensation for bunker oil pollution?

Initially, during the discussion on the Bunker Convention held by the IMO Legal Committee, some countries strongly desired to establish a fund dedicated for compensation for bunker oil pollution damage which should be contributed by ship-owners,[52] but this proposal was severely opposed by certain parties, in particular, ship-owners and the insurance industry.[53] The reason is that there is already tacit understanding among countries in respect to issues regarding limitation of liability, which means that claims for compensation for bunker oil pollution damage shall be included in the fund for limitation of liability which is established under the

52 Michael N. Tsimplis, The Bunker Pollution Convention 2001: Completing and Harmonizing the Liability Regime for Oil Pollution from Ships, *Llord's Maritime and Commercial Law Quarterly*, February 2005, p. 91.

53 Patrick Griggs, International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001, at http://www.bmla.org.uk/documents/imo-bunker-convention.html, 12 December 2006.

LLMC 1976.[54] If a definite fund for limitation of liability is set forth in the Bunker Convention separately, in the event of any bunker oil leakage, at least both the fund for limitation of liability under the LLMC 1976 and the fund for limitation of liability for bunker oil pollution shall be established for the ships from the States parties to the LLMC 1976. In the event that pollution is caused by a ship carrying hazardous and noxious substance, three funds must be established, i.e. the fund for limitation of liability for hazardous and noxious substances, the fund for limitation of liability under the LLMC 1976 and the fund for limitation of liability for bunker oil pollution, which is unfavorable to both ship-owners and insurers.

However, the author argues that the fund for limitation of liability for bunker oil pollution should be independent from other funds. Firstly, based on literal interpretation, the amount of insurance or financial security to be provided as required under the Bunker Convention, Art. 7 shall be "equal to the limits of liability under the applicable national or international limitation regime, but in all cases, not exceeding an amount calculated in accordance with the Convention on Limitation of Liability for Maritime Claims, 1976, as amended." This means that a fund for limitation of liability for bunker oil pollution must be established separately in addition to all other funds for limitation of liability for claims for compensation. Secondly, horizontal comparison shows that a fund for limitation of liability established for general pollution caused by oil substances is independent from other claims for compensation, hence, discriminatory treatment of bunker oil pollution and similar oil pollution is groundless. Finally, from the perspective of marine environment protection, damage to the marine environment arising from bunker oil pollution is not less severe than other damage caused by maritime incidents. If the claim for compensation for bunker oil pollution is included in the same fund as other claims for compensation, it will not be conducive to the compensation for damage to the marine environment arising from bunker oil pollution.

3. Difference among Limits of Liability for Bunker Oil Pollution

In accordance with the Bunker Convention, Art. 6, ship-owners and those providing insurance or other financial security may be entitled to the limitation of liability under any applicable national or international regime. Generally, the entitlement to limitation of liability and limits of liability are subject to *lex fori*.

---

54 Song Chunfeng, Review of the International Convention on Civil Liability for Bunker Oil Pollution Damage, *Chinese Journal of Maritime Law*, No. 5, p. 30. (in Chinese)

However, limitation of liability for bunker oil pollution varies in different countries. Some countries are States parties to a convention on limitation of liability. For example, Singapore, Australia, Belgium, Denmark, Finland, France, Germany, the U.K., India, the Netherlands, Norway and Poland are States parties to the LLOSS 1957, while Sweden is a State party to the LLMC 1976. Some countries have enacted special national laws to deal with limitation of liability for bunker oil, e.g. the OPA 1990 of the United States,[55] while some countries do not have any law in respect of limitation of liability for bunker oil pollution at all. For example, China neither joins the Bunker Convention nor has any special law in respect of limitation of liability for bunker oil pollution. And there is a controversy over whether the limitation of liability under the Maritime Law of China is applicable to bunker oil pollution. Furthermore, the Bunker Convention does not set forth the specific requirements a State has to meet if it intends to join the Convention. If a State which has neither a national law regarding limitation of liability nor is a State party to a convention regarding limitation of liability joins the Bunker Convention,[56] a ship-owner may assume limitless liability for bunker oil pollution. Ship-owners may become liable for unfair limits of liability, and it is impossible to assess their financial risk as a result of bunker oil leakage. The same difficulty faces insurers due to differences among and uncertainties of limits of liability.

D. Compulsory Insurance

Once an incident causing pollution damage to the marine environment occurs, it not only causes severe loss to the party who suffers damage caused by such pollution, but also substantial liability for compensation to the person liable. In most cases, this leads to bankruptcy of the person liable and unemployment of his employees because of his inability to assume such liability. Economic accumulation over decades may come to naught because of only one pollution incident. In order to safeguard the interests of parties, it is an international practice at present that

---

55 In accordance with provisions of the OPA1990, oil pollution includes bunker oil pollution, so the limitation of liability in respect of oil pollution is certainly also applicable to the liability arising from bunker oil pollution.

56 Herry Lawford, Oil Spills and Compensation System, Oil Spill International Conference 2000, at http://www.pcs.gr.jp/doc/esymposium/12173/epaj2000.html, 26 November 2006.

ships shall maintain compulsory insurance or appropriate financial security.[57] Compulsory insurance and financial security are two concepts. Nevertheless, as ways of providing security of compensation for bunker oil pollution damage, both have the same legal effect for the party who suffers damage caused by pollution. Therefore, the Bunker Convention sets forth similar provisions in respect to them. For the convenience of wording, this paper elaborates by taking compulsory insurance as an example.

1. Substantive Provisions in Respect of Compulsory Insurance

The Bunker Convention, Art. 7 provides for issues like policyholders of compulsory insurance, insured ships, and the authorities issuing certificates attesting compulsory insurance and financial security.

a. Policyholders

The Bunker Convention, Art. 7(1) only requires the registered owner of the ship to maintain insurance. It does not require other types of ship-owners in the definition of "ship-owner" under the Bunker Convention, Art. 1 to maintain insurance. Its Art. 7(10) provides that "any claim for compensation for pollution damage may be brought directly against the insurer or other person providing financial security for the registered owner's liability for pollution damage." From the wording of the Bunker Convention, on can see that the "insurer" therein is not only limited to the registered owner of the ship, but also includes other ship-owners in the definition of "ship-owner". Therefore, the party who suffers damage caused by pollution may exercise the right to file a lawsuit directly against the person liable, including but not limited to the compulsory insurer of the "registered owner". However, it is obviously unrealistic to require everyone other than the registered owner of the ship to maintain insurance in pursuance of the Bunker

57 One of the priorities of the IMO at present is to conventionalize the requirement that ship-owners should maintain compulsory insurance of liability, while current direction of research of the CMI is to integrate respective provisions of existing conventions. Both face the biggest problem posed by the liability insurance market, in particular, the negative resistance by the International Group of P&I Clubs. This is similar to the case where the US OPA 1990 required the oil tankers entering and exiting the United States to provide financial security. Despite the fierce resistance of groups of ship-owners and the International Group of P&I Clubs against the trend of environmental protection and protection of the persons who suffer damage caused by pollution at present, it appears irresistible that compulsory insurance of liability to be maintained by ship-owners will be conventionalized.

Convention, Art. 7.[58]

b. Ships

In accordance with the Bunker Convention, Art. 7(1), the registered owner of a ship having a gross tonnage greater than 1,000 registered in a State party shall be required to maintain insurance to cover the liability for bunker oil pollution. It should be noted that the failure of a ship having a gross tonnage greater than 1,000 to maintain compulsory insurance does not influence its entitlement to limitation of liability.

In accordance with the Bunker Convention, the appropriate authority of a State party must issue a certificate to the ship which maintains compulsory insurance or other financial security, attesting that such insurance or other financial security is in force.[59] Because the number of general merchant ships considerably exceeds that of oil tankers,[60] it would cause great administrative burden to a country if the regime applicable to oil tankers is extended to general merchant ships.[61] The Bunker Convention allows a State party to choose an institution or organization for issuing such certificates; however, this just transfers the administrative burden from one party to another and does not eliminate or reduce such burden.[62]

c. Amount of Insurance

In accordance with the provision of the Bunker Convention, Art. 7(1), the insured amount shall be equal to the limits of liability under the applicable national or international limitation regime, but in all cases, not exceeding an amount calculated in accordance with the LLMC 1976, as amended. Such an "applicable national or international limitation regime" was once construed as the applicable law of the country where pollution damage occurs rather than the applicable law

---

58 Patrick Griggs, International Convention on Civil Liability for Bunker Oil Pollution Damage 2001, at http://www.bmla.org.uk/documents/imo-bunker-convention.html, 12 December 2006.

59 The Bunker Convention, Art. 7(2).

60 Taking the year of 1999 as an example, there were 29,212 seagoing merchant ships having a gross tonnage greater than 1000 in major countries in the world, while the number of seagoing oil tankers having a gross tonnage greater than 1000 was 6,671, at http://www.iicc.ac.cn/oversea/sts/shcyyl.html, 10 May 2006. (in Chinese)

61 In pursuance of the CLC 1992, Art. 7, the owner of a ship registered in a contracting State and carrying more than 2,000 tons of oil in bulk as cargo shall be required to maintain insurance or other financial security.

62 Chao Wu, Liability and Compensation for Bunker Pollution, *Journal of Maritime Law and Commerce*, Vol. 30, 2002, p. 566.

of the country where the ship is registered.[63] In the event that damage occurs in more than one country, different limitation regimes of different countries and different amounts of compulsory insurance or financial security may result in confusion and disorder. In addition, if the registered owner of the ship, bareboat charterer or operator or manager of the ship maintains insurance separately, the uncertainty of the insured amount will not facilitate the division of liability. As such, it is suggested that the insured amount shall be expressly defined.[64] However, this suggestion has been denied for two reasons: firstly, it is not a necessary suggestion because if the insured amount covered by compulsory insurance is not consistent with the actual amount of liability, the insurer may be required to make up the difference. As such, there is no need to expressly set forth a fixed amount.[65] Secondly, this suggestion is not feasible. For contracting parties to the LLOSS 1957, the insured amount shall be equal to the limits of liability for compensation under applicable national or international regime. Therefore, to finalize the insured amount (generally, the limit of liability under the LLOSS 1957 is lower) is to recognize a higher amount of limitation of liability, which the contracting parties to the LLOSS 1957 are unwilling to accept.

2. Procedural Guaranties of Compulsory Insurance – Direct Action

One would assume that it is not necessary for the party who suffers damage caused by pollution to bring a direct action against the insurer.[66] However, the author believes that the right of direct action which is finally set forth in the Bunker Convention is an important means for the party who suffers damage caused by pollution to safeguard his legitimate rights interests.

---

63 Patrick Griggs, International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001, at http://www.bmla.org.uk/documents/imo-bunker-convention.html, 12 December 2006.

64 IMO Legal Committee-79th Session, at http://www.comitemaritime.org/news/nl1999.html, 17 November 2006.

65 Chao Wu, Liability and Compensation for Bunker Pollution, *Journal of Maritime Law and Commerce*, Vol. 30, 2002, p. 566.

66 In respect of whether the Bunker Convention should set forth the same provision, international organization observers representing interests of insurers and ship-owners strongly disagreed. They asserted that such a provision was not consistent with the basic principle of liability insurance - "paid to be paid" and beyond the insurers' ability to assume the liability. However, such an opinion was not accepted by a majority of countries. The 81st Session of the IMO Legal Committee eventually decided to adopt the model under the CLC 1992, which grants the persons who suffer damage caused by pollution the right to bring a direct action against the insurer. It also grants the insurer the right to counterplea correspondingly and entitlement to limitation of liability. IMO Legal Committee-81th Session, at http://www.comitemaritime.org/news/n12000.html, 18 October 2006.

a. The Person against Whom the Party Who Suffers Damage Caused by Pollution Bring a Direct Action

Those who suffer damage caused by pollution can exercise the right of direct action only when it is expressly defined against whom they can bring that action. To this end, the Bunker Convention, Art. 7(10) provides that "any claim for compensation for pollution damage may be brought directly against the insurer or other person providing financial security for the registered owner's liability for pollution damage." It can be found in this provision that the person against whom a direct action can be brought include the insurer or other person providing financial security for the registered owner. The author notices that the Bunker Convention prescribes no limit to the insurer in wording, but it limits the person providing financial security to the person providing financial security for the registered owner. The reason why the Bunker Convention sets forth such a provision is that the bareboat charterer, operator and manager of the ship rarely provide financial security in practice. From the perspective of the party who suffers damage caused by pollution, the registered owner is a obligatorily required to maintain compulsory insurance or financial security, therefore, those who suffer pollution damage may bring a direct claim for compensation against the insurer providing compulsory insurance or any other person providing financial security to the registered owner.

b. Status of the Insurer Providing Compulsory Insurance in Litigation

If the plaintiff brings an action against the ship-owner and the insurer providing liability insurance or the person providing financial security as defendants, the ship-owner and the insurer or the person providing financial security will become co-defendants. This is also the best way for those who suffer damage caused by pollution to protect their own interests. For example, when the ship-owner is not entitled to limitation of liability while the insurer or the person providing financial security is entitled to such limitation, an action is brought against both the ship-owner and the insurer or the person providing financial security by party who suffers pollution damage allows the receipt of complementary compensation from the ship-owner in addition to the limits of liability of the insurer or the person providing financial security. It also prevents the expiration of the statute of limitation against the ship-owner after the conclusion of the lawsuit filed against the insurer or the person providing financial security.[67] Therefore, if the party who

67 Si Yuzhuo ed., *Monographic Study on Maritime Law*, Dalian: Dalian Maritime University Press, 2002, p. 441. (in Chinese)

suffers pollution damage files a lawsuit against the insurer (the defendant), the insurer has the right to require the ship-owner to participate in the proceedings.

III. Consideration on Legislation in Respect of Liability for Compensation for Bunker oil Pollution Damage in China

Currently, there is no special legislation relating to compensation for bunker oil pollution damage in China and provisions in this regard are only scattered across various laws and regulations. Generally, existing legislation has the following characteristics: firstly, relevant terms are abstract with low operability. For example, the General Principles of the Civil Law of the People's Republic of China (General Principles of Civil Law), Art. 124 provides that "any person who pollutes the environment and causes damage to others in violation of State provisions concerning environmental protection and pollution prevention shall bear civil liability in accordance with the law." However, there is no further provision with regard to issues such as who is liable, what liability to assume, how to assume the liability, etc. Secondly, a majority of these provisions are administrative regulations which regulate vertical relationships between civil subjects with unequal status, lacking provisions in respect to civil liability and compensation between civil subjects with equal status. As the implementation regulations of the Marine Environment Protection Law of the People's Republic of China (Marine Environment Protection Law), the Regulations of the People's Republic of China on the Control over Prevention of Pollution by Vessels in Sea Waters has arranged a special chapter for compensation for damage as a result of a pollution incident caused by ships. However, this chapter only stipulates that the relevant provisions under the Environmental Protection Law should be applicable in legal proceedings, while disputes over liability for compensation and amount of compensation should be settled based on the mediation by the harbor authority. It can be held that at present, a full set of reasonable regimes of liability for compensation to regulate bunker oil pollution is absent in China, which is not beneficial to the protection of the legitimate rights and interests of those who suffer damage caused by pollution or of China's marine environment.

Currently, there are two types of regimes of compensation for bunker oil pollution damage internationally. One is the regime established under the Bunker

Convention, and the other one is the regime established under the OPA 1990 of the United States. The Bunker Convention is the result of international efforts and coordination in controlling bunker oil pollution damage by law, which represents the common value orientation of a majority of countries. However, as a result of compromises, some provisions of the Bunker Convention are unclear and unreasonable. Despite its adoption of the regime of compensation under the Bunker Convention, the OPA 1990, as a national law, reflects unilateral needs and standards of the United States, because it does not need to make a concession to the interests of other countries. On that account, the author holds that China's regime of liability for compensation for bunker oil pollution damage should be established by taking into account its actual conditions, the provisions of the Bunker Convention and reasonable provisions of the OPA 1990.

The academic community believes that there are two ways to establish a regime of compensation for bunker oil pollution damage. The first way is to join the Bunker Convention and use the regime under the Convention for reference. When amending the Maritime Law of the People's Republic of China ("Maritime Law"), a chapter shall be specially designed for liability for compensation against ship-related pollution damage, and a section shall be dedicated to the liability for bunker oil pollution damage.[68] The second way is to formulate a separate law governing the liability for compensation against ship-related damage.[69] The author asserts that the first way is more advisable for these reasons: firstly, amendment of the Maritime Law is inevitable. Adding a stipulation in respect of liability for compensation against bunker oil pollution damage in the amended Maritime Law will reduce the costs of legislation and establish the regime of liability for compensation for bunker oil pollution damage as soon as possible, so that there is a law to abide by in handling relevant cases. Secondly, the liability for compensation against bunker oil pollution damage is interrelated with other regimes under the Maritime Law. Including the provisions concerning the liability for compensation against bunker oil pollution damage in the Maritime Law will help the liability compensation regime to stay consistent with other regimes and to avoid conflicts of laws.

---

68 Si Yuzhuo ed., *Monographic Study on Maritime Law*, Dalian: Dalian Maritime University Press, 2002, p. 442. (in Chinese)

69 Xu Guangyu and Zhou Chongyu, Status Quo of and Advice on Legislation for the Regime of Compensation for Oil Pollution Damage on the Sea, at http://www.ccmt.org.cn/hs/explore/exploreDetial.php?s1d=214, 11 November 2005. (in Chinese)

The following paragraphs will discuss the subject of liability, assumption of liability and compulsory insurance in respect of bunker oil pollution in China.

A. Subject of Liability

In China, provisions related to liability for bunker oil pollution damage are scattered throughout laws and regulations related to environmental protection,[70] and do not address the issue of identification of the subject of liability. The author holds that ship-owners, including the registered owner, bareboat charterer, operator and manager of the ship, shall be provided for as direct subjects of liability by referring to the relevant provisions in the Bunker Convention.

In respect to whether they may be potential subjects of liability, non-bareboat charterers and emergency responders should be treated differently. If a non-bareboat charterer assumes the liability for bunker oil pollution under certain circumstances, the party suffering pollution damage will have more ways to get compensated. In addition, it will help to improve the risk awareness of the charterer, who may try to charter the best boat possible to reduce occurrence of incidents arising from bunker oil pollution damage. From this perspective, it is reasonable that a non-bareboat charterer should be a potential subject of liability for bunker oil pollution damage. However, things are different in the case of emergency responders. As mentioned above, the Bunker Convention has adopted a resolution to urge State parties to provide for exoneration of liability of emergency responders. At present, exoneration of liability for emergency responders depends on individual nations' laws. If emergency responders are not exonerated, this may discourage them from salvaging ships which cause or may cause bunker oil pollution, further hindering the prevention and mitigation of bunker oil pollution. Therefore, the author argues that China's laws or regulations shall expressly provide for the exoneration of emergency responders.

---

70 For example, the Regulations of the People's Republic of China on the Control over Prevention of Pollution by Vessels in Sea Waters, Art. 12 provides that "owners of vessels or offenders who have been fined or obliged to shoulder the responsibility of cleaning or compensation for polluting the waters or discharging wastes against the rules must complete the procedures for finding sureties or related payments before setting sail." Also see the provision of the Marine Environment Protection Law of the People's Republic of China, Art. 90(1).

B. Assumption of Liability

In respect of the assumption of liability by a single subject of liability, the author holds that China's legislation shall adopt the provision under the Bunker Convention, where the registered owner of the ship, bareboat charterer, operator and manager of the ship who are considered as the ship-owner, as well as the insurers providing them compulsory insurance or the person providing them financial security shall be liable jointly and severally. As mentioned above, holding the direct subjects of liability jointly liable can give the party suffering damage more ways to claim for compensation. For the sharing of liability among the direct subjects of liability, the author contends that it is reasonable that liability is assumed based on proportion of fault.

The assumption of liability among several subjects of liability is very complicated in practice. Taking ship collision as an example, generally, a ship collision involves two or more person liable. Damage category varies depending on negligence of the parties in connection with the collision. Therefore, a ship collision involves complicated legal issues. And legal issues involving bunker oil pollution as a result of ship collision are even more complicated. In this connection, controversies abound over the nature of legal relationship, whether the person liable should assume liability and how to allocate the liability.

1. Observation from the Perspective of Theory

a. Definition of Legal Relationship

In order to apply laws and define subject of liability correctly, the contents and nature of legal relationship concerned shall be clarified first. Some scholars argue that bunker oil pollution damage as a result of ship collision shall be included in damage to property of a third party arising from ship collision, to which laws in relation to ship collision shall be applicable.[71] However, the author maintains that damage to property of a third party arising from ship collision and bunker oil pollution damage as a result of ship collision involve two different legal relationships. First, although both ship collision and bunker oil pollution cause damage to property of a third party, bunker oil pollution damage is related to damage to the environment. The two are different in nature; therefore, the legal regulations governing them should be different as well. Second, the subject of legal

71 Qiu Wenkuan, How to "Pay" for the Loss Arising from Oil Pollution to the Sea, at http://www.ccmt.org.cn/hs/explore/exploreDetial.php?sId=121, 2 June 2005. (in Chinese)

relationship in connection with ship collision varies depending on damage caused. If a ship collision leads to damage to property of a third party, the parties which cause the collision due to negligence and the third party are parties concerned in the collision. Liability for damage to property of the third party shall be shared by the parties which cause the collision due to negligence according to proportion of liability. If ship collision leads to loss of life or personal injury of the third party, both parties in connection with the collision shall be one party as a whole, and the third party who suffers damage caused thereby shall be the other. The two parties in connection with the collision shall assume joint and several liability for the third party who suffers damage caused thereby. For the legal relationship in respect of bunker oil pollution damage as a result of ship collision, one is the party who causes the collision, and the other is the person who suffers damage caused by the pollution to the marine environment. Therefore, they cannot be confused with each other, and applying the legal rules for ship collision to the legal relationship in respect of bunker oil pollution as a result of ship collision will lead to an absurd result.[72]

b. Determination of Nature of Act – Joint Infringement of Right

Joint infringement of right is a main form of modern infringement of right. The academic community has several propositions regarding the constitution of joint infringement of right: the first is proposition of joint willfulness, which holds that joint infringement of right is constituted only when co-infringers conspire to infringe certain right;[73] the second is the proposition of joint fault, which maintains that joint infringement of right means damage to the legitimate rights and interests of others by more than two actors who all intend to infringe such right or have fault in such infringement;[74] the third is the proposition of objectivity, i.e., relevance-based joint act, which holds that joint infringement of right is the result caused by acts of infringement as long as there is objective relevance without necessarily the subjective connection between the actors;[75] the fourth is the

---

72 Provisions in respect of ship collision of the Maritime Law of the People's Republic of China can be applicable to allocation of internal liability.

73 Qian Guocheng, Joint Infringement of Rights and Special Infringement of Rights, in Zheng Yubo and Diao Ronghua ed., *Basic Issues in Relation to Modern Civil Law*, Taipei: Hanlin Press, 1981, p. 59. (in Chinese)

74 Wang Liming ed., *Civil Law - Law on Infringement of Rights*, Beijing: Renmin University of China Press, 1993, pp. 354~357. (in Chinese)

75 Liu Shiguo, *Research on Modern Compensation for Damage from Infringement of Rights*, Beijing: Law Press China, 1998, p. 85. (in Chinese)

proposition of compromise, which argues that the actors have the same or similar fault subjectively and the acts of such persons are relevant objectively.[76] The author asserts that it is appropriate to adopt the "proposition of objectivity" to determine the joint infringement of right, which means that when the acts of several actors are correlated and lead to a damage jointly, a joint infringement of right will be constituted.[77]

There is great controversy over whether bunker oil pollution as a result of ship collision is a joint infringement of right. The main reason for this is that parties have different understanding on the acts causing bunker oil pollution damage. Therefore, it is particularly necessary to clarify such acts.

It is believed that oil leakage is the cause for bunker oil pollution damage. Ship collision does not necessarily result in bunker oil pollution, but bunker oil leakage inevitably leads to pollution. Whether ship collision will result in pollution damage depends on the cargo or bunker oil on board rather than the collision itself. If the material that leaks as a result of the collision is non-polluting water, no pollution damage will occur.[78] However, the author holds that superficially, bunker oil pollution as a result of ship collision involves two factors which may cause pollution – "collision" and "oil leakage," but based on the analysis of the relevance between them, oil leakage is not an independent act. Therefore the point of view that oil leakage is the cause for bunker oil pollution damage blindly denies the objective relevance between ship collision and oil leakage as a whole. Ship collision may lead to many direct consequences and oil leakage is only one of them. Ship collision is caused by act or omission of an actor involving the intention of the actor, while oil leakage is free from any human factor. Whether oil leakage occurs depends on the severity of the collision rather than human will, and is different from intentional act of pollutant discharge. Hence, ship collision is the act causing bunker oil pollution.[79] A ship collision is caused by all parties in connection

---

76 Zhang Xinbao, *Law on Infringement of Right of the People's Republic of China*, Beijing: China Social Sciences Press, 1998, p. 167.

77 Li Zhiping, Further Discussion on No-Fault Liability for Infringement of Right in Connection with Environmental Pollution, at http://www.riel.whu.edu.cn/show.asp?ID= 608, 13 August. (in Chinese)

78 Li Yichuan, Economic Analysis of the Cause and Effect of Oil Pollution Damage, at http://www.ccmt.org.cn/hs/explore/exploreDetial.php? s1d=11, 13 May 2006.

79 Du Yixing, Form of Civil Liability for Oil Pollution Damage as a Result of Ship Collision - Concurrent Discussion on Applicability of Laws, at http://www.ccmt.org.cn/hs/explore/exploreDetial.php?s1d=261, 14 May 2006. (in Chinese).

with the collision jointly, though they do not harbor joint willfulness to give rise to pollution damage and do not conspire to do so. Nevertheless, when the parties have performed the joint act leading to pollution, a joint infringement of right is constituted.

c. The Way to Assume Liability – Joint and Several Liability

The author holds that in terms of the way to assume liability for joint infringement of right, joint infringers shall assume joint and several liability by applying the provision of the General Principles of Civil Law, Art. 130 unless laws and regulations expressly provide that joint infringers do not assume joint or several liability.[80] Requiring the joint infringers to assume liability jointly and severally is the correct way to show that no-fault principle is applicable to compensation for bunker oil pollution damage as a result of ship collision for the following reasons:

Firstly, requiring the joint infringers to assume joint and several liability is conducive to the protection of legitimate rights and interests of the party who suffers damage caused by pollution. The assumption of liability jointly and severally by parties in connection with the collision can reduce occurrences of cases in which the loss to those who suffer damage caused by pollution cannot be compensated or fully compensated because of the bankruptcy or inability to compensate for pollution damage of one party involved in the collision.

Secondly, requiring the joint infringers to assume joint and several liability is consistent with no-fault principle. Giving no consideration to the fault of parties in connection with the collision, this principle holds that ball parties should be liable for compensation for actual pollution damage regardless of fault. One party may have the right of recourse against other parties in accordance with his proportion of fault in the collision after he fully compensates the loss to those who suffer damage caused by pollution. It is considered that requiring all the parties in connection with the collision to assume the liability jointly and severally will increase the risk of operation for shipping enterprises and hence affect the development of the shipping industry. However, the author disagrees. The shipping industry cannot develop at the expense of the environment and the legitimate rights and interests of others. The establishment of joint and several liability regime will prompt operators or managers of ships to operate ships more carefully. Weighing the advantages

---

80 The General Principles of Civil Law of the People's Republic of China, Art. 130, "If two or more persons jointly infringe upon another person's rights and cause him damages, they shall bear joint liability."

and disadvantages, the author believes that it is more advisable that parties in connection with ship collision assume liability jointly and severally.

