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编者言

当前，世界正经历的百年未有之大变局，国际局势出现深刻复杂变化，全球治理的不稳定不确定性也愈加凸显。在目前俄乌冲突持续升级、全球发展鸿沟愈发突出、大国博弈竞争加速升级的大背景下，海洋经济、海洋技术实施等方面的发展面临着诸多不确定因素，其带来的新风险与新挑战日益受到关注。在积极响应中国自由贸易港建设、推进 21 世纪海上丝绸之路发展的号召下，《海洋法律与政策》（Marine Law and Policy），ISSN 2709-3948，ISSN 2710-1738（online）紧扣国际法、海洋法、海商法、海事行政法律及政策等主题，以期达到交流成果，启迪智慧，紧跟学术思潮，为广大读者服务的目的。

本期《海洋法律与政策》刊发的论文包含日本核污染水排放的国家责任、水下文化遗产的国际治理、司法保护海洋生态环境、审慎推行和扩大沿海捎带等热点问题。

2021 年 4 月，日本首相官邸召开相关阁僚会议，正式决定启动核污染水排海计划。然而该计划的启动仅基于 IAEA 的“担保”，日本也未与潜在受影响国协商。对此，华东政法大学国际法学院教授管建强和硕士研究生王云洲认为日本排放核污染水的行为违反国际义务，IAEA 对日本排污行为的“担保”不能成为日本不法行为的阻却事由，国际社会也未曾同意日本的排放核污染水计划，日本排放核污染水的行为将违反国际法。鉴于日本排放核污染水主要受影响国家为太平洋沿岸各国，建议充分利用各相关的国际组织平台，运用和平的方式解决争端。

公海历史沉船保护是水下文化遗产国际治理的痛点。历史沉船不仅具有重要的经济价值，而且具有无可替代的历史价值，为追求一时利益肆意打捞历史沉船会使人类社会永远失去沉船携带的历史信息。上世纪 80 年代发现和打捞“泰坦尼克”号沉船引发的全球关注促发了深海探测、海事、水下文化遗产保护等许多领域的发展和变革。为此，国家文物局考古研究中心副研究馆员王晶梳理了《泰坦尼克号国际协定》的形成过程，归纳了该协定创设的新规则及其意义，还观察到国家行为如何影响公海水下文化遗产保护的理念、方式和国际治理的规则。

司法权在海洋生态环境治理领域具有其独特价值。在全面治理我国海洋生态环境的背景下，司法既能够对行政执法进行有益补充，又能对行政权予以监督，与之相辅相成，特别是通过法律释明、损害救济以及典型案例等手段，能够有效提升我国海洋生态环境治理能力的上限。为此，上海市高级人民法院课题组通过对近五年发生在我国海域内，与海洋生态环境污染相关的民事、行政和刑事案件进行司法统计，聚焦上述三类案件呈现的特点与争议，发现我国司法保护海洋生态环境的依据存在缺陷，尺度不尽统一，创新也有所不足，并认为现行立法应进一步研究完善，进而达成法律观点共识，统一司法裁判规则，同时可以适度突破现有框架，形成一定创新成果。由于本刊篇幅有限，该文章分由上下两期刊出，本期聚焦于

司法保护海洋生态环境的实现路径和建议，其余部分已刊发于第五期。

沿海捎带业务从 1992 年首次在官方文件中提及就被学界和业界广泛讨论。从最初允许沿海捎带空箱到热烈讨论沿海捎带重箱，再到如今上海自贸区开始试行非五星旗船捎带业务，甚至于海南自贸港的完全自由，我国已经开始逐步试行沿海捎带业务。上海海事大学法学院博士研究生栾宇通过对“沿海捎带”一词辨义分析和文件追溯，分析现有研究对沿海捎带业务持支持和审慎态度的考虑因素，认为就我国现状来看可以适当开放可体现空箱捎带、发展内水运输置换开放沿海捎带，但应把握推行沿海捎带业务的根本出发点应该是如何提升我国港航企业的国际竞争力。

本期在“新发展与新文献”栏目呈现了四份相关文献，分别是《最高人民法院最高人民检察院关于办理海洋自然资源与生态环境公益诉讼案件若干问题的规定》《海南省游艇产业发展规划纲要（2021-2025）》《缔结条约管理办法》《联合国船舶司法出售国际效力公约》。

作为海洋法律与政策领域内的学术刊物，我们诚挚欢迎各位专家、读者的批评指教与惠赐大作。您的来稿，无论是以学术或非学术论文的形态，或者是以案例评析的形式撰成的，也不论是涉及海洋、船舶、航线、港口、海洋环境与海事管辖权等任何主题的作品，都将为我刊高度重视，并以中英两种语言刊发。

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Editor's Note

The world is undergoing profound changes unseen in a century. The global landscape has been shaped greatly, ushering in a new period of turbulence and change and bringing more challenges to global governance as instability and uncertainty abound. The development of marine-related industries, including marine economy and marine technology, is faced with many uncertain factors in the current context of the escalating conflict between Russia and Ukraine, the widening development gap between States, and the increasing tensions and competition between major powers. These factors bring new risks and challenges and draw growing attention across the globe. In response to the call for the construction of China Free Trade Port and the development of the 21st-Century Maritime Silk Road, this journal, Marine Law and Policy [ISSN 2709-3948, ISSN 2710-1738(online)], which aims to provide a platform for all practitioners and academics to exchange ideas, to inspire each other, and to keep up with the trending academic views, is open to all kinds of papers and case reviews covering international law, oceans law, maritime law, maritime administrative law and policy, etc.

In this issue of Marine Law and Policy, we have included articles on State responsibility of Japan's nuclear wastewater discharge, international governance of underwater cultural heritage, the judicial protection of marine ecological environment, and the promotion and expansion of coastal piggyback business.

In April 2021, a cabinet meeting was convened at Kantei, the official residence of Japan's Prime Minister, which decided to formally launch the nuclear wastewater discharge plan. Yet the programme was launched simply based on IAEA "endorsement", without consulting countries that are likely to be affected beforehand. Mr. GUAN Jianqiang, professor at International Law School, East China University of Political Science and Law, and Mr. WANG Yunzhou, graduate student from East China University of Political Science and Law, drew the following conclusion: Japan has failed to meet its international obligations and would violate international law by doing so. The IAEA's "endorsement" of Japan's wastewater discharge may not be invoked as a ground to preclude the wrongfulness of the country's behavior. No valid consent has been given by the international community to Japan's discharge plan either. In view of the fact that most of the countries potentially affected by Japan's wastewater discharge are those bordering the Pacific Ocean, it is suggested to resolve the dispute through peaceful means with the help of the competent international

organizations.

One contentious issue in the global governance of undersea cultural treasures is the preservation of historic shipwrecks on the high seas. Historical shipwrecks offer priceless historical worth in addition to significant economic significance. Salvaging historical shipwrecks willfully in the name of passing interests would result in the permanent loss of the historical knowledge that shipwrecks once carried for human society. Deep-sea exploration, maritime affairs, and undersea cultural heritage protection have all seen advancements and changes as a result of the worldwide attention to the discovery and recovery of the Titanic disaster in the 1980s. Therefore, Ms. WANG Jing, associate research librarian of Archaeological Research Center of the State Administration of Cultural Heritage, examined how the International Agreement on Titanic came to be, summarized its new rules and their significance, and observed how state actions impacted the ideas and procedures for protecting underwater cultural heritage in international waters as well as the rules of international governance.

The judicial branch plays a unique role in governing the marine ecological environment. The judiciary can assist administrative law enforcement in the context of comprehensively managing China's marine ecological environment by supervising the administrative organs and providing legal interpretations, damage relief, and standard cases. China's capacity to govern the marine ecological environment, therefore, can be improved effectively. The research team from Shanghai High People's Court analyzed the judicial statistics on civil, administrative and criminal cases relating to marine ecological and environmental pollution that have occurred in China's sea areas over the past five years, focusing on the characteristics and disputes of the aforementioned three types of cases. It is found that China's judicial protection of the marine ecological environment requires a sound legal foundation because it lacks uniform judging criteria and needs to be more innovative. The research team emphasized that additional analysis and amendments to the current legislation are required in order to reach consensus and suit the requirements for judicial adjudication. Breakthroughs on the current framework can be made in this fashion. This paper will be published in two issues of Marine Law and Policy, one for each half, due to the limited space in this one. This issue only covers the approaches and suggestions on how to improve the judicial protection of the marine ecological environment. The previous parts have been published in the fifth issue.

The coastal piggyback business has been widely discussed by the academic community and all practitioners in this field since it was first mentioned in the official document in 1992. All the facts from China's permission to coastal piggyback of empty containers, to the hot discussion about the coastal piggyback of laden containers, to trial coastal transportation incidental in Shanghai Free Trade Zone by non-five-star-flagships, even to the complete liberalization of Hainan Free Trade

Port, show that China has been trying out this business step by step. Ms. LUAN Yu, a PhD student from law school of Shanghai Maritime University, tried to evaluate the factors involved, including both supportive and prudent attitudes towards this business in an overall manner. She traced back to the source, distinguished the meaning of the phrase “coastal piggyback”, and traced documents containing relevant regulations. She believed that China should appropriately open coastal piggyback with the declaration of will to ship empty container incidental, and develop inland water transportation to replace the opening up of coastal piggyback. For the discussion of the coastal piggyback business, we should make it clear that the fundamental starting point is how to improve the international competitiveness of Chinese port and shipping enterprises, rather than simply discussing whether to open the coastal piggyback business. This issue also provides our readers with easy access to four documents in the column of Recent Developments and Documents, namely, Provisions of the Supreme People’s Court and the Supreme People’s Procuratorate on Several Issues concerning the Handling of Public Interest Lawsuits Involving Marine Natural Resources, Ecology and Environment; Hainan Yacht Industry Development Plan Outline (2021-2025); Measures for the Administration of Conclusion of Treaties; the United Nations Convention on the International Effects of Judicial Sales of Ships.

As a bilingual academic journal in the field of marine law and policy, we sincerely welcome your comments and contributions. Any contributions from you in the form of academic, non-academic articles or case reviews, and on any subjects concerning the sea, the vessel, the route, the port, the marine environment, and maritime jurisdiction, will be highly appreciated for publication in our journal in both Chinese and English.

MLP Editorial

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日本核废水排放问题的国际法分析

管建强、王云洲*

摘要：2021 年 4 月，日本政府未与潜在受影响国协商，执意启动向海洋排放过滤后仍含有放射性物质的核污染水的计划。日本排放核污染水行为违反国际义务，IAEA 对日本排污行为的“担保”并不成为日本不法行为的阻却事由，国际社会也未曾同意日本的排放核污染水计划。科学、合理和合规地处置日本核污染水的排放，将对未来维系海洋生态环境和人类安全环境的国际环境保护法制产生重大影响。呼吁各国在现有框架下采取措施全面监督日本排污行为，采用和平手段解决日本排污问题。

关键词：排放核污染水；《伦敦倾废公约》；联合国海洋法公约；国际原子能机构

2011 年“3・11 大地震”导致福岛第一核电站因海水灌入发生断电，其 4 个核反应堆中有 3 个先后发生爆炸和堆芯熔毁。日本为冷却熔毁的核反应堆持续引入海水进行降温，后产生核污染水，加之雨水、地下水流入反应堆设施产生了大量有核污染的废水（以下简称“核污染水”）。[1]为此，日本政府建造了大型储水罐以临时储存核污染水，[2]日本东京电力公司（以下简称“东电公司”）预计，储罐容量将于 2022 年秋季以后达到极限。[3]2021 年 4 月 13 日，日本首相官邸召开相关阁僚会议，正式决定启动核污染水排海计划。以两年后为目标，将着手从第一核电站用地内排放。[4]

在日本作出排海决定一周年之际，针对日本政府启动排放核污染水的行为，本文将从国家责任的角度入手，分析日本对国际义务的违反以及其可能提出的抗辩事由并驳斥，最终提出相应的解决方案。为构建和完善核污染水排放监督机制和责任机制进行学术探究，提出学术建言。鉴于篇幅所限，本文将着重关注此次日本排放核污染水所导致的国家责任问题。对

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王云洲，美国乔治城大学 2022 届法学硕士研究生。

1 刘军国：《日本福岛核污水排放计划引担忧（国际视点）》，载《人民日报》2020 年 10 月 23 日，第 16 版。

2 *Fukushima Daiichi Acciden*, World Nuclear Association (visited on April 24, 2022), https://world-nuclear.org/information-library/safety-and-security/safety-of-plants/fukushima-daiichi-accident.aspx,.

3 *Government OKs discharge of Fukushima nuclear plant water into sea*, (visited on April 24, 2022), https://www.japantimes.co.jp/news/2021/04/13/national/fukushima-water-release/. .

4 *Press Conference by the Prime Minister regarding the Disposal of ALPS Treated Water*, Prime Minister’s Office of Japan (visited on April 24, 2022), https://japan.kantei.go.jp/99_suga/statement/202104/_00008.html. .

日本过去核废水泄露以及排放的国家责任、此次日本排放核污染水所可能产生的国际法上不加禁止行为的国际责任，以及对从国内法角度追究日本政府责任等问题不展开论述。

一、日本排放核污染水入海违反国际义务

《关于国际不法行为的国家责任条款草案》（以下简称“《条款草案》”）第 2 条规定，一国国际不法行为在下列情况下发生：(a)由行为或不行为构成的行为依国际法归于该国；并且(b)该行为构成对该国国际义务的违背。[1]日本内阁会议上通过了核污染水排海决定且日本政府明确要求东京电力公司启动核污染水的排海计划。日本核污染水排放行为可以被视为日本的国家行为。[2]

1.日本排放核污染水入海违反《伦敦议定书》的目标和普遍性义务

在禁止海洋倾废领域，国际海事组织推动的 1972 年《防止倾倒废物和其他物质污染海洋的公约》（以下简称《伦敦倾废公约》）及《防止倾倒废物和其他物质污染海洋的公约（1996 年伦敦公约议定书）》（以下简称“《伦敦议定书》”）是最为重要的国际公约。日本于 1980 年加入《伦敦倾废公约》，后于 2007 年加入《伦敦议定书》。[3]

对于日本倾废行为能否适用《伦敦倾废公约》，国际社会在《伦敦倾废公约》缔约国第四十二届会议上进行过探讨。2020 年 10 月 5 日至 12 月 23 日期间，国际海事组织在线召开了“《伦敦倾废公约》缔约国第四十二届协商会议暨《伦敦议定书》缔约国第十五届例行会议”，在随后的讨论中，若干代表团对日本福岛第一核电站可能排放处理后的废水发表了看法：[4]

（1）大韩民国代表团对任何排放物对邻国海洋环境可能产生的影响的不确定性表示关切，并强调，《伦敦议定书》的目标是保护海洋环境不受所有污染源的污染（第 2 条）并采取预防措施的方式，该代表团表示，管理机构有必要澄清是否有可能将经福岛核电站处理过的废水的任何海上排放纳入《伦敦倾废公约》和《伦敦议定书》的职责范畴。并且，韩国递交的文书中还表示，先前存在过《伦敦倾废公约》和《伦敦议定书》的范畴下规制过矿井尾矿的排放以及海洋地球工程活动的行为，而这两个行为也不属于传统的“倾倒”范围内。[5]

（2）日本代表团指出，陆基设施的排放在《伦敦倾废公约》和《伦敦议定书》的定义下不被视为“倾倒”。该代表团表示，《伦敦议定书》第 2 条规定了一般目的，第 4、5、9 和 10 条对缔约国的具体义务作出了规定。该代表团还表示，东电公司福岛第一核电站储存的水是

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[1] 国家责任条款草案并非国际条约，但是该草案为对国际习惯法的编撰，有参考价值。

[2] 罗欢欣：《日本核污水排海问题的综合法律解读——对国际法与国内法上责任救济规定的统筹分析》，载《日本学刊》2021 年第 4 期，第 39 页。

[3] *Deposit of the Instrument of Accession to the 1996 Protocol to the London Convention*， (visited on April 24, 2022), https://www.mofa.go.jp/announce/announce/2007/10/1175645_836.html,.