Finally, joint and several liability embodies the value orientation of fairness for both joint infringers and the party who suffers damage caused by pollution. The regime of liability for joint infringement of right in connection with ships is worth advocating and it is necessary to apply it to all areas involving joint infringement of right in connection with ships.[81]

2. Analysis from the Empirical Perspective

In juridical practice, there is no consistency regarding whether the owner of the ship in connection with a collision shall assume joint and several liability when it involves the assumption of liability for a third party. Because the principle of imputation applies to both general oil pollution damage and to bunker oil pollution damage, the author argues that the empirical analysis of issues regarding the assumption of liability for general oil pollution damage is applicable to the assumption of liability for bunker oil pollution damage.

a. Joint and Several Liability for Compensation

On February 6, 1988, *Vlacherna Breeze*, a vessel operated by Koning Chasse Shipping Company affiliated to Glennave Shipping Company, collided with *Chao He*, a vessel owned by Shanghai Ocean Shipping Co., Ltd. (COSCO) in the sea waters to the east of Guangdong Province. Oil leakage from *Vlacherna Breeze* caused pollution damage, and the party who suffered damage caused by such pollution filed a lawsuit against the ship-owners and operators of these two ships on the grounds that joint infringer should be liable jointly and severally. The Guangzhou Maritime Court held that "as a result of the collision between *Vlacherna Breeze* and *Chao He* in navigation, pollution to the sea waters was caused by oil leakage from *Vlacherna Breeze*, and the fishery and aquaculture industries in the coastal areas in the east of Guangdong Province suffered damage and loss, which constituted joint infringement of right, and the defendants should be liable jointly and severally for compensation for the economic loss to the plaintiff as a result of the oil pollution damage."[82] This judgment was beneficial to protecting the rights and interests of the parties who suffered such pollution damage

---

81 Deng Ruiping, *Research on Basic Theoretical Issues Regarding Law on Act of Infringement of Right in Connection with Ships*, Beijing: Law Press China, 1999, p. 138. (in Chinese)

82 Xu Guangyu and Zhou Chongyu, Legal Issues Regarding Subject of Compensation and Liability in Respect of Oil Pollution Damage in Connection with Many Ships, at http://www.ccmt.org.cn/hs/explore/exploreDetial.php?sId=215, 12 October 2006. (in Chinese)

by adopting the principle of joint and several liability for compensation, and was a correct decision by the court.

b. Independent Compensation by the Oil Leakage Ship

In the *Jin You 6 Pollution* case[83] heard by Guangzhou Maritime Court in 1998 and the first instance of the *Min Ran Gong 2 Pollution* case[84] in 1999, judgments were made that owners of the ships which caused pollution assume liability.

On November 13, 1998, ships of Chinese nationality *Jin You 6* and *Jianshe 51* collided with each other in the sea waters of Guangzhou Port, which led to breakage of the oil tank of *Jin You 6*, resulting in leakage of substantial quantity of 0# diesel oil and causing severe pollution to surrounding sea waters, while *Jianshe 51* did not leak oil. The plaintiff filed a lawsuit on the ground that the joint infringement of right by the owners of the two ships caused loss to national fishery resources, and required the owners of the two ships to assume joint and several liability. The Guangzhou Maritime Court held through trial that in this case, the source of pollution was the 0# diesel oil leaking from *Jin You 6* and the person who was liable for polluting the environment was the owner of this ship, so the ship-owner of *Jin You 6* should be fully liable for national loss. Because *Jianshe 51* did not leak oil, its owner would not assume liability for national loss directly in this case.

On March 24, 1999, *Min Ran Gong 2*, a ship owned by China Marine Bunker (PetroChina) Co., Ltd. Fujian, collided with *East Sea 209*, a ship owned by Taizhou East Sea Shipping Company, in the sea waters of the Pearl River. *Min Ran Gong 2* suffered breakage of its hull and sank, as a result of which 2,000 tons of heavy oil flowed into the sea, causing severe pollution. The court of first instance held that the no-fault principle was applicable to the civil liability for oil pollution damage. Under this principle the person or persons who caused oil pollution damage should be liable, and the party responsible for the boat from which leakage occurred should assume liability for compensation independently without giving consideration to the liability of that party and any third party in the incident of collision. As such, the judgment was made that the ship-owner of *Min Ran Gong 2* was liable for compensation for oil pollution.

The people upholding independent compensation by the leaking ship holds that oil pollution damage is a special act of infringement of right, to which the

---

83 1999 Guang Shang Fa Shang Zi No. 113.
84 1999 Guang Shang Fa Shi Zi No. 047.

no-fault principle is applicable. Under any circumstance, the owner of the ship which leaks oil is the only person liable and assumes liability for compensation for damage to the party who suffers damage caused by such pollution independently. However, the author argues that since bunker oil pollution damage is caused by the collision between both parties, it is unfair that the owner of the ship which leaks oil assumes liability for compensation for oil pollution independently. This also covers up the truth that the pollution damage is jointly caused by both the ship which is leaking and the third party. This is not only unfavorable to protecting the interests of the party who suffers damage caused by such pollution, but also inconsistent with the value orientation of marine environment protection. For example, when oil leakage occurs to one of the two ships which collide with each other, if the principle of independent compensation by the ship to which oil leakage occurs is maintained, however, that ship sinks or no compulsory insurance or financial security is maintained for it, the interests of the party who suffers damage caused by such pollution will not be secured.

c. Compensation Based on Proportion of Liability for Collision

The court of second instance for *Min Ran Gong 2* held that the collision between two ships leading to pollution constituted joint infringement of right, and oil pollution damage as a result of the collision brought loss to the property of a third party. Therefore, the ship-owners of the two colliding ships should assume joint liability for compensation based on the proportion of fault and liability. In accordance with the Maritime Law, Art. 169, in the event of collision due to the fault of both parties, the colliding ships are only jointly and severally liable for the loss of life or personal injury of a third party, but they will not be jointly or severally liable for any loss to the property of a third party. They will assume liability for compensation based on the proportion of fault. Therefore, judgment was made that the defendants assumed joint liability for compensation for oil pollution based on the proportion of liability.

The court of second instance for *Min Ran Gong 2* approved the view that colliding ships constituted joint infringement of right, but adopted the practice that compensation was made based on the proportion of liability for the collision. Compensation based on the proportion of liability can reduce lawsuit burden by simultaneously solving compensation issues for those who suffer pollution damage and division of liability for parties involved. However, it confuses ship collision and oil pollution which are two acts of infringement of right of different natures. Ship collision is a general infringement of right to which the fault principle is applicable.

Under this principle, if the party who suffers damage caused by pollution wants to be compensated, he needs to prove the fact of damage, faults of both parties in connection with the collision, and the cause-and-effect relationship between such faults and the fact of damage. However, oil pollution is a special infringement of right, to which the no-liability principle is applicable. Under this principle, the party who suffers damage caused by pollution does not need to prove whether the infringing party is at fault, and he should pay compensation as long as he causes oil pollution damage. The application of fault principle which is applicable to ship collision to lawsuits related to compensation for oil pollution damage goes against the basic requirements of the no-fault principle which gives no consideration to the faults of parties in connection with the collision, resulting in the paradox of applying the no-fault principle while going against it. For the party who suffers damage caused by pollution, he can only have the right of recourse against parties in connection with the collision based on defined proportion, which increases the risk that he cannot be compensated. Obviously, this is not appropriate.

3. Advice on Legislation

Based on the above-mentioned analysis, the author believes that bunker oil pollution caused by ship collision is a joint infringement of right, which shall lead to joint and several liability. It is advised that by referring to the provisions of the OPA 1990 of the United States, China's legislation shall set forth the following provisions. Firstly, liability of parties concerned to which an incident occurs shall be divided based on their respective proportion of fault. Secondly, the third party causing a pollution incident shall be jointly and severally liable for compensation for bunker oil pollution damage.

C. Limitation of Liability

There is controversy over whether the provisions related to limitation of liability for maritime compensation of the Maritime Law, Chapter 11 are applicable to bunker oil pollution damage caused by ships. Some hold that bunker oil pollution caused by ships cannot be subject to limitation of liability for three reasons. Firstly, to limit liability does not comply with the principle of the strict liability regime. Secondly, in accordance with the Maritime Law, Art. 208(2), the provisions in respect of "limitation of liability for maritime compensation" of Chapter 11 shall not be applicable to the "claims for oil pollution damage under the International Convention on Civil Liability for Oil Pollution Damage to which the People's

Republic of China is a party," hence oil pollution damage is a "non-restricted creditors' right." Thirdly, there is no provision in respect of limitation of liability under the General Principles of Civil Law.

The author contends that bunker oil pollution can be limited in pursuance of the Maritime Law for the following reasons: firstly, the "regime of strict liability" is the principle of imputation and it does not influence the regime of limitation of liability. Secondly, bunker oil pollution damage is a typical maritime case in compliance with the Stipulation of the Supreme Court of the People's Republic of China on the Scope of Acceptance for Maritime Court, to which the Maritime Law (a substantive law) is applicable. Thirdly, bunker oil pollution damage involves a special regime of limitation of liability under corresponding international conventions rather than a "non-restricted creditor's right," in that case, relevant provisions of the Maritime Law are not applicable. However, as mentioned above, bunker oil pollution damage is not subject to the International Convention on Civil Liability for Oil Pollution Damage to which the People's Republic of China is a party, in this connection, provisions of the Maritime Law shall be applicable. Finally, the Maritime Law, Art. 207(1) provides that "with respect to claims in respect of loss of life or personal injury or loss of or damage to property including damage to harbor works, basins and waterways and aids to navigation occurring on board or in direct connection with the operation of the ship or with salvage operations, as well as consequential damages resulting therefrom, the person liable may limit his liability in accordance with the provisions of this Chapter." And bunker oil pollution damage shall be covered by this paragraph.

D. Compulsory Insurance

The author suggests that China begin to require compulsory insurance. Compulsory insurance can guarantee that the person liable after an incident is able to supply financial compensation. Countries also generally take the practice of requiring compulsory insurance to protect parties who suffer damage caused by pollution. China's present situation, in which it has not established a complete and feasible compulsory insurance regime, is not conducive to the protection of the interests of the party who suffers damage caused by pollution.

1. Compulsory Insurance or Financial Security

In respect of substantive law, in China, only the Marine Environment Protection Law, Art. 66 provides that "the State shall perfect and put into practice

the civil liability system of compensation for vessel-induced oil pollution, and shall establish a fund system for vessel-induced oil pollution insurance and oil pollution compensation based on the principle of the vessel owner jointly undertaking the risks of any vessel-induced oil pollution compensation liability." This principle-oriented provision shows that in China, only the ship-owner and the cargo owner are listed as parties to insurance policy, and there is no provision in respect of the category and amount of insurance, which is unfavorable to the protection of the party who suffers damage caused by pollution. The author proposes that the registered owner of ship should be obligated to maintain compulsory insurance by referring to the Bunker Convention and other ship-owners should be encouraged to maintain insurance, where the amount of insurance should be equal to the limit of liability to which the ship is entitled to.

2. Direct Action by the Party Who Suffers Damage Caused by Pollution

In pursuance of the Insurance Law of China, the insurer shall, according to the provisions of law or the agreement in the contract, directly pay insurance money to the third party if damages are caused by the insured covered by the liability insurance.[85] Thus, in the absence of written provisions of law and the agreement in the contract, those who suffer damage caused by pollution cannot claim for insurance money from the insurer directly. However, with a general view on China's laws, only the Special Maritime Procedure Law of the People's Republic of China, Art. 97 provides that "with respect to a claim for indemnity against oil pollution damage caused by a ship, the person suffering for the damage may make the claim to the ship-owner causing the oil pollution damage, or directly make the claim to the insurer bearing the liability for oil pollution damage of the shipowner or to other person providing financial security. Where the insurer bearing the liability for oil pollution damage of the ship-owner or the other person providing financial security against whom an action is filed, he is entitled to require the ship-owner causing the oil pollution damage to participate in the proceedings." The author believes that this provision should also be applicable to lawsuits related to bunker oil pollution damage caused by ships. However, with no relevant substantive law to vest those who suffer damage caused by pollution with the right to claim for insurance money from the insurer directly, such right becomes procedural rights which may not be exercised in practice. This may lead to failure to safeguard the interests of the sufferers of pollution-related damage. Therefore,

85 The Insurance Law of the People's Republic of China, Art. 49(1).

at the time of legislation, it shall be expressly prescribed that the party who suffers damage caused by pollution are entitled to claim for compensation against the insurer directly.

In China, direct action may lead to the problem that if the person liable for ship-related bunker oil pollution presents general guarantee rather than joint and several security, the right of direct action will contradict with China's provisions in respect of general security. In pursuance of provisions of the Guarantee Law of the People's Republic of China ("Guarantee Law") and Opinions of the Supreme Court of the People's Republic of China on Several Issues Regarding the Applicability of the Civil Procedure Law of the People's Republic of China, under general circumstances, the creditor can only claim for repayment of debts from the debtor first, and only when the debtor is unable to repay his debt can the creditor require the guarantor to assume the liability of guarantee. As a result, this leads to a legal dilemma in terms of protecting the rights of both those who suffer damage caused by pollution and general financial guarantors. If the principle of general guarantee is abided by strictly, those who suffer damage caused by pollution can only claim for compensation against the person or persons liable for bunker oil pollution first, rather than filing a lawsuit directly against the person providing financial security. As a result, the interests of the party who suffers damage caused by pollution cannot be remedied in a timely manner. If the precedence of direct action by the party who suffers damage caused by pollution over general financial guarantor is recognized, the rule for general guarantees will be violated and the interests of general guarantors will not be protected.

The author holds that under the circumstance of conflict of rights between the general financial guarantor and the party who suffers damage caused by pollution, the only way is to abide by general principle of selection, which means to choose the greater of two benefits and the lesser of two evils. From the perspective of protecting the marine environment and the party who suffers damage caused by pollution, it should be considered that direct action by the party who suffers damage caused by pollution shall be of precedence. In terms of legal theory, the Special Maritime Procedure Law and substantive law provisions related to direct action in the future are special law provisions and shall be considered as an exception to the rule of general guarantee under the Guarantee Law. Even if the ship-owner provides general financial security, he shall recognize the right of those who suffer

pollution damage to file a lawsuit against the general financial guarantor directly.[86]

As mentioned above, in accordance with the provision of the Special Maritime Procedure Law, Art. 97, the insurer or the person providing financial security has the right to require the ship-owner to participate in the proceedings, but there are different opinions on the status of the ship-owner in the proceedings at that time. A majority argue that the ship-owner shall act as a third party without an independent right of claim, while others believe that he shall appear in the court as a co-defendant. In accordance with provisions of the Opinions on Several Issues Regarding the Applicability of the Special Maritime Procedure Law of the People's Republic of China, the ship-owner in litigation should act as a third party without an independent right of claim.[87]

IV. Conclusion

The regime under the Bunker Convention is not entirely satisfactory.[88] Some reviews even hold that the Bunker Convention creates as many issues as it addresses.[89] Some specific examples include: firstly, the cancellation of exoneration of liability of emergency responders is unfavorable to encouraging salvors to salvage ships in distress; secondly, there is no independent regime of limitation of liability to address issues related to limitation of liability for compensation for bunker oil pollution damage, which creates difficulty in applying limitation of liability; thirdly, the ambiguities of the Bunker Convention are detrimental to the consistent application of the Bunker Convention. Furthermore, it is not easy for the Bunker Convention to come into force because of very demanding conditions

---

86 Si Yuzhuo ed., *Monographic Study on Maritime Law*, Dalian: Dalian: Dalian Maritime University Press, 2002, p. 442. (in Chinese)

87 Opinions on Several Issues Regarding the Applicability of the Special Maritime Procedure Law of the People's Republic of China, Art. 69 provides that "a maritime court may inform the ship-owner of participating in the lawsuit as a third party without independent right of claim at the request of the insurer or other person providing financial security in connection with oil pollution damage."

88 Michael N. Tsimplis, The Bunker Pollution Convention 2001: Completing and Harmonizing the Liability Regime for Oil Pollution from Ships, *Llord's Maritime and Commercial Law Quarterly*, February 2005, p. 100.

89 New Convention on Liability and Compensation for Pollution from Bunkers, at http://www.isma-london.org/focus/focus06. html, 27 December 2005.

for taking effect.[90] Therefore, liability and compensation for bunker oil pollution shall be governed by national laws for a long time.[91] However, on the whole, as Bill O'Neil, Secretary-general of the IMO, has said, the adoption of the Bunker Convention has accomplished the mission which was put forth when the IMO established the Legal Committee 30 years ago – to adopt a set of comprehensive and harmonized international rules to provide prompt and effective compensation for all persons who suffer damage caused by ship-induced pollution.[92] Undeniably, the basis of liability, subject of liability, the way to assume liability, compulsory insurance, direct action and others under the Bunker Convention have filled in the legal lacuna in the field of compensation for bunker oil pollution damage internationally, and the regime of compensation established under the Bunker Convention will exert great influence on countries' national legislation

With the expansion of China's foreign trade, the number of and types of ships in its territorial waters is increasing, leading to more frequent bunker oil pollution incidents. Aging of ships and poor technology cause pollution incidents in China as well. However, China does not have special legislation in relation to compensation for bunker oil pollution damage. Additionally, difficulties exist in applying present laws when courts hear pollution cases. This is unfavorable to the protection of the interests of those who suffer damage caused by pollution and of the marine environment. Therefore, research on international conventions related to liability for compensation for bunker oil pollution damage is of important significance to the establishment and improvement of relevant legal regimes in China.

Translator: WANG Shunv
Editor (English): Mary Frances Cappiello

---

90 The Bunker Convention, Art. 14 provides that "1. This Convention shall enter into force one year following the date on which eighteen States, including five States each with ships whose combined gross tonnage is not less than 1 million, have either signed it without reservation as to ratification, acceptance or approval or have deposited instruments of ratification, acceptance, approval or accession with the Secretary-General. 2. For any State which ratifies, accepts, approves or accedes to it after the conditions in paragraph 1 for entry into force have been met, this Convention shall enter into force three months after the date of deposit by such State of the appropriate instrument."

91 The New Bunker Convention, at http://www.gard.no/Publications/GardNews/Recentlssues/gn165/art_7.asp, 27 December 2005.

92 Suzanne Starbuck and Roger Overall, Conventional Wisdom, at http://www.worldbunkering.com/pages/Issue6_2conventional.htm, 26 February 2006.

Dual Legal Character and Double Values and Functions of the Right to Use Sea Areas

GONG Gu*

Abstract: Generally, experts and scholars in conventional jurisprudence analyze the right to use sea areas from a single perspective, giving rise to the one-sidedness of their theory and considerable controversy. From the perspective of economics, the right to use sea areas falls under the category of property rights in nature. Such right produces value in terms of both private and public interests, and has functions related to economy and environmental protection. Therefore, it can be deduced that the right to use sea areas has nature of both public and private rights. In legal practice, measures can be taken to help unify the double values and functions of the right to use sea areas, such as imposing restrictions on exercise of such right when public interests are involved, protecting economic interests of the right holders and using the royalties for the use of sea areas reasonably.

Key Words: Right to use sea areas; Property right; Public right; Private right; Values; Functions

I. A Debate on the Legal Character of the Right to the Use of Sea Areas: Public or Private?

The right to use sea areas is legally enjoyed by the subjects who use the sea, enabling the right holders to use specific sea waters exclusively for a particular period of time. This right is newly established in the Law of the People's Republic of China on the Administration of Sea Areas (hereinafter "the Law on the Administration of Sea Areas"), and it is one of the fundamental rights of Chinese

---

* GONG Gu is a Ph.D. candidate of Ocean University of China and his research orientation is environmental resources law. This article is part of the research result of the Humanities and Social Science Research Project "Research on the Regime for the Paid Use of Chinese Sea Areas" (project No. D2120-3) funded by the Ministry of Education.

citizens in terms of using marine resources.

Two different points of view relating to the legal character of the right to use sea areas exist in the academia, namely the "public right" theory and the "private right" theory. Scholars in favor of the former mainly use either (i) the public law nature of the Law on the Administration of Sea Areas to deduce the character of the right, or (ii) the nature of the administrative law to demonstrate why that right is a public right. Scholars championing the private right theory, by alluding to the common practice of using public laws to establish civil rights in modern society, argue that the attribute of property of sea area infers the same nature of the right, in order to conclude that such right has the attribute of a private right.[1] The latter theory however encompasses several different viewpoints. These involve the right to natural resources, quasi-real right, special real right and real right, etc. Among all, the real right, especially usufructuary right argument is more popular.[2] Some scholars even call the right to use sea areas as the real right of sea areas.[3] Besides, some scholars contend that the right to use sea areas should be regarded as parallel to the right to use land and should belong to the scope of "superordinate concept" in real right regime.[4] Therefore, it can be inferred that the private right theory is mainstream in current jurisprudential circle, and regarding the right to use sea areas as a private right, especially the real right or other rights similar to the real right, is a common conclusion when it comes to the determination of the legal character of the right.

However, regardless of the numerical count or the acclaimed sufficiency of

---

1 Liu Lan, An Analysis of the Legal Character of the Right to Use Sea Areas, *Academic Exchanges*, No.1, 2005. (in Chinese)

2 Cui Jianyuan, The Regime of the Right to Use Sea Areas and Its Reflection, *Tribune of Political Science and Law*, No. 6, 2004 (in Chinese); Fan Jing, Zhang Qinrun, A Study on the Problem of the Right to Use Sea Areas, *Journal of Yantai University*, No. 1, 2004 (in Chinese); Ye Zhinian, An Analysis on the Basic Legal Problems of the Right to the Use of Sea Areas, *Journal of Southwest University of Political Science and Law*, No. 6, 2004 (in Chinese); Shui Bing, An Analysis on the Value of the System of the Right to Use Sea Areas, *Journal of Ocean University of China*, No. 2, 2005 (in Chinese); Mao Yamin, A Primary Research on the Right to Use Sea Areas, *Journal of Hangzhou Institute of Commerce*, No. 3, 2004 (in Chinese); Cui Fengyou, An Analysis on the Real Right Character of the Right to Use Sea Areas, *Tribune of Political Science and Law*, No. 2, 2001. (in Chinese)

3 Scholars have already used the concept of the real right of sea areas in various works, see Yin Tian, Legal Consideration on the Real Right of Sea Areas, *Journal of Henan Administrative Institute of Politics and Law*, No. 1, 2005 (in Chinese); Yin Tian ed., *A Research on China's Real Right of Sea Areas*, Beijing: China Legal Publishing House, 2004. (in Chinese)

4 Guan Tao, A Study on the Problem of the Right to Use Sea Areas, *Journal of Henan Administrative Institute of Politics and Law*, No. 3, 2004. (in Chinese)

their reasons, the private right theorists must admit that the inconsistency between the right to use sea areas and the conventional real rights. That is to say, the particularity of either its objects or content of the right, the public law nature of the Law on the Administration of Sea Areas that established the right, and the rigorous procedures for the exercise of right, all militate against the private nature of this right, and that the nature of the right is not so simple as can be divided into either scope absolutely. According to Professor Yin Tian, "it is not difficult to demonstrate whether sea areas are real estate or not, and it is not challenging to prove whether the right to use sea areas is a usufructuary right or not. The key issue however lies in why we try to make such a demonstration or proving. In other words, the key is how to arrange the system in a reasonable way.[5]

Professor Yin Tian's objective and realistic attitude is admirable. When a brand new right appears, simply applying the traditional theories may not always yield convincing conclusions. This means that we may be required to combine different theories and consider the realities of the right in order to offer a truly appropriate explanation. As for judging the correctness of the theory, the conjunctions between the new right and practices count, therefore, the judgment must take into account whether the theory benefits social practices, rather than neglecting special circumstances. Any preconceived measure may in fact veil the truth. Further, purely theoretical improvement and self-justification, without reference to social effects, are irresponsible approaches.

As a result, before any further research into the right to use sea areas, the first and foremost concern should be its institutional effectiveness, rather than its sync with conventional theories. This article will not follow traditional ways used by general commentators, in which the commentator determines a legal standpoint at the outset, and then plays the role of defender in demonstrating the specific theory. Rather, this article will analyze the problem outside the purview of law, and then try to examine social functions of the right to use sea areas comprehensively from an economic standpoint. Finally, the article will discuss legal issues of the right on the basis of economic analysis.

II. The Right to Use Sea Areas Being a Kind of Property Right and Its Double Values and Functions

5 Yin Tian, Legal Consideration on the Real Right of Sea Areas, *Journal of Henan Administrative Institute of Politics and Law*, No. 1, 2005. (in Chinese)

Within the analytical framework of economics, property is a core concept. Normally, the term "property" reflects economic rights owned by subjects over objects, including the power to possess, use, dispose of and seek profit from the objects. The term property is almost equivalent to the legal concept of property right, which involves ownership, usufruct rights, creditors' rights, intellectual property and stock rights, etc. These rights, as listed before, must have some basic characters, namely exclusiveness, limitedness, and disposableness.

As a core concept in economic theory, the value targets and functions of the property have been constantly improved, while its connotation and extension have kept changing. At the very start, "property" was regarded as a synonym for property right, which was applicable to private property and targeted at the protection of the legitimate interests of right holders. By means of protecting private interests, it encouraged right holders to develop economy further. Later, with a series of theories, such as the externality theory[6] and tragedy of the commons,[7] the impact of property on persons other than the right holders as well as the whole society began to be realized. In analyzing the regime of property at that time, one finds that it was experiencing two kinds of changes: (i) the value target of the regime began to take the public interest into account, as opposed to previously considering pure private interests; and, (ii) as for the functions, the regime started carrying the features of solving externalities and providing public goods, rather than being just a profit-making tool intended only at maximizing economic benefits. These new changes did not cause any impairment to the significance of the property regime. On the

6 The theory of externality says that in the process of manufacturing or consuming, an individual's behavior brings external costs or benefits, in the form of monetary compensation, to a third party, which does not grant its consent. One of the typical examples is the environmental pollution caused by the corporations.

7 The "tragedy of the commons" is a theory in economics. According to this theory, when there is no valid property right regime, individuals, in pursuit of their self-interests, may behave contrary to the whole group's long-term best interests by depleting some common resources, which will further lead to the tragedy of joint damage or even the destruction of the whole society.

contrary, it greatly enhances its applicable scope and vitalities.[8] In this modern society, economic incentives and ecological protection are recognized as the two basic functions of property, both of which are indispensable and ill-ignorable.

A. The Fact that the Right to Use Sea Areas Possesses the Nature of Property Right Determines Its Dual Function

Although there are fierce debates about the nature of the right to use sea areas, scholars have agreed on the basic content of the right. Generally, the right involves the following:

(1) Exclusivity of the right: Article 2(3) of the Law on the Administration of Sea Areas states that "this law shall be applicable to any exclusive use of any specific sea areas in the interior waters or territorial seas of the People's Republic of China continuously for three months or above". Its Article 23(1) provides that the "right enjoyed by the holder of the right to lawfully use sea areas and obtain proceeds therefrom shall be protected by law, and may not be infringed upon by any entity or individual". Its Article 44 stipulates that "the right holder may plead the maritime administrative department to remove the hindrance, or institute a suit at the people's court in case of a violation of Article 23. The provision also confers the right to plead for damages if any losses resulted from the violation". These provisions clearly show that the right holders have an exclusive use of special sea areas.

(2) Restrictions on the exercise of the right: the restrictions manifested as constraints on both space and time, limit the scope of the exclusive use of the sea areas. The right to use sea areas can be exercised subject to the approval of the authorities, which shows that the right has limits on the applicable space. Article 25 of the Law on the Administration of Sea Areas provides for the maximum term for

8 The applicable scope of the regime of property expanded from purely private property to public goods, which was not covered by conventional theories; the functions of the regime were extended from pure economic functions to other functions related to public welfare, including the protection of environment. These changes did not reduce the significance of the regime of property, on the contrary, they made the regime more prominent, and people came to recognize the important values produced by a reasonable regime of property to the protection of environment.

using sea areas, which puts restrictions on time,[9] while Article 23(2) stipulates that the holder of the right to use sea areas may not hinder or hamper the non-exclusive use of the sea, in this connection, the exclusiveness of the right is also restricted.

(3) Right to dispose: The three paragraphs in Article 27 of the Law on the Administration of Sea Areas describe the three way in which the right holders may dispose their right to use the sea areas, namely purchasing shares by selling the right, transferring the right and granting the right to a third party by inheritance.[10] Additionally, scholars also believe that the right holders are entitled to mortgage such rights.[11]

As discussed above, different from rights to use natural resources, which are often surrendered in practice, the right to use sea areas has genuine nature of property, and every aspect of the right is in line with the basic characteristics of property. Therefore, regardless of its legal character, the right, from an economic perspective, qualifies as a property right. That being the case, the right to use sea areas should also take both private and public interests into account, solve the external problems in connection with property and perform its dual function to utilize marine resources and protect marine environment.

B. The Fact That the Object of the Right to Use Sea Areas Possesses the Nature of Public Property Determines Its Dual Function

The object of a right is a specific object to which the content of the right points. As a basic constituent element of right, the object determines the content of the right and the way in which the right is exercised. The object of the right to use sea areas is sea areas. From the perspective of private right theory, sea area is a kind

---

9 Article 25 of the Law on the Administration of Sea Areas provides that the maximum term for using sea areas shall be defined according to the following purpose: (1) 15 years for aquatic breeding; (2) 20 years for ship recycling; (3) 25 years for tourism and entertainment; (4) 30 years for salt production and mineral exploitation; (5) 40 years for public interests; (6) 50 years for construction projects including port, shipbuilding factories, etc.

10 Article 27 of the Law on the Administration of Sea Areas provides that, if it is necessary to alter the holder of the right to use sea areas due to corporate merger, split-off or setting up of joint ventures or cooperative enterprises, the approval of the people's government that gave the permission previously shall be obtained. The right to use sea areas may be lawfully transferred. The specific measures for the transfer of the right to use sea areas shall be formulated by the State Council. The right to use the sea areas may be inherited in accordance with the law.