[4] 《<伦敦公约>缔约国第四十二届协商会议暨<伦敦议定书>缔约国第十五届会议报告（中文版）》，IMO，LC 42/1, para.7.19.

[5] *Comments on the documents submitted by the Secretariat on open agenda items-Submitted by the Republic of Korea*, IMO November 6, 2020, LC 42/1/4, para.4.

经 ALPS[1]处理的水，而不是“废水”或“被污染的水”，并且不会批准任何不符合国际标准的排放，以确保保护海洋环境和人类健康。

《伦敦议定书》第 2 条目标言明：“缔约当事国应单独和集体地保护和保全海洋环境，使其不受一切污染源的危害，应按其科学、技术和经济能力采取有效措施防止、减少并在可行时消除倾倒或海上焚烧废物或其他物质造成的海洋污染。在适当时，它们应对该方面的政策作出协调。”这一目标被日本代表视为过于宏观，而对缔约国的具体义务规定是第 4、5、9 和 10 条。

事实上，这样的说辞并不能支持日本通过建设海底管道排放核污染水的行为获得豁免。理由如下：

《伦敦议定书》第 4 条的核心是禁止倾倒任何废物或其他物质，但附件Ⅰ中所列者除外。而附件Ⅰ：可考虑倾倒的废物或其他物质并不包括核射性物质。[2]日本代表提及的第 5 条内容是禁止海上焚烧、第 9 条内容是许可证的颁发和报告，第 10 条是关于应用和执行。上述条款均未对第 2 条的目标条款作出例外的安排。因此，日方否定《伦敦议定书》适用的理由可谓过于离题。

《伦敦倾废公约》和《伦敦议定书》均为国际海事组织推动下制定，它主要规范对象是禁止海上倾倒，因此，《伦敦倾废公约》和《伦敦议定书》中定义的“倾倒”是指“从船舶、航空器、平台或其他海上人工构造物将废物或其他物质在海洋中作的任何故意处置”，但这并不等于公约对其所列举的海上倾倒以外的其他污染行为就无权管辖。公约的适用范围来自缔约国的授权，而不是国际海事组织本身。日本主张排放核污染水是建设海底管道排放，通过内水汇入海洋的核污染水，不属于《伦敦议定书》中定义的“倾倒”。此说虽然讲得通，但是，《伦敦议定书》除了“倾倒”以外，还规范了“污染”海洋的行为。

《伦敦议定书》第 1 条有关定义的规范是具体的，其中第 10 款言明：“‘污染’系指人类活动将废物或其他物质直接或间接地引入海洋中，造成或可能造成诸如损害生物资源和海洋生态系统、危害人体健康、妨碍包括捕鱼和对海洋的其他合法利用在内的海上活动、影响海水使用质量和降低环境舒适性之类的有害影响。”不仅如此，日本代表还回避了《伦敦议定书》第 3 条的普遍义务规定。《伦敦议定书》第 3 项明确规定“在实施本议定书的规定时，各缔约当事国采取的行动不应使损害或损害的可能性直接或间接地从环境的一个部分转移到另一个部分或从一种污染转变为另一种污染。”按照日本代表的逻辑，宏观的规定不能算数，只接受

[1] ALPS 全称 Advanced Liquid Processing System，是一种多核素去除装置，其设计目的是为了去除 62 种不同的污染物。

[2] 附件I：可考虑倾倒的废物或其他物质：（1）疏浚挖出物；（2）污水污泥；（3）鱼类废物或工业性鱼类加工作业产生的物质；（4）船舶、平台或其他海上人工构造物；（5）惰性、无机地质材料；（6）自然起源的有机物；和（7）主要由铁、钢、混凝土和对其的关切是物理影响的类似无害物质构成的大块物体，并且限于这些情况：此类废物产生于除倾倒外无法使用其他实际可行的处置选择的地点，如与外界隔绝的小岛。

具体的规定，但是，他们又不能直面《伦敦议定书》关于“污染”的禁止性规范，更不能逃避第 3 条规定的普遍性义务。

全面客观地解释以上禁止性条款的规定，笔者认为，这些禁止性规范的适用范围毋庸置疑可以包含日本通过修建海底隧道，将核污染水通过在内水的排放而转移至海洋的不法行为。故日本政府批准了日本东电公司排放核污染水的行为，违背《伦敦议定书》有关禁止污染海洋的相关规定。

不仅如此，根据《伦敦议定书》第 8 条第 2 款的规定：“在对人体健康、安全或海洋环境构成不可接受的威胁并且没有任何其他可行解决办法的紧急情况下，缔约当事国可作为第 4 条第 1 款和第 5 条的例外颁发许可证。在此之前，该缔约当事国应与有可能受到影响的任何其他国家和本组织进行磋商；本组织在视情况与其他缔约当事国和主管国际组织进行磋商后，应按第 18 条第 1 款第 6 项[1]迅速向该缔约当事国建议应采用的最适当程序。”如前所述，日本政府计划排放前未与可能受影响其它国家通报和磋商。可见，仅此行为也违反《伦敦议定书》。

如果国际社会针对《伦敦倾废公约》及《伦敦议定书》是否能适用于日本的核污染水处置范围存在争议，那么也可以通过争端解决机制解决此问题。首先可以采用《伦敦议定书》项下规定的争端解决机制，组成仲裁庭对日本核污染水排放行为是否适用《伦敦议定书》进行解释；其次，也可以由太平洋沿岸国通过联合国大会达成决议提请国际法院就争议问题发表咨询意见。[2]再次，即使《伦敦倾废公约》以及《伦敦议定书》不能适用日本的排放行为，通过上述措施，也可以在实践中让更多国家参与监督日本排放计划。

2.日本排放核污染水入海违反《联合国海洋法公约》

《联合国海洋法公约》是国际海洋法律制度发展的重要里程碑。[3]日本于 1995 年批准加入了该公约。

《联合国海洋法公约》第 194 条第 2 款规定，各缔约国应确保在管辖或控制范围内的活动不损害其他国家的环境。第 195 条规定，各国在采取措施防止、减少和控制海洋环境的污染时采取的行动不应直接或间接将损害或危险从一个区域转移到另一个区域，或将一种污染转变成另一种污染。该公约第 207 条第 1 款规定各国应制定法律和规章，以防止、减少和控制陆地来源，包括河流、河口湾、管道和排水口结构对海洋环境的污染。第 210 条第 5 款规定，禁止各国在领海、专属经济区以及大陆架上进行废物倾倒，若沿海国主管部门事先批准审核，且与可能遭受不利损害的国家进行充分协商后同意倾倒的，沿海国才能准许倾倒废物，但是

[1] 《伦敦议定书》18.1.6 条，经与主管国际组织磋商，制定或通过第 8.2 条中所述程序，包括确定例外和紧急情况的基本标准和在此种情况下的咨询建议和海上安全处置物质的程序。

[2] 《联合国宪章》第 96 条规定：“一、大会或安全理事会对于任何法律问题得请国际法院发表咨询意见。二、联合国其他机关、及各种专门机关，对于其工作范围内之任何法律问题，得随时以大会之授权，请求国际法院发表咨询意见。”

[3] 黄惠康：《国际海洋法前沿值得关注的十大问题》，载《边界与海洋研究》，2019 年 1 月，第 6 页。

沿海国对这种废物的倾倒应进行有效的管理和控制，避免造成跨界环境损害。

概言之，《联合国海洋法公约》关于海洋环境保护方面，首先其基本精神是禁止向海洋倾倒废物。公约明确规定沿海国应避免造成跨界环境损害，这是对“禁止跨界损害原则”的肯定。针对具体的倾废行为，《联合国海洋法公约》第 198 条规定；“当一国获知海洋环境有即将遭受污染损害的迫切危险或已经遭受污染损害的情况时，应立即通知其认为可能受这种损害影响的其他国家以及各主管国际组织。”

日本政府排放核污染水的行为，同样也违反了《联合国海洋法公约》对缔约国的基本要求，其排放核污染水的行为，并未依照第 210 条第 5 款的规定与潜在受影响国协商。值得一提的是，《联合国海洋法公约》第 15 部分是关于争端的解决机制，如果缔约国利用《联合国海洋法公约》第 15 部分第一节的和平磋商机制，一旦用尽和平磋商机制仍未解决争端，则争端自动纳入第 2 节的争端强制解决措施，由国际仲裁法庭或法院管辖争议案件。

3.日本排放核污染水入海违反国际习惯法和国际法基本原则

（1）日本排放核污染水违反“禁止跨界损害”这一国际习惯法

“禁止跨界损害原则”在法理上与罗马法格言“使用自己的财产应不损及他人的财产”（sieuteretuoutalienum non laedas）一脉相承，是国家主权原则在国际关系中的具体体现。即一个国家在使用本国领土时，不得滥用权力，给他国的领土和国民造成损害。

“禁止跨界损害原则”是国际环境法的一项基本原则，也被公认为一条国际习惯法。[1]判断是否违背“禁止跨界损害原则”需要考察起源国是否履行国际法义务中的行为义务。[2]行为义务是指一国若履行了该行为义务的要求，即使未能阻止损害结果的发生，也不承担不法行为国家责任。1977 年的《国家责任草案》中区分了行为义务和结果义务。[3]但行为义务和结果义务二者并不是泾渭分明的，所以部分国家不认同这一分类。[4]2001 年的草案中删去了对于行为义务和结果义务的区分。但这并不意味着行为义务和结果义务已经被国际法摒弃了，正如中国代表团在关于《条款草案》专题的发言中所指出：“在处理违反国际义务的条款时，适当区分‘行为义务’和‘结果义务’是必要的”。[5]若一国证明其已经尽到了行为义务的要求，即使损害结果发生，也可归因于意外事故或不可抗力，该国无需承担不法行为国家责任。

一个国家的行为义务是否符合“禁止跨界损害原则”的标准，取决于是否尽到“审慎义

[1] [法]亚历山大基斯：《国际环境法》，张若思译，法律出版社 2000 年版，第 84 页。

[2] Gunther Handl, *State Liability for Accidental Transnational Environmental Damage by Private Persons*, American Journal of International Law, Vol.74, 1980, pp.535-540.

[3] *Report of the International Law Commission on the work of its twenty-ninth session*, May 9 - July 29, 1977, A/32/10.

[4] 北欧各国、法国、德国、瑞士、英国等国主张删去有关这一分类的规定，国际法委员会：“国家责任：各国政府提出的评论和意见”，A/CN．4/488，1998 年 3 月 25 日，第 60、61 页。

[5] 中华人民共和国外交部政策研究室：《中国外交》（2000 年版），世界知识出版社，2000 年 7 月第 1 版，第 686 页。

务（Obligation of Due Diligence）”的要求。[1]审慎义务也称“合理的注意义务”、“适当注意义务”。[2]在国际环境法领域，禁止跨界损害原则不仅要求一国对其自身的活动负责，还要求对其管辖和控制下的任何公共或私人活动也负有责任。也就是说，国家应当在环境领域尽到“审慎”的义务。国家有义务建立监督制度，监督可能对其他国家的环境或任何国家管辖范围以外的环境造成影响的活动。[3]在禁止跨界污染领域，目前较为确定的判断标准为：（1）采取行动或预防措施的机会；（2）对某一活动可能导致跨界损害的预见或知晓；（3）选择措施以防止损害或减低风险的适当性。[4]随着科技的不断进步，原本被认为在国家管辖下绝对不存在风险的活动也存在产生风险的可能。同样，对于风险较高的活动，审慎义务的标准也应当更加严格。[5]

针对日本计划排放核污染水而言，其行为未尽到审慎义务的要求。首先，日本排放核污染水属于高风险活动，其应当预见到可能造成的损害。国际原子能机构（International Atomic Energy Agency, 以下简称“IAEA”）专家组评估报告曾明确指出，福岛核电站现已经过处理的含氚废水中仍含有其他放射性核素。2018 年 8 月，环保人士经过分析东电公司发布的数据发现，处理后的核污染水远远不止残留氚，其中 2017 年度的核污染水有 60 次碘 129 超标。核污染水中还存在锶 90 严重超标的问题。[6]绿色和平组织的报告称，这些核污染水中含有放射性同位素氚和碳-14，其中，碳-14 有可能损害人类 DNA。[7]《科学》杂志研究显示仅含大量氚的核污染水也可能导致潜在的健康影响。[8]仅基于现有研究，就有大量数据表明日本核污染水的危害。日本政府应当预见继续推动核污染水排放计划所可能造成的损害问题。

其次，日本政府存在处理核污染水计划的替代措施。例如日本政府可以在福岛核电站周边修建储水罐，继续存放产生的核污染水。日本政府可以在此期间继续对核污染水可能造成的危害进行研究，待科学界达成一致结论后，再讨论如何处理核污染水的问题。日本政府在尚未用尽替代措施的前提下，在未经与相关潜在的受害国通报和协商的条件下，执意擅自排放核污染水，以经济代价最小的方案让全世界承担高风险的损害结果。这也说明日本政府已经完全无视国际社会的反对声音，彻底突破正常国际关系准则的底线。不仅如此，日本政府

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[1] See Malcolm N. Shaw, *International Law Eighth Edition*, Cambridge University Press, 2017. p.648.
[2] Joanna Kulesza, *Due Diligence in International Law*, Leiden; Boston: Brill Nijhoff, 2016. p.91.
[3] [法]亚历山大基斯：《国际环境法》，张若思译，法律出版社 2000 年版，第 83 页。
[4] RodaVerheyen, *Climate Change Damage and International Law: Prevention Duties and State Responsibility*, Leiden: MartinusNijhoff Publishers, 2005, p.176.
[5] *Responsibilities and Obligations of States with Respect to Activities in the Area, Advisory Opinion, February 1, 2011*，ITLOS Report 2011, p.10.
[6] 《2021 年 4 月 14 日外交部发言人赵立坚主持例行记者会》，中华人民共和国外交部，https://www.fmprc.gov.cn/web/fyrbt_673021/t1868895.shtml，最后访问时间 2022 年 4 月 22 日。
[7] *Fukushima water release could change human DNA*, Greenpeace warns (visited on April 24, 2022), https://edition.cnn.com/2020/10/24/asia/japan-fukushima-waste-ocean-intl-scli/index.html,.
[8] See Ken O. Buesseler, *Opening the floodgates at Fukushima*, Science, August 7, 2020: Vol.369, Issue 6504, pp. 621-622.

将开创严重核事故处理后废水向海洋排放的先例。日本政府的决定无视生态环境、危害全人类，不具有科学性和正义性可言。

基于目前针对过滤后核污染水的危害性尚不明晰，在多国表示反对的情况下，若日本执意排放核污染水进而造成损害的，其未尽审慎义务之要求，违反禁止跨界损害原则这一国际习惯法。

（2）日本排放核污染水违反“风险预防原则”

《里约环境与发展宣言》第 15 条规定：“为了保护环境，各国应根据它们的能力广泛采取预防性措施。凡有可能造成严重的或不可挽回的损害的地方，不能把缺乏充分的科学肯定性作为推迟采取防止环境退化的费用低廉的措施的理由。”《气候发展变化公约》也有着类似的规定。虽然《里约环境与发展宣言》并不具有强制约束力，但是风险预防原则已经国际司法实践广泛适用，例如国际海洋法法庭在 1999 年的“南方黑鲔案”中就讨论了风险预防原则的适用。[1]也有学者认为此案是在国际法上确定风险预防原则的“极好的例子”。[2]

预防原则要求针对某些结论，科学家还没有达成一致时，决策者必须要对特定情况进行研究，根据最可靠的证据和最可信的科学方法作出决策。[3]日本核污染水排放是否会产生危害，目前还没有明确科学一致观点。日本为了排放核污染水入海，官方的公关宣传片面突出稀释后的低浓度核污染水密度符合所谓的排放标准，却不提及这是一项持续不断的排放行为。需要全盘评估的是，即使将已有的 125 万吨核污染水稀释后排放入海，也不意味着核污染水的危害性源头处理完毕，因为福岛每天冷却的核污染水仍有 140 吨产生。长此以往，连续将所谓稀释过的核污染水倾倒于流动的海洋，核放射性浓度经过累积后，就不再是一个安全的恒定不变的“低浓度”。虽然氚的半衰期只有 12.5 年，但是过滤后的核污染水中还有铯等放射性元素，铯的半衰期长达 29.1 年。[4]在长达十年的核污染水储存期间，日本政府既没有将所谓过滤、稀释的核污染水进行动物健康安全实验，也没有对人体健康进行医学试验，在缺乏实验数据的情况下，竟然有个别日本官员扬言喝了也没有事。[5]然而，2022 年 2 月 8 日，因被检测出放射性物质超标，日本政府指示福岛县再次暂停销售福岛县海域的许氏平鲉。福岛附近海域的海洋鱼类已经多次被检出放射性物质超标。[6]

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[1] Southern Bluefin Tuna Cases (New Zealand *v.* Japan; Australia *v.* Japan), Order on Provisional Measures (ITLOS Cases Nos. 3 and 4). International Tribunal for the Law of the Sea,27 August 1999.

[2] Tim O'Riordan & James Cameron, *Reinterpreting the Precautionary Principle*, Cameron May International Law & Policy, 2001, pp. 113-142.

[3] [法]亚历山大基斯：《国际环境法》，张若思译，法律出版社 2000 年版，第 95 页。

[4] See *Radioisotope Brief: Strontium-90*, (visited on April 24, 2022), https://www.cdc.gov/nceh/radiation/emergencies/isotopes/strontium.htm,

[5] *China to Japanese official: If treated radioactive water from Fukushima is safe, "please drink it"*, (visited on 24 April 24, 2022), https://www.washingtonpost.com/world/2021/04/14/china-japan-fukushima-water-drink/.

[6] 《日本暂停一种辐射超标海鱼上市销售》，载新华网，http://www.news.cn/world/2022-02/08/c_1128344451.htm，最后访问时间 2022 年 4 月 23 日。

目前日本核污染水的损害尚不明晰，科学界未形成统一观点。在存在替代措施的情况下，日本执意启动核污染水排放计划，违反预防原则。

二、日本排放核污染水不存在被排除不法性的理由

1.AEA 的“担保”不能阻却日本违反国际义务的不法性

IAEA 总干事曾经表示欢迎并支持日本的排放计划。[1]虽然 IAEA 的担保并非《条款草案》所规定的排除不法性的理由之一，但是日本政府却将 IAEA 的审查结果认为是允许其排放核污染水的背书。

IAEA“担保”不能阻却日本违反国际义务的不法性。首先，IAEA 的职能并不包括对日本核污染水的排放计划作出肯定性意见。IAEA 系由联合国大会通过决议，推动成立的一个专门致力于和平利用原子能的国际机构，其目的是谋求加速和扩大原子能对全世界和平、健康及繁荣的贡献。机构应尽其所能，确保由其本身、或经其请求、或在其监督或管制下提供的援助不致用于推进任何军事目的。[2]针对过去发生的核污染事件，IAEA 有效介入并提供帮助。在切尔诺贝利核电站事故发生后，IAEA 向苏联提供了在环境治理、退役和放射性废物管理方面的支助，以加强该核电站的安全水平。IAEA 还在“国际切尔诺贝利项目”下与其他联合国组织密切合作，该项目提供了对该事故放射后果的评定并对防护措施做了评价。[3]其原本职能并不包括允许 IAEA 对于日本核污染水的排放计划作出决定。[4]IAEA 无权就核污染水的后续处理方式给出终局性的意见。

其次，IAEA 对于日本排放核污水的结论并不拘束成员国。基于《国际原子能机构规约》《核安全行动计划》等文件，IAEA 于 2021 年 7 月 8 日与日本政府签订协议，针对日本计划倾废行为向日本派出专家组进行安全审查。日本通过该协议将 IAEA 的权限限定于：检验将要排放的水的放射性特征；审查水排放过程中的安全相关问题；评估核污染水的放射性特征、排水过程的安全相关方面、与排放相关的环境监测、与保障人员和环境有关的放射性环境影响评价、监管控制。[5]由此可见，目前 IAEA 派遣包含国际专家的专家组进行安全审查，其主要权力来源是《核安全行动计划》和 IAEA 与日本政府签订的授权协议。IAEA 在针对日本核污染水处理的权限范围是确定的，IAEA 在日本倾废事件中扮演的角色应当为监督、评估、

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[1] *IAEA Ready to Support Japan on Fukushima Water Disposal, Director General Grossi Says*, IAEA (visited on April 24, 2022), https://www.iaea.org/newscenter/pressreleases/iaea-ready-to-support-japan-on-fukushima-water-disposal-director-general-grossi-says.

[2]《国际原子能机构规约》第 2 条：机构应谋求加速和扩大原子能对全世界和平、健康及繁荣的贡献。机构应尽其所能，确保由其本身、或经其请求、或在其监督或管制下提供的援助不致用于推进任何军事目的。

[3] *The 1986 Chornobyl nuclear power plant accident*, IAEA (visited on April 24, 2022), https://www.iaea.org/topics/chornobyl..

[4] 参见余敏友等:《论 IAEA 在海洋放射性废物治理中的作用与局限———聚焦日本福岛核污水排海事件》，载《太平洋学报》2022 年第 5 期，第 9 页。

[5] *IAEA to Review and Monitor the Safety of Water Release at Fukushima Daiichi*, IAEA (visited on April 24, 2022), https://www.iaea.org/newscenter/pressreleases/iaea-to-review-and-monitor-the-safety-of-water-release-at-fukushima-daiichi.

提出建议及时向相关国家共享信息角色。IAEA 应当将收集到的信息以及完成的报告提供给国际社会，供各国作出判断。尽管 IAEA 在核领域问题的评估或建议时是权威的，但是，在上述 IAEA 法律权限的条件下，IAEA 基于《核安全行动计划》和与日本政府间协议派出同行专家，对于日本的排放计划进行评估，即使最终的结论是日本可以排放被过滤的核污染水，也是理论上的判断。《国际原子能机构规约》并没有明确规定《核安全行动计划》对成员国的法律地位，同时《核安全行动计划》也没有明确其对全体会国的强制性拘束力，因此，基于《核安全行动计划》的同行评审的结论，距离国际法意义上具有拘束所有成员国的效果依然距离很远。IAEA 基于与日本政府签订的协议得出的权利范围与报告结论，自然不能约束其他国家。

基于 IAEA 的职能，与在日本倾倒核污染水事件中所扮演的角色，IAEA 不应当给出担保性意见，IAEA 的结论也并不能掩盖日本排放行为的违法性。

2.大部分国家未“同意”日本排放核污水

根据《条款草案》第 20 条，如果一国对另一国的违法行为表示了同意，那么在同意范围内，对前者来说该行为的不法性将被排除。

中国等国家参与 IAEA 主导的日本核污染水排放同行评审专家小组，并不代表中国同意日本排放核污染水。目前，IAEA 的技术工作组已经邀请中国、韩国专家前往日本评估核污染水排放问题。外交部发言人汪文斌明确表示，中方支持技术工作组的工作，不代表中方认同日方向海排放核污染水的错误政策。[1]“同意”必须是明示的，不能是默示的，且中国官方已经明确表示了参加同行评审的行为不得被视为同意。即使 IAEA 的同行评审最终得出日本政府可以排放核污染水的结论，中国参与同行评审的行为也不代表中国的“同意”。

从非 IAEA 缔约国的角度来说，日本核污染水的排放也未获这些国家的“同意”。即使 IAEA 大会最终能达成一项全体成员国接受的同意日本向海洋排放过滤后的核污染水，也存在着一个不容忽视的问题，即日本向海洋排放过滤的核污染水，其最大概率的受害国家是太平洋岛国和环太平洋沿岸国家。而在 IAEA 的 173 个成员国家中，除了美国以外，还有汤加、东帝汶、密克罗尼西亚联邦、基里巴斯、瑙鲁、所罗门群岛、图瓦卢、瓦努阿图、秘鲁等国家均不是成员国。根据国际习惯法上的条约不能拘束第三方的原则，根据《核安全行动计划》的同行评审的结论以及 IAEA 大会的决议，对于非会员国仅有参考作用而无拘束力。

目前日本核污染水的排放问题也未在联合国大会或者其它国际组织会议上获得通过，日本的核污染水排放未获得大部分国家的“同意”。只有美国等少部分国家单独且明确表示其支

[1] 《2022 年 2 月 15 日外交部发言人汪文斌主持例行记者会》，中华人民共和国外交部，https://www.fmprc.gov.cn/web/fyrbt_673021/jzhsl_673025/202202/t20220215_10642488.shtml，最后访问时间 2022 年 4 月 24 日。

持日本排放核污染水，该行为可以被视为国际法上的“同意”，因此这些国家在将来不可以追究日本排放核污染水的不法性。

3.日本排放核污染水不存在“紧急情况”或“不可抗力”

《条款草案》第 23 条规定，一国实施的与其承担的国际义务不相符合的不法行为，若出现在不可抗力的情况中，则其不法性可以被排除。

不可抗力的情况是指出现了不能抵抗的力量或者是不可预见的事件，该事件在该国控制能力范围以外。[1]日本的计划排放核污染水的行为并不存在“不可抗力”，虽然日本核污染水的产生缘由是海啸造成核电站损毁，在核电站损毁初期所造成核污水的泄漏可能可以援引“不可抗力”作为阻却不法性的理由，但是由海啸产生的不可抗力不能绵延到数年后的日本核污染水排放中。如果阻碍其履行自认国际义务的原因消失，那么其所提出的排除不法性的理由不影响其此后对已承担国际责任的继续遵守。[2]在不可抗力的原因消失之后，日本应当继续遵守其应当遵守的国际义务，不得随意排放核污染水。

同样，《条款草案》第 25 条规定的紧急情况不能作为日本排放核污染水的不法阻却事由。紧急情况的援引需要没有严重损害其义务受益国或者国际社会整体的根本利益。[3]如上文所论证的，日本核污染水一旦倾倒入海，其危害的可能是全体人类的生命安全。

4.是否排放过滤的核污染水并非一国国内管辖事件

在 2022 年 2 月 18 日日本东京举行线上记者会上，国际原子能机构副总干事莉迪・埃夫拉德表示这（排放核污染水）是日本政府决定的方案，国际原子能机构只是受日本政府邀请进行安全性审查，对于核能的安全性问题无权承认或反对。国际原子能机构对于核污染水排海计划没有决定权，但是会对核污染水排海的安全标准等进行评估。[4]依据不干涉内政原则，如果一事务被认定为一国国内管辖事件，国际社会不可以加以干涉，该国有权自主决定之。

在此需要澄清的是，是否排放核污染水并非属于“国内管辖事件”，并非日本“内政”。日本核污染水排放涉及海洋环境以及全体人类健康安全，不应当由日本单独决定。

《联合国宪章》第 2 条第 7 款将“内政”定义为“本质上属于任何国家国内管辖之事件”。常设国际法院在“突尼斯和摩洛哥国籍法令案”咨询意见中，论述了如何理解“国内管辖事件”。法院认为，纯属一国国内管辖事件是指原则上不受国际法调整的事项。鉴于国际法的发

[1] 贾兵兵：《国际公法：和平时期的解释与适用》，清华大学出版社 2015 年版，第 389 页。
[2] J. Crawford, *The International Law Commission's Articles on State Responsibility*, Cambridge: CUP, 2002, 160.
[3] 贾兵兵：《国际公法：和平时期的解释与适用》，清华大学出版社 2015 年版，第 390 页。
[4] 《国际原子能机构结束首次日本核污水排放计划实地调查》，载新华网，http://www.news.cn/2022-02/18/c_1128393004.htm，最后访问时间 2022 年 4 月 24 日。

展，对于国内管辖事件的理解也会不同。[1]例如 1948 年联合国大会通过的《防止及惩治灭绝种族罪公约》明确灭种罪“系国际法上之一种罪行”，不属有关国家国内管辖事项。