11 Yin Tian ed., *A Research on China's Real Right of Sea Areas*, Beijing: China Legal Publishing House, 2004, p. 55. (in Chinese)

of property; therefore, the right to use sea areas is a kind of property right. In terms of its legal status, this right may further be regarded as a real right. However, this argumentation only emphasizes the common features between sea areas and general properties at the cost of neglecting the specificity of sea areas, which is inevitably biased. Sea areas are integral and mobile. Numerous parties may develop such areas and the relevant resources can be shared. Therefore, they are different from conventional objects under real right regime, which can be absolutely controlled, exclusively used or freely disposed of. As for social characteristics, the sea area is not a mere property, which brings economic benefits to individuals. It also has important environmental elements, and ecological values. At the same time, as the blue "territory" and an important public resource, sea areas also have strategic values relating to national security.

The public nature of the right to use sea areas demonstrates that sea area is not an ordinary property capable of being freely disposed of. It is a peculiar public property, which is prone to have external problems. Hence, every provision regulating the right to use sea areas must take this peculiar character into consideration. In China, marine resources have long been exploited free of charge and excessively, leading to a great disorder. This, on the one hand, results in waste and inefficient utilization of marine resources and affects the personal interests of the developers; while, on the other hand, it causes serious pollution and damage to marine environment, threatening the interests of the whole society. Therefore, internalizing the externalities of marine development activities is the key to marine governance. In this regard, to clarify the property right and establish effective economic constraint mechanism is necessary. Only by establishing a unified mechanism of environmental protection and profit-making, can the personal interests and social interests, economic interest and ecological interest align together organically. This is in line with the goal of harmonious development of economy, society and environment, and it will help to achieve the sustainable development of marine economy. The significance of the establishment of the right to use sea areas is twofold: first, it means the marine developers can use the sea areas exclusively and fully utilize the waters; secondly, it defines the obligations and responsibilities of the right holders, which facilitates the management of sea areas and better protects the marine environment.

III. The Dual Legal Character of the Right to Use Sea Areas and Its Manifestations

As the most important property right in the field of marine resources, the right to use sea areas has the dual function of stimulating economy and protecting environment, and the dual value in pursuing private interests and protecting public ones. In this regard, some scholars in civil law contend that "The claim of the right to use sea areas must be combined with the protection of marine environment resources, and an effort must be made at both macro and micro levels, only then can the exercise of right achieve a successful state".[12] "Nevertheless, it should also be noted that although the right to use sea areas is a civil right, the laws governing such right – the stated purpose of which is to guarantee reasonable and sustainable use of sea areas – were enacted for the protection of public interests. The right is granted provided that public interests are maintained, and its exercise is also subject to constraints and limitations of the administrative organizations. Therefore, the right itself possesses a strong public character."[13]

Finding the function of stimulating economy and the value in pursuing private interests in the real right theory of the right to use sea areas, gives rise to several questions, such as who bears the function of environmental protection? how to reflect the value in respect of public interest? Modern civil law theories tend to associate private rights with certain public service functions. Many scholars assert that public service functions do not shake the status of the private right theories, and they firmly believe that although the right to use sea areas is stipulated in public laws and thus has strong public nature, it is still a private right.

The author argues that the progressive development of law seems to give rise to an integration and mutual transformation of public and private laws. Thus, to restrict individual rights for the sake of public interests has become a fundamental requirement of private laws, for instance, environmental obligations are universally imposed on individuals. However, there are fundamental differences between public and private laws with regard to the extent to which the interests are concerned and the ways such interests are adjusted. These differences further buttress the

---

12 Fan Jing, Zhang Qinrun, A Study on the Problem of the Right to Use Sea Areas, *Journal of Yantai University*, No. 1, 2004. (in Chinese)

13 Liu Lan, An Analysis of the Legal Character of the Right to Use Sea Areas, *Academic Exchanges*, No. 1, 2005. (in Chinese)

distinction between private and public laws and that is the value their existences have created. In terms of their focus and concern also, the two differ significantly. Private rights, which are individual-based and have the maintenance of private interests as their basic objective, cannot be compared with public rights, whose purpose is to bring benefits to the society. Private rights' negative support to public interests cannot be equal to the public rights' positive pursuit of public interests; the self-deference and restraint of economic activities cannot meet the requirements to protect environment. Since the sea area has a strong public tinge, the laws governing them should not be limited their focus to the interests of developers, but rather must concern with and aim to inure to the benefits of the society as a whole. Full utilization of marine resources and the protection of marine environment are both the fundamental goals pursued by the Law on the Administration of Sea Areas. Neither can be neglected. Therefore, the only reasonable conclusion can only be that the right to use sea areas has a dual nature, namely the nature of a public right and that of a private right.

It seems rather incredible that a right has two opposite characters at the same time. But in fact, in the field relating to resources, the view that some rights possess a dual nature or a superposition of public and private right is popular. For example, when it comes to the recognition of the nature of water right, some scholars hold that it has a mixed nature of both public and private right.[14]

The division of public rights and private rights is mainly founded on the content, the legal effect and the purpose of the right, as well as the relevant focus of values and objective effect. With regards to the private nature of the right to use sea areas, the right is shown as the exclusive use by the right holders of specific sea areas; it establishes a civil relationship between the right holders and the State: the owner of sea areas; the purpose of the right is to fully use marine resources and protect economic interests of the right holders; the right focuses on the property value of sea areas; objectively, it enables the resources to be used effectively. For a State, to transfer sea areas by charging fees is a way to exercise its ownership; as for the right holders, obtaining the right is a powerful protection for their rights and interests over sea areas.

In terms of the public nature of the right to use sea areas, the right is reflected

---

14 Japanese professor Yoshio Kanazawa (in his article entitled "Water Law") and Chinese Scholar Fei Liping (in her article "Preliminary Study on Water Right Regime") habor this kind of opinion; see Cui Jian yuan, *A Study on the Quasi-Real Right*, Beijing: Law Press China, 2003, pp. 45~63. (in Chinese)

as the administrative or social obligations assumed by the right holders, for example, the approval process for obtaining the right, the restrictions on the way to develop and use sea areas and exemptions in case of public interests;[15] its relation with oceanic administrative organizations includes not only civil legal relations, but also administrative legal relations generated by the acts of administrative organizations relating to seas. The ultimate goals of these obligations are to protect marine ecological environment and to develop the oceans sustainably. Such obligations also emphasize the sea areas' ecological value as ecological environment and living spaces, and the social value as public goods and national wealth; they have the objective effect of protecting environment and resources. For a State, the establishment of the right to use sea areas makes the rights and responsibilities clearer, which greatly improves management efficiency; for the right holders, the right of exclusive use enables them to develop sea areas more reasonably, which will benefit the marine ecological balance and sustainable use of marine resources.

Therefore, the author claims that the right to use sea areas possesses both the nature of private and public rights. The regime of the right to use sea areas is the foundation of the real right regime of sea areas, and it is also an important component of the system of marine environment protection.

VI. Legal Practices in Connection the Dual Value and Function of the Right to Use Sea Areas

The dual legal nature of the right to use sea areas requires us to take public interests and private interests simultaneously into account in legal practices, and to unify economic and ecological values of marine resources. In legal practice, the following points must be noted:

A. The Right to Use Sea Areas is Only Subject to Public Interests

First of all, the use of sea areas must be limited strictly to those activities that

15 Article 30 of the Law on the Administration of Sea Areas provides that for the purpose of public interest or the security of the State, the people's government that gave the approval may lawfully recover the right to use sea areas. If the right to use sea areas is withdrawn pursuant to the provisions of the preceding paragraph prior to the expiration of the term of use, appropriate compensation shall be made to the right holder.

advance public interest, important social values and ecological environment. The public nature of the right is manifested not only in the fact that the right is secured only after following certain prescribed administrative procedures; but also in the fact that even after the right has been granted, its exercise is subject to various limitation, including those dictated by public interest. Thus, a sense of constraints runs through the whole process of the right. Articles 23, 24, 28, 29 and 30 of the Law on the Administration of Sea Areas impose restrictions on the use of sea areas, including the exceptions of exclusiveness, prohibitions on basic marine scientific research and the obligation to report environmental information, the approved use of the sea, the dismantlement of facilities that may cause environmental pollution and recovery of the right. The supervision and inspection right of the competent oceanic administrative departments and their corresponding responsibilities are also provided in the Law on the Administration of Sea Areas, which too reflect the tinge of public nature of the right.

Nevertheless, it is worth noting that there is no provision relating to the environmental responsibilities of the right holders, which is a legal lacuna needing revision and improvement. Meanwhile, the administrative organizations should also play positive role in this regard. They should help supervise and inspect the use of the sea areas and the royalties as well as strengthen supervision and inspection on the quality of marine environment.

Secondly, the sea area is a kind of properties, and the right to use it can bring about powerful protection measures for the holders of such right. Save in exceptional cases of public interest, the exercise of the right should not be intervened or restricted. The exclusive use of the sea areas is the basic feature that distinguishes the right from other temporary ocean-related rights, and it is also forms the core of the right. It is only when the right holders are granted with the right of exclusive use, does the right meet the requirements of the property right, and thus plays its essential function. Therefore, except for natural conditions of the sea areas and statutory conditions, such as the term of use, the right to use sea area is only subject to public interests; the exercise of the right may not be interfered by any entity and individual.

Finally, making sure that the marine functional zoning is given full play. Although the exercise of the right to use sea areas is only restricted by public interests, identifying public interest is a tough job. Especially in terms of the sea, which possesses vast areas, flows quickly and involves numerous parties, whether the establishment of a right complies with public interests, and how to exercise

the right, are not simple questions: they are subject to social conditions as well as natural attributes of the sea areas, and scientific and technological conditions. In this regard, it is of significant importance to establish marine functional zoning based on science, after taking into account the natural conditions of sea areas and the needs for the development of economy and society. Every activity related to seas should be carried out on the basis of marine functional zoning, the foundation of marine management system. Marine functional zoning is not only a basis for the right holders to develop and use sea areas, but also "a scientific basis for the marine administrative departments in the management of sea areas utilization and for marine environmental protection"[16]; its practical use should be further strengthened.

B. Safeguarding the Economic Interests of the Holders of the Right to Use Sea Areas

The acquisition and the exercise of the right to use sea areas aim to gain financial benefits, which is the main value created by the "private" use of sea areas. Although we can set constraints and limitations on the use of sea areas based on public nature of the sea areas, the economic rights and interests of the right holders should be fully protected. In this regard, we should respect the effect of the right to use sea areas as real right on the one hand, respect the independent exercise of the right and not interfere, except when public interests so require; on the other hand, we should honor the exclusiveness of the right, as once a specific area has been delimited, there must be no other exclusive use of the sea, or non-exclusive activities which might hamper the right holders from exclusively using this area lawfully. Meanwhile, for public reasons, if the right has to be restricted or even withdrawn, sufficient financial compensation must be made for the right holders.

C. Reasonable Use of the Royalties for the Use of Sea Areas

Royalty for the use of sea areas is the premise and consideration for the establishment of the exclusive right to use sea areas, as it forms the core of the paid use of sea areas. However, at present, the laws and regulations of China emphasize on the collection of royalties but lack the provisions relating to the allocation and

16 State Oceanic Administration of China, *Marine Functional Zoning in China*, 10 September 2002. (in Chinese)

use of the royalties, thus hampering the performance of the dual function of the right to use sea areas.

Article 33(2) of the Law on the Administration of Sea Areas provides that: "any entity or individual that uses a sea area shall pay royalties for the use according to the rates as provided by the State Council. The royalties for using sea areas shall, pursuant to the provisions of the State Council, be turned over to the state treasury". Ministry of the Land and Resources explained in the Statement on the Law of the People's Republic of China on the Administration of Sea Areas (Draft), that "the main consideration is the fact that the sea areas belong to the State, thus the State, as the owner of the sea areas, shall be entitled to receive the proceeds therefrom. Therefore, the users shall pay royalties to the State, pursuant to the relevant rules, for the use of sea areas". "The royalties will not only help the realization of ownership of the State in the economically, but will also help to prevent the waste of resources and the loss of national resources". As can be seen from the above, currently, the provisions relating to the royalties for the use of sea areas mainly focus on the process of fees collection, their concerns still remain in the private nature of the right, and the rules were concluded from the perspective of property income and resource utilization. The drawbacks of current rules reflect a lack of attention to public interests concerns, such as the protection of marine environment.

The author argues that when it comes to the royalties for using sea areas, the most important thing is not about how to collect the royalties, but how to allocate and make use of such royalties. The measure of turning over all the royalties for the use of sea areas as national revenues does not play its best effect. The exclusive use of sea areas shall not impair the interests of other potential users and the environment for the whole society, as it is quite different from purely economic benefit, such as tax. The royalties for the use of sea areas shall not be simply regarded as the income of the country, because it involves a large amount of social costs requiring payment. The laws should further clarify the allocation and use of the royalties, and a considerable part of which should also be used to set up funds for the protection of marine environment and ecological compensation. Only by doing so, may the ecological functions of the right be fully played and its public values can be achieved.

Translator: LIN Jie
Editor (English): Arpita Goswami

Summary of the Second Intergovernmental Review Meeting of the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities

ZHU Xiaoqin* DONG Lin**

Abstract: Advocated by the United Nations Environment Programme (UNEP), the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities (GPA) aims at addressing the threats to health, productivity and biodiversity of the marine and coastal environment resulting from human activities on land. By summarizing the Second Intergovernmental Review Meeting of the GPA, 2006, Beijing, and its achievements, this article provides some updates on the actions taken by the United Nations and China to protect the marine environment from land-based activities.

Key Words: Global Programme of Action for the Protection of the Marine Environment from Land-based Activities; The State of the Marine Environment by UNEP; National Report of China on the Protection of Marine Environment from Land-based Activities; Beijing Declaration

I. Background

Advocated by the United Nations Environment Programme (UNEP), the Global Programme of Action for the Protection of the Marine Environment from

---

* ZHU Xiaoqin, SJD, associate professor from Xiamen University Law School. This article is prepared by referring to the special report about the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities on the website of the State Environmental Protection Administration of China and related articles on *China Environmental News* dated October 15-23, 2006.

** DONG Lin, master candidate matriculated in 2005, majoring in environment management at College of Ocean & Earth Sciences, Xiamen University.

Land-based Activities (GPA) was adopted at the intergovernmental meeting held in Washington, USA in 1995. China is one of the 108 members of GPA. Aiming at addressing the threats to health, productivity and biodiversity of the marine and coastal environment resulting from human activities on land, the GPA is the only institution in the world expressly stating the intention to deal with some crucial problems concerning marine ecology, such as fresh water, coastal environment and marine water environment. It proposed that consistent cross-cutting actions should be taken on the basis of participation at local, national, regional and global levels. Driven by the GPA, many countries have established related mechanisms to examine the legislative framework and environmental policies set out for the protection of sustainable development of marine and coastal environment. In 2001, over 100 countries attended the First Intergovernmental Review Meeting of the GPA (IGR-1) held by the UNEP in Montreal, Canada. The IGR-1 focused on reviewing the national implementation of the GPA and putting forward new goals and actions. It led to the adoption of the Montreal Declaration that positively promoted the development of the GPA and is widely recognized as a valuable tool for furthering ecosystem approaches to coasts, oceans and island management.

The Second Intergovernmental Review Meeting of the GPA (IGR-2) took place in Beijing, China, from October 16 to 20, 2006. The IGR-2 focused on strengthening the implementation of the GPA at national, regional and global levels and stating its value as a flexible tool to facilitate the sustainable development of oceans, coasts and islands as well as related river basins. The meeting included two sessions: the first session was attended by government representatives and other stakeholders (in the first three days of the meeting), whose outcomes would be submitted to the second session; and the second session was attended by ministers and other high-level officials (in the last two days of the meeting).

To support the meeting, the UNEP published a report titled “The State of the Marine Environment”, which comprehensively analyses and assesses the situation of protection of global marine environment in recent years and evaluates each of the nine categories of threats to global marine environment.

According to the report above, in terms of the protection of global marine environment, encouraging progress has been made in three areas: 1. Persistent organic pollutants (POPs). Currently, the production, sales and use of 12 kinds of POPs are governed under the Stockholm Convention on Persistent Organic Pollutants. 2. Radioactive substances. The dumping of low-level radioactive waste in the ocean has been banned under the London Convention since 1993, although

authorized discharge into sea of radioactive waste from nuclear fuel units keeps on in some places. The substantial radioactive substances in oceans are naturally formed and the control measures for man-made pollution are effective. 3. Oils. Generally, the oils leaking into the sea are less than those in mid-1980s and the severity of pollution has decreased by about 2/3. The report also indicates that results are mixed in two areas. 1. Heavy metals. Most developed countries have taken measures to control extensive heavy metal pollutions, but some heavy metals including mercury are entering marine environment due to industrial and mining activities, and burning of fossil fuels for energy and transport. Levels of mercury in Arctic ringed seals and beluga whales have increased two to four times over the past 25 years in some areas of the Arctic. However, lead, cadmium and mercury inputs into the North Sea have decreased by up to 70% and progress was also made in other regions including the North-East Atlantic and Mediterranean Sea. 2. Sediment mobilization. Due to dam construction, large-scale irrigation, urbanization, deforestation and agriculture-related land use change, mobilization of sediments and soils is being changed significantly.

According to the report, worsening conditions are occurring in four areas: 1. Sewage. Over half of the sewage entering the Mediterranean Sea remains untreated. In Central and Eastern Europe, many large cities discharge wastewater virtually untreated. About 60% of wastewater is discharged untreated into the Caspian Sea; 85% in Latin America and the Caribbean; nearly 90% in East Asia; over 80% in the South East Pacific; and 80% in West and Central Africa. At the global level, an additional $56 billion is required annually for wastewater treatment. The report clearly states that this may be the most serious problem with the least progress within the GPA framework. 2. Eutrophication. The amount of coastal 'dead zones' have doubled every decade since 1960, which is related to nutrient increase due to agricultural fertilizer runoff, manure, wastewater discharge and fossil fuel combustion. The occurrence of this problem, used to be limited in developed countries to a large extent, is now spreading toward developing countries. 3. Marine litter. This problem is continually worsening, in spite of both national and international efforts to control it. Marine litter originates from municipal, industrial, fishing boat and vessel discharges, most of which is non-biodegradable. Around 70% of litter entering the oceans lands on the seabed, 15% on beaches and 15% remains floating on the surface. 4. Physical alteration and destruction of habitats. Almost 40% of the world's population lives on only 7% of the Earth's total land area, a narrow fringe of coastal land. Average population density in the coastal

zone will increase from 77 p/km^2 in 1990 to 115 p/km^2 in 2025. This growth has significant impacts on overuse of marine resources, pollution and damage to and loss of ecosystem.

II. International Forum of China

The International Forum of China on the Protection of Marine Environment from Land-based Activities took place in the form of a beside event to IGR-2 on October 18, 2006. The international forum agenda included three parts: China governmental work experience communication, international experience communication and China local experience communication. Eight authorities, including the State Environmental Protection Administration (SEPA), Ministry of Communications, Ministry of Construction, Ministry of Water Resources, Ministry of Agriculture, State Forestry Administration, State Oceanic Administration and Environmental Protection Office of the People's Liberation Army (PLA), gave keynote speeches from their respective perspectives. The part of international experience communication disclosed the Northwest Pacific Action Plan (NOWPAP) Contribution to GPA implementation, the 2005 Caribbean Regional Cooperation Programme - Strengthening of the Implementation of the Cartagena Convention and Cooperation of the Caribbean Environment Programme, the Mediterranean Programme Protocol Experience for Reducing Pollution from Land-based Activities and the Canada's National Programme of Action for the Protection of the Marine Environment from Land-based Activities. The part of China local experience communication involved a presentation of local experience on protection of marine environment in Shanghai and Xiamen and experience on control of pollution from land-based activities in the Bohai Sea. The following paragraphs provide in detail the actions and achievements on control of pollution from land-based activities in the Bohai Sea.

The Bohai Sea is a nearly closed inland sea of China and enjoys important strategic position in terms of politics, economy and national defense. Liaoning Province, Hebei Province, Tianjin Municipality and Shandong Province are located from north to south along the Pan-Bohai Rim. The rapid economic and population growth in the Pan-Bohai Rim and the consequent amount of debris flowing from the upstream areas into the sea, increased substantially the pressure on Bohai Sea's environment, leading to increasingly serious ecological conflicts in the area.

The Central Committee of the Communist Party of China (CCCPC) and the

State Council of China have attributed great attention to this problem as early as the Ninth Five-Year Plan period, when the Bohai Sea was included in the "33211" national key project for environmental protection. In this respect, the SEPA organized the compilation of National Blue Sea Action Plan in the Bohai Sea in 2000, which advocates to consider both land and sea as a whole matter of protection, focuses on monitoring the pollution from land-based activities, aims at recovering and improving the ecology system in the Bohai Sea and guarantees the sustainable development of the Pan-Bohai Rim. The action period of the plan ranges from 2001 to 2015 and covers a land scope of 13 coastal regions and cities within the three Pan-Bohai provinces and Tianjin Municipality and an offshore scope of the entire Bohai Sea and partial Yellow Sea, totaling an area of 9.5 km^2.

The State Council approved the National Blue Sea Action Plan in the Bohai Sea in 2001 (Guo Han [2001] No.124), clarifying the responsibilities of pertinent State departments and indicating that the local people's governments are those mainly in charge for the environmental protection of the Bohai Sea. The Tenth Five-Year Plan represented the first phase of the plan's implementation, during which the plan was implemented effectively and great results were achieved under the joint efforts of relevant State departments and governments at all levels in the Bohai Sea area.

Up to now, the revision of the National Blue Sea Action Plan in the Bohai Sea for the Eleventh Five-Year Plan period has been completed. The revision, by understanding the achievements and problems experienced during the implementation of the Tenth Five-Year Plan period, aims at providing basis and guidance for the environmental protection in the Bohai Sea for the next Eleventh Five-Year Plan period so as to better fulfill the spirit embodied in the approval from the State Council.

The revised National Blue Sea Action Plan in the Bohai Sea emphasizes that protection of marine environment from land-based activities is a difficult task requiring long-term efforts. The regions along all the four seas in China are experiencing rapid social-economic development. Through the joint efforts of the national and local governments during the Tenth Five-Year Plan period, achievements have been gained in the control of pollution stemming from land-based activities in the Bohai Sea, but serious pollution and ecosystem degradation still exist in some offshore waters, requiring continuous and increased financial investment for contamination treatment and ecological protection.

The plan proposes that a monitoring system should be established for

supervision on the direct discharge pollution sources, rivers and sea waters at city (district and county), provincial (municipal) and national levels. Main target of the monitoring system includes pollutants entering the sea, offshore water quality and ecological quality. And the monitoring system is implemented based on special monitoring plans.

III. Domestic Achievements

A. National Report of China on the Protection of Marine Environment from Land-based Activities

At the international forum, the SEPA published National Report of China on the Protection of Marine Environment from Land-based Activities, which would represent the basic programmatic and technical document for future development of national action plans in China. The report draft was organized by the SEPA; other participating organizations included the Ministry of Communications, Ministry of Agriculture, Ministry of Construction, Ministry of Water Resources, Ministry of Land and Resources, State Oceanic Administration, State Forestry Administration, National Tourism Administration and the Environmental Protection and Afforestation Commission of the PLA; and organizations involved in the compilation included Chinese Research Academy of Environmental Sciences and provincial environmental protection bureaus of 11 coastal provinces (autonomous regions or municipalities).

The report covers the following contents: basic situation of China's sea areas; impacts of major land-based activities on marine environment; main existing actions for the protection of marine environment; national plan on promoting the protection of marine environment; laws, regulations, policies and management system for protection of marine environment; scientific research and international cooperation; problems and recommendations regarding the control of pollution from land-based activities.

The report identifies four offshore waters in China, which include: the Bohai Sea, the Yellow Sea, the East China Sea and the South China Sea; China has a variety of offshore ecosystems, which are mainly represented by estuary, gulf, beach wetland, mangrove, reef and island. Presently, there are 29 national marine protected areas in China with a total area of about 25,000 km^2. In addition, eight special marine protected areas have been established. Protection targets include a

range variety from rare and endangered marine biological species to typical marine ecosystems and various valuable marine resources including seascapes and natural and historic heritages. Meanwhile, service-based marine economy enjoys a rapid development and there has been a shift from "resource" development to marine "service" development in the field of marine economy.

The report indicates that, in 2005, the quality of most offshore seawater across China was good with partial serious pollution problems and the quality of distant seawater remained good as well. A total of 67.2% of offshore seawater reached Grade I and II in national marine quality standard, up by 17.6 percentage points on a year-on-year basis; 8.9% reached Grade III standard, down by 6.5 percentage points; and 23.9% achieved or was inferior to Grade IV standard, down by 11.1 percentage points. Compared to the year before, the quality of offshore water in the four seas was improved upon different degrees, with the Yellow Sea and the South China Sea quite good, Bohai Sea average and the East China Sea quite poor. Among the coastal provinces, autonomous regions and municipalities across China, the quality of offshore seawater of Hainan, Guangxi, Shandong and Guangdong was relatively good, but the quality of Shanghai and Zhejiang seawater was relatively poor.

The report also provides statistics on effects of major land-based activities on marine environment in seven aspects: economic and social development of cities and towns, agricultural production activities, sea transportation, sea waste dumping and offshore oil exploitation, land-resource development activities in coastal zones and activities in coastal military areas. With regard to these effects, the report summarizes the major existing actions for the protection of marine environment, including pollution control, eco-conservation and rehabilitation, environmental monitoring and special investigation.

So far, 60 countries have developed or are formulating their own National Programme of Action. China is one of the members of the GPA and some regional programmes such as North-West Pacific Action Plan, the UNEP/GEF Project in the South China Sea and Gulf of Thailand and UNEP/GEF Yellow Large Marine Ecosystem Project. At national level, pursuant to the requirements of the GPA, the SEPA is co-ordinating relevant institutions (including Ministry of Communications, Ministry of Agriculture, Ministry of Construction, Ministry of Water Resources, Ministry of Land and Resources, State Oceanic Administration, State Forestry Administration, National Tourism Administration and the Environmental Protection and Afforestation Commission of the PLA) to develop China's National Programme

of Action for the Protection of Marine Environment from Land-based Activities (China NPA) in order to guide and promote the protection of marine environment across the country. At present, the formulation of the China NPA goes smoothly and the China NPA current status report, the report of sea-related departments and the report of coastal provinces (autonomous regions or municipalities) have been completed. It is expected that the China NPA will be completed within the next 12 months.

B. Prevention and Control of Pollution from Land-based Activities to Protect Marine Environment – Efforts and Achievements in China

China is a country of vast maritime territory and therefore shoulders the important task of protecting marine environment from impacts of land-based activities and promoting the economic and social sustainability of coastal areas. It also represents a significant contribution of Chinese government to the cause of protecting the global marine environment. The Chinese government pays great attention to the prevention and control of pollution from land-based activities and takes every effort to prevent, mitigate and control the marine pollution from land-based activities. Based on the principle of "considering both land and sea" and "planning rivers and seas as a whole", a series of policies and measures have been adopted to consistently prevent and control the pollution from land-based activities.

1. Protect Marine Environment by Enhancing Legal System Construction

With regard to the legal system for the protection of marine environment, China promulgated and implemented the Marine Environment Protection Law in 1982, followed by the Management Regulations on Preventing Land-based Activities from Polluting and Damaging Marine Environment and the Management Regulations on Preventing Coastal Construction Projects from Polluting and Damaging Marine Environment. In addition, the Functional Zones in Offshore Sea Areas was developed and the Measures on the Administration of Functional Zones in Offshore Sea Areas was issued in the form of a director's order. The implementation of the Functional Zones in Offshore Sea Areas provides scientific basis that guides Chinese local coastal governments to improve marine environment and realize target-based accountability in sustainable development and utilization of marine resources.

2. Strive for Improving Sea Ecological Environment by Formulating and Implementing the Blue Sea Action Plan

The National Blue Sea Action Plan in the Bohai Sea was formally implemented with approval from the State Council and has been included in the key projects of comprehensive environmental treatment under the Ninth and Tenth Five-Year Plans. The degeneration trends of the Bohai Sea environment have been initially kept under control through the construction of urban sewage treatment plants, landfill facilities, eco-agriculture and eco-forestry in coastal areas, treatment of small watersheds, oil pollution control in ports and docks, and the emergency response system for oil spills at the sea as well as the implementation of measures to forbid phosphor. To protect and improve the marine ecological environment and facilitate the sustainable, rapid and healthy economic development in coastal areas, seven additional coastal provinces, municipalities or autonomous regions are also arranging their own local Blue Sea Action Plan in order to prevent and control marine pollutants from land-based activities as well as marine pollution through specific measures. In addition, in consideration of continuously deteriorating ecological environment in the estuaries of Yangtze River and Pearl River and their neighboring waters, as well as the frequent occurrence of red tides there, which directly affects the sustainable social and economic development of Yangtze River and Pearl River Deltas, China is preparing blue sea action plans for these areas aiming at improving their ecological environment.