日本排放核污染水不属于“国内管辖事件”。上文已经论述，一国使用自己领土不应损害他国的领土。日本排放核污染水，可能对全体人类的生命健康与安全造成危险，故日本无权单方作出是否排海决定，处理核污染水的方式也不应当由日方单独决定。而是应当听取有关国家意见，在国际社会的监督下作出处置核污染水的最终解决方案。

三、日本排放核污染水的解决方案

1.排放核污染水应当尊重相邻相关国家意见

仅针对此次排放过滤后的核污染水而言，日本目前还未实际排放。在这个阶段，我们呼吁日本除了需要参考《核安全行动计划》的同行做出的排放安全之评估之外，还有责任与全体太平洋岛国以及太平洋沿岸国家磋商并征得这些国家的同意，这才是特种“核污染水”排放之前的必要程序。只有确保程序的正义，才有可能产生实质的正义。

至于具体的实体方面的处置问题，应当要求日本政府与相关受影响的国家在有关国际组织平台均可以参与协商讨论解决，这是程序正义的基础。如果日本排放核污染水的问题仅仅与少数几个国家达成一致，或者仅仅凭借 IAEA 的基于《核安全行动计划》的同行做出安全性评估，就实施排放核污染水于海洋的行为，那么这种行为一定背离了科学理性，是藐视国际法的疯狂行为，也就不可能属于科学合理的范畴。

实体方面的处置问题应当协商解决。例如，氚元素的释放辐射能力减半的“半衰期”为 12.3 年。污水中不仅残留氚，过滤后的污水中还残留放射性铯元素，它的半衰期为 29.1 年。当然，日本面临着储存核污染水的困境急于排放滤后污水，国际社会可以理解。但是，太平洋沿海国或岛国必然会要求陆基储存的核污染水至少应等到残留的放射性物质“全衰”期过后才能排放。具体的排放处置方案（包括过滤后放射物含量的标准，陆基储水的必要期间，督察机制等问题）以协商一致达成的方案为最上策。日本也可以采用建造扩建储水罐以及循环利用核污染水的方式避免将核污染水排入海洋。重要的是，确保国际海洋环境的安全是包括日本在内的国际社会所有国家的法律义务。另一方面，在责成日本政府严格遵守国际法义务的同时，在道义上，国际社会也有协助日本合理处置核污染水。

2.和平解决争端原则在排放核污染水争端中的适用

国际争端是国际法主体之间，主要是国家之间关于法律上或事实上的主张不一致，或者是政治利益和特定权利上的矛盾对立。和平解决国际争端是一项国际法的基本原则。《联合国

[1] *Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion of 7 February 1923*, ICJ, https://www.icj-cij.org/public/files/permanent-court-of-international-justice/serie_B/B_04/Decrets_de_nationalite_promulgues_en_Tunisie_et_au_Maroc_Avis_consultatif_1.pdf. p.24

宪章》第 2 条明文规定了联合国及其会员国应当遵守的国际法原则，其中第 3 条规定：“各会员国应当以和平方法解决其国际争端，避免危机国际和平、安全及正义。”和平解决国际争端的方法主要是通过政治外交方法和法律方法。外交方法的途径有谈判、调查、调停等，法律方法的途径有国际仲裁和国际司法诉讼途径。

如果无法达成共识或用尽政治外交谈判途径，日本仍我行我素实施排放，利益相关的、大概率的受害国家有权通过诉讼途径，向国际法院起诉日本国。起诉日本的法律依据是与核污染水排放于海洋有关的《联合国海洋法公约》《伦敦议定书》和《国际原子能机构规约》，这些公约也是国际法院管辖的基础。

首先，《联合国海洋法公约》第十五部分规定了缔约国在用尽外交谈判手段仍不能解决争端的情况下，可以将争端提交强制争端解决程序。这里的强制争端解决程序包括了国际仲裁和国际司法审判。其次，《国际原子能机构规约》在争端的解决方面规定：“A．与本规约的解释或实施有关的任何问题或争端，未能以谈判方式解决，有关各方又未商定其他解决方法，则应按照国际法院的规约，提交国际法院。”

最后，《伦敦议定书》在争端的解决方面第 16 条第 2 款规定：“如在一缔约当事国向另一缔约当事国作出它们之间存在争端的通知后十二个月内不能解决争端，除非争端各方同意使用《1982 年联合国海洋法公约》第 287 条第 1 款中所列的某一程序，否则在争端的一方作出请求后应使用附件Ⅲ中所列的仲裁程序解决争端。争端各方，不论是否也属《1982 年联合国海洋法公约》的当事国，可以同意使用该公约的上述程序。”

除了通过诉讼的方法解决争端，另一种准法律手段也为解决争端提供了便利。《国际原子能机构规约》在争端的解决方面规定：“在联合国大会授权下，机构的大会及理事会都有权请求国际法院，就机构活动范围内的任何法律问题发表咨询意见。”

四、结语

日本政府寄希望于 IAEA 基于《核安全行动计划》的同行评审，对日本的滤后核污染水排放做出安全性评估，因而未经与潜在受影响国之间的协商，就公布了两年后将启动向海洋排放过滤后仍遗留放射性氚和铯元素的核污染水计划。日本排放核污染水的行为将违反国际法。如何处置持续不断储存积累的核污染水之问题，在现有的国际法体制中并不存在科学和公认的排放标准和规制。今天面临的问题是，如何科学、合理和合规地处置日本的过滤后核污染水的排放难题，这也必将对未来维系国际海洋生态环境和人类安全的环境保护法制产生重大影响。

海洋是人类的共同家园，构建人类海洋命运共同体，确保蓝色海洋可持续发展，对于人

类社会生存和发展具有重要意义。海洋并非任何一国私产，一旦实施有失审慎的举动可能殃及全球海洋，并带来不可逆转的风险。在尚未用尽替代方案的情况下，日本政府不应草率排放核污染水。

鉴于日本排放核污染水主要受影响国家为太平洋沿岸各国，充分利用各相关的国际组织平台，运用和平的方式解决争端是最优途径。同时，国际社会也应通过国际合作帮助日本解决核污染水问题，提供可行核污染水处理方案，这也是践行人类命运共同体倡议的应有之义。

Japan's Nuclear Wastewater Discharge: Perspectives from International Law on State Responsibility

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Abstract: In April 2021, Japan unilaterally announced, without consulting countries that are likely to be affected, a plan to release treated nuclear wastewater that still contains radioactive substances into the ocean. By doing so, Japan has violated its international obligations. The IAEA's "endorsement" of Japan's wastewater discharge may not be invoked as a ground to preclude the wrongfulness of the country's behavior. No valid consent has been given by the international community to Japan's discharge plan either. Japan's nuclear wastewater should be disposed of in a scientific, reasonable and compliant manner, which will surely have a great impact on the international legal system regarding environmental protection that will help maintain a healthy marine ecosystem and a safe environment for human beings. Each and every State is called upon to take measures to comprehensively monitor Japan's disposal of nuclear wastewater within the existing framework and help Japan resolve the tricky problem through peaceful means.

Keywords: Discharge of nuclear wastewater; London Convention; UNCLOS; IAEA

On 11 March 2011, a massive earthquake triggered a major disaster at Japan's Fukushima Daiichi Nuclear Power Plant. Seawater flooded into the plant, causing power failure and later the explosion and meltdown of three of its four reactors. Seawater has been used to cool the three damaged reactor cores. The cooling water, as well as the groundwater and rainwater that permeated the reactor has become the wastewater that contains a variety of radionuclides, hereinafter called "nuclear wastewater".[1] Large tanks have been built up to temporarily collect and store such wastewater.[2] However, according to Tokyo Electric Power Company (TEPCO), these tanks will

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1 LIU Junguo, *Concerns over Japan's Plan to Discharge Nuclear Wastewater from Fukushima (International Perspective)*, People's Daily, October 23, 2020, p. 16.

2 *Fukushima Daiichi Accident,* World Nuclear Association (visited on April 24, 2022), https://world-nuclear.org/information-library/safety-and-security/safety-of-plants/fukushima-daiichi-accident.aspx.

reach their capacity limits sometime after the autumn of 2022.[1] On 13 April 2021, a cabinet meeting was convened at Kantei, the official residence of Japan's Prime Minister, which formally decided to launch the nuclear wastewater discharge plan. Wastewater will be released from the facilities of the Daiichi Nuclear Power Plant after two years from 2021.[2]

On the occasion of the first anniversary of Japan's decision to discharge nuclear wastewater, this paper analyzes, from the perspective of State responsibility, Japan's violation of its international obligations, refutes the arguments that Japan is likely to use to support its decision, and finally puts forward possible solutions. The paper endeavors to offer some academic advice with regards to the establishment and improvement of supervision and accountability mechanisms for the discharge of nuclear wastewater. Due to space limitations, this paper merely focuses on the issue of State responsibility resulting from Japan's wastewater discharge. It does not dwell on Japan's State responsibility for previous leakage and release of nuclear wastewater, the international liability for injurious consequences arising out of its discharge even if not prohibited by the international law, or the responsibility of the Japanese government under domestic law.

I. Japan Breaches Its International Obligation by Discharging Nuclear Wastewater into the Ocean

Draft Articles on Responsibility of States for Internationally Wrongful Acts, hereinafter referred to as the "ILC Articles", Article 2 prescribes that there is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.[3] The plan to discharge the nuclear wastewater into the ocean was adopted at Japan's cabinet meeting, and the Japanese government has explicitly asked TEPCO to start dumping the nuclear wastewater. Therefore, the discharge of wastewater as such may be regarded as a State act of Japan.[4]

1. Japan's Discharge of Nuclear Wastewater into the Ocean Violates the Objectives and General Obligations under the London Protocol

The IMO Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter of 1972, known as the London Convention, and the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, commonly known as London Protocol, are the most important international treaties to prohibit pollution of the sea by

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[1] *Government OKs discharge of Fukushima nuclear plant water into sea*, (visited on April 24, 2022), https://www.japantimes.co.jp/news/2021/04/13/national/fukushima-water-release/.

[2] *Press Conference by the Prime Minister regarding the Disposal of ALPS Treated Water,* Prime Minister's Office of Japan (visited on April 24, 2022), https://japan.kantei.go.jp/99_suga/statement/202104/_00008.html.

[3] The Draft Articles on Responsibility of States, albeit not an international treaty, is a compilation of customary international law, providing valuable reference.

[4] LUO Huanxin, *An Analysis of Legal Issues and Countermeasures Concerning Japan's Plan to Discharge Contaminated Water into the Ocean: Coordinating the International Law and Domestic Law on Liability Relief*, Japanese Studies, No. 4, 2021, p. 39.

dumping. Japan acceded to the London Convention in 1980 and the London Protocol in 2007.[1]

Whether the London Convention is applicable to Japan's dumping behavior was discussed at the 42nd session of the Contracting Parties to the London Convention. From 5 October to 23 December 2020, the 42nd Consultative Meeting of Contracting Parties to the London Convention and the 15th Meeting of Contracting Parties to the London Protocol was held virtually by IMO, where several delegations exchanged their views on the possible discharge of treated wastewater by Fukushima Daiichi Nuclear Power Plant.[2]

One the one hand, the delegation of the Republic of Korea expressed its concern over the uncertainty of the impacts that any discharge was likely to impose on the marine environment of Japan's neighbors, and stressed that the objective of the London Protocol was to protect the marine environment from all sources of pollution (Art. 2) and take effective measures to prevent pollution. The delegation said it was necessary for the regulatory body to clarify whether it was likely to place any discharge of treated wastewater from the Fukushima nuclear power plant into the sea under the ambit of the London Convention and the London Protocol. Additionally, the Korean submission also stated that the discharge of mine tailings and marine geoengineering activities, two behaviors not covered by conventional "dumping", had also been previously regulated by the London Convention and the London Protocol.[3]

On the other hand, the Japanese delegation claimed that discharge from land-based facilities was not considered "dumping" under the definitions set out in the London Convention and the London Protocol. It further noted that the London Protocol, Article 2, provided for the general purpose and Articles 4, 5, 9 and 10 specified the obligations of the Contracting Parties. It also stressed that the water stored at TEPCO Fukushima Daiichi Nuclear Plant was ALPS[4]-treated water, rather than "wastewater" or "contaminated water", and that it would not approve any discharge that did not meet international standards to ensure the protection of the marine environment and human health.

London Protocol, Article 2 (Objectives) specifies that "Parties to the Protocol are individually and collectively to protect and preserve the marine environment from all sources of pollution and take effective measures, according to their scientific, technical and economic capabilities, to prevent, reduce and where practicable, eliminate pollution caused by dumping or incineration at sea of wastes or other matter. It also instructs Parties to harmonize their policies in pursuit of these

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[1] *Deposit of the Instrument of Accession to the 1996 Protocol to the London Convention,* (visited on April 24, 2022), https://www.mofa.go.jp/announce/announce/2007/10/1175645_836.html.

[2] *Report of the 42nd Consultative Meeting of Contracting Parties to the London Convention and the 15th Meeting of Contracting Parties to the London Protocol*, IMO, LC 42/1, para.7.19.

[3] *Comments on the documents submitted by the Secretariat on open agenda items - Submitted by the Republic of Korea*, IMO, November 6, 2020, LC 42/1/4, para.4.

[4] ALPS is an acronym for Advanced Liquid Processing System, which is a multi-nuclide removal device designed to remove 62 types of contaminants.

objectives where appropriate." However, the said objectives were rejected by the Japanese delegation for being too broad, who, instead, insisted that the obligations imposed on Contracting Parties were specified in Articles 4, 5, 9 and 10.

In fact, such argument does not support an exemption for Japan's construction of an undersea tunnel for releasing nuclear wastewater into the ocean because of the following reasons:

Article 4 of the London Protocol prohibits, essentially, the dumping of any wastes or other matter with the exception of those listed in Annex 1. Nevertheless, "wastes or other matter that may be considered for dumping" under Annex 1 do not include radioactive matter.[1] Article 5 invoked by the Japanese delegation focuses on the prohibition of incineration at sea, Article 9 on issuance of permits and reporting, and Article 10 on application and enforcement. None of the above provisions makes an exception to the objectives under Article 2. Henceforth, Japan's arguments against the application of London Protocol are too far-fetched.

The London Convention and the London Protocol are both formulated under the aegis of IMO, which mainly regulate the dumping at sea. Under the two instruments, "dumping" means "any deliberate disposal into the sea of wastes or other matter from vessels, aircraft, platforms or other man-made structures at sea", but this does not mean that pollution other than dumping at sea may not be governed by the two. The scope of application of the Convention is derived from the authorization of the Contracting Parties, not from the IMO itself. Japan claims that the discharge of nuclear wastewater through its internal waters to the ocean is not "dumping" as defined in the London Protocol because it is released through the constructed submarine tunnel into the ocean. It sounds plausible; however, the London Protocol also regulates the "pollution" of the sea in addition to "dumping".

The definitions set out in Article 1 of the London Protocol are specific, where paragraph 10 articulates: "'Pollution' means the introduction, directly or indirectly, by human activity, of wastes or other matter into the sea which results or is likely to result in such deleterious effects as harm to living resources and marine ecosystems, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities." Notwithstanding that, the Japanese delegates sidestepped the general obligations provided in London Protocol, Article 3, whose paragraph 3 explicitly states that "In implementing the provisions of this Protocol, Contracting Parties shall act so as not to transfer, directly or indirectly, damage or likelihood of damage from one part of the environment to another

[1] Annex 1 provides wastes or other matter that may be considered for dumping include: (1) dredged material; (2) sewage sludge; (3) fish waste, or material resulting from industrial fish processing operations; (4) vessels and platforms or other man-made structures at sea; (5) inert, inorganic geological material; (6) organic material of natural origin; and (7) bulky items primarily comprising iron, steel, concrete and similarly unharmful materials for which the concern is physical impact, and limited to those circumstances where such wastes are generated at locations, such as small islands with isolated communities, having no practicable access to disposal options other than dumping.

or transform one type of pollution into another." The line of reasoning of the Japanese delegates is that general provisions do not count and only specific provisions are acceptable. However, they cannot face up to the prohibitive norms of the London Protocol on "pollution", let alone the general obligations enshrined in Article 3.

A comprehensive and objective interpretation of the above-said prohibitive provisions shows that these provisions, undoubtedly, apply to Japan's wrongful act of transferring nuclear wastewater to the ocean, which is done by releasing wastewater into its internal waters through the construction of submarine tunnels. Therefore, the Japanese government's approval of TEPCO's plan to discharge nuclear wastewater into the ocean violates the provisions of the London Protocol relating to the prevention of marine pollution.

Apart from the above, Article 8, Paragraph 2, of London Protocol reads: "A Contracting Party may issue a permit as an exception to articles 4.1 and 5, in emergencies posing an unacceptable threat to human health, safety, or the marine environment and admitting of no other feasible solution. Before doing so the Contracting Party shall consult any other country or countries that are likely to be affected and the Organization which, after consulting other Contracting Parties, and competent international organizations as appropriate, shall, in accordance with article 18.1.6[1] promptly recommend to the Contracting Party the most appropriate procedures to adopt." As mentioned earlier, before planning to discharge the wastewater, the Japanese government failed to notify or consult any other potentially affected countries. Obviously, this act alone constitutes a violation of the London Protocol.

In the event that the international community disagrees on the applicability of the London Convention and the London Protocol to Japan's disposal of nuclear wastewater, this issue may also be resolved through a dispute settlement mechanism. First, an arbitral tribunal may be established as per the dispute settlement mechanism under the London Protocol, which may decide and explain whether the Protocol is applicable to Japan's discharge of nuclear wastewater. Second, the Pacific littoral States may, through a resolution of the United Nations General Assembly, request the International Court of Justice to give an advisory opinion on the disputed matter.[2] Third, even if the London Convention and the London Protocol fail to apply to Japan's discharge of wastewater, the said measures may empower more countries to monitor Japan's implementation of its discharge plan in practice.

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[1] Article 18.1.6 of London Protocol states that "develop or adopt, in consultation with competent international organizations, procedures referred to in article 8.2, including basic criteria for determining exceptional and emergency situations, and procedures for consultative advice and the safe disposal of matter at sea in such circumstances".

[2] United Nations Charter, Article 96, articulates that "(a) The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question. (b) Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities."

2. Japan's Discharge of Nuclear Wastewater into the Ocean Violates the United Nations Convention on the Law of the Sea (UNCLOS)

UNCLOS represents an important milestone in the development of the international legal system of the sea.[1] Japan ratified and acceded to the convention in 1995.

UNCLOS Article 194(2) provides that States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment. Article 195 stipulates that in taking measures to prevent, reduce and control pollution of the marine environment, States shall act so as not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another. Article 207, Paragraph 1, prescribes that States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources, including rivers, estuaries, pipelines and outfall structures. Article 210, Paragraph 5, specifies that dumping within the territorial sea and the exclusive economic zone or onto the continental shelf shall not be carried out without the express prior approval of the coastal State, which has the right to permit, regulate and control such dumping after due consideration of the matter with other States which by reason of their geographical situation may be adversely affected thereby; even if permitted, the dumping should be effectively regulated and controlled by the coastal State to avoid transboundary environmental harm.

In general, UNCLOS fundamentally prohibits dumping waste into the sea when it comes to marine environment protection. The convention explicitly stipulates that coastal States shall refrain from inflicting transboundary environmental harm, which is concordant with the "no-harm rule". For specific dumping practices, UNCLOS Article 198 provides "When a State becomes aware of cases in which the marine environment is in imminent danger of being damaged or has been damaged by pollution, it shall immediately notify other States it deems likely to be affected by such damage, as well as the competent international organizations."

Japan's discharge of nuclear wastewater also goes against the basic requirements for States Parties under UNCLOS, as it has decided to do so without consulting any potentially affected States in accordance with Article 210(5). Notably, UNCLOS Part XV focuses on the procedures to settle disputes, if any. In cases where no settlement has been reached by recourse to any peaceful means provided for in Part XV, Section 1 of UNCLOS, the dispute will be automatically transferred to the compulsory procedures under Section 1, where the case will be submitted to the international arbitral tribunal or court having jurisdiction.

[1] HUANG Huikang, *Ten Frontier Issues Relating to Recent Development in the Law of the Sea*, Journal of Boundary and Ocean Studies, January 2019, p. 6.

3. Japan's Discharge of Nuclear Wastewater into the Ocean Goes Against Customary International Law and the Basic Principles of International Law as Well

A. Japan's Discharge of Nuclear Wastewater into the Ocean Breaches the "No-Harm Rule" of Customary International Law

The "no-harm rule" is consistent with the Roman legal maxim "sic eutere tuo ut alienum non laedas", which means "use your own property in such a manner as not to injure that of another". This doctrine is an embodiment of the principle of State sovereignty in international relations: when a country uses its own territory, it shall not abuse its power in a manner that causes damage to the territory and people of other countries.

The "no-harm rule" is a basic principle of international environmental law, and also recognized as a customary international law.[1] To determine the existence or non-existence of a breach of the "no-harm rule", it is necessary to examine whether the State of origin has fulfilled its obligation of conduct under international law.[2] The obligation of conduct entails that when a State has met the requirements thereunder, it should not bear the State responsibility for any wrongful act even if it fails to prevent any harmful consequence from happening. The 1977 Draft Articles on State Responsibility distinguished between two kinds of international obligations, namely obligation of conduct and obligation of result.[3] However, some countries disagreed with this classification as the two are not distinctly different.[4] The 2001 draft deleted the distinction between the two. The deletion does not mean, however, that the two types of obligations have been abandoned by international law, as the Chinese delegation pointed out in its presentation on the topic of the ILC Articles: "When dealing with a breach of provisions relating to international obligations, it is necessary to make a proper distinction between 'obligation of conduct' and 'obligation of result'".[5] In the case that a State proves its performance of the obligation of conduct, the State should not bear the liability caused by a wrongful act even if the wrongful act results in damage, because the damage is attributable to accidents or force majeure.

Whether a State's obligation of conduct can meet the standards embodied by the "no-harm rule" depends on how it satisfies the requirements under the obligation of due diligence.[6] The obligation of due diligence is also called "obligation of reasonable care" or "obligation of due

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[1] [French] Alexandre Kiss, *International Environmental Law*, translated by ZHANG Ruosi, Law Press, 2000, p. 84.

[2] Gunther Handl, *State Liability for Accidental Transnational Environmental Damage by Private Persons*, American Journal of International Law, Vol. 74, 1980, p. 535-540.

[3] *Report of the International Law Commission on the work of its twenty-ninth session*, May 9 - July 29, 1977, A/32/10.

[4] The Nordic countries, France, Germany, Switzerland and the United Kingdom, among others, proposed the deletion of the provisions relating to this classification. International Law Commission, State Responsibility: Comments and Observations Received by Governments, A/CN.4/488, March 25, 1998, p. 60 & 61.

[5] Policy Research Office of the Ministry of Foreign Affairs of the People's Republic of China, *China's Diplomacy (2000 edition)*, World Knowledge Press, 2000, p. 686.

[6] See Malcolm N. Shaw, *International Law Eighth Edition*, Cambridge University Press, 2017, p. 648.

care".[1] Under international environmental law, the "no-harm rule" requires a State to be responsible not only for its own activities, but also for any public or private activities under its jurisdiction and control. A State should have the obligation to establish a regime monitoring activities that may have an impact on the environment of other States or on the one beyond the jurisdiction of any State.[2] With regards prohibition of transboundary pollution, the well-established standards of due diligence for now are: (a) the opportunity to take action or preventive measures; (b) the foresight or knowledge that an activity is likely to cause transboundary harm; (c) the appropriateness of the measures chosen to prevent damage or minimize risk.[3] With the continuous advancement of science and technology, activities that were previously considered absolutely risk-free under State jurisdiction may also have the potential to incur risks. Accordingly, the standard of due diligence should be more severe for riskier activities.[4]

Japan did not satisfy its due diligence obligation when planning to discharge nuclear wastewater into the ocean. First, since Japan's discharge of wastewater is a high-risk activity, it should have predicted the damage that it is likely to incur. According to the assessment report issued by the team of experts of International Atomic Energy Agency (IAEA), the treated tritium-containing wastewater from the Fukushima nuclear power plant still contains other radionuclides. In August 2018, environmental activists, based on the data published by TEPCO, found that the treated wastewater contained many other contaminants in addition to tritium, and the iodine-129 concentration in the wastewater was above the safe limit in 60 of all the tests conducted in 2017. There is also an excessive amount of strontium-90 in the nuclear wastewater.[5] In a report, Greenpeace says the contaminated water, in addition to radioactive isotope tritium, contains radioactive isotope carbon-14, which has the potential to damage human DNA.[6] According to a study published in the journal Science, the contaminated water, even if containing only high amounts of tritium, may also have potential health effects.[7] The completed studies alone can provide a wealth of data proving the dangers of Japan's nuclear wastewater. The Japanese government should have anticipated the damage that might result from continuing its plan to release the wastewater.

Second, alternative options are available for the Japanese government to dispose of the nuclear

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[1] Joanna Kulesza, *Due Diligence in International Law*, Leiden; Boston: Brill Nijhoff, 2016, p. 91.

[2] [French] Alexandre Kiss, *International Environmental Law*, translated by ZHANG Ruosi, Law Press, 2000, p. 83.

[3] Roda Verheyen, *Climate Change Damage and International Law: Prevention Duties and State Responsibility*, Leiden: Martinus Nijhoff Publishers, 2005, p.176.

[4] *Responsibilities and Obligations of States with Respect to Activities in the Area, Advisory Opinion, February 1, 2011*, ITLOS Report 2011, p. 10.

[5] *Foreign Ministry Spokesperson ZHAO Lijian's Regular Press Conference on April 14, 2021*, Ministry of Foreign Affairs of the People's Republic of China (visited on 22 April 2022), https://www.fmprc.gov.cn/web/fyrbt_673021/t1868895.shtml.

[6] *Fukushima water release could change human DNA*, Greenpeace warns (visited on 24 April 2022), https://edition.cnn.com/2020/10/24/asia/japan-fukushima-waste-ocean-intl-scli/index.html.

[7] See Ken O. Buesseler, *Opening the floodgates at Fukushima*, Science, August 7, 2020: Vol. 369, Issue 6504, p. 621-622.

wastewater. For example, more storage tanks could have been built around the Fukushima nuclear power plant to store more treated wastewater. In addition, at that phase, the Japanese government could have continued the study on the potential harm that may be caused by the wastewater, and could not have moved forward to deal with the contaminated water until a scientific consensus was reached. Without exhausting alternative measures, the Japanese government unilaterally determined, without notifying and consulting the countries that were likely to be affected, to release the nuclear wastewater, which was most cost-effective for Japan but would bring high risk of damage to the whole world. This also shows that the Japanese government, completely ignoring the opposition from the international community, has broken the bottom-line rules governing normal international relations. Aside from that, the Japanese government will set a precedent for dumping wastewater resulted from a serious nuclear accident into the ocean. Its decision is neither scientific nor moral, as it disrespects the ecological environment and endangers mankind.

As the harm that may be brought by the filtered nuclear wastewater is yet to be known, if any damage is incurred by Japan's arbitral discharge despite of opposition from many countries, Japan would have failed to fulfill the obligation of due diligence and violated the customary international law – "no-harm rule".

B. Japan's Discharge of Nuclear Wastewater into the Ocean Breaks the "Precautionary Principle"

Rio Declaration on Environment and Development, Principle 15, provides that "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." Similar provisions may also be found in the Convention on Climate Change. Notwithstanding the Rio Declaration is not compulsorily binding, the precautionary principle has been widely applied in international judicial practices. For example, the application of this principle has been discussed by the International Tribunal for the Law of the Sea in the Southern Bluefin Tuna Cases of 1999.[1] The cases have been cited by scholars as a "prime example" of establishing the precautionary principle in international law.[2]

The precautionary principle requires that when scientists have not reached a consensus on a certain issue, policymakers should examine the situation, and then make a decision based on the most reliable evidence, using the most trustworthy scientific method.[3] There is no definite scientific

[1] Southern Bluefin Tuna Cases (New Zealand *v.* Japan; Australia *v.* Japan), Order on Provisional Measures (ITLOS Cases Nos. 3 and 4). International Tribunal for the Law of the Sea, 27 August 1999.

[2] Tim O'Riordan & James Cameron, *Reinterpreting the Precautionary Principle*, Cameron May International Law & Policy, 2001, p. 113-142.