3. Control the Total Amount of Marine Pollutants from Land-based Activities Based on Environmental Carrying Capacity of the Sea

China carried out the pilot project of measurement and calculation of Liaodong Gulf environmental carrying capacity in order to implement the Marine Environment Protection Law, to promote the monitoring system for the total amount of marine pollutants from land-based activities, to strengthen the prevention of pollution from land-based activities and to further improve the quality of coastal water environment. After two years of hard work, the special researches fully-finished include investigation and estimation of marine pollutants from land-based activities, model for measuring and calculating Liaodong Gulf environmental carrying capacity, control planning of the total environmental carrying capacity of Liaodong Gulf and environment informative system of Liaodong Gulf. Furthermore, the maximum allowable discharge amount of major pollutants at various discharge points was set; countermeasures for controlling pollution from land-based activities in Liaodong Gulf were put forward; and a

technical roadmap was established to control and manage the total amount of pollutants from land-based activities, whereby the maximum allowable discharge amount was determined on the environmental protection goals of the functional zones in offshore sea areas. These achievements have been used for drafting the Blue Sea Action Plan for Liaoning Province (2006-2010).

4. Prevent and Control Pollution from Coastal Industries

The rapid development of coastal industries and increasing environmental pressure push Chinese government to take any effort to enhance viable measures to prevent and control pollution from coastal industries: (1) to switch the current economic growth model towards a circular economy development, by adjusting industrial and product structure; (2) to strengthen the treatment of key industrial pollution sources, promote a whole-process clean production, adopt high tech to transform traditional industries, change production techniques and processes, reduce the amount of industrial wastes and improve their recycling rate as clean resources; (3) to adopt professional treatment and on-site treatment according to the polluter pays principle, prohibit discharge of toxic and hazardous substances contained in industrial pollution sources and put an end to direct discharge of untreated industrial wastewater into sea; (4) to enhance environmental supervision on and management of coastal enterprises and strictly implement the environmental impact assessment and "three-synchronization" mechanism; and (5) to implement a system concerning the control on the total pollutant discharge amount and a pollution discharge license system; to make every direct-discharge source meet its reduction target in order to control the total pollutant discharge amount; and to schedule a gradual reduction of total pollutant discharge amount.

5. Prevent and Control Pollution from Coastal Cities

Since the Chinese economic reform, Chinese coastal cities have experienced rapid development, resulting in greater environmental pressure on the coastal waters. Effective measures have been taken by Chinese government to prevent, mitigate and control the marine pollution from coastal cities, such as adjusting unreasonable urban planning, strengthening urban greening and construction of urban coastal protective forest, protecting coastal wetlands, fastening the construction of sewage collection pipelines and domestic sewage treatment facilities in coastal cities, improving the urban sewage collection and treatment capabilities and, lastly, improving the ability of urban sewage treatment facilities to remove nitrogen and phosphor. With these efforts, the ability to prevent and control environmental pollution of coastal cities has been further enhanced. Besides,

in combination with the national target systems such as "National Quantitative Assessment for Comprehensive Control of Urban Environment", "National Model Cities on Environmental Protection", and "Eco-demonstration Zones", the Chinese government has incorporated the offshore environmental function zones in coastal cities into the assessment indicators, so as to strengthen the measures to prevent and control the marine pollution from coastal cities.

6. Prevent, Mitigate and Control Pollution from Coastal Agricultural Production

In line with the construction of an ecological province or city, some coastal provinces and cities have actively developed ecological agriculture, controlled soil erosion, comprehensively applied a technical system that reduces fertilizer and pesticide runoff and lowered non-point source pollution from agricultural productions. Furthermore, the density and scale of livestock and poultry farming in land catchment areas have been strictly controlled in environment-sensitive waters; centralized farm control zones have been established; management of livestock and poultry farms has been standardized; farm pollutants have been treated effectively; and waste discharge limit has been strictly implemented within a specified period.

7. Prevent and Control Pollution to River Basins in Conjunction with Pollution to Seas

Various comprehensive treatment plans for prevention and control of pollution from land-based activities, including the Prevention and Control Plan for Water Pollution in Liao River, the Prevention and Control Plan for Water Pollution in Hai River and the Prevention and Control Plan for Water Pollution in Huai River, have been developed under the organization of SEPA and have been formally implemented with the approval of the State Council. The pollutants from rivers to seas have been reduced significantly through the pollution treatment and ecological building projects defined in the foregoing plans, including urban wastewater treatment plants, landfill facilities, ecological agriculture, ecological forest and treatment of small river basins.

8. Actively Participate in International Cooperation and Promote the Implementation of the GPA

Apart from taking various actions to protect the coastal and marine environment, China has been actively participating in international cooperation on the protection of marine environment and has consistently contributed to the common cause of global marine environment protection. The international treaties and agreements that China has signed up and acceded to mainly include the United

Nations Convention on the Law of the Sea (1982), the Convention on Biological Diversity (1992) and the Convention on Wetlands of International Importance, especially as Waterfowl Habitat (1971).

Since the creation of the GPA in 1995, Chinese government has attached great importance to its implementation and actively participated in the IGR-1. While at the global level, China actively participates in the implementation of the GPA, at the regional level, China proactively get involved in the regional sea projects of the UNEP.

At the national level, the UNEP/GPA Secretariat called the SEPA for several discussions and supported China in holding the first workshop in January 2004 in Qingdao, China. In 2005 and 2006, the activities for preparing the China NPA for the protection of the marine environment from land-based activities were further discussed and prepared with the support from the GPA Coordination Office, and four working meetings were held respectively in Changdao, Zhanjiang, Beijing and Xining with participants coming from sea-related government departments and representatives of coastal provinces (municipalities or autonomous regions). In 2006, ten sea-related government departments established a leading group to guide the work on the China NPA. At present, the formulation of the China NPA goes smoothly and the China NPA current status report, report of sea-related departments and the report of coastal provinces (autonomous regions or municipalities) have been completed.

9. Major Countermeasures to Protect Marine Environment during the Eleventh Five-Year Plan Period

(1) China has actively organized the development of National Guidelines for Coastal Zones and Marine Eco-environmental Protection Planning, so as to coordinate the social and economic development of the coastal areas and coastal and marine environment protection.

(2) China has refined laws and regulations and performed administrative duties by law. It has enhanced legislative work and improved the laws and regulations supporting the Marine Environment Protection Law. Further, it has proactively coordinated with related departments to perfect regulations, provisions, rules and standards supporting the Marine Environment Protection Law as soon as possible. For example, it has amended the Management Regulations on Preventing Pollutants from Land-based Activities from Polluting and Damaging Marine Environment. Additionally, it has performed administrative duties by law and tightened law enforcement, so as to guarantee the effective implementation of environment-

related laws and regulations and facilitate the sustainable development of oceans and coastal areas.

(3) China has deeply enforced the Blue Sea Action Plan and actively promoted the planning of environmental protection in key waters.

(4) China has taken the initiative to promote the monitoring of total discharge amount of pollutants from land-based activities. Based on the principle of "planning rivers and seas as a whole" and "considering both land and sea", China has conducted the research on environmental carrying capacity of the offshore waters and determined the maximum allowable discharge amount of pollutants from land-based activities by using the environmental protection goals of functional zones in offshore sea areas as a limit, which would provide basis for the implementation of pollution discharge license system.

(5) China has enhanced international cooperation on the implementation of the GPA. Specially, China has actively communicated and cooperated with various State and international organizations for the protection of marine environment; and seriously fulfilled international environment-related conventions and agreements. In order to boost the implementation of the GPA in China, it has developed the China NPA for the protection of the marine environment from land-based activities and furthered the implementation of regional sea projects including the North-West Pacific Action Plan and Partnerships in Environmental Management for the Seas of East Asia.

(6) China has developed national emergency response schemes for major marine pollution accidents and improved its capabilities in emergency response to pollution accidents. It has actively organized the development of emergency response schemes for major oil spill in the Bohai Sea, Yellow Sea, East China Sea and South China Sea as well as Taiwan Strait in order to address extraordinarily serious oil spill or hazardous chemical leakage on seas.

(7) China has enhanced the monitoring, surveillance and warning of red tides in offshore waters and made efforts to alleviate damages resulting from red tides. It has improved its capabilities in red tide monitoring and surveillance; developed schemes for red tide monitoring, surveillance, forecasting, warning and emergency response; arranged special monitoring and close surveillance on key offshore waters, aquaculture areas and river estuaries; made every effort to mitigate the losses caused by red tides, and safeguarded people's lives and properties.

D. China has Mainstreamed the GPA into Its Report of National Development Planning

One of the focuses of the IGR-2 is to mainstream the GPA into the national development planning and budgetary mechanisms to boost the implementation of the GPA and conscientiously protect marine environment. Therefore, on October 16, 2006, China SEPA reported to the IRG-2 the progress of the integration of GPA into its mainstream national development planning. In consideration that the development of NPA is underway in China, the SEPA first introduced five aspects – kickoff, foundation, progress, measures and assessment system – of the China NPA according to the report framework of the GPA Secretariat.

1. Kickoff

According to the functional division for departments under the State Council of China, the SEPA is responsible for leading the work of the China NPA. Its members include nine departments: Ministry of Land and Resources, Ministry of Construction, Ministry of Communications, Ministry of Water Resources, Ministry of Agriculture, State Forestry Administration, National Tourism Administration, State Oceanic Administration and the PLA. The development of the China NPA began in 2003; the development plan for the China NPA has been discussed and agreed by all participating departments; and an NPA development team consisting of experts from sea-related departments and coastal provinces has been established.

In the last three years, the SEPA held several workshops on the preparation of the China NPA and organized the development of current status reports of the State, related departments and coastal areas. The GPA Secretariat also provided support to the SEPA in all perspectives during the preparation of the China NPA. According to the plan, different attendees will be selected to attend different topic workshops scheduled for future stages of the project.

2. Foundation

The report pointed out that China has not started a comprehensive evaluation of measures to control the pollution from land-based activities nor a comprehensive identification of the problems, pressure, opportunities and capability development in connection with marine environment for the whole seawaters of China; but the cooperation framework on pollution from land-based activities and other related framework have been formed; further, the evaluation of both legal and financial framework is also underway. Additionally, the monitoring network, evaluation and reporting system for marine environment have been well established in China.

During the development of China NPA, existing data and monitoring network will be fully assessed and utilized.

During the Tenth Five-Year Plan period, the key river basin and sea pollution prevention and control projects determined by China included three rivers (Huai River, Hai River and Liao River), three lakes (Tai Lake, Cao Lake and Dian Lake) and Bohai Sea, the pollution prevention and control plans of which have been approved by the State Council. The implementation of such plans has played an important role in reducing the pollution from land-based activities, preventing the marine environment from continuous deterioration and improving the marine ecosystems. It is especially noteworthy that through the implementation of the National Blue Sea Action Plan in the Bohai Sea, the overall offshore water quality of the Bohai Sea has been recovered.

Currently, the pollution prevention and control program during the Eleventh Five-Year Plan period is being drafted for three rivers, three lakes and Three Gorges reservoir as well as the relevant upstream, the Yellow River basin, the South-to-North Water Diversion Project, the Yangtze River basin and the Bohai Sea. China is also organizing related departments to develop the Overall Plan for the Protection of the Bohai Sea with the aim of comprehensively and systematically exploring the problems existing in social and economic development, sustainable resources exploitation and environmental protection for river basins and seas. The Blue Sea Action plans for the estuaries of Yangtze River and Pearl River as well as their adjacent seawaters are also being developed, which represents a first step towards this purpose.

These plans provided sound working foundations for the development and implementation of the China NPA.

3. Progress

The timeline for the development of the China NPA is scheduled in 2007. According to the different duties and functions assumed by the relevant departments, the executive branches have been determined and their respective duties for the development of China NPA have been clarified. Upon its completion, the China NPA will be performed according to the current administrative procedures in China.

The overall objective of the China NPA, determined so far, is to effectively control the total amount of major pollutants discharged into sea and gradually increase the offshore water quality by 2010 and to substantially improve the marine environment quality and ecology by 2020. The China NPA is developed according to the following guidelines: to develop in a balanced manner and realize mutual

win; to strengthen the relevant legislation and comprehensively prevent marine pollution; not to incur new debts and try to pay off old dues; to rely on technology and create new advanced systems; to lead the work field by field and pay attention to key arguments.

The work carried out so far include: setting project priority criteria, especially for the key seawaters; putting forward a clear planning and implementation approach and determining near- and mid-term action plans for key seawaters including the Bohai Sea and estuaries of Yangtze River and Pearl River. The priorities of projects to control the pollution from land-based activities for nationwide waters and their implementation plans are also under consideration. Furthermore, the China NPA will be implemented to control marine environment pollution at different stages according to the National Eleventh Five-Year Plan for National Economic and Social Development, the National Eleventh Five-Year Plan for Environmental Protection and the eleventh five-year plans for national economic and social development of various provinces and cities.

Given the current condition of China, the financial matter involved in the China NPA will be solved by the following methods: financial support from the central government, financial support from local governments, funds from issuance of national bonds, bank loans and investment from stakeholders.

4. Measures to be Taken

In the China NPA, a security policy will be clearly implemented and systems for adherence to and enhancement of such a policy will also be specified. The fund allocation based on financial strategy and planning activities will be incorporated into the implementation plan of the China NPA. It is planned that funds will be allocated annually. The China NPA will clarify the strategy for public participation and encourage the public to participate in various related activities.

The following measures for pollution control will be taken: control of industrial pollution sources; urban wastewater treatment; construction of facilities for prevention, control and monitoring of vessel and harbor pollution; control of marine project pollution; control of non-point source pollution; promotion of ecological aquaculture; construction of emergency response project for marine pollution; establishment of technical support system; publicity, education and public participation; and enhancement of environment-related global communication and cooperation.

5. Establishment of a Monitoring, Assessment and Revision System

The development of the China NPA also needs to consider the establishment of

a system to monitor, assess and revise the implementation of the China NPA itself. The specific assessment indicators will be determined based on main objectives and strategies. Once established, the system will be incorporated into the routine work of relevant departments. An evaluation and reporting system of the NPA will be performed regularly, or irregularly or by other means. The detailed information will be included in the China NPA.

IV. Beijing Declaration

One of the important results of the IGR-2 is the adoption of Beijing Declaration on Furthering the Implementation of the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities ("Beijing Declaration"). The Beijing Declaration was drawn up by the representatives of 104 governments and the European Commission, with the support and concurrence of delegates from international financial institutions, international and regional organizations, private sector, non-governmental organizations, other stakeholders and major groups.

The Beijing Declaration covers many issues relating to the marine environment, including the importance of oceans and coasts and their resources; the vulnerability to natural disasters of low-lying coastal areas and small island developing States; the urbanization of coastal areas; the marine ecosystems; mainstreaming of environmental issues; planning of the sea and land as a whole; financial difficulties; the building of capability; the establishment of legal framework and environmental policies; and the multi-stakeholder partnerships.

Through the Beijing Declaration, the participating countries commit to furthering the implementation of the GPA in 2007−2011: (a) by applying ecosystem approaches; (b) by valuing the social and economic costs and benefits of the goods and services that coasts and oceans provide; (c) by establishing partnerships at the national, regional and international levels; (d) by cooperating at the regional and interregional levels; (e) by mainstreaming the GPA into national development planning and budgetary mechanisms; and (f) by supporting the UNEP/GPA Coordination Office in undertaking its tasks.

The Beijing Declaration also elaborates the proposed actions to protect marine environment from pollution from land-based activities. The proposed action could be divided into four parts: national actions, regional actions, international actions and UNEP actions.

1. National actions: (a) to mainstream the objectives of the GPA and commit to achieve those objectives, which indicates the importance of mainstreaming in furthering the implementation of the GPA; (b) to improve cooperation at all levels in order to deal with issues related to river basins, coasts, oceans and other important areas in an integrated manner, which, in fact, means to apply the ecosystem-based management method instead of splitting the integral environment unit by administrative division; (c) to conduct economic valuation of the goods and services provided by oceans and provide financial and other supports for resolution of environmental issues; and (d) to develop and implement durable mechanisms to promote the involvement and participation of various stakeholders.

2. Regional actions: to develop and implement protocols addressing land-based pollution sources and activities so as to steadily further the implementation of the GPA; and to apply integrated ecosystem approaches to important areas, and to develop and strengthen strategic partnerships.

3. International actions: to call upon various important institutions, groups and multilateral environmental agreements to increase the integration of the GPA into their policies, plans and programmes; to call upon financial institutions and donor countries to provide financial and technical support; and to emphasize the mainstreaming issue and develop partnerships at various levels.

4. UNEP actions: to endorse the GPA programme of work for the period 2007−2011, and commend it to the United Nations Environment Programme Governing Council/Global Ministerial Environment Forum for more financial support; and to request the United Nations Environment Programme Governing Council/Global Ministerial Environment Forum to endorse the Beijing Declaration and the outcome of the IGR-2.

The Beijing Declaration restates that all countries shall firmly implement the GPA and make it a flexible and effective tool for the sustainable development of oceans, coasts and islands. The participating countries decided to hold the third intergovernmental review meeting of the GPA in 2011.

Translator: CHEN Shiqiong
Editor (English): Alessia Placchi

A Review of "the Inspiration of Mini Three Links for Three Direct Links" Academic Seminar

JIANG Jiadong* WU Lintao**

On October 19, 2006, the academic seminar, "The Inspiration of Mini Three Links for Three Direct Links," sponsored by Xiamen University Center for Oceans Law and Policy, was held at Xiamen University Law School. One of the major topics discussed during the seminar was the Review and Inspiration of Six Years of the "Mini Three Links", as part of the Sea Area Management Issues of China and the Legal Issues of Maritime Affairs in the Communication between China Taiwan and China Mainland. In consideration of the practical significance of this topic, numerous departments and industries concerned gave strong support to this seminar. Experts who attended include officers in charge of Xiamen Ocean and Fishery Bureau, Xiamen Port Authority, Xiamen Waterway Transportation Administrative Office, Xiamen Navigation Mark Administrative Office, Xiamen Shipping Co., Ltd., Council of Kinmen County, Harbor Office of Kinmen County, owners of passenger vessels *New Kinglong* and *Quanzhou* running the "Mini Three Links," as well as experts from Xiamen University Law School, Xiamen University Center for Oceans Law and Policy, and other institutions. The chief aim of the seminar was the comprehensive examination of the actual results of the "Mini Three Links" policy. It also sought to assist governmental departments concerned with improving the legal environment of the "Mini Three Links," so as to make well-advised institutional arrangements for the laws and policies of the "Three Direct Links." As such, the seminar attached importance to the suggestions from executive sectors and relevant operators.

---

* JIANG Jiadong, 2004 postgraduate student majoring in international law at Xiamen University Law School.
** WU Lintao, 2005 postgraduate student majoring in international law at Xiamen University Law School.

The seminar had five major themes:

1. The managerial status quo of the "Mini Three Links" and the relevant achievements;

2. Problems of the "Mini Three Links";

3. Valuable experience applicable to the "Three Direct Links" from the "Mini Three Links";

4. Thinking and direction for further development of the "Mini Three Links" in the near future; and

5. The possible influence of the "Three Direct Links" on the politics, economy, culture and security of China Taiwan and the China Mainland in the future.

Professor Kuen-chen FU chaired the seminar. Experts from across the Taiwan Straits had in-depth conversations and discussions about these subjects throughout their keynote speeches and free discussions. Summarized below are the seminar's major points.

I. The Managerial Status Quo of the "Mini Three Links" and the Relevant Achievements

Lai Shiwei, head of Xiamen Waterway Transportation Administrative Office, introduced the managerial status quo and achievements of the "Mini Three Links" in the regard of transportation management.

Mr. Lai first introduced the maritime navigation patterns and operation status quo in the coastal areas of Fujian Province and in China Taiwan. At the time, there were numerous different patterns of maritime navigation between the Mainland and Taiwan, which specifically were the direct transportation routes of passengers and cargo from the coastal areas of Fujian to Kinmen, Matsu and Penghu (referred to as the "Mini Three Links" or "Partially Open to Navigation"), pilot-direct transportation routes of container liners between China Taiwan and China Mainland, and transportation between Mainland, Taiwan, and Hong Kong.

Among the three patterns, the first was the smoothest. The participating enterprises were qualified shipping companies with charters in both Taiwan as well as the Mainland. Accordingly, the participating ships were also registered in Taiwan or the Mainland. Navigation management was handled by flying company flags and carrying separate endorsement documents. The ships, in this pattern, primarily carried passengers from coastal areas of Fujian to Kinmen, Matsu, and Penghu or from the latter to the former as well as building materials, such as sand and crushed

stone, from Fujian to Kinmen, Matsu and Penghu. Within this pattern the ships carrying passengers and building materials developed efficient communication techniques as well as flag hanging techniques.

The second pattern, commenced on April 19, 1997, in which the participating enterprises were companies with international shipping qualifications, and the participating ships were flag-of-convenience ships (which in Taiwan are referred to as "expedient ships") with investments made by China Taiwan and China Mainland. Ships passing in and out of ports on one side had to raise the flag of the other side and have their relevant certificates checked and endorsed. Those containers on board carried cargoes from Fujian Province which are planned to be exported to Europe and America, but the cargo in direct trade between Fujian and Taiwan could not enter Taiwan. That is to say, in this pattern, ships can enter the ports of the other side; nevertheless, cargoes may not be directly discharged and sold at the other side.

The third pattern was also adopted in 1997. The participating enterprises were companies with international shipping qualifications. This pattern was used by both container-liner trade and unscheduled break-bulk cargo transports. The participating ships were flag-of-convenience ships, also with investments made by China Taiwan and China Mainland, which mainly carried direct commercial cargo exported from Fujian to Taiwan. The ships had to detour through Ishigaki, Japan, or Hong Kong for a transit and exchange of bill, and then to Taiwan. That is to say, in this pattern, cargoes can enter the place controlled by the other side; nevertheless, ships may not directly enter the ports of the other side.

In addition to discussing these established patterns, Mr. Lai also introduced the achievements made in navigation between China Taiwan and China Mainland. The navigation practice over the five preceding years showed that the "Mini Three Links" had been fruitful, and laid a solid foundation for the implementation of the "Three Direct Links." Compared to the direct sailing pilot with no substantial navigation, or the transportation between the Mainland, Taiwan and Hong Kong, which was quite time and resource consuming, the "Mini Three Links" achieved unprecedented progress, specifically in the following aspects: (1) ships and cargos may come and go between some designated places on both sides of Taiwan Straits; (2) passengers may travel to and from between both sides of Taiwan Straits smoothly and easily; (3) the obstruction to finding an appropriate flagging method was removed; and (4) the method of negotiation over navigation made a breakthrough. The Ministry of Communications highly regarded the successful

operation of the "Mini Three Links." It also affirmed in the seminar that the existing pattern of the "Mini Three Links" should become the pattern for the "Three Direct Links" in the future.

Zhang Guotu, head of Harbor Office of Kinmen County, reviewed the legal basis of the "Mini Three Links." In Taiwan, the basis was found in Article 18 of Offshore Islands Development Act, Pilot Scheme for Navigation between Kinmen and Matsu and the Mainland, Article 95(1) of the Act Governing the Relations between the People of the Taiwan Area and the Mainland Area. The implementation of the "Mini Three Links" in Taiwan followed the principles of "security, order and progressive openness" and gave "priority to 'decriminalization' and the part 'under Taiwan's control.'" This policy was aimed at accelerating the construction and development of the offshore islands, enhancing the interaction between China Taiwan and China Mainland, and improving the relations across the straits. Therefore, the "Mini Three Links" of Taiwan was anchored in the promotion of communication between China Taiwan and China Mainland. Taiwan had formulated a series of schemes and measures for shipping, merchandise trading, traveling, finance, mailing, and the development of the farming and fishing industries, which resulted in major achievements in the years when it was effective.

For shipping, three routes (Kinmen-Xiamen, Kinmen-Quanzhou, and Kinmen-Meizhou) were opened for passenger transportation, and nine passenger liners were engaged in the operation. Round trip liners increased to twenty trips to and from Kinmen and Xiamen, and one round trip liner traveled to and from Kinmen to Quanzhou every day. Passenger capacity increased steadily every year: in the first nine months of 2006 there were 454,686 passengers, which almost equaled the entire capacity during 2005, which saw 518,728 passengers. For freight transport, nine routes opened, and forty-five cargo carriers engaged in the operation. The carrying capacity for freighters in the first eight months of 2006 reached 250,000 tons, exceeding the 230,000 tons transported during 2005.

Among commerce and finance shipping for merchandise trading, 457 items from China Mainland were allowed by the competent authority of China Taiwan to be imported to Kinmen and Matsu. Exported goods to the Mainland from Kinmen and Matsu were limited to articles produced in Kinmen and Matsu, newspapers published in Taiwan, Henry Steudnera Tuber (natural taro powder), and the articles made in Taiwan which are required by Taiwanese businessmen in Fujian. 318 duty-free items from Kinmen and Matsu were imported to China Mainland. For finance, the exchange of the new Taiwan dollar and Renminbi began in Kinmen and Matsu

on October 3, 2005. Citizens qualified to exit and enter, as per the regulations in connection with the "Mini Three Links," could exchange new Taiwan dollars and RMB in any financial institution in Kinmen and Matsu approved by the competent authority. These transactions were limited to 20,000 RMB per exchange.

As of August 2002, Taiwanese businessmen are able to pass in and out of the Mainland through Kinmen and Matsu. Also since August 2002, Taiwan citizens' spouses who were born in Fujian may pass in and out of the Mainland through Kinmen and Matsu. From March 2004, Taiwanese veterans[1] whose were born in Fujian were able pass in and out of the Mainland through Kinmen and Matsu. In May 2004, the people of Kinmen and Matsu ancestrally from Mainland were finally able pass in and out of the Mainland through Kinmen and Matsu. Beginning in December 2004, the Mainland residents could officially travel to Kinmen and Matsu. From February 2005, Taiwanese people who registered as residents of Kinmen and Matsu before December 31, 2000, as well as their relatives within a certain radius, were able pass in and out of the Mainland through Kinmen and Matsu in groups. Starting from May 2006, Taiwanese people ancestrally from Mainland and who registered as residents of Kinmen and Matsu before December 31, 2000, as well as their relatives within a certain radius, were able pass in and out of the Mainland through Kinmen and Matsu freely. Currently, Taiwanese residents must make a special application if they wish to come to Xiamen, and only those with religious reasons and exchange events listed on their applications are allowed to enter Xiamen; exchange other than religious ones are not permitted.

Yang Suyuan, chairman of the board of Jinxia Marine Transportation Co., Ltd., contended that the "Mini Three Links" made a definite difference in practice, while concurrently benefiting China Taiwan and China Mainland. Originally, one to two weeks were needed to complete the application process for a mainland tourist going to Taiwan. Now, with the effort of Kinmen, the application process only takes three days. Convenient measures have ended with an increase in the number of passengers, promoting Kinmen's tourist industry. As of September 2006, the number of passengers for the year exceeded 1.6 million, of which 90% were Taiwanese businessmen. If the per capita consumption was 10,000 new Taiwan dollars per traveler (or a total of sixteen billion new Taiwan dollars), which equals

---

1 "Taiwan veteran" refers to an honored veteran of China Taiwan. For its specific scope, see the Stipulations of the "Executive Yuan Council" on the Issuance of Honored "Citizen" Certificate by the Veterans Affairs Commission.

about four billion RMB, it would contribute to an impressive economic result. The "Mini Three Links" is economically beneficial for China Mainland, especially Xiamen, Quanzhou, and Fuzhou, among other cities. Take Xiamen as an example, Taiwanese businessmen from Kinmen and Matsu bring a corresponding economic benefit, such as the purchase of commercial housing. Their investments have exceeded RMB thirty billion. Therefore, the implementation of the "Mini Three Links" policy benefited both China Taiwan and China Mainland and has had an active influence on the economic development and non-governmental exchanges.

II. The Problems Existing in the "Mini Three Links" for Ships, Passengers, Cargoes, and Ports

Mr. Zhang Guotu, head of the Harbor Office of Kinmen County, argued that the "Mini Three Links" had a more positive influence on the economy of Xiamen than that of Kinmen, which was one of the reasons why Taiwan was unwilling to proceed with the implementation of "Three Direct Links." He also described that due to the tight restraint of relevant politics in Taiwan, there was a large difference between the present operation scheme of the "Mini Three Links" and the original objectives, discussed in detail below.