[3] [French] Alexandre Kiss, *International Environmental Law*, translated by ZHANG Ruosi, Law Press, 2000, p. 95.

consensus on whether Japan's release of wastewater is harmful. In order to dump the wastewater into the sea, the public relations campaigns of Japan only emphasized that the diluted, low-level radioactive wastewater met the so-called "discharge standards", without mentioning the discharge was continuous. What needs to be fully evaluated is that: even if the existing 1.25 million tons of contaminated water is released into the sea after being diluted, it does not mean that the harmful source will be completely removed, because 140 tons of contaminated wastewater will still come from the cooling water at Fukushim each day. If the so-called "diluted wastewater" is continuously dumped into the moving ocean, the concentration of radionuclides in the seawater will not remain at a constant, safe "low-level" when they accumulate over time. Although tritium has a half-life of only 12.5 years, there are other radioactive elements such as cesium in the filtered nuclear wastewater, which has a half-life of 29.1 years.[1] During the decade-long storage period of the nuclear contaminated water, the Japanese government did not conduct any animal experimentation to see the impact of the "filtered and diluted nuclear wastewater" on the safety and health of animals, nor did it carry out medical testing on humans. In the absence of experimental data, some Japanese officials even claim the treated radioactive water is safe to drink.[2] However, on 8 February 2022, the Japanese government instructed Fukushima Prefecture to suspend again the sale of scorpionfish caught in waters off the Prefecture, due to excessive radioactive substances detected in the area. Marine fish in that area have repeatedly been found to contain high-level radioactive substances.[3]

The harm of Japan's nuclear wastewater is not clear until now, as the scientific community has not reached a consensus on it yet. In the presence of alternative measures, Japan unilaterally insisted on starting the plan to release the wastewater into the sea, which obviously violates the precautionary principle.

II. Absence of Circumstances That Japan Can Invoke as Grounds to Preclude the Wrongfulness of Its Nuclear Wastewater Discharge

1. IAEA's "Endorsement" Cannot Be Invoked to Preclude the Wrongfulness of Japan's Breach of International Obligations

IAEA Director General once said he welcomed and supported Japan's decision to dispose of nuclear wastewater.[4] Such statement cannot be invoked to preclude the wrongfulness of an act

[1] See *Radioisotope Brief: Strontium-90,* (visited on April 24, 2022), https://www.cdc.gov/nceh/radiation/emergencies/isotopes/strontium.htm.

[2] *China to Japanese official: If treated radioactive water from Fukushima is safe, "please drink it",* (visited on April 24, 2022), https://www.washingtonpost.com/world/2021/04/14/china-japan-fukushima-water-drink/.

[3] *Japan suspends the sale of a marine fish with excessive radiation*, Xinhuanet (visited on April 23, 2022), http://www.news.cn/world/2022-02/08/c_1128344451.htm.

[4] *IAEA Ready to Support Japan on Fukushima Water Disposal, Director General Grossi Says*. IAEA (visited on April 24, 2022), https://www.iaea.org/newscenter/pressreleases/iaea-ready-to-support-japan-on-fukushima-water-disposal-director-general-grossi-says.

under the ILC Articles; the Japanese government, however, took the IAEA's findings as an endorsement of its release of contaminated water.

IAEA's "endorsement" cannot be invoked to preclude the wrongfulness of Japan's breach of its international obligations, due to the following reasons. First, it doesn't fall within the IAEA's authority to give any positive opinion on Japan's plan to release the wastewater. The IAEA is an international organization dedicated to the peaceful use of atomic energy, established according to a resolution adopted by the UN General Assembly. It seeks to accelerate and enlarge the contribution of atomic energy to peace, health and prosperity throughout the world. It shall ensure, so far as it is able, that assistance provided by it or at its request or under its supervision or control is not used in such a way as to further any military purpose.[1] The IAEA has effectively intervened in many past nuclear accidents, and has provided assistance as well. For example, soon after the Chornobyl nuclear power plant accident, the IAEA provided support to the Soviet Union in the area of environmental remediation, decommissioning and management of radioactive waste, to enhance the safety levels at the plant. It also worked closely with other UN organizations under the "International Chernobyl Project," which provided an assessment of the radiological consequences of the accident and evaluated protective measures.[2] However, its established functions do not empower itself to decide on Japan's plan to discharge the wastewater.[3] The IAEA is neither in a position to give a final opinion on how to dispose of the wastewater afterwards.

Second, the conclusion that the IAEA rendered on Japan's release of nuclear wastewater has no binding force on its Member States. The IAEA signed, based on the Statute of the IAEA, the IAEA Action Plan on Nuclear Safety and other documents, an agreement with the Japanese government on 8 July 2021. Under the agreed terms, expert teams would be sent to Japan to conduct safety reviews on its planned dumping. And the authority of the IAEA would be limited to examining: (a) the radiological characterization of the water to be discharged; (b) safety related aspects of the water discharge process; (c) the environmental monitoring associated with the discharge; (d) the assessment of the radiological environmental impact related to ensuring the protection of people and environment and (e) the regulatory control.[4] All these show that the team of international experts sent by the IAEA to conduct safety reviews at the moment act, in its capacity, in line with the Action Plan on Nuclear Safety and the said agreement between the IAEA and the Japanese government. With regards to Japan's disposal of nuclear contaminated water, the IAEA's authority

[1] The Statute of IAEA, Article 2: The Agency shall seek to accelerate and enlarge the contribution of atomic energy to peace, health and prosperity throughout the world. It shall ensure, so far as it is able, that assistance provided by it or at its request or under its supervision or control is not used in such a way as to further any military purpose.

[2] *The 1986 Chornobyl nuclear power plant accident*, IAEA (visited on April 24, 2022), https://www.iaea.org/topics/chornobyl.

[3] See YU Minyou & YAN Xing, *The Functions and Limitation of the IAEA in the Governance of Ocean Radioactive Waste: Focus on the Discharge of Nuclear Contaminated Water from Fukushima, Japan*, Pacific Journal, No. 5, 2022, p. 9.

[4] *IAEA to Review and Monitor the Safety of Water Release at Fukushima Daiichi*, IAEA (visited on April 24, 2022), https://www.iaea.org/newscenter/pressreleases/iaea-to-review-and-monitor-the-safety-of-water-release-at-fukushima-daiichi.

is clear: to supervise, assess, recommend and share information with the relevant countries in a timely manner. The Agency should share its information and report with the international community so that the pertinent countries could make their own judgement. Indeed, the IAEA is authoritative in its assessment or recommendation with respect to nuclear issues; however, pursuant to its legal authority as described above, a final conclusion, which was made by the experts sent by IAEA to assess Japan's discharge plans against the Action Plan on Nuclear Safety and the said agreement, should be considered merely as theoretical, even if the experts decide that Japan may release the wastewater into the sea. The IAEA Statute fails to specify the legal status of the Action Plan on Nuclear Safety for the Member States, nor does the latter stipulate its mandatory binding force on the Member States; in this connection, the conclusion of the peer review conducted against the said Action Plan is far from having the effect of binding all Member States under international law. In a similar vein, the IAEA's authority and conclusions, which are based on its agreement with the Japanese government, are not binding on other countries.

The IAEA, given its authority and role in Japan's release of nuclear wastewater, is not supposed to render a guaranteeing opinion, and its findings cannot cover the wrongfulness of Japan's discharges.

2. Absence of Consent by the Majority of States to Japan's Release of Nuclear Wastewater

As per Article 20 of the ILC Articles, if a State has given consent to the commission of a given act by another State, its consent will preclude the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.

The involvement of China and other States in the IAEA-led peer review expert team on Japan's wastewater discharge does not mean that China agrees with the discharge. Currently, the IAEA technical team includes experts from China and South Korea, which are invited to Japan to assess the discharge issue. Chinese Foreign Ministry Spokesperson WANG Wenbin has made it clear that China's support to the work of the technical team does not equal to its consent to Japan's wrongful policy of discharging the wastewater into the sea.[1] "Consent" shall be given explicitly, rather than implicitly; furthermore, the Chinese authorities have declared expressly that its participation in peer review should not be considered a consent to Japan's wrongful act. That is still the case even when the IAEA ultimately finds, upon the completion of peer review, that the Japanese government may release the contaminated water.

[1] *Foreign Ministry Spokesperson WANG Wenbin's Regular Press Conference on February 15, 2022*, Ministry of Foreign Affairs of the People's Republic of China (visited on April 24, 2022), https://www.fmprc.gov.cn/web/fyrbt_673021/jzhsl_673025/202202/t20220215_10642488.shtml.

Japan's discharge of nuclear wastewater has not received the "consent" from Non-IAEA Member States. Even if a final resolution, which allows Japan to release filtered wastewater into the sea, is unanimously agreed by all the IAEA Member States at the IAEA General Conference, there is still a serious problem that cannot be overlooked: The States that are most likely to be harmed by the discharge are Pacific littoral and coastal States. In addition to the United States, Tonga, East Timor, Federated States of Micronesia, Kiribati, Nauru, Solomon Islands, Tuvalu, Vanuatu and Peru are not among the 173 Member States of the IAEA. In line with the principle of customary international law that a treaty cannot bind third parties without their consent, the conclusions of a peer review conducted against the Action Plan on Nuclear Safety and a resolution of the IAEA General Conference are only valuable for reference, but not binding for Non-Member States.

Up until now, Japan's discharge plan has not been passed by the United Nations General Assembly or conferences of any other international organizations, which implies that it has not been "agreed" by most States. A couple of countries, such as the United States, have individually and explicitly expressed their support for Japan's release of the wastewater, which can be considered a "consent" under international law; therefore, these countries cannot hold Japan responsible for its wrongfulness in the future.

3. Lack of "Necessity" or "Force Majeure" in the Case of Japan's Discharge of Wastewater

Article 23 of the ILC Articles provides that the wrongfulness of an act of a State not in compliance with an international obligation of that State is precluded if the act is due to force majeure.

Force majeure means the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State.[1] Japan's plan to release the contaminated water is not due to "force majeure". It is true that Japan's nuclear wastewater was caused by the damage that the tsunami brought to the nuclear power plant. In this connection, "force majeure" may be invoked as a ground for precluding the wrongfulness of the leakage of nuclear wastewater at the early phase of the damage. Nonetheless, the "force majeure" of tsunami may not apply to many years later when Japan decided to release the wastewater into the sea. If the circumstance preventing a State's performance of its international obligation disappears, the ground it invoked to preclude the wrongfulness of its act shall not affect its continued compliance with the assumed international responsibility thereafter.[2] Japan should resume the performance of its international obligations when the force majeure no longer exists, thus it is not allowed to arbitrarily release the wastewater.

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[1] JIA Bingbing, *Public International Law: Its Interpretation and Application in Time of Peace*, Tsinghua University Press, 2015, p. 389.

[2] J. Crawford, *The International Law Commission's Articles on State Responsibility*, Cambridge: CUP, 2002, 160.

Similarly, "necessity" under ILC Articles, Article 25, may not be invoked as a ground for precluding the wrongfulness of Japan's wastewater discharge, because this circumstance may not be invoked unless the wrongful act does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.[1] Nevertheless, as discussed above, once Japan's contaminated water is dumped into the sea, it may endanger the life and physical safety of all human beings.

4. Whether to Discharge or not to Discharge Filtered Nuclear Wastewater Is not a Matter Within the Domestic Jurisdiction of a State

On an online press conference held in Tokyo, Japan on 18 Feb 2022, Lydie Evrard, IAEA Deputy Director General, said the plan to discharge the wastewater was made by the Japanese government, the IAEA was only invited by the latter to conduct a safety review and had no right to confirm or oppose issues relating to the safety of nuclear energy. The IAEA does not have the right to decide on the plans to discharge the wastewater into the sea, but does assess the pertinent safety standards and other matters.[2] According to the principle of non-interference in the internal affairs of States, if a matter is deemed to be within the domestic jurisdiction of a State, the international community cannot interfere in it and that State has the right to decide for itself.

Obviously, whether or not to discharge nuclear contaminated water is neither a "matter within domestic jurisdiction", nor Japan's "internal affairs", as it affects the marine environment and the health and safety of all human beings; thus it should not be decided solely by Japan.

Article 2, Paragraph 7, of the Charter of the United Nations defines "internal affairs" as "matters which are essentially within the domestic jurisdiction of any state". The Permanent Court of International Justice, in its advisory opinion on the Nationality Decrees of Tunis and Morocco case, addressed the interpretation of "matters within the domestic jurisdiction". In the opinion of the Court, matters solely within the domestic jurisdiction refer to matters that are not, in principle, regulated by international law. The question whether a certain matter is within the jurisdiction of a State is a relative question, which depends upon the development of international law.[3] For example, the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly in 1948, articulates that the crime of genocide is "a crime under international law", which does not fall within the domestic jurisdiction of the State concerned.

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[1] JIA Bingbing, *Public International Law: Its Interpretation and Application in Time of Peace*, Tsinghua University Press, 2015, p. 390.

[2] *IAEA Completed Its First On-Site Investigation Concerning Japan's Plan to Discharge Nuclear Wastewater*, Xinhuanet (visited on April 24, 2022), http://www.news.cn/2022-02/18/c_1128393004.htm.

[3] *Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion of 7 February 1923*, ICJ, https://www.icj-cij.org/public/files/permanent-court-of-international-justice/serie_B/B_04/Decrets_de_nationalite_promulgues_en_Tunisie_et_au_Maroc_Avis_consultatif_1.pdf. p. 24.

Japan's release of nuclear wastewater is not a matter within domestic jurisdiction. As mentioned above, when a country uses its own territory, it shall not abuse its power in a manner that causes damage to the territory of other countries. Japan's wastewater discharge may endanger the life, health and safety of all human beings. Therefore, Japan has no right to unilaterally decide on whether to or not to dump the wastewater into the sea, or how to dispose of the contaminated water. Instead, it should finalize, taking into account the opinions of the States concerned, a solution for the disposal of the water under the supervision of the international community.

III. Solution to the Issue Relating to Japan's Release of Nuclear Wastewater

1. Opinions of the Relevant Neighbors Should Be Respected in the Disposal of Nuclear Wastewater

Japan has announced the plan to release the filtered nuclear wastewater, but has not yet implemented it. At this stage, we call upon Japan to consult with all Pacific littoral and coastal States to obtain their consent, in addition to the discharge safety peer review conducted in accordance with the Action Plan on Nuclear Safety, which are procedures required to be gone through prior to the discharge of such special "nuclear wastewater". Substantive justice is possible only when procedural justice is ensured.

As for substantive issues, the Japanese government and all the potentially affected States should have the right to participate in consultations and discussions under the auspice of the competent international organizations, with an aim to solve the problem. This is the basis of procedural justice. If Japan releases nuclear wastewater into the ocean with the consent of only a handful of countries, or based solely on the IAEA peer safety review carried out according to the Action Plan on Nuclear Safety, then it must be crazy whose behavior is beyond scientific reasoning and against international law; there is no scientificity and reasonableness in such conducts.

The dispute over any substantive matter should be resolved through consultation. Tritium, for example, has a "half-life" of 12.3 years, which means that it takes 12.3 years for tritium to lose half of its radioactivity. Apart from tritium, the filtered wastewater also contains radioactive cesium with a half-life of 29.1 years. Japan, facing the predicament with respect to the storing of nuclear wastewater, is eager to release the treated water, which is certainly understandable to the international community. However, Pacific coastal or littoral states would certainly demand that such land-based wastewater storage be not released at least until the still-remaining radioactive substances have passed their "full lives". The detailed disposal plan, including the standard of radioactive content of the treated wastewater, the required period for land-based storage of wastewater and the supervision mechanism, should best be the one reached by consensus. Japan could also avoid releasing contaminated water into the ocean by building more storage tanks and

recycling it. Importantly, ensuring the safety of the international marine environment is the legal obligation of all States of the international community, including Japan. Furthermore, while urging the Japanese government to strictly perform its obligations under international law, the international community is also morally obliged to assist Japan in the proper disposal of nuclear wastewater.

2. Application of the Principle of Peaceful Settlement of Disputes to the Dispute over the Discharge of Nuclear Wastewater

If an international dispute is between the subjects of international law, it primarily involves the inconsistency of legal or de facto claims between States, or any contradiction or conflicts of political interests and certain rights. Peaceful settlement of international disputes is a rudimentary principle in international law. The Charter of the United Nations, Article 2, specifies the principles of international law that shall be observed by the United Nations and its Members, and Article 2, Paragraph 3, stipulates that "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." The peaceful means to settle international disputes mainly refer to political and diplomatic means, and legal ones as well: the former includes negotiation, investigation and mediation, while the latter includes international arbitration and international judicial proceedings.

If a consensus fails or Japan continues its discharge of wastewater even after the means of political and diplomatic negotiation are exhausted, the interested countries with a high probability of being affected should be entitled to bring Japan before the ICJ. The legal grounds for filing a lawsuit against Japan are the provisions of UNCLOS, the London Protocol and the Statute of the IAEA relating to release of nuclear wastewater into the ocean, which also provide the basis for the ICJ's jurisdiction in this case.

First, Part XV of UNCLOS stipulates that if a State Party fails to resolve a dispute after exhausting all means of diplomatic negotiation, it may refer the dispute to compulsory dispute settlement procedures, which includes international arbitration and international judicial process. Second, concerning settlement of disputes, the IAEA Statute provides, "A. Any question or dispute concerning the interpretation or application of this Statute which is not settled by negotiation shall be referred to the International Court of Justice in conformity with the Statute of the Court, unless the parties concerned agree on another mode of settlement."

Last, with regards to the settlement of disputes, Article 16, Paragraph 2, of the London Protocol provides "If no resolution is possible within twelve months after one Contracting Party has notified another that a dispute exists between them, the dispute shall be settled, at the request of a party to the dispute, by means of the Arbitral Procedure set forth in Annex 3, unless the parties to the dispute agree to use one of the procedures listed in paragraph 1 of Article 287 of the 1982 United Nations Convention on the Law of the Sea. The parties to the dispute may so agree, whether

or not they are also States Parties to the 1982 United Nations Convention on the Law of the Sea."

In addition to the compulsory procedures above, a quasi-legal means can also be used to settle disputes. With regards to settlement of disputes, the Statute of the IAEA further articulates, "The General Conference and the Board of Governors are separately empowered, subject to authorization from the General Assembly of the United Nations, to request the International Court of Justice to give an advisory opinion on any legal question arising within the scope of the Agency's activities."

IV. Conclusion

The Japanese government pins its hope on the peer review, conducted by the IAEA against the Action Plan on Nuclear Safety, to assess the safety of its discharge of filtered nuclear wastewater. It announced, without consulting the States that are likely to be affected thereby, that it would start discharging the wastewater that still contained radioactive tritium and cesium into the ocean after two years from 2021. Its release of wastewater would violate international law. No recognized standard and regulation with scientific merit can be found in the existing international legal system that addresses how to deal with the continuous accumulation of nuclear wastewater. The difficulty we are facing today is how to tackle the problem on how to discharge Japan's filtered nuclear wastewater in a scientific, reasonable and compliant manner, which will have a great impact on the international legal system regarding environmental protection that will help maintain a healthy marine ecosystem and a safe environment for human beings

As the oceans are a common property of mankind, building a maritime community with a shared future and ensuring the sustainable development of the blue ocean are of great significance to the survival and development of humanity. The oceans are not the sole property of any country. An ill-judged action can damage the global oceans and bring irreversible risks. The Japanese government should not rush to release contaminated water without exhausting alternative options.

In view of the fact that most of the countries potentially affected by Japan's wastewater discharge are those bordering the Pacific Ocean, it is best to resolve the dispute through peaceful means under the auspices of the competent international organizations. In addition, the international community should also cooperate to assist Japan in solving the problem and provide a feasible treatment plan, which is also embodied in the initiative of building a community with a shared future for mankind.

Translator: XIE Hongyue

从《泰坦尼克号泰坦尼克协定》看水下文化遗产国际治理

王晶*

摘要：上世纪 80 年代发现和打捞“泰坦尼克”号沉船引发的全球关注促发了深海探测、海事裁判、水下文化遗产保护等许多领域的发展和变革，包括限制海事法传统原则适用的立法和司法实践，并促进了联合国教科文组织 2001 年《保护水下文化遗产公约》的出台。从《泰坦尼克号海事纪念地法》到《泰坦尼克号协定》，美国用时三十年才将其国内立法理念推进为国家管辖范围以外海域历史沉船保护的规则，也显示出其国家行为如何影响了公海水下文化遗产保护的理念、方式和国际治理的规则。

关键词：“泰坦尼克”号打捞；公海历史沉船；海事纪念地；原址保护；《水下公约》

今年是“皇家邮轮泰坦尼克号”沉没 110 周年，这艘位于公海海底的沉船对海事裁判和水下文化遗产立法产生了根本性影响。《皇家邮轮“泰坦尼克”号协定》（Agreement Concerning the Shipwrecked Vessel R.M.S. Titanic，以下简称《泰坦尼克协定》）自 2019 年起开放签署并生效，是除《保护水下文化遗产公约》（Convention on the Protection of the Underwater Cultural Heritage，以下简称《水下公约》）之外的另一部水下文化遗产保护多边条约。作为公海水下文化遗产保护的范例，学界对“泰坦尼克”号案明确发现物法不适用于历史沉船、限制适用救捞法背后的美国国内立法以及该国际条约通过的影响的关注不多。现有研究也尚未关注到《泰坦尼克协定》生效对打捞公司主张提取沉船内文物、美国政府要求介入海事诉讼的影响。已有研究较少关注与水下文化遗产保护密切相关的打捞方式，《泰坦尼克协定》要求打捞作业应得到成员国政府许可，显示出历史沉船打捞逐渐受专业标准规范的趋势。

历史沉船身份的证明较为困难。沉没于公海则不受国家行政法规约束，除国际海底管理局（International Seabed Authority）规章中的文物报告条款、[1]1989 年《国际救助公约》

* 本文系国家社科基金“维护国家海洋权益”研究专项“我与 21 世纪海丝沿线主要国家海上合作维权策略研究”（项目批准号：17VHQ012）；教育部哲学社会科学研究重大课题攻关项目“中国海洋遗产研究”（项目批准号：19JZD056）的阶段性成果之一。

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[1] 《“区域”内多金属硫化物探矿和勘探规章》第 8 条、第 37 条，《“区域”内富钴铁锰结壳探矿和勘探规章》第 8 条、第 37 条，《“区域”内多金属结核探矿和勘探规章》第 8 条、第 35 条。

（International Convention on Salvage）对文物允许保留适用，[1]以及《水下公约》成员国的报告义务外，基本在海事法范畴内处置公海水下文化遗产。一国海事法院在缺乏国际同意的前提下难以有效管辖公海水下文化遗产，而规定为全人类利益合作保护水下文物的 1982 年《联合国海洋法公约》（United Nations Convention on the Law of the Sea）也未规定不同权利的层级、《水下公约》的协调国机制也缺乏具体协商规则。因此，国家实践对规范公海历史沉船打捞具有重要意义。已有研究侧重《泰坦尼克协定》规则，本文探究美国如何推动和通过《泰坦尼克协定》引导国家管辖范围以外海域的历史沉船保护，以及对我国建立海洋和文化国际治理话语权有何启示。

一、“泰坦尼克”号沉船的法律地位

这艘英国注册邮轮所属和运营的英国白星航运公司（White Star Line）是一家美国公司的附属公司。沉船事件发生后英国保险公司进行了赔付。1993 年，泰坦尼克风险有限合伙公司（Titanic Ventures Limited Partnership）的权益继承人泰坦尼克号公司（R.M.S. Titanic, Inc.）向弗吉尼亚东区联邦法院主张专属打捞权，法院在报纸上刊登沉船扣押令，一家保险公司提出异议后被法院驳回，后泰坦尼克号公司与其达成协议，[2]故无人主张对该沉船的所有权。“泰坦尼克号”于 1912 年沉没在纽芬兰海岸外 340 海里处，为加拿大外大陆架；1500 余名遇难者多数是英国人和美国人，也有法国乘客。这四个沉船相关国家应依照《联合国海洋法公约》第 149 条、第 303 条规定，为了全人类的共同利益，合作保护区域内发现的考古和历史物品。[3]但该公约未规定物主、来源国、文化发源国、考古历史起源国的权利内容，以及各方权利冲突时的处置方式，缺乏落实机制。

“泰坦尼克号”沉船的法律位置源自其独特价值，它在国际范围内具有海洋墓地和文化遗产纪念地的双重价值及法律位置。“泰坦尼克”号沉没作为和平时期伤亡最重的一次海难，事故后通过了《海上人命安全公约》（Convention for Safety of Life at Sea）等全球海事标准和规范，并设立了国际海事组织（International Maritime Organization，以下简称 IMO）。“永不沉没”的全球最大最豪华邮轮的建造来自当时的特殊社会需求，具有历史价值。海难中体现出的崇高牺牲精神，以及灾难带给社会的冲击和对工业科技的反思，使这艘沉船承载着物之外的人道价值和后世哀思，具有独特的文化和社会价值。

1985 年这艘知名沉船的发现让国际社会警醒到海洋科技发展破坏水下文化遗产的可能性

[1] 《国际救助公约》第 30 条（d）项规定：如果“有关财产为位于海床上的具有史前的、考古的或历史价值的海上文化财产”，成员国可以做出保留。

[2] R.M.S. TITANIC, INC., successor-in-interest to Titanic Ventures, limited partnership, Plaintiff, *v.* The Wrecked And Abandoned Vessel, Its Engines, Tackle, Apparel, Appurtenances, Cargo, etc., 924 F. Supp. 714 1994 (ED Va, 1994).

[3] 《联合国海洋法公约》第 149 条：在“区域”内发现的一切考古和历史文物，应为全人类的利益予以保存或处置，但应特别顾及来源国，或文化上的发源国，或历史和考古上的来源国的优先权利。第 303 条：在海洋发现的考古和历史文物：1. 各国有义务保护在海洋发现的考古和历史性文物，并应为此目的进行合作。

和制定保护规则的必要性。《国际救助公约》使避免打捞历史沉船等水下文化遗产成为国际法规则，有力补充了《联合国海洋法公约》对水下文化遗产的原则性规定。“泰坦尼克”号的打捞活动还促使国际法学会（ILA）拟定 1994 年《保护水下文化遗产公约草案》，联合国教科文组织在此基础上于 2001 年通过了《水下公约》。2000 年，英美法加通过《泰坦尼克协定》，协定即刻对英国生效，并成为有效的开放性签署条约，也是首次就保护公海历史沉船问题形成的具体国际规则。

二、“泰坦尼克”号沉船《泰坦尼克协定》的形成过程

1.美国提出沉船作为海事纪念地应原址保护的理念

（1）通过国内立法确定沉船法律定位

1985 年，美法联合考察队发现了“泰坦尼克”号沉船，美方伍兹·霍尔海洋研究所（Woods Hole Oceanographic Institution）的罗伯特·巴拉德博士（Robert Ballard）认为沉船保存完好且易损，考虑到亡者的安宁，不应干预船体，应仅许可在船体外围提取物品并建立博物馆，以遥控潜器录制船体内部的方式向公众开放。考虑到沉船独特的全球性历史意义，以及其位于国际海域、不适用任何既存的国内法进行保护的现实问题，并意识到打捞可能对沉船造成的潜在破坏，沉船发现当月，美国众议院即着手后续处置的法案。美国国会认可“泰坦尼克”号沉船是具有国家和国际文化和历史重要性的遗址[1]，1986 年美国制定了《泰坦尼克号海事纪念地法》（R.M.S. Titanic Maritime Memorial Act）。

（2）确定国际协商目的和内容

《泰坦尼克号海事纪念地法》第 2 条指出国会认可沉船的深海科研开发、海洋科学工程应用意义，以及文化和科学重要性。同条 b 款第四项和第 7 条规定在泰坦尼克协定或指南确定之前禁止扰动、打捞沉船。按照该法第 5 条、第 6 条的规定，国家海洋与大气管理局（NOAA）受派进行国际指南的咨询，国务卿进行协定谈判，其中协定与指南是相一致的。美国开始与英国、法国、加拿大等国协商签订协定，以纪念在海难中的逝者，保护沉船遗址的科学、文化和历史价值。

（3）国家间对沉船保护的理念冲突

①不扰动和科学研究

为避免盗捞，巴拉德博士于 1986 年考察时在沉船上放置了纪念物铜牌“Any who may come hereafter leave undisturbed this ship and her contents as a memorial to deep water exploration”（“后来者不要扰动作为深海探索纪念物的这艘沉船及其船载物”）。同年，科学家和海洋开发者进行了沉船辩论，乔治·巴斯（George Bass）博士表示沉船应为公众和后代享

[1] *HR Report on HR 99-3-3*, 99th Cong. 1st Sess., 1985, p. 4-8.