Although the "Mini Three Links" made advancements for the convenience of passenger transportation between Kinmen and Xiamen, restrictions remain. Travel was limited to, for example, Taiwan veterans who were born in Fujian, Taiwanese citizens' spouses who were originally from China Mainland, and individual Kinmen locals ancestrally from China Mainland. Others could not pass in and out of the Mainland through Kinmen, which created an obstruction for the further benefit brought by the "Mini Three Links" to take place.

As a result of the inconvenient application procedures for travelers, few mainland passengers traveled to Kinmen for pleasure, making it difficult to expand the sightseeing industry of Kinmen.

Additionally, the process of importing materials necessary for people's livelihoods was burdensome due to the heavy tariffs levied and stipulated fees. These burdens had the effect of limiting profitability, which indirectly contributed to increasingly concealed and frequent smuggling of materials, flooding the market with inferior articles made in China Mainland and seriously affecting people's health and safety.

Similarly, although a wide variety of raw materials available from China

Mainland may be exported to Kinmen and Matsu, very few of these materials were actually imported. Imported materials were limited to sand, stones, and building materials. This was due to the heavy taxes and fees placed on these materials and the inconvenient import procedures. These restrictions impeded the policy of "importing the cheap raw materials from the Mainland to drive the development of industries in offshore islands Taiwan."

As it stood, mail was not being shipped across the straits. The failure of direct remittance and mailing seriously influenced the operation of bilateral mailing.

Another issue was that the freight market tilted in a unidirectional pattern. The freight market of Kinmen and Fujian grew with each passing day, but the freight import shipping could only be operated in a unidirectional manner. In addition, Taiwan goods could not be carried from Fujian through Kinmen; therefore the idling backhaul brought higher costs, dragging down the development opportunity of Kinmen shipping market.

Industrial and commercial construction projects, such as the processing industry and the goods trading center between China Taiwan and China Mainland, which were supposed to have significant influence on the economic development of Kinmen areas, failed to be carried out as scheduled.

There was also conflict between the differing navigational systems of China Mainland and China Taiwan. The navigation mark of the Mainland implemented the international system of A (red to the left and green to the right) while Taiwan implemented the international system of B (green to the left and red to the right).

Wu Sida, head of Xiamen Customs, described the running conditions of the "Mini Three Links" over the previous few years from the perspective of clearance of goods. Since 1997, a channel has opened to link Xiamen, Fuzhou and Kaohsiung for freightage. However, due to the political relations between Taiwan and the Mainland, goods to Taiwan were unable to land. Instead, they could only stay for transit shipment and were unable to go through clearance. Therefore, goods could only take transit shipment through Fuzhou, Xiamen, Hong Kong, and Japan. This led to huge economic losses, while Japan needed only a stamp to collect enormous fees. Xiamen Customs relayed this problem to the central government so as to strive for more flexibility. The Mainland actively tried to offer Taiwan tariff preferences. For example, passengers of Kinmen were originally only allowed to carry two bottles of Kinmen Kaoliang spirit back to the Mainland, after the tariff preferences were set, those travelers were allowed four bottles. Such subtle but real measures created substantial economic benefits for an area like Kinmen County,

which lacked mainstay industry and relied on such local economy as "Three Treasures of Kinmen".

Mr. Yang Suyuan stated, from the perspective of Taiwan ship operators, the unequal phenomenon in the operation of the "Mini Three Links."

He first suggested that the Mainland policies did not give preference to Taiwan compatriots in the regard of relevant costs. For example, the berthage did not exceed RMB 2,000 for ships from Xiamen to Kinmen, but the three ships of Kinmen berthing in Xiamen cost, including the fees at the dock, about RMB 8,000. Another example: if a ship from the Mainland sold 10,000 tickets in Kinmen, Kinmen would not collect any tax; but if a ship from Taiwan sold 10,000 tickets, the competent authority in Mainland would collect business tax at the rate of 4.6%~8% for the relevant harbor and dock services, which again would be collected in Taiwan. This was unreasonable and unfair for operators. Another example of inequality is that if a ship from the Mainland to Kinmen went out of order, the towboats dispatched by the Harbor Office of Kinmen County would charge no fees, but if a ship of Kinmen went out of order, the Xiamen port would charge an even higher fee than that of Kaohsiung port.

The "Mini Three Links" between Kinmen and Xiamen was positioned as a "special route across the strait." The Mainland regarded it as a domestic route under the guiding principle of "One China," but charged as per the international standard, while Kinmen charged as per the domestic standard. The ship-owners of Taiwan were somewhat afraid of the implementation of "Three Direct Links" because the wages of the Mainland crews at the time stood at about a quarter of the wages in Taiwan. The monthly wage of a Taiwanese captain was approximately RMB 20,000, while the wage of a Mainland captain was about RMB 7,000 to 8, 000, making it hard for Taiwan captains to compete with those from the Mainland. Therefore, upon the introduction of the "Mini Three Links," there were no more than two hundred passengers daily. The ship *Xin Ji Mei*, even advertised round-trip tickets for one Yuan on newspapers of Kinmen. Operators of the Mainland ships were state-owned enterprises making it extremely difficult for private enterprises located in Kinmen to compete with them. This added obstacles to maintaining a stable market price of travel through the "Mini Three Links." Therefore, the relatively stable market was achieved by great efforts. Mr. Yang further added that according to statistics, the carrying capacity of the Mainland stood at about 60%, while that of Kinmen remained at 40%. He discovered that on the "second dispatch," Mainland tourists traveled on Mainland ships because these ships offered

preferential policies, seen as another unequal element in the operation. If the operators of Kinmen lowered the price of travel, a price war was inevitable. All of these considerations stood in urgent need of joint consultation from both sides with prompt improvement.

Captain Xu Yuefeng from Xiamen Shipping Co., Ltd. explained the series of questions proposed by Mr. Yang. He considered the reasons why the Taiwanese ship owners assumed that the Mainland was charging too much was attributed to the obstruction of travel between Taiwan and the Mainland. For example, their cooperation on the sea chart was not so successful, leading to stranding, which largely increased the operating costs. In addition, the actual consumption cost of the Mainland was higher than that of Taiwan. As Taiwan did not accede to some international conventions, which required the Mainland to have at least fifteen crew members on the ship in order to set sail, Taiwan only needed eight to nine crew members. In the meantime, the Mainland controlled the ships in a more rigid way than Taiwan, and it also imposed a stricter safety requirements for ships (such as strict regulations on ship scrapping, which is not required in Taiwan), causing the security costs to be much higher for ships on the Mainland than in Taiwan. Government intervention placed by China Mainland on ship companies was much greater than in Taiwan (there were about 150 departments that had a say on management of the shipping companies, while in Taiwan there were only 30). While the management system and ability to regulate was still in the early stages, there were serious overlapping functions from various governmental units, leading to higher fees for administrative affairs for shipping companies based on China Mainland.

Head of Xiamen Port Authority, Mr. Lin Mingjian, listed the problems that needed attention before the launch of the "Three Direct Links" was possible. He described how the management system was heavily burdened. Xiamen Port Authority managed three additional districts in Zhangzhou, totaling eight districts within its control, but it was ranked as only a class two office in organization and salary, leading to a shortage of available labor and funding. Additionally, despite the fact that Xiamen is known as a "natural good harbor" for port hardware, the natural depth of Xiamen port is no deeper than 14 meters, a depth that only allows for ships of 20,000 to 50,000 tons to pass, while those of 50,000 to 100,000 tons are unable to pass smoothly through the port. Meanwhile, the breadth of land area of Xiamen harbor is only a little more than 400 meters, making it too small to stack goods. Xiamen port has a serious and fast channel siltation (eight meters within

eight years for the most severe case) that requires a large amount of funding to clear. A budget of RMB 2.5 billion was appropriated for dredging this year, but that amount proved to be insufficient.

III. The Inspiration of the "Mini Three Links" for the Future "Three Direct Links"

Mr. Lin Mingjian summarized the knowledge gained from the implementation and experience of the "Mini Three Links" that would be valuable for the "Three Direct Links" moving forward.

The first idea presented by Mr. Lin, recalled the work done for the Xiamen-Kinmen route over the previous six years with profound perception of the working method "from the people, to the people" and "having faith in the people by relying on the people." The specific design of the scheme for the Xiamen-Kinmen route, including everything from the original design of the route and selection of ships to the recent stipulations about the navigation between Fujian and Taiwan declared by the Fujian Communications Department, was the result of the coordination and wisdom of theoretic and operating sectors as well as the compatriots in Kinmen. This kind of working relationship is the kind of experience that would be applicable for the future "Three Direct Links," and is valid everywhere.

Mr. Lin also discussed that relying on good faith is another experience that the "Three Direct Links" should use moving forward. A report file containing the agreements concluded in the negotiations between Mr. Lin and Mr. Zhang of Kinmen was not made. They only set out the specific route schedules. However, the "Mini Three Links" achieved great success, which was attributable to the Chinese cultural heritage and good-faith efforts found among the south Fujian people. The faith that man cannot accomplish anything without good credit should be maintained and developed in the implementation of the "Three Direct Links."

Mr. Lin described two problems that needed to be resolved for the "Three Direct Links": family ties and commercial intercourse. China Taiwan and China Mainland are related by blood, and the "Mini Three Links" brought together relatives separated for over fifty years, which was long yearned for by people on both sides of the straits, and is the trend of popular sentiment. In addition, 80% to 90% of the current passengers through the "Mini Three Links" were Taiwanese businessmen traveling to make investments in the Mainland. If they detoured through Hong Kong or Macao, it would cost 10,000 New Taiwan dollars more

per trip. The "Mini Three Links" undoubtedly significantly reduced the cost for Taiwanese businessmen to travel across the strait. It can be inferred that family ties and economic benefits are the vitality of the "Mini Three Links." As long as the "Mini Three Links" continued to perfect and meet the common needs of Taiwan and the Mainland, it would be marketable and able to facilitate the smooth operation of and transition to "Three Direct Links."

Finally, Mr. Lin cited the instructions given by General Secretary Hu Jintao and the diplomatist Qian Qichen, and held that the principle of parity was not necessarily applicable to the three links between China Taiwan and China Mainland. The Mainland did not care about personal gains and losses; instead, it carried out a series of preferential measures to facilitate the communication and exchange across the straits. This was an important opinion guiding the implementation of "Mini Three Links" and even for the future "Three Direct Links."

IV. Thinking and Direction for the Perfection of the "Mini Three Links" in the Near Future

Lai Shiwei, head of the Xiamen Waterway Transportation Administrative Office, held that Xiamen should, on the basis of the present "Mini Three Links," fully deploy the port and shipping resources in order to create a special role for Xiamen in the navigation between Taiwan and the Mainland and to leverage its advantage in port competition. It should make use of the power of the whole Fujian Province to promote the cross-straits direct transportation link between Xiamen, Fujian, and Taiwan, by changing the shipping structure across the strait.

In the light of the above thinking, he advised that relevant government departments of Xiamen should take the following measures: (1) specify the function and positioning of Xiamen port and perfect the port and harbor planning; (2) promote the integration of a free trade zone and port and establish a free trade harbor area; (3) optimize the environment for customs clearance and adapt to the needs of international transit services; (4) accelerate port and harbor construction which would improve the ability for navigation and berthing; (5) increase routes in order to build international shipping networks; (6) expand the harbor hinterland to attract peripheral resources; (7) reduce port expenses in order to support the development of transit services; and (8) adjust the shipping policy targeting at Taiwan and strive for a breakthrough.

Mr. Lai also suggested that actively applying for more policies from the

central government would help to conduct direct sailing between Taiwan and the Mainland by borrowing ideas from the shipping pattern of the "Mini Three Links." He indicated that observing the principle of "internal affairs in one country, direct two-way navigation, and mutually beneficial interaction" would give raise to Xiamen's shipping position by utilizing its geographic advantage. If flags of convenience are not flew on ships navigating between China Taiwan and China Mainland (exclusive of international voyage), goods from the Mainland would make their transit in Kinmen and then to Taiwan Island. Newly added routes should go through strict examination and approval, be subject to strict control, and be assembled in the Xiamen port as much as possible. These shipping routes should be allowed to imitate the Xiamen-Kinmen direct-sailing pattern and use the public anchorage between Xiamen and Kinmen as a third place to carry out direct sailing from the Mainland, Taiwan, and Hong Kong. If other routes between Taiwan and the Mainland should open in the future, the Xiamen port should take priority among the available options.

While discussing the near-term development of the "Mini Three Links," Zhang Guotu, head of the Harbor Office of Kinmen County, described the needs of the program. First and foremost, the trade economy between Kinmen and Fujian must be enlarged to include commercial trade, finance, investment, technology, labor and tourism, promoting the construction and development of "Kinmen, Fujian and Taiwan Tourism Development Circle".

Additionally, apart from those people currently allowed to travel between Taiwan and the Mainland through the "Mini Three Links," the following people should also be allowed passage: (1) citizens with Taiwanese passports should be allowed to access the Mainland freely via the "Mini Three Links," following the example of the Hong Kong and Macao patterns; (2) overseas Chinese citizens, ancestrally from Kinmen, and their relatives, should be applicable to the "Mini Three Links," and must return to where they reside through Taiwan; and (3) Taiwan veterans not ancestrally from Fujian, Taiwanese citizens' spouses from Mainland must pass in and out of the mainland through Kinmen and Matsu.

He suggested that for sightseeing and pleasure trips, people from the Mainland should be allowed to travel to Taiwan for leisure or professional activities by passing through Kinmen and Matsu. The formalities to make this trip should be simplified to shorten the application time. Tourist groups should be enlarged to allow both individual pass and group pass. Foreigners travelling to Taiwan should also be allowed to use the "Mini Three Links" to travel between the Mainland and

Taiwan in order to promote the "border tourism" between Kinmen and Xiamen.

For commodities, he suggested the export of small amounts of farming, fishery, and livestock products from the Mainland to Kinmen markets should be promoted under the policies of "tariff free," "reduced inspection and quarantine procedures," and "reduction and exemption of administrative fees" in order to prevent smuggling and the introduction of possible epidemic outbreaks. In the meantime, goods exported from Taiwan to the Mainland should no longer be limited to the raw materials needed by Taiwanese businessmen in Fujian. These exported goods should fit within the demand of Taiwanese businessmen traveling to the Mainland and create economic benefit by increasing circulation to reduce empty return trips of marine transportation from Kinmen to the Mainland.

V. The possible influence of the "Three Direct Links" on the relationship between Taiwan and the mainland

Chairman Yang talked about the further development of the "Mini Three Links" and believed that the "Three Direct Links" would likely come to fruition. In 1993, no one in Taiwan believed that the "Mini Three Links" would come about, including Ma Ying-jeou. If there was any possibility, it would be found in the direct link of Taipei and Kaohsiung with Shanghai and Xiamen, and Kinmen would be out of the question. However, the "Mini Three Links" turned out to be successful, giving reason to have faith in the future success of "Three Direct Links." Chairman Yang considered that sufficient time should be given as to the specific timetable for implementation. Three or four years might be needed if the process was quick, and seven or eight years if it was slow. Yet such a move as a chartered flight for the Spring Festival can be regarded as a slow transition to the "Three Direct Links." The "Three Direct Links" was sure to come about because of the main stream public opinion and the requirement for the economic development of Taiwan. Kinmen-Xiamen would be a promising land provided that that Taiwan does not focus on the ideology, which is quite essential for the construction of an economic zone at the west bank of the strait as well as the steady progress of the relations across the straits.

Appendix: Statistical Data Relevant to the Management of the "Mini Three Links" [2]

1. Monthly Statistics of the Passenger Traffic Volume of Xiamen-Kinmen Route (January 2006 to September 2006)

Company name	Ship name	Passenger quota	Sub-total	Xiamen – Kinmen	Kinmen – Xiamen	Total	Xiamen – Kinmen Subtotal	Kinmen – Xiamen Subtotal
Xiamen Lunzong Maritime Passenger Transport &Tourism Co., Ltd.	*Tong An*	380	352	176	176	51114	20121	30993
Sanlian Shipping Co., Ltd.	*Xin Ji Mei*	300	636	318	318	87678	42341	45337
Xiamen Lunzong Maritime Passenger Transport & Tourism Co., Ltd.	*Gu Lang Yu*	150	302	151	151	21590	13170	8420
Xiamen Lunzong Maritime Passenger Transport & Tourism Co., Ltd.	*Jie An*	30	618	309	309	67546	37954	29592
Subtotal of shipping companies based in China Mainland			1908	954	954	227928	113586	114342

2 The following data are supplied by the Xiamen Waterway Transportation Administrative Office, to which we hereby extend our sincere thanks.

(Continued from the previous page)

Darong Marine Transportation Co., Ltd.	*Marco Polo*	195	678	339	339	62221	30420	31801
Kunlong Shipping Co., Ltd.	*Eastern Star*	300	718	359	359	81007	41194	39813
King Xia Marine Co., Ltd.	*New Kinglong*	282	384	192	192	45914	23044	22870
King Xia Marine Co., Ltd.	*Quanzhou*	248	210	105	105	20837	10680	10157
Subtotal of shipping companies based in China Taiwan			1990	995	995	209979	1053338	104641
Total			3942	1961	1961	444031	221985	2220406

2. Annual Statistics on the Number of People and Ship Passing in and out of Xiamen and Kinmen through Direct Sailing (2001-2005)

Year	Total number of people	Total ship-times	People from Xiamen to Kinmen	Xiamen – Kinmen ship-times	People from Kinmen to Xiamen	Kinmen – Xiamen ship-times
2001	20835		10346		10489	
2002	53371	678	26415	339	26956	339
2003	160428	1493	80488	742	79940	751
2004	406131	3103	203639	1566	202492	1564
2005	518453	3722	257810	1861	260643	1679
Total	1138383	9023	568352	4508	570031	4333

3. Monthly Statistics of the Freight Volume of Xiamen-Kinmen Direct Sailing (January 2006-August 2006)

Month	Voyage number			Freight volume (tons)		
	Subtotal	In	Out	Subtotal	Import	Export
January	5	0	8	6409	0	6409
February	5	0	2	1925	0	1925
March	5	0	4	4425	25	4400
April	12	0	12	18191	0	18191
May	5	1	4	6577	39	6538
June	2	0	2	3408	0	3408
July	10	0	10	15413	0	15413
August	11	0	11	16850	0	16850
Subtotal: shipping companies based in China Mainland	52	2	50	73198	64	73134
January	9	0	9	3992	0	3992
February	6	0	6	2569	0	2569
March	4	0	4	1579	0	1579
April	5	0	5	1868	0	1868
May	5	0	5	1848	0	1848
June	4	0	4	1485	0	1485
July	5	0	5	2350	0	2350
August	4	0	4	1451	0	1451
Subtotal: shipping companies based in China Taiwan	42	0	42	17142	0	7142
Total	94	2	92	90340	64	90276

4. Statistics on the Container Quantity of Taiwan Routes for 1997-2005

Cross-straits direct sailing	Import		Export		Total		Total
	Loaded containers	Empty containers	Loaded containers	Empty containers	Loaded containers	Empty containers	
1997	21178	18183	46592	559	67770	18742	86512
1998	30838	46974	99223	908	136061	47882	177943
1999	27856	91772	149321	3236	177177	95008	272185
2000	24482	110778	144245	1272	168727	112050	28077
2001	27262	141549	184630	855	211892	142404	354296
2002	29084	151513	164222	2034	193306	153547	346853
2003	33925	132207	156231	2103	190156	134310	324466
2004	43485	132754	185363	503	228848	133257	362105
2005	73181	107497	167478	706	240659	108203	48862
China Mainland, China Taiwan and China Hong Kong	Import		Export		Total		Total
	Loaded containers	Empty containers	Loaded containers	Empty containers	Loaded containers	Empty containers	
1997	7665	694	7454	1249	15119	1943	17062
1998	244482	3951	17256	5122	41738	9073	50811
1999	27445	6743	23457	1475	50902	7948	58850
2000	30655	14129	36118	310	66773	14439	81212
2001	31466	13475	36083	797	67549	14272	21821
2002	44550	13515	46818	1593	91368	15108	106476
2003	39597	7866	43642	4022	83239	11888	95127
2004	41642	681	48939	4103	90581	10784	101365
2005	36708	8110	52555	1543	89263	9653	98916

Translator: CHENG Xiaoyan

Editor (English): Katie Annette Roth

Recent Developments in Settlement of Maritime Disputes by the International Court of Justice

ZHAO Wei *

In the past two years, two cases on maritime disputes were brought before the International Court of Justice: *Dispute Concerning Maritime Delimitation in the Black Sea between Romania and Ukraine* (2004), accompanied with *Dispute Concerning Navigational and Related Rights of Costa Rica on the San Juan River* (2005). The proceedings of both cases have still not concluded, and consequently the judgments are not clear for the time being. However, facts of both cases and issues concerning international law therein might be indicative. Therefore, a brief description of and comments on the two cases will be presented in the paper.

I. Dispute Concerning Maritime Delimitation in the Black Sea between Romania and Ukraine (2004)

On 16 September 2004, Romania brought a case against Ukraine before the International Court of Justice (hereinafter referred to as the "Court" or "ICJ") relating to a dispute concerning the establishment of maritime boundary between the two States in the Black Sea, thereby delimiting the continental shelf and the exclusive economic zones appertaining to them.

A. Subject-Matter of the Dispute

In its Application instituting proceedings, Romania claimed:

Following a complex process of negotiations, Romania and Ukraine concluded

---

* ZHAO Wei, Ph.D. candidate of Xiamen University majoring in international law, whose research interest is the law of the sea.

two legal instruments. These were the Treaty on Relations of Co-operation and Good Neighborliness between Romania and Ukraine (the "Treaty on Relations") and an additional Agreement, concluded by exchange of letters of the Ministers of Foreign Affairs of the two States (the "Additional Agreement"). Both entered into force on 22 October 1997. By these agreements, the two States assumed the obligation to conclude a treaty on the régime of the State border between Romania and Ukraine,[1] as well as an agreement for the delimitation of the continental shelves and the exclusive economic zones of the two countries in the Black Sea. At the same time, the Additional Agreement provided for the principles to be applied in the delimitation of the above-mentioned maritime areas, and set out the commitment of the two countries that the dispute could be submitted to the ICJ, subject to the fulfillment of certain conditions. Both the Treaty on Relations and the Additional Agreement were registered by Romania with the Secretariat of the United Nations Organization, according to Article 102 of the Charter of the United Nations.

Between 1998 and 2004, 24 rounds of negotiations were held on the subject of the establishment of the maritime boundary. However, no result was obtained and an agreed delimitation of the maritime areas in the Black Sea was not accomplished. In order to avoid the indefinite prolongation of discussions that, in the opinion of the Romanian side, obviously cannot lead to any outcome, Romania filed the dispute between it and Ukraine before the International Court of Justice.

B. Jurisdiction of the Court

Article 4 of the Additional Agreement concluded by Romania and Ukraine in 1997 provides that: the problem of delimitation of the continental shelves and the exclusive economic zones shall be solved by the ICJ, at the request of any of the parties, provided that:

1. these negotiations shall not determine the conclusion of the above-mentioned agreement in a reasonable period of time, but not later than two years since their initiation;

2. the treaty on the régime of the State border between Romania and Ukraine

---

1 The treaty on the régime of the State border refers to the Treaty of Territorial Limits, namely the Treaty on Relations of Co-operation and Good Neighborliness between Romania and Ukraine, signed by two States later.

has entered into force. However, should the ICJ consider that the delay of the entering into force of the treaty on the régime of the State border is the result of the other Party's fault; it may examine the request before the entering into force of this Treaty.

The negotiations on the agreement for the delimitation of the continental shelves and the exclusive economic zones of Romania and Ukraine had by far exceeded the two-year period specified in Article 4. Furthermore the treaty referred to in the Additional Agreement - the Treaty between Romania and Ukraine on the Romanian-Ukrainian State Border Régime, Collaboration and Mutual Assistance on Border Matters - was signed on 17 June 2003 and entered into force on 27 May 2004.

In this connection, the two conditions set forth in the Additional Agreement were fulfilled, and the Court had jurisdiction over the dispute between Romania and Ukraine in accordance with Article 36 (1) of its Statute.[2]

C. Applicable Laws

Since the proceedings have not concluded, and the applicable laws the Court will refer to is not determined, the applicable laws in the sector represent the legal grounds upon which Romania bases its case. In general, the applicable laws are represented by the relevant provisions of the Additional Agreement concluded in 1997 and of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), to which both Romania and Ukraine are parties, as well as other relevant instruments binding on Romania and Ukraine.

In particular, the Additional Agreement represents a *lex specialis* between the two States, and the delimitation required from the Court must be determined in conformity with the five principles set out in Article 4 of the Additional Agreement. These principles are as follow:

---

2 Statue of the International Court of Justice, Art. 36(2): The States parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of an international obligation; d. the nature or extent of the reparation to be made for the breach of an international obligation.

a. the principle stated in Article 121 of the UNCLOS;[3]

b. the principle of the equidistance line in areas submitted to delimitation where the coasts are adjacent and the principle of the median line in areas where the coasts are opposite;

c. the principle of equity and the method of proportionality, as applied in State practice and the decisions of international courts;

d. the principle according to which neither of the Contracting Parties shall contest the other Contracting Party's sovereignty over any part of its territory neighboring the area submitted to delimitation;

e. the principle of taking into account the special circumstances of the area submitted to delimitation.

Romania considered that the method of delimitation of the disputed maritime areas in the Black Sea, as well as the resulting boundary, as proposed by Ukraine during the negotiations, did not correspond to the relevant provisions of the Additional Agreement that had to be applied to the case. Consequently, Ukraine had failed to respect Article 4 of the Additional Agreement. Furthermore Ukraine's position did not produce an equitable solution as between the two States as required by Articles 74 and 83 of the UNCLOS.

D. Current Status of the Case

The proceedings have not concluded. The ICJ, on 19 November 2004, fixed the following time-limits for the filing of the written pleadings: 19 August 2005 for the Memorial of Romania; 19 May 2006 for the Counter-Memorial of Ukraine. The ICJ, on 3 July 2006, authorized the submission of a Reply by Romania and a Rejoinder by Ukraine and fixes the following time-limits for the filing of those pleadings: 22 December 2006 for the Reply of Romania; 15 June 2007 for the Rejoinder of Ukraine.

---

3 United Nations Convention on the Law of the Sea, Art. 121: 1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide. 2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory. 3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.

II. Dispute Concerning Navigational and Related Rights of Costa Rica on the San Juan River (2005)

On 29 September 2005, Costa Rica brought a case regarding navigational and related rights against Nicaragua before the ICJ, claiming in its Application, that Nicaragua imposed a number of restrictions on the navigation of Costa Rican boats and their passengers on the San Juan River. Costa Rica had proposed many times to Nicaragua a diplomatic solution as well as the use of the available mechanisms of peaceful resolution of differences, including mediation through the Organization of American States and international arbitration. The Government of Nicaragua rejected all those alternatives. For these reasons, Costa Rica requested the Court to settle the dispute to cease Nicaraguan conduct which prevented the free and full exercise and enjoyment of the rights that Costa Rica possessed on the San Juan River, and which also prevented Costa Rica from fulfilling its responsibilities, and to make full reparation for losses suffered from Nicaragua.

A. The Rights on the San Juan River Claimed by Costa Rica and Its Legal Grounds

1. The Rights on the San Juan River Claimed by Costa Rica

(a) the perpetual right of free navigation for commercial purposes of Costa Rican boats and their passengers;

(b) the right for boats of Costa Rica to touch at any part of the banks of the river where the navigation is common, without paying any dues except such as may be established by agreement between the two Governments;

(c) the right to navigate the river in accordance with Article 2 of the Cleveland Award;[4]

(d) the right to navigate the San Juan River in official boats for supply purposes, exchange of personnel of the border posts along the right bank of the river with their official equipment, including the necessary arms and ammunitions, and for the purposes of protection, as established in the pertinent instruments ;

---

4 Cleveland Arbitral Award, Article 2: The Republic of Coast Rica under said Treaty and the stipulations contained in the sixth article thereof, has not the right of navigation of the River San Juan with vessels of war; but she may be related to and connected with her enjoyment of the "purposes of commerce" accorded to her in said article, or as may be necessary to the protection of said enjoyment.

(e) the right not to have navigation on the river obstructed or impaired at any point where Costa Rica is entitled to navigate.

2. Legal Grounds for Proposed Rights

(a) the Treaty of Limits between Costa Rica and Nicaragua, 1858 ("the Treaty of Limits"), in particular Article 6, stipulating that: Nicaragua shall have exclusively the dominion and sovereign jurisdiction over the waters of the San Juan river, while Costa Rica shall have the perpetual right of free navigation on the said waters;

(b) the arbitral award issued by the President of the United States of America, Grover Cleveland, on 22 March 1888 ("the Cleveland Award"), declaring the extent of Costa Rica's right of navigation of the River San Juan;

(c) the judgment of the Central American Court of Justice in the case *Costa Rica v. Nicaragua*, 1916, declaring related rights of Costa Rica;

(d) the Agreement Supplementary to Article IV of the Pact of Amity, Washington, 9 January 1956; and

(e) other applicable rules and principles of international law.

B. Restrictions Imposed by Nicaragua

Costa Rica considered that, Nicaragua had - in particular since the late 1990s - imposed a number of restrictions on the navigation of Costa Rican boats and their passengers on the San Juan River. These restrictions were not consistent with legal instruments binding on two States and included the following:

(a) the imposition of charges on Costa Rican boats and their passengers;

(b) the obligation to stop successively at each Nicaraguan military post on the Nicaraguan bank of the river to examine passengers and boats of Costa Rica;

(c) the prohibition on Costa Rica to navigate the river in accordance with the Cleveland Award;

(d) the imposition of timetables for navigation on the river;

(e) the limitations to free moorage along the banks of the river;

(f) other limitations to free and expeditious transit on the river.

Costa Rica claimed that these restrictions were of a continuing character. Particularly, on 28 September 2005, the National Assembly of Nicaragua passed a resolution, threatening to impose economic sanctions against Costa Rica in the event of its bringing the present dispute to the Court; annexed to that Resolution was the text of a draft law which would impose an import tax of 35% on all goods

and services of Costa Rican origin.

C. Jurisdiction of the Court

Costa Rica held that the Court had jurisdiction over the present dispute in accordance with following instruments:

1. the provisions of Article 36(2) of Statute of the International Court of Justice, by virtue of the operation of the following:

(a) the declarations of acceptance made respectively by the Republic of Costa Rica dated 20 February 1973 and by the Republic of Nicaragua dated 24 September 1929;

(b) the Tovar-Caldera Agreement, Alajuela, 26 September 2002. Both States had agreed to establish a three-year standstill period between them under the Tovar-Caldera Agreement, during which Nicaragua would maintain the legal status existing with respect to its declaration of acceptance of the jurisdiction of the Court while Costa Rica would not initiate any action before the Court. At the expiry of this period, both States shall bring present dispute before the Court if it is not settled. Costa Rica stated that during this period, the two Parties were indeed able to make progress on a number of important issues for the Central American region, to their mutual benefit. Unfortunately, however, the dispute over Costa Rica's navigational and related rights on the San Juan River remained unresolved.

(2) The Court also had jurisdiction over the present dispute in accordance with the provisions of Article 36(1) of its Statute, by virtue of the operation of the American Treaty on Pacific Settlement of Disputes, Bogotá, 30 April 1948, Article 31.[5]

D. Current Status of the Case

Proceedings of this case have not concluded. The ICJ, on 29 November 2005, fixed the following time-limits for the filing of the written pleadings: 29 August 2006 for the Memorial of Costa Rica; 29 May 2007 for the Counter-Memorial of Nicaragua.

---

5 Statue of the International Court of Justice, Art. 36(1): The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

III. Implications

Since the final judicial pronouncement on the above two cases is still pending, the applicable laws and final rulings are yet to be determined. However, through an analysis of the facts of the cases, we can observe the following:

A. Maritime disputes between States have increased in recent years along with an upsurge in ocean exploitation and utilization activities. The cases mentioned above were the only cases brought before the ICJ in 2004 and 2005 respectively. One is concerned with maritime delimitation, and the other is regarding the dispute over navigational and related rights in a boundary river. Although, the latter does not seem to have an obvious connection with maritime disputes, but it still involved general principles of international law and general rules on navigation. Nowadays, the maritime disputes are settled in accordance with the provisions of the UNCLOS, general principles of international law, and consideration of special circumstances, if any. However, these legal instruments are proving to be inadequate to settle all maritime disputes, let alone addressing new issues arising in the maritime disputes. Consequently, further development in international law in these aspects shall be achieved, and the law of the sea would regulate maritime interests and rights among various States more adeptly, and resolve disputes arising out of ocean exploitation.

B. The ICJ plays an important role in the development of international law, as its adjudication is not only an application of international law, but also, to some extent, laying down of new principles. Judgments of the Court are not a direct source of international law, but they are of a persuasive value. As to the development of the law of the sea, judgments of the Court are important as they have developed a rational and well-founded jurisprudence laying down basic principles and methods to solving maritime disputes. The role of the ICJ will be fundamental for the future development of the law of sea.

C. China should undertake a serious study and research on such cases. As a geographically disadvantaged State, China is challenged into disputes relating to maritime delimitation with States with opposite or adjacent coasts in all surrounding sea areas, besides, new maritime disputes might come up in the future. Settlement of these disputes is of great significance to protecting China's maritime interests and rights, and to maintaining peace and stability in the surrounding areas. For these reasons, China encounters a multitude of obstacles and challenges in resolving maritime disputes. China should encourage research on the relevant rules

of international law and pay close attention to the development of judicial practice in the international law of the sea. Such steps would be instructive and beneficial for China. Take the maritime delimitation in Black Sea as an example:

1. With regards to the applicable principles and methods, Romania requested the Court to delimit in accordance with the treaty between the two Parties, and general principles of international law. When dealing with similar disputes, China can negotiate with relevant States to reach consistent solutions, which take into consideration the general principles involved in the settlement of maritime disputes and other principles of international law, as well as special circumstances, if any.

2. As to the method of settlement, the fact that Romania resolved its delimitation dispute through the ICJ is indicative to China of possibility of international adjudication. For a long time, China continually insisted on settling delimitation disputes through diplomatic channels, but in reality, this approach has not yielded any effective result yet, particularly in the negotiations on maritime delimitation in the East China Sea with Japan. Practically speaking, final solutions to maritime disputes cannot be indefinitely prolonged, and effective approaches are required to be put forward. The delimitation in Black Sea proves that it is feasible to settle maritime disputes through international judicial or arbitral means.

3. In terms of delimitation of continental shelf and exclusive economic zone, Romania particularly requested to establish a single maritime boundary to delimit continental shelf and exclusive economic zone between the two States. Likewise, China should also seek to establish a single maritime boundary in the East China Sea. Since the UNCLOS entered into force in 1982, there are not enough instances of drawing two boundaries, one for continental shelf and other for exclusive economic zone. Even though some Chinese scholars contend that China and Japan should establish two different boundaries for continental shelf and exclusive economic zone, the truth is that such a contention is not in line with general practice of international community and may trigger further disputes.

Translator: WANG Xiaowei
Editor (English): Arpita Goswami

A Review of the Studies on the Law of the Sea in China in 2006

COLR Research Group*

Remarkable achievements have been made in the studies concerning the law of the sea in China in 2006, mainly concerning some theoretical explorations into relevant Chinese maritime practices. In an effort to facilitate future studies by acquainting scholars in this field with the current progresses of academic researches on relevant topics, as well as in order to provide direction for the future development of China's studies on the matter, this article provides an overall review of the findings originating from relevant papers and books concerning ten topics in the field of marine policy and legislation: the United Nations Convention on the Law of the Sea, maritime sovereignty disputes and maritime delimitation, the right to utilization of sea areas, marine pollution and environmental protection, port management and shipping, protection of underwater cultural heritage, marine energy, marine fisheries, polar issues, marine scientific research, and military usage of the sea.

I. Studies on the United Nations Convention on the Law of the Sea

This year, the studies on the United Nations Convention on the Law of the Sea (hereinafter referred to as the "Convention") have achieved considerable results. Regarding marine security, a greater deal of attention has been paid to piracy and other unconventional threats in addition to traditional ones; further, scholarly reflections have been made on events such as the accelerating cooperation on the regional maritime security among ASEAN (the Association of Southeast Asian

---

* COLR Research Group is group led by Kuen-chen Fu, professor and doctoral tutor at Xiamen University Law School, whose members include Chen Zhichao, Fan Dan, Huang Shan, Ji Ye, Jiang Jiadong, Li Hui, Li Yuanyuan and Zheng Jingfang.

Nations) States and the multilateral cooperation mechanism on maritime security established by Japan and other States. Meanwhile, some interdisciplinary and transnational perspectives about issues relevant to the continental shelf delimitation have deepened China's understanding to the relevant regimes under the Convention and also have provided the theoretical basis for the resolution of China's territorial dispute with its neighboring States, further enhancing and developing China's previous knowledge of the regimes of the exclusive economic zone and the international seabed area regulated by the Convention.

A. Maritime Security

Nowadays, as the sea has become a bond connecting States, an important stage for friendly exchanges and international security cooperation, as well as a prominent point where interests of all countries are closely intertwined, the question of maritime security has become one of the focuses of the international relations. Thus, to meet the related challenges, the 81st Session of the International Maritime Organization (IMO) Maritime Safety Committee (MSC) was held in London from 10 to 19 May 2006. Apart from the plenary meeting, some groups were established at the session, including three working groups, namely, the Maritime Security Working Group, the Ad Hoc Working Group on Passenger Ship Safety, and the Goal-Based Construction Standards Working Group, two drafting groups respectively on mandatory instruments and formal safety assessment (FSA), and the informal Group of Experts on Performance Standard for Protective Coatings (PSPC), all of which played a significant role in the final adoption of 14 resolutions and the ratification of 49 circulars in the session.[1]

As a typical example of a continental and coastal State at the same time (being surrounded on three sides by countries and on one side by the ocean), China is confronted with delicate situations regarding marine security, which involves an urgent need to safeguard China's maritime safety through the construction of an effective maritime security system. In the view of Zhang Wei and two other scholars, China should build a powerful navy to implement the military strategy of active protection, in adherence to the naval strategic thinking that an effective

1 Chinese Delegation to the 81st Session of the International Maritime Organization Maritime Safety Committee, A Brief Introduction to the 81st Session of the International Maritime Organization Maritime Safety Committee, *China Maritime Safety*, No. 7, 2006. (in Chinese)

offshore defense must stay true to the integrated development of mechanization and computerization led by informatization, so as to constantly improve its capacity to conduct joint operations and ensure comprehensive maintenance of maritime security. On the other hand, China should comply with the principles provided for under the Charter of the United Nations, the Convention, the Five Principles of Peaceful Coexistence, and other universally recognized principles of international law as the basic guiding principles to handle regional maritime security issues, and take comprehensive measures to cope with traditional and unconventional threats to regional maritime security, so as to progressively promote maritime military cooperation.[2]

Prof. Ji Guoxing has put forward a proposal aiming to safeguard China's maritime security: for one thing, China should resolve its disputes with States that have adjacent or opposite coasts with China concerning sovereignty over islands, and the delimitation of continental shelf and exclusive economic zone, so as to have clear maritime boundaries, which is of first importance to maritime security. For another, China should build an integrated maritime force mainly composed of the navy, as well as commercial vessels and ocean research fleets for the purpose of ensuring the exploitation of oil, gas and fisheries resources and protecting the safety of marine transport lines and defending China against threats from the sea.[3] Under the guidance of the concept of "comprehensive security", the ASEAN has made two major adjustments to its maritime security theory. First, it will enhance its overall maritime defense capability and the one to respond to maritime crises by improving the combat effectiveness of its navies and air forces and by strengthening maritime security cooperation among ASEAN States. Second, it intends to secure its say on matters relating to the maritime security in the Asia-Pacific region by playing an active and leading role in the construction of regional forums of the ASEAN and by tactfully implementing the strategy of balancing great powers.[4]

Meanwhile, considerable attention has paid to non-traditional security threats including maritime transnational crimes such as terrorism, piracy, armed robbery at

---

2 Building an Effective Maritime Security System, *Guangming Daily*, 11 January 2006, p. A9. (in Chinese)

3 Ji Guoxing, Strategies for the Settlement of Disputes Concerning Jurisdiction over Sea Areas, *Journal of Shanghai Jiaotong University (Philosophy and Social Sciences)*, No. 1, 2006. (in Chinese)

4 Feng Liang and Tang Guiyou, Theory and Practice on the Post-Cold War Maritime Security of the ASEAN, *Forum of World Economics & Politics*, No. 3, 2006. (in Chinese)

sea, dealings of drugs and arms, proliferation of chemical weapons and weapons of mass destruction, and large-scale marine environmental pollution. In the view of Dr. Gong Yingchun, since non-traditional security threats, which are interwoven with traditional security threats, have become a universal and transnational problem, it is inevitable that there will be some security gaps that cannot be covered by the existing international legal system and traditional military alliances. In recent years, in an effort to fill the security gap arising from the absence of direct U.S. military involvement in the South China Sea and the Malacca Strait due to political reasons and other factors, Japan has been actively committed to the construction of a Japan-led multilateral maritime security cooperation mechanism in the Asia-Pacific region for the core purpose of conducting maritime joint law enforcement. China should actively participate in this mechanism while continuing to advocate new security concepts like common security and comprehensive safety, in order to accurately grasp the trend of maritime security order in this region and prevent this maritime security mechanism in the Asia-Pacific region from developing into a paramilitary alliance.[5] In the new maritime security situation in Southeast Asia after the 9/11 attacks, in order to promote the substantial development of ASEAN Regional Forum, the ASEAN has further strengthened maritime security cooperation to combat terrorism and piracy at sea and stepped up the efforts towards the establishing of the ASEAN Security Community. By so doing, the ASEAN took a solid step in the direction of realizing the integration of ASEAN security.[6]

Facing rampant piracy in today's world, Associate Prof. Wang Qiuling, after comparing the definition and the constituent elements of piracy under the Convention with the characteristics of current piracy, comes to the conclusion that many provisions under existing international conventions in this regard can no longer meet the actual needs, and hence the subject, object, venue of this crime be redefined and the identification conditions for this crime should be relaxed.[7] After

---

5 Gong Yingchun, Japan and the Construction of Multilateral Maritime Security Mechanism, *Contemporary Asia-Pacific Studies*, No. 7, 2006 (in Chinese); Gong Yingchun, The Influence of Non-traditional Security Factors in the Marine Sector on Maritime Legal Order, *China Oceans Law Review*, No. 1, 2006 (in Chinese); Gong Yingchun, Initiatives and Progress of Japan's Construction of the Multilateral Maritime Security Mechanism in the Asia-Pacific Region, in Gao Zhiguo, Zhang Haiwen, Jia Yu, *Theory and Practice of the International Law of the Sea*, Beijing: China Ocean Press, 2006, pp. 256~269. (in Chinese)

6 Feng Liang and Tang Guiyou, Theory and Practice on the Post-Cold War Maritime Security of the ASEAN, *Forum of World Economics & Politics*, No. 3, 2006. (in Chinese)

7 Wang Qiuling, The Crime of Piracy and Its Constitutive Elements, *Journal of Dalian Maritime University (Social Science Edition)*, No. 2, 2006. (in Chinese)

a comparison of many different relevant legislations on piracy under the criminal laws of Canada, Japan, Russia, and other States, Wang Zhen and Sha Yunfei have proposed some suggestions on the improvement of China's relevant legislation in this regard.[8] In response to the new trend of the collaboration between piracy and maritime terrorism in Southeast Asia since the 9/11 attacks, Wang Jian and Dai Yichen have put forward the new governance model of strengthening internal cooperation, seek assistance from major States, and integrating resources through international organizations.[9]

Prof. Zhou Zhonghai contends, the Convention has developed and expanded the application scope and the targets for the right of hot pursuit under traditional international law, which has now become the main mean for coastal States' effective law enforcement and has been exercised to combat illegal fisheries activities and international crimes in territorial seas, contiguous zones, and especially exclusive economic zones of coastal States in a more frequent manner. Besides, he has explored the question of compensation for damages arising from use of force or improper exercise of the right of hot pursuit.[10]

With the advancement of technology and the increasing shortage of energy, international trade of nuclear materials has become more and more frequent. Taking into account the freedom of navigation under the Convention and the conflicts and coordination of marine environmental protection and human life safety interests, Wang Xiaohui explores the topic of secret transportation of nuclear materials by sea under many regards, such as the precautionary principle, the requirement of advance notice, and State responsibility, and proposes that this topic should be further discussed from the perspectives of international law theory, considering the potential threats menacing China, and that serious efforts should be made to work out a cooperation scheme which can ensure the safe transportation of nuclear materials.[11]

---

8 Wang Zhen and Sha Yunfei, Piracy and Issues Concerning Legislation on Piracy in China, *China Oceans Law Review*, No. 1, 2006. (in Chinese)

9 Wang Jian and Dai Yichen, The Problem of Piracy in Southeast Asia and Its Solution, *Contemporary Asia-Pacific Studies*, No. 7, 2006. (in Chinese)

10 Zhou Zhonghai, The Connotation and Practice of the Maritime Right of Hot Pursuit, *China Oceans Law Review*, No. 1, 2006. (in Chinese)

11 Wang Xiaohui, An Exploration of the Secret Transportation of Nuclear Materials by Sea from the Perspective of the International Law, *China Oceans Law Review*, No. 1, 2006. (in Chinese)

B. Issues Concerning the Continental Shelf

The concept of natural prolongation is one of the key elements in the definition of continental shelf. Dr. Gao Jianjun, after an investigation into relevant practices of the International Court of Justice, international arbitration and mediation institutions concerning the settlement of maritime delimitation disputes, concludes that in these practices, the facts in geology, tectonics and geomorphology have constituted the main reference to determine whether the area to be delimitated is a single continental shelf or an area where there exists an interruption of the natural prolongation, which seems to gather more and more attention.[12] In response to the view that "the principle of natural prolongation has become secondary to the principle of equidistance line" in Japanese theories on the international law of the sea, Dr. Zhang Xinjun asserts this view is a misunderstanding of the negative application of the principle of natural prolongation in the settlement of early disputes, which ignores not only the emphasis of court on the geological situation of the continental shelf but also the fact that both State parties to these disputes shares a common continental shelf, which is the premise for arbitral tribunals and courts to decide not to apply the principle of natural prolongation as the delimitation principle.[13]

On the basis of a comparative analysis of the concept of continental shelf in geology and in law as well as a revisit on the four developmental phases of the legal definition of the continental shelf, Zhang Haiwen argues that the term continental shelf provided for under Article 76 of the Convention has a far more richer extension than its equivalent in geology, as it actually refers to the continental margin, reflecting the views of States with broad continental shelf and margin in geology.[14] As pointed out by Fang Yinxia and Zhou Jianping, the concept of the continental shelf in the legal sense as provided for under Article 76 of the

---

12 Gao Jianjun, An Empirical Study on the Interruption of Natural Prolongation, in Gao Zhiguo, Zhang Haiwen and Jia Yu, *Theory and Practice of the International Law of the Sea*, Beijing: China Ocean Press, 2006, pp. 34~45. (in Chinese)

13 Zhang Xinjun, The Affirmation of Customary Law and the Principle of Natural Prolongation, in Gao Zhiguo, Zhang Haiwen and Jia Yu, *Theory and Practice of the International Law of the Sea*, Beijing: China Ocean Press, 2006, pp. 46~60. (in Chinese)

14 Zhang Haiwen, A Comparative Study of the Continental Shelf Regime in Geology and the Continental Shelf Regime in Law, in Gao Zhiguo, Zhang Haiwen and Jia Yu eds., *Theory and Practice of the International Law of the Sea*, Beijing: China Ocean Press, 2006, pp. 16~33. (in Chinese)

Convention is not only the combination of scientific, legal, and political elements but also the outcome of a compromise between groups of different interests; therefore, certain complexity adds to its interpretation in practice, especially in regard to the settlement of issues relating to the oceanic ridge. Therefore, China should strengthen its studies on the juridical logic and application conditions of Article 76 of the Convention in order to provide a useful reference for the delimitation of the continental shelf beyond 200 nautical miles.[15]

On the principle for continental shelf delimitation, Dr. Qu Bo has proposed to use Article 58, Paragraph 3 of the Convention, which embodies the equitable principle, as a significant guidance on the delimitation of the continental shelf. Besides, he shares the view that Article 83 of the Convention shall not be deemed as the recognition of the negotiation principle; instead, the equitable principle is the only basic principle for the delimitation of the continental shelf while other precepts and principles can be applied only when they conform to the equitable principle.[16] On the basis of his analysis of the relationship between public and private laws, the convergence between international and domestic legislation and by reference to the system of common ownership under the domestic civil law, Dr. Dong Yupeng has put forward a new solution to continental shelf delimitation disputes, an alternative to China's current policy of "shelving sovereignty and joint development", which consists in resolving the disputes over sovereignty by adopting the system of common ownership. Although there is still a lot of room for improvement about this new approach, trial implementation of the idea of common ownership of continental shelf can be gradually conducted between States adjacent to continental shelf that have sound diplomatic relations and few conflicts of interest.[17]

C. Issues Concerning the Exclusive Economic Zone

The regime of exclusive economic zone established under the Convention is a major development of the regime of international law of the sea. After discussing

---

15 Fang Yinxia and Zhou Jianping, The Juridical Logic and Application Conditions of Article 76 of the UNCLOS Concerning Continental Shelf, *China Oceans Law Review*, No. 1, 2006. (in Chinese)

16 Qu Bo, A Reflection on Several Issues Concerning the Delimitation of the Continental Shelf, *Contemporary Law Review*, No. 4, 2006. (in Chinese)

17 Dong Yupeng, On the Common Ownership of Continental Shelf, *China Oceans Law Review*, No. 1, 2006. (in Chinese)

the sovereign rights of coastal States over exclusive economic zones based the concept of the term "sovereignty", Yin Nianchang holds that the sovereign rights of coastal States over such zones is an important part of their economic sovereignty and that China should make full use of relevant provisions under the Convention which respects the sovereignty of a State to actively safeguard China's rights over its exclusive economic zones.[18]

Shen Yingzi believes that as the exclusive economic zone is a compromise reached between major maritime States and States aspiring to expand their fishing rights, it is inevitable that the Convention, while providing for the rights of coastal States and others, has left some vacuum, resulting in the issue of so-called "residual rights". She also shares the view that this is especially true for the newly designated exclusive economic zone, where there is not a definitive division of rights enjoyed by coastal States with respect to sovereign rights and exclusive jurisdiction, and freedom of high seas and the rights enjoyed by other States. Actual practice shows that the States' jurisdiction over exclusive economic zones and its content tend to be expanding.[19]

Prof. Li Guangyi has further pointed out that although other States are entitled to military use of the sea in the exclusive economic zones of coastal States such as the freedom of navigation and overflight, such privileges are not the traditional rights of high seas and at the same time the concerned airspace is not international airspace, in this connection, the freedoms of military use of the water body and seabed in the exclusive economic zones enjoyed by the coastal States and other States should be differentiated in terms of scope and extent. Therefore, any form of activities relating to military use of the sea by any States, including such non-contracting States to the Convention as the United States, shall be conducted on the premises that the sovereignty and security of coastal States should be respected, that such activities should be only for peaceful purposes and that any form of illegal activities shall be prohibited.[20]

D. Maritime Disputes and Their Solutions

---

18 Yin Nianchang, On State Sovereign Rights over Exclusive Economic Zones, *Journal of Zhanjiang Ocean University*, No. 2, 2006. (in Chinese)

19 Shen Yingzi, On the Jurisdiction of States over the Exclusive Economic Zone, *Contemporary Manager*, No. 18, 2006. (in Chinese)

20 Li Guangyi, An Analysis of Legal Issues Concerning the Military Use of the EEZ, *Contemporary Law Review*, No. 4, 2006. (in Chinese)

Jiao Pei has explored this issue from a case study of the dispute between Russia and Japan over the Four Northern Islands. He holds that since the effective date of the Convention, the traditional territorial dispute over islands has evolved into a dispute over the rights to strategic traffic, territorial sea expansion, and marine resources exploitation. For this reason, he proposes that China should strengthen international publicity, occupy the disputed sea areas when possible, and accelerate the development of marine technology to protect China's maritime rights and interests to the extent possible.[21]

Prof. Ji Guoxing argues that China's disputes with other States concerning the jurisdiction over sea areas in the Yellow Sea, the East China Sea, and the South China Sea can be resolved through the adoption of any of the three internationally applied approaches for equitable solution; namely, negotiations and mutual concessions, submission to the ruling by the International Court of Justice, the arbitration and mediation by a third party, and joint exploitation or jurisdiction while shoveling disputes.[22]

After a comparative analysis of the relevant provisions under the Statute of the International Court of Justice, the Convention, and the Rules of the International Tribunal for the Law of the Sea, Liu Xuefei comes to the conclusion that provisions of the International Court of Justice are distinctively different from those of the International Tribunal for the Law of the Sea in the following four aspects: who requests advisory opinion, who gives advisory opinion, the questions upon which the advisory opinion is requested, and finally the purpose for advisory functions. In her opinion, China should, after having acquired an in-depth understanding of the advisory functions of both the two bodies, give full attention to and take active and steady steps towards the acquirement of advisory opinions though indirect channels, so as to solve the international disputes involving China as early as possible.[23]

E. The Regime for the International Seabed Area

---

21 Jiao Pei, A Reflection on International Disputes over Sea power: A Case Study of Relevant Issues on the Four Northern Islands, *Theoretical Exploration*, No. 4, 2006. (in Chinese)

22 Ji Guoxing, Strategies for the Settlement of Disputes Concerning Jurisdiction over Sea Areas, *Journal of Shanghai Jiaotong University (Philosophy and Social Sciences)*, No. 1, 2006. (in Chinese)

23 Liu Xuefei, A Comparison of the International Tribunal for the Law of the Sea and the International Court of Justice in Terms of Advisory Jurisdiction, *Journal of Ocean University of China (Social Science Edition)*, No. 4, 2006. (in Chinese)

The regime for the international seabed area (hereinafter referred to as the "Area"), based on the principle that the Area as well as its resources are the common heritage of humankind, is another major achievement of the Convention. Dr. Jin Yongming has reviewed the development phases of the concept of "common heritage of mankind", analyzed the current controversies on the nature of the concept in the international community, and pointed out the development trend of it.[24] From the perspective of the property rights theory in economics, Ren Qiujuan holds that the regime for Area cannot be effectively operated through the mechanic compliance with the property rights theory but instead must be read according to the basic principle that the Area as well as its resources are the common heritage of mankind, which should be the direction of our efforts in spite of many difficulties in practice.[25] By making a systematic elaboration of Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, the first regulation issued by the International Seabed Authority, Dr. Jin Yongming highlights the respective rights, obligations, functions and powers of the International Seabed Authority and contractors, for the purpose of facilitating China's reasonable and proper conducting of activities relating to the exploitation and exploration of the Area and its resources and the promotion of China's development of deep-sea exploitation.[26]

After an introduction and analysis of the *Seabed Politics* by Canadian scholar Barry Buzan, Liu Zhongmin and Li Xingya hold that the ideas of Barry has great implications for current studies on the regime of the Area, the law of the sea, and the international law as a whole. Besides, they describe the profound impact of international institutions on the regime of the Area in the three decades since the first publication of the book as well as a prediction of possible conflicts that may be encountered by developing countries as they become more powerful.[27]

In short, the maritime legal regime established under the Convention has, for the first time in history, made systematic and definite provisions on the

---

24 Jin Yongming, The Regime of International Seabed Area and China, in Gao Zhiguo, Zhang Haiwen and Jia Yu, *Theory and Practice of the International Law of the Sea*, Beijing: China Ocean Press, 2006, pp. 61~91. (in Chinese)

25 Ren Qiujuan, A Reflection of the Theory of Property Rights in Economics from the Perspective of the Legal Status of the International Seabed Area, *Academic Forum*, No. 5, 2006. (in Chinese)

26 Jin Yongming, A Review of Regulations on the Exploration of International Seabed Resources, *Ocean Development and Management*, No. 4, 2006. (in Chinese)

27 Liu Zhongmin and Li Xingya, Seabed Politics and International Law: A Review of *Seabed Politics* by Barry Buzan – and New Developments in International Seabed Politics, *China Oceans Law Review*, No. 1, 2006. (in Chinese)

marine rights and interests of States, marking the establishment of a new global maritime order as well as the arrival of a new era for international maritime affairs. Therefore, China should enhance its studies and application of the Convention by actively participating in international maritime affairs, raising public awareness of ocean, and improving China's maritime legal regime. Meanwhile, with the aim of safeguarding China's maritime rights and interests in an all-round way, China should also strengthen its actual control over disputed sea areas and be actively engaged in the preparation of marine survey data and relevant supporting materials.[28]

II. Disputes over Maritime Sovereignty and Delimitation

This year, further achievements have been made concerning the studies on disputes over maritime sovereignty and delimitation, which include not only theoretical studies but also discussions about the issue of China's maritime sovereignty and delimitation. In this respect, in reference to the South China Sea, most studies reaffirmed China's sovereignty over the islands in that area in compliance with the principle of occupation in international law.[29] As negotiations between the representatives of the Chinese government and the Japanese counterparts are successively under way, the issue of China-Japan delimitation of the East China Sea has become an increasingly hot area for research. The efforts made by Chinese scholars in this regard mainly focus on the following two aspects:

A. The Principle and Methods for China-Japan Delimitation of the East China Sea

The issue of the delimitation of the East China Sea, which is no wider than 400 nautical miles, involves not only the delimitation of the continental shelf but also that of the exclusive economic zone. China and Japan take different stances on

---

28 Xue Guifang, Suggestions on the Countermeasures for the Safeguard of China's Maritime Rights and Interests under the Regime of the UNCLOS, *Journal of Ocean University of China (Social Science Edition)*, No. 6, 2005. (in Chinese)

29 Xiao Qian, A Reflection of the Sovereignty over South China Sea Islands from the Perspective of International Law, *Journal of Xinjiang Vocational University*, No. 1, 2006 (in Chinese); Liu Jiyong and Li Jiyun, A Preliminary Analysis of China's Sovereignty over Sea Area of the Nansha Islands in Line with the Principle of Preemption, *Journal of Liaoning Technical University (Social Science Edition)*, No. 4, 2006. (in Chinese)

the delimitation of the East China Sea: China has been insisting that its continental shelf be extended all the way to Okinawa Trough; in contrast, Japan has unilaterally proposed the median line not only to intentionally confuse the exclusive economic zone with the continental shelf by ignoring their differences but also to propose the so called "median line" as the boundary between the two different sea areas.[30] Zhang Youfen and two other scholars have taken the view that as the principle of natural prolongation proposed by China can be applied only to the delimitation of the continental shelf but not to the exclusive economic zone in the East China Sea, China's proposal cannot repeal Japan's insisting on the principle of single maritime boundary delimiting the continental shelf and the exclusive economic zones in the East China Sea with its so called "median line". They further point out that to delimitate the sea areas of East China Sea by applying the principle of single maritime boundary not only goes against the current international law of the sea but also impairs China's geographical advantages, giving Japan the chance to fight for the jurisdiction over the continental shelf with China. Therefore, China's top priority in this issue should be to draw a line that is both lawful and reasonable and can be known, understood, and adopted by Japan and the rest of the international community.[31]

Regarding China's proposal to extend its continental shelf in the East China Sea to the line connecting the maximum water depth points in Okinawa Trough, Jia Yu holds that only making proposals is not enough, rather, China should seek support and improvement from the law. He has pointed out that since the continental shelf claimed by China in line with the principle of natural prolongation has exceeded 200 nautical miles from its coast and the outer limit of the continental shelf beyond 200 nautical miles should be submitted to review by the United Nations Commission on the Limits of the Continental Shelf (the "Commision"). Specially, details about the outer limits of the continental shelf beyond 200 nautical miles from the coast and relevant scientific and technical information should be submitted to the Committee for review in accordance with the requirements of

---

30 Jia Yu, A Preliminary Study of Legal Issues on the 200-Natical-Mile Outer Continental Shelf in the East China Sea, *China Oceans Law Review*, No. 1, 2006 (in Chinese); Liang Yong, An Analysis of the China-Japan Dispute Concerning the Delimitation of the Continental Shelf in the East China Sea from the Perspective of International Law, *Legal Science Monthly*, No. 8, 2006. (in Chinese)

31 Zhang Youfen, Yu Zhirong and Dong Xiji, A Jurisprudential Analysis of China-Japan Dispute Concerning the Delimitation of the East China Sea, *Ocean Development and Management*, No. 1, 2006. (in Chinese)

the Convention and finally China should submit its application for review to the Committee prior to May 2009. Moreover, he also mentioned that China should also uphold and reaffirm the claim over its rights and interests in the continental shelf in the East China Sea by submitting their dispute to the Committee.[32]

Dr. Zhang Xinjun asserts that the clarification of the relationship between rights and interests in the continental shelf and the rules governing delimitation are of great significance to the determination of the laws applicable in the China-Japan dispute over the East China Sea. In view of the current progress in the China-Japan negotiations over the delimitation of the East China Sea, though there is no indication that their dispute in the East China Sea will be submitted to international judicial or arbitration institutions for settlement, both of the States believe that their dispute should be resolved through negotiations in compliance with the international law. However, in accordance with relevant regulations, two different provisions shall be applied in the two different phases of the settlement of dispute over continental shelf. First, Article 76 of the Convention shall be applied to make a judgment on the rights and interests claimed by the contending parties. Second, unless otherwise agreed, only after their claims to rights and interests have been ruled as legally equitable and effective against the other party, can the delimitation regime under Article 83 of the Convention be applied to achieve a solution based on the equitable principle. According to his opinion, in the China-Japan dispute over the delimitation of the East China Sea, the first thing for China to do should be to make sure whether the claims of China and Japan are legally equitable and effective against the other party, resulting in overlapping of claims. Otherwise, delimitation will not constitute an issue and there will be no necessity to apply the equitable principle under international law required by the delimitation regime in the case that the two claims can be prioritized by employing the continental shelf regime.[33]

Additionally, with regard to the Diaoyu Islands which remain to be delimitated between China and Japan, Wang Keju holds that the Diaoyu Island and its affiliated islands, which cannot sustain human habitation or economic life of their own, shall

---

32 Jia Yu, A Preliminary Study of Legal Issues on the 200-Natical-Mile Outer Continental Shelf in the East China Sea, *China Oceans Law Review*, No. 1, 2006. (in Chinese)

33 Zhang Xinjun, The Important Status of the Principles of Natural Prolongation in the China-Japan Dispute over the East China Sea: from the Perspective of the Relationship between Rights and Interests and Delimitation Rules, *Tribune of Political Science and Law*, No. 4, 2006. (in Chinese)

have no exclusive economic zone or continental shelf in the maritime delimitation; in addition to their proximity to the median line, their small area, and their disputed sovereignty, it is advisable that the Diaoyu Islands be given zero effect in the delimitation of the exclusive economic zone and the continental shelf between China and Japan.[34]

B. Solutions to the Sino-Japan Dispute over the Delimitation of the East China Sea

The China-Japan dispute over the delimitation of the continental shelf in the East China Sea is in essence a conflict over the rich reserves of oil and gas resources of the continental shelf. Though China's claim to its rights and interests over the continental shelf in the East China Sea is well grounded in terms of both geological structure and legal basis, harmony brings mutual benefits while hostility causes harm to both sides in the China-Japan dispute over the above mentioned resources, because exploitation will inevitably involve the issue of the exclusive ownership of sovereignty right. Therefore, both sides face the question of how to get out of the dilemma that "exploitation is impossible without the resolution of the dispute over sovereignty".

China's official position on the issue of the maritime delimitation between China and Japan is that all disputes relating to maritime delimitation should be resolved through amicable negotiations in compliance with the acknowledged international law in an equitable and reasonable manner, where specific conditions in different sea areas shall be taken into consideration, and in a way that China's bilateral relations with other States will not be affected by the dispute. China's policy on maritime delimitation dispute is "shelving disputes and seeking joint exploitation."[35]

This position has won support from many scholars such as Liu Zhongmin, Ju

---

34 Wang Keju, The Diaoyu Islands and Its Role in the East China Sea Delimitation, *China Oceans Law Review*, No. 1, 2006. (in Chinese)

35 Maritime Delimitation Dispute Should Be Settled through Friendly Consultations, at http://China.gansudaily.com.cn/system/2006/09/15/010132237.shtml, 10 December 2006. (in Chinese)

Hailong, Zhang Sanbao, Jin Yongming, and many others,[36] all of whom have made some explorations into specific mechanisms of joint development. [37] Liang Yong believes that either to implement such strategy of "joint development" or to submit the dispute to the International Court of Justice or to international arbitration institutions for settlement may be a possible way to get out of the dilemma.[38] However, Dr. Zhang Xinjun shares the view that since no positive results have been achieved since the adoption of the above mentioned position, due attention should be attached to China's legal stand in the negotiations, or at least to the basis of international law which can support the position. He also points out that the policy of "joint development" can only serve as a provisional arrangement and cannot affect China's claim that its continental shelf in the East China Sea shall be extended to the Okinawa Trough. In this connection, it should be made clear in terms of law that if the principle of natural prolongation under the regime of the continental shelf has been confirmed to take predominance over the equidistance principle, unless Japan claims to share a continental shelf with China instead, there will be no delimitation issue in the China-Japan dispute. In other words, "joint development" is only a voluntary act of China, but not the necessary result of compulsory application of the legal regime on delimitation. In his opinion, as the joint development zone is lying within the natural prolongation of the continental shelf of China, its scope shall be subject to the decision of China. Conversely, if the delimitation dispute between China and Japan needs to be resolved in an equitable manner, Japan shall confirm that the equidistance principle and the principle of natural prolongation are legally equitable and effective against the other party; to say the least, even if the equidistance principle has replaced principle of natural

---

36 Liu Zhongmin, Current Situation of and Countermeasures for China-Japan Disputes over Maritime Rights and Interests, *Pacific Journal*, No. 3, 2006 (in Chinese); Jin Yongming, Dispute Concerning the Delimitation of the Continental Shelf in the East China Sea and Its Development Trend, *Political Science and Law*, No. 1, 2006 (in Chinese); Ju Hailong and Zhang Sanbao, A Realistic Reflection on the Delimitation of the East China Sea between China and Japan from the Perspective of Deng Xiaoping's Proposal of Peaceful Settlement of International Disputes by Shelving Disputes and Seeking Common Development, *Socialism Studies*, No. 3, 2006. (in Chinese)

37 Ju Hailong and Zhang Sanbao, A Realistic Reflection on the Delimitation of the East China Sea between China and Japan from the Perspective of Xiaoping's Proposal of Peaceful Settlement of International Disputes by Shelving Disputes and Seeking Common Development, *Socialism Studies*, No. 3, 2006. (in Chinese)

38 Liang Yong, An Analysis of the China-Japan Dispute Concerning the Delimitation of the Continental Shelf in the East China Sea from the Perspective of International Law, *Legal Science Monthly*, No. 8, 2006. (in Chinese)

prolongation as the primary criterion for continental shelf delimitation, the delimitation issue arising out of each other's claim based on equidistance principle still requires an equitable solution; under both circumstances, the joint development zone, as one of the obligatory solutions to the delimitation dispute, can only be restricted within the sea areas simultaneously claimed by both sides.[39]

As for the China-Japan dispute concerning the sovereignty over the Diaoyu Islands, Dr. Zhang Xinjun has also explored the two possible relationships - resolving them together or separately - between the resolution of the dispute over the Diaoyu Islands and that over the continental shelf in the East China Sea. In his opinion, regarding settlement procedures or approaches, due to the cultural tradition, modern history, current political situation, and overall strength of China, the diplomatic approach is "relatively feasible but not advisable" whereas the legal approach "relatively advisable but not feasible". Moreover, he has pointed out that: if China were to solve the dispute over the Diaoyu Islands under the current situation, it would doubtlessly adopt the diplomatic approach and the Diaoyu Islands would be divided between China and Japan; as to whether the Chinese government decides to resolve the dispute and which approach it chooses, it depends on the extent to which the Chinese government can accept the delimitation results; it should be noted that although the dispute over the Diaoyu Islands is a serious territorial dispute between China and Japan, it is not all about the China-Japan relation, nor even one of the main aspects of it; as such, once it has affected the overall China-Japan relations, it will be put aside; in fact, "shelving dispute, joint development" is one of China's important policies for handling territorial and maritime delimitation disputes with other States; although this is not very favorable to China, the dispute over the Diaoyu Islands should not be protracted.[40]

III. Issues Concerning Right to the Use of Sea Areas

In the Recommended Draft on the Law of Property of China proposed by the Law Committee of the National People's Congress in August 2004, the term "sea

---

39 Zhang Xinjun, The Important Status of the Principles of Natural Prolongation in the China-Japan Dispute over the East China Sea: from the Perspective of the Relationship between Rights and Interests and Delimitation Rules, *Tribune of Political Science and Law*, No. 4, 2006. (in Chinese)

40 Song Yuxiang, Issues on Solutions to China-Japan Dispute over the Diaoyu Islands, *China Oceans Law Review*, No. 1, 2006. (in Chinese)

area" has been listed for the first time among the objects of State ownership such as rivers, mineral resources, and land. In the speech of the legislator, the word "blue territory" was used for the first time in history, bringing about a craze of in-depth academic study on the right to the use of sea areas. This year, further studies have been conducted into such topics as the legal nature of the right to use the sea areas, and how to improve China's regime of this right.

Answering the first question, the idea of the right to the use of sea areas as a private right is the mainstream in the current studies of the science of law. Ji Miaoyi et al. hold that the relevant provisions under the Law of the P. R. C. on Administration of the Use of Sea Areas have provided for the right to the use of sea areas as a brand new category of property rights and this non-conventional type of usufructuary right is gradually coming into being with the development of the society as well as the advance of science and technology.[41] Dr. Gong Gu has further pointed out that the single-perspective analysis of the right to the use of sea areas typical of the traditional jurisprudence has resulted in the narrowness and incoherence of such analysis. In his opinion, from the perspective of economics, the right to the use of sea areas has the nature of a property right which carries the double value of private and public interests and has the dual function of source of economic profits as well as environmental protection; on the basis of this, it can be concluded that the right to the use of sea areas has the dual attributes of public and private right; therefore, the double values and dual functions of the above mentioned right can be unified by taking such measures as restricting the public interests in its exercise, securing the economic interests of the right holders, and making reasonable use of fees for the use of sea areas.[42]

Still, some scholars have pointed out the problems and shortcomings of China's current system for the right to the use of sea areas. According to presiding judge Liu Qiaofa, at the legislative level, the Law of the P. R. C. on Administration of the Use of Sea Areas, which is highly administrative and resembling a public law, fails to make sound provisions on the rights and interests of the user of sea areas nor does it lay adequate emphasis on its nature as a property right concerning the obtaining and content of this right. He also argues that in practice, there are some conflicts between the Law of the P. R. C. on Administration of the

---

41 Ji Miaoyi, The Legal Nature of the Right to the Use of Sea Areas as Usufruct, *Ocean Development and Management*, No. 1, 2006. (in Chinese)

42 Gong Gu, Dual Legal Character and Double Values and Functions of the Right to Use Sea Areas, *China Oceans Law Review*, No. 2, 2006. (in Chinese)

Use of Sea Areas and relevant laws; fees for the use of sea areas is set too low; it is quite common that the right to the use of sea areas is rented or contracted to make exorbitant profits; the use of sea areas is inefficient; the supervision of administrative bodies remains to be strengthened; in reality, the status of the Law of the P. R. C. on Administration of the Use of Sea Areas and relevant supporting regulations remain to be improved.[43] As proposed by Shui Bing, the effect and status of the right to the use of sea areas should be enhanced through civil legislation; the categories of property rights clarified under the Law of the P. R. C. on Administration of the Use of Sea Areas should be provided for under the basic law of china on property so that the ownership and transfer of the right to the use of sea areas can be fully applied to the rules established under the basic law of china on property.[44] Furthermore, Liu Qiaofa has designed some specific systems, such as the "sea areas value assessment system" and the "contract system for the transference of the right to the use of sea areas", to make the system for the right to the use of sea areas compatible with the basic rules of the market economy.[45]

VI. Marine Pollution and Environmental Protection

In the respect of the issue of compensation for vessel-source oil pollution, Dr. Xu Guoping has introduced the basic framework and main contents of the laws governing the matter, analyzed the institutional and theoretical basis for such laws, and put forward and proved the theoretical feasibility of the idea of establishing China's own legal regime on compensation for vessel-source oil pollution, filling the gap in this regard in China.[46] How to effectively regulate through legal channels the pollution caused by vessels in the Taiwan Strait is one of the major problems that should be resolved jointly by both sides across the Strait. Kuen-chen Fu and Liu Xianming hold that cooperation between governments across the Strait is the

---

43 Liu Qiaofa, The Defects and Improvement of China's System of the Right to the Use of Sea Areas, *Journal of Shanghai University of Political Science and Law*, No. 4, 2005. (in Chinese)

44 Shui Bing, A Preliminary Analysis of the Value of the System of the Right to the Use of Sea Areas, *Journal of Ocean University of China*, No. 2, 2005. (in Chinese)

45 Liu Qiaofa, The Defects and Improvement of China's System of the Right to the Use of Sea Areas, *Journal of Shanghai University of Political Science and Law*, No. 4, 2005. (in Chinese)

46 Xu Guoping, *A Study on the Legal System on Compensation for Vessel-source Oil Pollution*, Beijng: Peking University Press, 2006. (in Chinese)

necessary way to effectively control vessel-source oil pollution and has provided some useful references for cooperation methods and legal approaches for the resolution of difficulties that may be encountered in future bilateral corporations.[47]

In an effort to welcome the rise of global governance theory as a branch in the field of public administration, Wang Qi and Liu Fang propose that, adapting to the needs of China's practice, China should establish its own model of network governance linking governments, enterprises, and the public, which is a necessary requirement for the transition from maritime environmental management to maritime environmental governance as well as the inevitable choice for China to resolve the conflicts arising in practice between all parties involved in the maritime environmental management, to effectively govern the marine environment, and to realize the sustainable development of marine environment.[48] The international seabed area is a potential base for strategic resources that have not yet been fully known, exploited, and utilized by mankind as well as one of the important alternative resources for land resources in the 21st century. For this reason, various States have been rushing to be engaged in the research and exploitation of seabed mineral resources. In the opinion of Lin Chaojin, in the exploitation and utilization of the international seabed area resources, the international community should adhere to the concept of sustainable development and actively apply high and new technologies, and put equal importance to the exploitation of the international seabed area resources and to maritime environmental protection.[49]

The system of marine protected areas is established on the basis of the existing system of marine natural reserve of China. A marine protected area is a special area that has integrated the rational exploitation and utilization of marine resources with marine environmental protection. However, there is not any specialized law designed to regulate the management of marine protected areas in China. Liu Huirong, et al., have explained the necessity and urgency of establishing and improving legislation governing the management of marine protected areas from a couple of perspectives, analyzed the rational relationship between such legislation

---

47 Kuen-chen Fu and Liu Xianming, Preliminary Opinions on Legal Issues on Vessel-source Oil Pollution in the Taiwan Strait, *China Oceans Law Review*, No. 1, 2006. (in Chinese)

48 Wang Qi and Liu Fang, Marine Environmental Management: the Transformation from Administration to Governance, *Journal of Ocean University of China (Social Science Edition)*, No. 4, 2006. (in Chinese)

49 Lin Chaojin, The Necessity on Adherence to Principles on Marine Environmental Protection in the Development of Seabed Resources, *Legal System and Society*, No. 8, 2006. (in Chinese)

and other relevant international and domestic laws, and designed the basic management system for the protection of marine protected areas.[50]

Concerning the environmental problem in the Bohai Sea of China and Seto Inland Sea of Japan, Li Haiqing, arguing from a study on applicable international law, domestic laws, and other important documents related to environmental protection of both China and Japan, has made a comparative analysis of the environmental legislation for the Bohai Sea of China and the Seto Inland Sea of Japan, and comes to the conclusion that China should establish the legal system for the environmental protection of the Bohai Sea and the management system featuring sustainable utilization of resources and the environment by learning from Japan's experience of governing the Seto Inland Sea, so as to fundamentally ensure the overall effect of governance in the Bohai Sea and China's capacity of sustainable use of the Bohai Sea.[51]

V. Port Management and Shipping

This year's studies on port management are mainly concentrated on the analysis of and discussion over port logistics, which cover various aspects of the topic, including the status quo of the overall advancement of China's port logistics[52], current development and future plans for each port[53], the construction of port logistics parks, international and domestic experience in port logistics

50 Liu Huirong, Gao Wei and Yang Yisong, Legal System on the Management of Marine Protected Area, *Journal of Shanghai University of Political Science & Law*, No. 3, 2006. (in Chinese)

51 Li Haiqing, A Comparative Study of Environmental Legislation of the Bohai Sea and the Seto Inland Sea, *Marine Environmental Science*, No. 2, 2006. (in Chinese)

52 Chang Jiang, Status Quo and Development Strategy of Port Logistics in China, *Times Finance*, No. 9, 2006 (in Chinese); He Liju, Status Quo and Improvement Strategy of Shipping Logistics in China, *Logistics Technology*, No. 2, 2006. (in Chinese)

53 Huang Guodong and Lin Weiming, Current Situation of and Countermeasures for Xiamen Port Logistics, *Containerization*, No. 10, 2006 (in Chinese); Zhang Qian, Zhang Guilan, et al, An Analysis of the Current Situation of and Countermeasures forLogistics Development of Quanzhou Logistics, *Logistics Technology*, No. 3, 2006 (in Chinese); Zhang Xizhou and Zhang Xiaoliang, An Exploration into the Development of Modern Logistics in Qingdao Port, *Special Zone Economy*, No. 9, 2006 (in Chinese); Liu Lihui, A Study on the Development of Modern Logistics Industry in Weihai, *Group Economics Research*, No. 23, 2006. (in Chinese)

expansion,[54] and international cooperation on this regard[55]. Based on the detailed analysis and conclusions, some advice and suggestions have been put forward on the further development of China's port logistics.

On April 2006, 29, the first China Mayor Forum on Port Cities was held, co-sponsored by Ministry of Transportation of China and Tianjin Municipal Government, bringing together heads in governmental and commercial sectors from 29 coastal and inland port cities of China. At this Forum, Li Shenglin, Minister of China's Ministry of Transportation, has made a speech on the strategic opportunities for China's ports: China will make a national planning on the arrangement of coastal ports in China which is aimed at, through arrangement optimization and resources integration, establishing a modern port system featuring reasonable arrangement, optimized structure, distinct layers and satisfactory functions; China will accelerate the construction of coastal and inland waterway channels for coal transportation, discharge ports for the import of 300,000 tons of crude oil and over 200,000 tons of iron ore, and international container terminals such as Shanghai International Shipping Center; China will accelerate the integration of ports and port cities and promote the development of ports into logistics centers; China will focus on strengthening the construction of port clusters in the Yangtze River Delta, the Pearl River Delta, the Bohai Bay and coastal ports in southeastern and southwestern China as well as inland ports, so as to give impetus to the rise of central China and the development of the western region, and

---

54 Gong Yunlan, Port Logistics Park Construction Risk Analysis and Assessment, *China Water Transport*, No. 9, 2006 (in Chinese); Gu Yazhu and Zhou Xizhao, Study on Port Container Logistics Park Scale, *Navigation of China*, No. 36, 2006 (in Chinese); Lu Guangbin, Discussion on the Development of Logistics Parks for Port Cities, *Logistics Technology*, No. 5, 2006. (in Chinese)

55 Hu Zhenguo, Reflections on the Integration of Logistics Industry of Shenzhen and Hong Kong, *China Maritime*, No. 11, 2006 (in Chinese); A Study of Modern Port Management and Logistics in Europe, *Chinese Port*, No. 1, 2006 (in Chinese); A Report on the Investigation of Logistics Industry of Germany and Belgium, *China Logistics & Purchasing*, No. 4, 2006 (in Chinese); A Review of the Development of Ports and Logistics of Baltic States, *China Water Transport*, No. 3, 2006 (in Chinese); Jin Xindao and Huang Hualin, A Study of the Unification and Development of China Taiwan, China Hong Kong, and China Mainland, *China Water Transport*, No. 9, 2006 (in Chinese); Zhao Yi and Zheng Wenhan, A Preliminary Study on the Development of Logistics of the Hong Kong Port, *Suzhou Urban Planning*, No. 10, 2006 (in Chinese); Fan Siyuan and Xu Mei, An Analysis of Current Situation of and Strategy for the Development of International Logistics, *Market Weekly (Theoretical Study)*, No. 8, 2006 (in Chinese); Jin Hanxin, A Preliminary Analysis of Logistics Cooperation in Northeast Asia, *Market Weekly (New Logistics)*, No. 10, 2006. (in Chinese)

to promote the coordinated development of regional economy and society.[56] In the context of China's port development prospects, the formulation and improvement of legislation on logistics has become the hot topic for academic research and discussion.

As for the management of waterway transportation, in the context of strengthening public safety nationwide to cope with rising security accidents, quite a great deal of attention has been paid to the management of water security, which is best exemplified by the Notice on the further Strengthening of the Management of the Transportation of Dangerous Chemicals through Roads and Waterways jointly released by the Ministry of Transportation, the Ministry of Public Security, and the State Administration of Production Safety Supervision and Management.

IV. The Protection of Underwater Cultural Heritage

Since the Convention on the Protection of the Underwater Cultural Heritage ("CPUCH") was adopted by the United Nations Educational, Scientific and Cultural Organization (UNESCO) in 2001, relevant studies in this regard in China, are systemic to some extent despite of their limited number. In the following paragraphs, we will make a review of the more relevant studies in this regard in recent years.

Since its establishment, the Center for Oceans Policy and Law of Xiamen University (XMU-COPL) has been attaching great value to relevant legal issues on the protection of underwater cultural heritage research. Prof. Kuen-chen Fu, Director of the Center, is one of the first scholars in China to undertake studies on the CPUCH. He has made an introduction to the CPUCH and the existing systems across the Strait and put forward the proposal that China should claim to have priority over the shipwrecks and cultural relics originating from China beyond the territorial sea of China in line with the consistency and equivalence requirements in international law and provisions under Article 149 of the UNCLOS.[57] In 2004, the Center successfully held the first Charrette on the Protection of Underwater Cultural Heritage in China, which explored the current situation as well as

---

56 The First China Mayor Forum on Port Cities Held in Tianjin, at http://www.022net.com/2006/4-19/47145029254 6368.html, 20 April 2006. (in Chinese)

57 Kuen-chen Fu, Comment on the Convention on the Protection of Underwater Cultural Heritage Adopted by the UNESCO in 2001, in Kuen-chen Fu, *A Monographic Study of the Law of the Sea*, Xiamen: Xiamen University Press, 2004, pp. 1~20. (in Chinese)

problems and possible solutions concerning the protection of underwater cultural heritage and the coordination of the CPUCH and the Regulations Concerning the Management and Protection of Underwater Cultural Relics of China.[58] Quite a few doctoral students in the Center have also conducted studies in this regard and made some analysis and comments on relevant provisions over sunken warships and vessels of other States, which is also the topic of the doctoral thesis completed by Zhao Yajuan under the supervision of Prof. Kuen-chen Fu.[59] In 2006, Prof. Kuen-chen Fu and his postgraduate student Song Yuxiang jointly published a monograph entitled the Protection of the Underwater Cultural Heritage and International Law, which made a systematic introduction and analysis of the CPUCH and commented that the CPUCH together with the 14 rules under its Annex succeeded in creating an effective regime for protection of underwater cultural heritages all over the world without causing serious conflict with other international laws, including the original application scope of the UNCLOS. Meanwhile, the monograph also made further elaboration on several potential disputes or difficulties that might be caused by the new convention, including the conflicts between the CPUCH and relevant provisions across the Strait.[60]

The Law No. 89-874 of 1 December 1989 on Maritime Cultural Property promulgated by France in 1989 and its implementation effects have aroused the interest of Chinese scholars. Guo Yujun and Xiang Zaisheng hold that the new concept of "maritime cultural property" put forward in this Law, is noteworthy and the Law has highlighted the attributes of maritime cultural property as national property by amending the rights and obligations of the discoverer of cultural property and providing that the State is entitled to the ownership of cultural property. In their opinion, the Law and its supporting 1991 Decree have achieved satisfactory results on the protection of underwater cultural sites; relevant measures provided for under the Law are salutary attempt to prevent organized theft of underwater cultural relics; while many provisions under the Law are in consistence with the basic principles of the later Convention on the Protection of Underwater

---

58 For main content of the charrette, please see A Review of Charrette on the Protection of Underwater Cultural Heritage, *China Oceans Law Review*, No. 1, 2005. (in Chinese)

59 Zhao Yajuan, The Legal Status of Sunken Warships and Other State-owned Vessels: from the Perspective of the Protection of Underwater Cultural Heritage, *Presentday Law Science*, No. 5, 2005. (in Chinese)

60 Kuen-chen Fu and Song Yuxiang, *The Protection of Underwater Cultural Heritage by International Law*, Beijing: Law Press China, 2006. (in Chinese)

Cultural Heritage, some of its provisions, such as the one concerning the bonus system, though out of good intention, fail to achieve satisfying effects in practice.[61]

The book *Commentary on the Convention on the Protection of the Underwater Cultural Heritage*, by Prof. Zhang Xianglan and Dr. Zhu Qiang, is a comprehensive study on the background, goals, principles, and application scope of the CPUCH as well as the relationship between the CPUCH and the law of salvage, the regime of jurisdiction and the heritage preservation under the CPUCH. The book also holds that though the final text of the CPUCH met with criticism from major maritime powers such as Britain and the United States, it, after all, succeeded in coordinating the interests of all parties and maintaining conformity with the CPUCH in principle, providing a basic legal framework for the protection of international underwater cultural heritage.[62] However, in the view of Prof. Guo Yujun and Dr. Xu Jintang, it is a great pity that the CPUCH fails to make provisions on the attribute and ownership of underwater cultural heritage; meanwhile, there are also some problems on the feasibility of the system for the protection and management of underwater cultural heritage under the CPUCH. According to the two scholars, underwater cultural heritage cannot be treated as ownerless property that can be directly applied to the system of preoccupation, nor can it be deemed as common heritage of mankind; instead, it should be recognized as sunken objects, whose ownership should be determined in accordance with relevant laws and regulations on lost property. As for the protection and management of underwater cultural heritage, the principle of "protection first" should be established so as to maintain strict control over the development and utilization of underwater cultural heritage and achieve its most desirable effects on mankind.[63]

VII. Marine Energy

With the growing need of power sources fueled by the continuing development of the world economy, marine energy is of rising importance. In this context, Cai

---

61 Guo Yujun and Xiang Zaisheng, The Legal Status of Marine Cultural Property under French Law, *Presentday Law Science*, No. 4, 2005. (in Chinese)

62 Zhang Xianglan and Zhu Qiang, Comment on the Convention on the Protection of Underwater Cultural Heritage, *China Oceans Law Review*, No. 1, 2006. (in Chinese)

63 Guo Yujun and Xu Jintang, A Study of the Legal Issues on International Underwater Cultural Heritage, *China Legal Science*, No. 3, 2004; Xu Jintang, Reflections on Relevant Legal Issues on Underwater Sunken Properties, *China Oceans Law Review*, No. 2, 2005. (in Chinese)

Yiming, Wang Shicheng and other scholars have pointed out that China's economic evolution is in urgent need of larger and newer supply of energy.[64] Meanwhile, at the fourth Well-logging Advanced Forum sponsored by Professional Committee of Well-logging of Chinese Petroleum Society (CPS), attention has been paid to the continuous growth of worldwide investment in oil and the proportion of offshore oil investment in recent years. In an effort to meet the needs of development, China National Offshore Oil Corporation has stepped up investment in the exploration of Chinese offshore oil and gas resources, which leads to the rapid expansion of the scale of oil production, providing a strong impetus for the development of offshore oilfield service industry.[65]

Dr. Zhang Liangfu has made an analysis of the basic characteristics of oil and gas exploitation activities carried out by China's maritime neighbours in the disputed sea areas: both the extension of the disputed sea areas actually controlled by and the amount of activities relating to the exploration of oil and gas resources carried out by China's maritime neighbours have far exceeded those by China at an extremely large rate; in the South China Sea, China's maritime neighbors have entered the stage of large-scale production of oil and gas, and their scope of exploration has transcended China's traditional maritime boundary and has been gradually expanding to the sea areas surrounding Nansha Islands. Following the South China Sea, East China Sea has become another important sea area whose offshore oil and gas resources have met with serious threat since 2004. Therefore, it is necessary for China to insist on its territorial sovereignty and maritime jurisdiction, define China's specific scope of maritime jurisdiction, strengthen its actual presence and economic development activities in the disputed sea areas, and take different measures for joint development in different disputed sea areas according to their specific features.[66]

In an effort to find a solution to the problem of China's oil shipping being in

---

64 Cai Yiming, Carry forward the Spirit of Zheng He and Establish a New Outlook on Ocean, *Chinese Port*, No. 7, 2006 (in Chinese); Wang Shicheng, Development Strategy on Offshore Oil and National Energy Security, in Gao Zhiguo, Zhang Haiwen and Jia Yu, *Theory and Practice of International Law of the Sea*, Beijing: China Ocean Press, 2006, p. 251. (in Chinese)

65 The Trend on the Development of Oil Industry, *Well Logging Technology*, No. 3, 2006. (in Chinese)

66 Zhang Liangfu, Issues on the Joint Development of Oil & Gas Resources in the Disputed Sea Areas, in Gao Zhiguo, Zhang Haiwen and Jia Yu, *Theory and Practice of International Law of the Sea*, Beijing: China Ocean Press, 2006, p. 168. (in Chinese)

the control of other States, Li Lixin and Xu Zhiliang have pointed out that it is a choice of expediency for China to establish oil transport channels within its control in collaboration with Russia and other land neighbours, because about four-fifths of China's imports of crude oil is transported through the Strait of Malacca which, though being China offshore oil lifeline, is solely within China's political and diplomatic influence, but almost out of its military influence, and thus the Malacca Dilemma of China should be alleviated through other channels. He has also shared the opinion on how China can gradually obtain its control over its transportation channels in the Strait of Malacca, which is the best State policy for China in the end. Specifically, China should concentrate its limited funds on the construction of maritime power and the step-by-step implementation of its maritime strategy by making Hainan Island and Xisha Islands the staging bases of its maritime forces, gradually deploying its maritime forces into the Nansha Islands and their adjacent sea areas, and acquiring its control over the sea-lane in the Nansha Islands in the end.[67]

Rao Danzhen has explored China's maritime rights and interests from the perspective of sea power, and pointed out that China's current sea power has been a serious constraint to its oil security. In her opinion, China should become a strong maritime State, or its marine resources will be plundered and its marine rights and interests will be damaged, which is not conducive to the expansion of China's overseas interests and will seriously hinder its growth.[68]

As regards to the cooperation in the exploration of offshore oil, Qin Guohui has analyzed the legal nature of the standard contract of China National Offshore Oil Corporation applicable to the participation of foreign enterprises in the cooperative exploration of petroleum resources in China and holds that it conforms to the characteristics of standard contracts. However, in his opinion, the regulation of offshore oil contracts has the following defects: lack of flexibility, possibility to lower attractiveness for foreign enterprises, possibility to increase pressure on listed enterprises affiliated to China National Offshore Oil Corporation; possibility to add to the adverse effects of Article 41 of Contract Law of China on offshore oil contracts; fragmented regulation and conflicted functions; and inconformity with

---

67 Li Lixin and Xu Zhiliang, Maritime Strategy is the Preferable Strategy for the Safeguard of the Long-term Security of China's Offshore Energy – the Alleviation of the Malacca Dilemma and Others, *Ocean Development and Management*, No. 4, 2006. (in Chinese)

68 Rao Danzhen, The Influence of Weak Sea Power on Oil Security, *Journal of Yunyang Teachers' College*, No. 5, 2006. (in Chinese)

the spirit of Administrative Permission Law of China. In addition, he has proposed some specific measures such as deregulation, the abolishment of the examination and the approval system for oil contracts and the implementation of the record system, coordinating department functions and avoiding regulatory duplication, etc.[69]

In China's rigorous development of exploitation of offshore oil in collaboration with foreign enterprises, maritime arbitration is an ideal solution to solve disputes or tort disputes that both the foreign and Chinese parties can accept. Cai Hongda has gathered some typical examples of defective arbitration clause, introduced the standard clause recommended by China Maritime Arbitration Commission, and proposed that as a major maritime State, China should rigorously promote and popularize maritime arbitration, which involves the active participation of government departments, trade associations, and business leaders.[70]

VIII. Marine Fisheries

With regard to fisheries subsidies, in a report released in 2004, the United Nations Environment Programme (UNEP) noted that about three-quarters of the world's fishery resources have been exhausted or shrank due to huge subsidies provided by various States, and called for their reform among the international community. Based on an analysis of the position of interested parties in the discussion in the WTO Negotiating Group on Rules, Chen Jingna and Mu Yongtong contend that the current question is no longer whether to reform fisheries subsidies through international cooperation, but how to further promote the reform of fisheries subsidies through international cooperation. The most likely results for the WTO negotiations may be a hybrid of the "signal light" method and the "differential and special treatment" method. [71] After a review of the evolution of

---

69 Qin Guohui, A Reflection on the Legal Nature of CNOOC Standard Contracts and Government Regulation of Offshore Oil Contracts, in Gao Zhiguo, Zhang Haiwen and Jia Yu, *Theory and Practice of International Law of the Sea*, Beijing: China Ocean Press, 2006, pp. 229~239. (in Chinese)

70 Cai Hongda, Maritime Arbitration: an Important Legal Guarantee for International Cooperation on the Development of Offshore Oil, in Gao Zhiguo, Zhang Haiwen and Jia Yu, *Theory and Practice of International Law of the Sea*, Beijing: China Ocean Press, 2006, pp. 240~249. (in Chinese)

71 Chen Jingna and Mu Yongtong, Comment on Positions of Main Proposal at WTO Fisheries Subsidies Negotiations, *Chinese Fisheries Economics*, No. 5, 2005. (in Chinese)

the matter of fisheries subsidies in the United States and Canada, Yang Lin and Jia Mingxiu analyzes the rationality of the existence of policies relating to fisheries subsidies from the perspective of the effects of fisheries subsidies policies on economic growth, international trade, and sustainable development. In addition, they put forward some effective proposals on the adjustment of China's policy on fisheries subsidies, and argue that red box subsidies should be gradually canceled, amber box subsidies should be provided in limited amount, and green box subsidies should be granted in sufficient and appropriate amount.[72]

Concerning China's legal system on marine fishery, Wang Fang and Wang Zili hold that though China has already established a very sound legal system featuring multi-level, multi-category, and multi-form, there are also some problems: first of all, from the point of view of legislative spirit, China's legislation on marine fisheries, which is devoid of independent development and extension, is still subordinate to fisheries legislation, which, however, fails to conform to the institutional system of fair trade required by the WTO; moreover, from the perspective of legal content, there are a lot of laws and regulations on fisheries management and resources protection while those on the revitalization and development strategy of the aquaculture are quite limited. In their opinions, legislative gaps in aspects such as the investment and insurance and relief of marine fisheries should be filled so that China's fisheries trading system can be established and improved.[73]

Marine fisheries are an important part of the fishery production. Sustainable development of marine fisheries concerns the sustainable development of the whole fisheries industry. He Jie defines the concept and principles of "sustainable development of fisheries", and describes the problems China is facing on the matter of fisheries including the increasing exhaustion of fisheries resources, the serious pollution of fishing areas, and shrinking scope of inshore fishing. He also puts forwards a strategy for the sustainable development of China's marine fisheries, including: a renewal of the ideas by strengthening the approach of ecological breeding; comprehensive development by further adjusting and optimizing the industrial structure of fisheries; conserving resources and preventing pollution;

---

72 Yang Lin and Jia Mingxiu, Looking at the Existence of Fisheries Subsidies from the Perspective of the Evolution of Polices of the U.S. and Canada on Financial Support for Fisheries, *Chinese Fisheries Economics*, No. 5, 2005. (in Chinese)

73 Wang Fang and Wang Zili, A Study on China's Legal System on Marine Fisheries, *Chinese Fisheries Economics*, No. 5, 2005. (in Chinese)

enhancing the construction of the legal system on fisheries and conducting legalized management of marine resources; implementing the strategy of developing fisheries with science and technology by applying those science and technology to maintain a more rational use of fishery resources.[74] In an effort to help resolve problems such as the increasing exhaustion of marine fishery resources, serious pollution, saturated market, lower quality, weak offshore fishing abilities, and low added value in sea food processing, Lu Bu et al. put forward three strategies, namely, developing deep-sea and offshore fishing, creating high-added-value breeding, and implementing fisheries with modern technologies. Besides, he predicts, by adopting the approach of comprehensive forecasting, that China's marine fisheries will maintain a healthy and rapid development.[75] Tong Chunfen also shares the same view that in recent years China has been confronted with an increasingly acute contradiction between strong fishing capacity and fragile fisheries resources, and hence she proposes that the idea of harmony between man and sea must be followed to achieve rational exploitation of fisheries resources and coordinated development of society and fisheries industry by conducting rational allocations of fishery resources, guiding fishermen to change their trade, and developing recreational fishery.[76] Through an analysis of the current development and utilization of fishery resources in the East China Sea respectively by China, Japan and Korea, Guo Wenlu and Huang Shuolin have demonstrated the necessity and feasibility of a cooperative management and joint conservation of fisheries resources in the East China Sea and put forward related proposals, which are noteworthy.[77]

Recreational fishery has become an important part of modern fisheries and plays an indispensible role in protecting fishery resources, helping fishermen (farmers) increase their income, adjusting the industrial structure of fisheries, and other aspects. However, the planning, development, and management of recreational fisheries are all deep-seated problems facing this new-type

---

74 He Jie, A Reflection on the Sustainable Development of China's Marine Fisheries, *Fisheries Science & Technology Information*, No. 1, 2006. (in Chinese)

75 Lu Bu, Yang Ruizhen and Chen Yinjun, The Development, Problems, and Prospects of China's Marine Fisheries, *China Agricultural Information*, No. 9, 2006. (in Chinese)

76 Tong Chunfen, Harmonious Development of Marine Fisheries and Society, *Studies in Dialectics of Nature*, No. 8, 2006. (in Chinese)

77 Guo Wenlu and Huang Shuolin, A Study on the Regional Cooperation on Management and Joint Conservation of Fisheries Resources in the East China Sea, in Gao Zhiguo, Zhang Haiwen and Jia Yu, *Theory and Practice of International Law of the Sea*, Beijing: China Ocean Press, 2006, pp. 206~220. (in Chinese)

fishery. Liu Yadan has made a detailed analysis of the current development of recreational fisheries both home and abroad.[78] Wu Yanling and Ge Chenxia hold that recreational fishery, as a kind of tourist entertainment project, constitutes a comprehensive utilization of fishery resources and can help to increase the income of fishermen. Based on it, they point out several promising directions for China to develop its recreational fishery: developing angling-related entertainment projects in the suburbs, establishing a group of bases for sea fishing, actively driving tourism in coastal fishing areas, arranging marine sightseeing tours in areas with suitable conditions, and planning the growth of recreational fisheries.[79]

As for the system of the fishing rights, Wang Zhikai has proposed that as fishing rights are inherent to fishermen, the clarification of them should be ensured by the construction of a fishing rights system. Besides, in his opinion, the practice of the clarification of rural land property rights can be followed: first, contract out collectively-owned waters or State-owned waters under collective use, and then establish the system of permanent fishing rights similar to emphyteusis (*jus in re aliena*) on the contracted State-owned waters. As to the obtaining and transfer of the fishing rights, he holds that they are clarified, confirmed, and protected by means of the government's issuance of a certificate and this approach may be a feasible solution to the problem of waters transfer to establish emphyteusis aimed at protecting the interests of fishermen and change contracting right into emphyteusis at an appropriate time. Furthermore, he has also explored the issues of the distribution of income and the compensation for fishermen's interests in the transfer of fishing rights and pointed out that it will be an effective mechanism of long-term earnings due to the fact that fishermen may enjoy long-term earnings from the development of waters which have been requisitioned from them by subleasing these requisitioned waters.[80]

As for the question of the law enforcement in marine fisheries, Zhu Kongwen and Sun Chengxia hold that currently an macro-direction for the economic development of China's marine fisheries is absent, the management system for the coordination and planning of the exploitation of marine resources remains to be

78 Liu Yadan, The Development and Management of Recreational Fishery, *World Agriculture*, No. 1, 2006. (in Chinese)

79 Wu Yanling and Ge Chenxia, On the Development of China's Recreational Fishery, *Journal of Jilin Agricultural Science and Technology College*, No. 2, 2006. (in Chinese)

80 Wang Zhi kai, Fishing Right System and the Protection of the Interests of Fishermen, *Chinese Fisheries Economics*, No. 5, 2005. (in Chinese)

improved, fishermen's legal awareness still requires to be strengthened, and finally China's fisheries administrative departments and law enforcement departments are plagued by displacement and absence of functions. As suggested by the two scholars, China should enhance law enforcement, improve laws and regulations on marine fisheries, strengthen law enforcement personnel in marine fisheries and the mechanism for the supervision on such personnel, and pay due attention to legal advocacy and theoretical studies.[81]

IX. Polar Issues

This year's studies on the polar regions are mainly concentrated on scientific investigation into them. In March 2006, China's 22nd Antarctic scientific expedition, which lasted 131 days, came to a successful end. In the Great Wall Station, the expedition completed the following tasks: International Epoch GPS Campaign, geological survey into the ecology of ice-free areas, studies on marine ecological environment and biological biodiversity, routine meteorological observations, engineering investigation into the Great Wall Bay dock, investigation into the disposal of old buildings and facilities, the 6000 m^2 building facilities painting project, and water system renovation project. In Zhongshan Station, the expedition achieved the tasks as below: completed the aerophotogrammetry of the Rathmann hilly areas using helicopters for the first time; reassumed the observation of gravity tides which had been suspended for six years; acquired the complete observation data for the Upper Atmosphere Physics Observation for a sunspot cycle of 11 years; sampled in a large scale dropping-amended soil in colonies of penguins and seals in surrounding areas of Zhongshan Station and Davis Station in collaboration with Australia; completed routine observation such as annual International Epoch GPS Campaign, geomagnetic observation, ozone observation, sea ice observation, and meteorological observation; conducted the accurate mapping of 1/500 topographic map at Zhongshan Station to meet the need of the Tenth Five-Year Plan Capacity Building Project and future development; decided the siting of the HF radar antenna array and oil depot of the Tenth Five-Year Plan Capacity Building Project and carried out all the necessary topographic and

81 Zhu Kongwen and Sun Chengxia, Strengthening Marine Fisheries Law Enforcement and Promoting the Sustainable and Healthy Development of Marine Fisheries, *Jiangxi Fishery Sciences and Technology*, No. 2, 2006. (in Chinese)

geologic survey for the implementation of the Project, laying the foundation for the follow-up work.[82] Meanwhile, they completed a survey in three sections covering a total areal of over 4 million square nautical miles into the diversity of southern Indian Ocean marine phytoplankton, achieving the only extensive survey samples thereof in the world with samples of some phytoplankton as one and only in the world, which are of high scientific value.[83]

During the Tenth Five-Year Plan period, fruitful results have been accomplished in the surveying and mapping of the polar areas by China, covering nearly 170,000 square kilometers. China has made a great variety of line maps, image maps, and thematic maps necessary for surveys and investigations. The high precision measurement of absolute gravity points at the Great Wall Station has filled China' gap in the field of absolute gravity point measurement in King George Island. As was revealed by the Acceptance Meeting for the Project of the Basic Surveying and Mapping of the Antarctic expedition region held in Wuhan University and ended on April 7, 2006, fruitful results have been achieved in many aspects by China's expedition on the surveying and mapping of polar regions through the application of 3S-technology and its integration, such as the monitoring of Antarctic plate movement, of environmental change in polar ice sheets and glacial movement, and of sea level change, as well as the construction of China's Internet information sharing platform on polar space information and polar exploration management information, which made significant contributions to China's polar expedition.[84] Based on the accurate surveying conducted from 1997 to 2006 with the two GPS satellite observation stations located respectively at the Great Wall Station and the Zhongshan Station, China's surveying and mapping personnel has figured out for the first time the movement of the Antarctica Plate: the Pacific Plate is moving northwestward; the Nazca Plate is moving northeastwards; the African Plate is moving northeastwards; the Antarctic Plate is shifting towards the South America; the Indo-Australian Plate is advancing northward off the Antarctic Plate; in general, the Antarctic continent is moving towards the South

82 Polar Expedition Office of China, China's 22nd Antarctic Expedition Successfully Ended, at http://www.soa.gov.cn/jdsy/0331.htm, 30 March 2006. (in Chinese)

83 Yang Wei, Chinese Antarctic Expedition Obtains Samples a South Indian Ocean Plankton for the First Time, *China Ocean News*, 10 February 2006, p. A1. (in Chinese)

84 Wu Ling, Fruitful Results Achieved on China's Basic Surveying and Mapping of Polar Regions, *China Ocean News*, 11 April 2006, p. A1. (in Chinese)

America.[85] In the first 21 Antarctic expedition of China, the Chinese expedition has discovered and determined the highest point (latitude 80°22'00", longitude 77°21'11") and elevation (4093 meters) of the Antarctic ice sheet. Besides, they have also conducted the first ever manual surveying & mapping of the ice field in human history, made the first precise topographic map of the ice surface of Dome A, the highest point on the East Antarctic ice sheet covering 70 square kilometers, set up monitoring sites for the precision inspection of ice sheets movement along their journey, made the profile map of the elevations of the straight line of 1,250 km between Zhongshan Station and Dome A in the eastern Antarctic, and determined the velocity vector of the movement of ice sheet along the journey.[86] The Chinese Antarctic ice sheet expedition has covered a distance of over 1200 kilometers into the Antarctica inland ice sheet and fulfilled the sacred mission of arriving at the summit of the Antarctic ice sheet for the first time in human history.[87]

In addition, related work on project application and review for the China Strategic Research Polar Science Fund in 2006 has been successfully completed, and a total of over 2.2 million RMB has been granted to 19 projects falling into four categories, namely: studies on the development strategies for China's polar expedition, major scientific investigation projects, research on countermeasures for important international conferences and follow-up studies, and youth scientific research projects.[88]

X. Marine Scientific Research and the Military Use of the Sea

In 2006, the first year of implementation of the Eleventh Five Year Plan, relevant departments of China have gradually started to carry out the maritime-related part of the Plan. projects on this topic began to acquire support from the 863 Program (the so called State High-Tech Development Plan), and marine science

---

85 Zhang Jimin and Li Changzheng, Chinese Surveying and Mapping Personnel Finds Antarctica Moving towards South America, *China Ocean News*, 11 April 2006, p. A1. (in Chinese)

86 Wu Ling, Fruitful Results Achieved on China's Basic Surveying and Mapping of Polar Regions, China Ocean News, 11 April 2006, p. A1. (in Chinese)

87 Yang Wei, Man Surmounts the Summit of Antarctic Ice Sheet for the First Time, at http://www.soa.gov.cn/jdsy/13781a.htm, 22 January 2005. (in Chinese)

88 Zhang Yiling, Project Review Results on China Strategic Research Polar Science Fund Announced, *China Ocean News*, 25 July 2006, p. A1. (in Chinese)

has been listed among key disciplines which can get large support from the 973 Program (National Basic Research Program) and the National Natural Science Foundation of China (NSFC). Projects such as the Research and Demonstration Project of Technological Packages on Desalination and Comprehensive Utilization of Seawater, the Research Project of Warning and Emergency Response Technologies, and the Research Project of Polar Science have been listed among the Eleventh Five-Year National Science and Technology Support Program. Such special projects of the Eleventh Five-year Plan as Polar Exploration, Research on the Development of Marine Resources and Inshore Investigation as well as Development of Ocean Series Satellite have been already approved by the government or will be approved in the future.

In the National Medium- and Long-Term Program for Science and Technology Development (2006-2020) issued by the State Council on February 9, 2006, related to marine technology are seven priority topics, one frontier area of technology, a series of basic research and development priorities, and one major science and technology special project. This is a great driving force as well as an excellent opportunity for the development of marine science and technology.

On August 25, the 2006 Academic Annual Meeting of China Society for the Law of the Sea, co-sponsored by China Society for the Law of the Sea and Naval Equipment Research Institute, was held in Harbin under the theme of the "10th Anniversary of the Enforcement of the UNCLOS in China & the Role of Navy in the Maintenance of Maritime Rights and Interests". The meeting has brought together over 60 representatives from such institutions as the Ministry of Foreign Affairs of China, the State Oceanic Administration, the Bureau of Legislative Affairs of the Central Military Commission, Headquarters of the General Staff, PLA Navy, and oceanic administrative departments, who have conducted extensive and in-depth exchanges on such topics as the theory and practice of the law of the sea, maritime security and strategy, and naval construction and development around the theme of safeguarding the national maritime rights & interests of China, providing a lot of valuable advice and suggestions for the strengthening of the construction of maritime legal system and coast defense of China.

On September 4, 2006, the first National Science and Technology Conference jointly held by the State Oceanic Administration, the Ministry of Science and Technology, the State Commission of Science and Technology for National Defense Industry, and the National Natural Science Foundation of China, was held in Beijing, to have a comprehensive discussion on the draft for the Eleventh

Five-Year Plan for Marine Science and Technology Development. On the basis of the suggestions and comments proposed at the conference, the State Oceanic Administration and other three ministries have further improved the Plan and ultimately released the final Eleventh Five-Year Plan for Marine Science and Technology Development. This represents China's first national plan on the development of marine science and technology, which has highlighted the development strategy of "one center, two breakthroughs, three capabilities, four overall considerations" as well as the multidisciplinary and multi-technology feature of research and development concerning marine science and technology. Moreover, it determines the targets for the development of marine science and technology during the Eleventh Five-Year Plan period. The holding of National Science and Technology Conference and the promulgation of the Eleventh Five-Year Plan for Marine Science and Technology Development mark a new historic period featuring comprehensive, coordinated and innovative development of China's marine technology.[89]

XI. Other Issues

On the topic of maritime law regime, China has begun its large-scale legislative efforts in the marine sector since the early 1980s, covering many matters, such as maritime rights and interests, marine resources, marine environment, marine scientific research, marine shipping and other aspects. Yu Zhirong holds that China's legislation in the marine sector, though boasting remarkable merits, like great in number, broad coverage, high level, and consistent pace with the times, also shows demerits such as delayed legislation, poor operability, legislation gaps, and poor applicability. In his view, China should strengthen its theoretical studies and improve its maritime-related bodies.[90] Jiang Ping has proposed that China should establish the principles of its system of the law of the sea and coordinate its individual regulations with comprehensive maritime laws, to perfect and improve

89 Director General of State Oceanic Administration Sun Zhihui's Answers to Questions Concerning Planning Outline for Marine Science and Technology of China, at http://www.gov.cn/zwhd/2006-11/27/content_454531.htm, 23 January 2005. (in Chinese)

90 Yu Zhirong, The Status Quo and Outlook of the Construction of the System of Maritime Law of China, *Ocean Development and Management*, No. 4, 2006. (in Chinese)

its sea-related laws.[91]

According to the opinion of Chen Yan and Zhao Xiaohong concerning the marine management system, the current marine management in China is conducted under a decentralized system, as there is no mechanism for coordination in both marine administration and maritime law enforcement. Due to the lack of authority caused by its low administrative rank in the central government and its inability to report directly to the State Council, China's maritime administrative department has difficulties in coordinating contradictions and conflicts between departments arising out of marine exploitation and fully performing their functions in this process. Furthermore, they put forward the concept of "the system for integrated and coordinated marine management".[92] As maritime law enforcement is an important tool for modern marine management, Jiao Yongke makes a comparative analysis of the basic conditions of the law enforcement forces of major States in the world, including their nature, functions, personnel, equipment, and funding, providing useful information for China's work in this regard.[93] Sun Hai has also proposed that China should be equipped with a powerful navy and border forces and should establish a strong and coordinated maritime cruising force led by its maritime sector.[94]

As stressed by Prof. Kuen-chen Fu at the 2006 Annual Meeting of Chinese Society of International Law, though China cannot be counted as a major maritime power in terms of such aspects as coastline *per capita*, fishing area *per capita*, and area of the outer continental shelf, in line with international law, considerable right shall be enjoyed by both land-locked and geographically disadvantaged States. Therefore, he urged relevant bodies of China to spread the idea among the public that "China is not a major maritime State, but a geographically disadvantaged state" and only in this way can China strive for more maritime rights and interests at the international level. This idea is a challenge to the traditional idea that China

---

91 Jiang Ping, Some Suggestions for the Improvement of the System of the Law of the Sea of China, *Marine Information*, No. 1, 2006. (in Chinese)

92 Chen Yan and Zhao Xiaohong, A Preliminary Study on the Direction, Objectives, and Mode of the Reform on China's Marine Management System*, Chinese Fisheries Economics*, No. 3, 2006. (in Chinese)

93 Jiao Yongke, Features of Maritime Law Enforcement Forces of Foreign States, in Gao Zhiguo, Zhang Haiwen and Jia Yu, *Theory and Practice of the International Law of the Sea*, Beijing: China Ocean Press, 2006, pp. 277~284. (in Chinese)

94 Sun Hai, Galloping along the 200-Natical-Mile Cruise Line, *Security*, No. 1, 2006. (in Chinese)

is a major maritime power and therefore deserves attention from the academic community of China.[95]

Translator: ZHANG Zhiyun
Editor (English): Riccardo Ragonese

95 Yin Danyang, International Law and the Construction of a Harmonious World – A Review of the 2006 Academic Annual Symposium of China Society of International Law, *Journal of Xi'an Politics Institute*, No. 3, 2006. (in Chinese)

中国海洋法学评论

China Oceans Law Review

2006 年卷第 2 期，总第 4 期

刊号：ISSN 1813-7350

出版时间：2006 年 12 月

重印：2014 年 11 月

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

出版：（香港）中国评论文化有限公司

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

定价：人民币（RMB）80.00 元

港　币（HKD）80.00 元

美　元（USD）80.00 元