用保护起来，不应因个人私利而受到扰动和破坏，历史纪念物和遗址保护并不因位于陆上或水下而有所差异。[1]

1991 年，加拿大-俄罗斯-美国联合探险队使用深潜器探索“泰坦尼克”号沉船的海洋环境，并拍摄了纪录片。探险队从沉船外围提取了钢铁样品，并通过冶金测试发现高脆度船材在寒冷水域失去延展性与沉没有关，并收集了数百种鱼类、岩石、细菌、珊瑚和岩土样本，但没有提取任何沉船物品。NOAA 后续监测显示“泰坦尼克”号遗址暴露在海洋环境中的有机物已消失，而船体内在恒压低温低氧无水流状态下，有机物可保存数百年。[2]

②打捞展示

美国政府禁止进入“泰坦尼克”号船体和暂停打捞的措施与法国政府的想法并不一致，法国倾向于取回文物向世人分享对这场灾难的记忆。1987 年，法国海洋开发研究所（French Institute for Research and Exploitation of the Sea/INFREMER）在一项受英国的海洋调查勘探有限责任公司（Ocean Research Exploration, Ltd.）资助的考察中，用鹦鹉螺号（Nautile）机器手从“泰坦尼克”号沉船取出了一些物品，双方约定所发现的物品禁止出售并应进行公开展览。[3]同年，美国的泰坦尼克冒险有限合伙公司和法国海洋开发研究所一起从沉船遗址打捞了约 1800 件物品并带至法国，包括撞上冰山前发出警告的瞭望塔铃、船长扩音器、头等餐厅的瓷器和装有现金、金币和珠宝的皮包，租船协议规定应作为整体收藏出售给公开展览机构的人工制品不包括黄金、现金、珠宝等。

2.艰难推进形成《泰坦尼克协定》案文

（1）美国立法司法限制历史沉船打捞

1987 年《被弃沉船法》（Abandoned Shipwreck Act）第 6 条明确领海内列入《国家历史遗迹名录》（National Register of Historical Places）或符合列入标准的沉船等三类无主沉船的所有权属于联邦政府并转移给沉船所在州。[4]这部法案虽然不涉及领海外沉船的所有权，但国会明

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[1] James A. R. Nafziger, *The Titanic Revisited*, Journal of Maritime Law and Commerce, vol. 30, 1999, p. 312.

[2] *R.M.S. Titanic 2004 Expedition*, NOAA (visited on May 1, 2022), https://oceanexplorer.noaa.gov/explorations/04titanic/welcome.html.

[3] Nafziger, *Finding the Titanic: Beginning an International Salvage of Derelict Law at Sea*, Colum.-VLA Journal of Law & Arts, vol. 12, 1988, p. 339.

[4] Abandoned Shipwreck Act, Section 6: RIGHTS OF OWNERSHIP.
(a) UNITED STATES TITLE.
The United States asserts title to any abandoned shipwreck that is -
(1) embedded in submerged lands of a State;
(2) embedded in coralline formations protected by a State on submerged lands of a State; or
(3) on submerged lands of a State and is included in or determined eligible for inclusion in the National Register.
(b) Notice of shipwreck location, eligibility determination for inclusion in National Register of Historic Places
The public shall be given adequate notice of the location of any shipwreck to which title is asserted under this section. The Secretary of the Interior, after consultation with the appropriate State Historic Preservation Officer, shall make a written determination that an abandoned shipwreck meets the criteria for eligibility for inclusion in the National Register of Historic Places under clause (a)(3) of this section.
(c) TRANSGER OF TITLE TO STATES.

确了公共利益最大化的立法宗旨，尤其是商船和渔业委员会(Congressional House Committee on Merchant Marine and Fisheries)表明救捞法和发现物法不利于海洋遗产保护。[1]同时，随着一系列考古立法，与“泰坦尼克”号系列案同时期的海事裁判在强调抛弃等因素与海事一般规则一致性的同时，也更为重视沉船的公共利益，把考古注意义务作为尽责任打捞的表现。

自 1994 年起，美国联邦法院给予泰坦尼克号公司对“泰坦尼克”号沉船的专属打捞权，[2]避免不同打捞者竞相打捞破坏沉船。但打捞活动须一直持续，以保持占有打捞者（salvor in possession）身份。法院对打捞权的限制是不进入船体、不出售打捞物，因打捞物商业价值有限而试图把专属打捞权扩展到拍摄和旅游等方面。[3]

（2）“泰坦尼克”号沉船打捞引出水下文化遗产国际保护契机

泰坦尼克号公司和法国海洋开发研究所一起在英格兰国立海洋博物馆、美国、法国等进行了展览，但也有博物馆因泰坦尼克号公司记录、整体保存、分析物品和公开数据来自不当打捞而拒绝展览。[4]泰坦尼克号公司及其前身至 1994 年已打捞了 3000 多件物品，同时其它探险活动也未停止，这艘知名沉船的打捞乱象引起了国际社会对历史沉船保护的关切。

①《格林威治宣言》

法国、英国和加拿大对 1986 年美国提出的泰坦尼克协定一直没有反馈，直至 1995 年以沉船打捞和英国国立海事博物馆展览为促因，四国就协定和指南开始交流。后在该博物馆邀请法学家、考古学家、历史学家、科学家和打捞者讨论“泰坦尼克”号等历史沉船保护和管理的格林威治会议（Greenwich Conference）上，才有除美国以外的国家对形成泰坦尼克协定表示感兴趣，并会上讨论了《水下公约草案》。次年英国国立海事博物馆在国际海事组织（伦敦）组织的第二次会议上形成了关于水下文化遗产管理原则的《格林威治宣言》（Greenwich Declaration），认可了水下文化遗产对人类的重要性，还明确如果对其扰动和提取是非基于最

The title of the United States to any abandoned shipwreck asserted under subsection (a) of this section is transferred to the State in or on whose submerged lands the shipwreck is located.

(d) EXCEPTION.

Any abandoned shipwreck in or on the public lands of the United States is the property of the United States Government. Any abandoned shipwreck in or on any Indian lands is the property of the Indian tribe owning such lands.

(e) RESERVATION OF RIGHTS.

This section does not affect any right reserved by the United States or by any State (including any right reserved with respect to Indian lands) under—

(1) section 1311, 1313, or 1314 of this title; or

(2) section 414 or 415 of title 33.

(Pub. L. 100–298, §6, Apr. 28, 1988, 102 Stat. 433.)

[1] *HR Report No. 100-514*, Pt. 2, 1988, p.8.

[2] R.M.S. Titanic Inc *v.* Wrecked and Abandoned Vessel, 924 F. Supp. 714 (ED Va, 1994) “default judgment is entered against all potential claimants who have not yet filed claims [to the Titanic or its artifacts] and such claims are therefore barred and precluded so long as [R.M.S.T] remains salvor in possession.” 1994 年法院宣布原告泰坦尼克号公司是“泰坦尼克”号沉船占有打捞人的决定于 1999 年 3 月 24 日、2002 年 4 月 12 日和 2006 年 1 月 31 日被第四巡回法院多次确认。

[3] R.M.S Titanic Inc *v.* Wrecked and Abandoned Vessel, 1996 WL 650135 (ED Va, 1996); R.M.S Titanic Inc *v.* Wrecked and Abandoned Vessel, 9 F. Supp. 2d 624, 626 (ED Va, 1998). R.M.S Titanic, Inc *v.* Haver, 171 F. 3d 943, 970 (4th Cir, 1999).

[4] Broad, *Show of Titanic Items is Attacked*, N.Y. Times, May 11, 1997.

佳考古实践和国家主管机构指导的，将造成不可挽回的损失。会议还讨论了由 UNESCO 制定国际文件事宜。

②美加英法形成《泰坦尼克协定》

四国政府代表谈判开始于 1997 年，1999 年签署了《有关皇家邮轮泰坦尼克号沉船泰坦尼克协定的最后备忘录》（The Final Minutes of the International Agreement Concerning the Shipwrecked Vessel R.M.S. Titanic），2000 年形成最终案文，包括 12 项条款和一个附件。

《泰坦尼克协定》第 2 条规定该沉船是海难纪念地和具有国际重要性的历史沉船。协定旨在避免对人类遗骸的扰动、保护沉船和物品完整性、提取的物品不散失并向公众开放；成员国认可原址保护是最有效的保护方式，同时，在遵守附件的前提下，基于教育、出于科学或文化利益及避免遗址或物品受明显威胁，可以进行提取和发掘。第 4 条规定进入船体不应扰动物品和人类遗骸，以遗址发现物为目标的活动要在可行的最大限度内遵照附件；成员国赋予专属打捞权不应违背非侵入性。

《泰坦尼克协定》第 4 条还规定成员国应采取合理行动依照本协定对其国民和悬挂该国国旗的船舶采取措施，禁止在其港口、领海等领土开展不符合本协定的行为。考虑到其它国家的国民和船舶也可以到达“泰坦尼克”号沉船遗址，以及沉船沉物也可能被打捞或非法取出后到达其它国家，因此，更多成员国的加入有利于规定的落实，故也通知了俄罗斯、日本等拥有深海技术能够到达该遗址的国家。

3.《泰坦尼克协定》创设的新规则及其意义

《泰坦尼克协定》于 2003 年底开放签署，规定两个国家签署并受约束后生效。英国于 2003 年签署，基于其 1997 年《航运和海洋安全法》（Merchant Shipping and Maritime Security Act）关于保护英国领海外非军事沉船的双多边协定生效的条款（第 24 条）即对该国生效。美国于 2004 年签署并声明在通过实施性立法后对其生效。

（1）《泰坦尼克协定》附件与《水下公约》附件一致

《泰坦尼克协定》附件参照了 1996 年国际古迹遗址理事会（International Council on Monuments and Sites/ICOMOS）《水下文化遗产保护管理国际宪章》（International Charter on the Protection and Management of Underwater Cultural Heritage）、美国内务部《考古和历史保护标准》（Standards and Guidelines for Archeology and Historic Preservation）、美国国家公园局《被弃沉船法指南》（Abandoned Shipwreck Act Guidelines）。此《宪章》形成了 UNESCO 2001 年《水下公约》附件《关于开发水下文化遗产活动的规章》（Rules Concerning Activities directed at Underwater Cultural Heritage, 以下简称《规章》）。

《泰坦尼克协定》附件和 NOAA《指南》与《水下公约》附件的一致性，使美国历史沉

船打捞的司法实践也体现出了与国际先进理念和规则的一致性。1997 年马莱克斯国际有限公司案（Marex International , Inc. *v.* The Unidentified, Wrecked and Abandoned Vessel[1]）的判决指出《宪章》及《水下公约》附件可作为判断打捞是否满足最低科学要求的标准。

（2）形成具有强制力的《皇家邮轮泰坦尼克号沉船研究、勘探和打捞指南》

基于 1996 年 ICOMOS《宪章》和美国国家公园局联邦考古项目标准，NOAA 于 2000 年制定了《皇家邮轮泰坦尼克号沉船研究、勘探和打捞指南》（Guidelines for Research, Exploration and Salvage of R.M.S. Titanic，以下简称《指南》），明确了原址保护优先的政策，授权提取或发掘应仅基于教育、科学、文化利益的合理性，并明确避免打扰人类遗存、非破坏性技术和非侵入性调查优先于提取或发掘、最小负面影响、记录活动并向公众推广历史、文化和考古信息等理念和作业方式。鉴于《泰坦尼克号海事纪念地法》规定的《泰坦尼克协定》与《指南》之间的关系，《指南》的一些政策具有强制力。

（3）联邦法院基于公共利益适用救捞法、打捞活动和打捞物受 NOAA 规制

《泰坦尼克协定》确定了“泰坦尼克”号沉船的性质，进而明确了不扰动人类遗骸和保护文化遗产完整性的宗旨，继而在成员国间统一了对原址保护方式的认同，以及发掘提取的前提和进入沉船的活动限制。泰坦尼克号公司因打捞前景受损，于 2004 年向地区法院请求过渡性货币性打捞回报和发现物所有权。第四巡回庭 2006 年在判决中指出应出于利于公共利益的目的适用救捞法。[2]2007 年底，泰坦尼克号公司提起打捞报酬诉讼，后按法院要求提交了完整收集、按照《指南》《泰坦尼克协定》及其附件和考古资料保存联邦标准来管理打捞物的承诺。获得打捞报酬的条件是遵守《泰坦尼克号海事纪念地法》，由 NOAA 局长代表公共利益监督打捞作业，打捞物受打捞者与 NOAA 和国务院协商后由法院形成的永久性承诺和条件的规制。[3]

美国海事法院对“泰坦尼克”号沉船的判决首次指出对公海无所有人主张的历史沉船不适用发现物法。此前，法院虽然认为基于发现物法的占有会导致海盗般的打捞行为，但仍适用并给予打捞者对公海打捞文物的所有权。[4]保护“泰坦尼克”号沉船历史价值的裁判被誉为美国海事法院皇冠上的明珠，对以往判例中海事权利和公共利益冲突的裁量产生了根本性影

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1 Marex International, Inc. *v.* The Unidentified, Wrecked and Abandoned Vessel, 952 F. Supp. 825 (S.D. Va 1997)

2 R.M.S. Titanic, Inc. *v.* Wrecked & Abandoned Vessel, 435 F.3d 521, 526 (4th Cir. 2006), para. 25-26. “除修正传统救捞法外，法院就打捞物权源和使用方式的命令应增进打捞作业的历史、考古和文化目的。地区法院以利于所有者（或者无所有者）和公共利益，同时给予打捞者合理回报的方式适用传统救捞法原则。”

3 R.M.S. Titanic, Inc. *v.* Wrecked & Abandoned Vessel, 742 F. Supp. 2d 784, 792 (E.D. Va. 2010), 804 F. Supp. 2d 508, 509 (E.D. Va. 2011).

4 Martha’s Vineyard Scuba Headquarters, Inc. *v.* The Unidentified, Wrecked And Abandoned Steam Vessel, etc., 833 F. 2d 1059 (1st Cir., 1987)

响，后续判例进一步形成了适用《被弃沉船法》时不适用救捞法的原则[1]。

（4）《泰坦尼克协定》生效使成员国的打捞活动需行政许可

《泰坦尼克协定》于 2019 年 11 月对美国生效，满足了该条约的生效条件。缔约国按照《泰坦尼克协定》第 4 条的属人管辖通过行政许可对公海沉船的打捞行为进行规范，即泰坦尼克号公司在沉船遗址打捞除获得法院同意外，还需向作为主管机构的 NOAA 申请批准，而 NOAA 有权拒绝。虽然，此前也有齐赫案（Zych *v.* Unidentified, Wrecked & Abandoned Vessel, Believed to Be the “Seabird”[2]）等以行政许可作为合法打捞权要素的案例，但《泰坦尼克协定》使打捞需事前受行政规范确定下来。另外，《泰坦尼克协定》的生效也使海事法的公共利益从打捞物不散失提升到以原址保护为原则。

①成员国对本国人和船的公海打捞活动进行行政许可

英国于 2003 年制定了《沉船保护令》（Protection of Wrecks (R.M.S. Titanic) Order）并按《航运和海洋安全法》第 24 条的要求，规定“泰坦尼克”号沉船的指定区域为 1 千米。与《泰坦尼克协定》不同之处是保护或保管行为不需事先许可。在航运法项下，由交通部长（Secretary of State for Transport）发放活动许可，但相关事项涉及到与英国文化传媒体育部（Department for Culture, Media and Sport）、英国外交部（Foreign and Commonwealth Office）之间的事项分工协调，以及与 1973 年《沉船保护法》（Protection of Wrecks Act）对领海内沉船许可机制、1995 年《航运法》（Merchant Shipping Act）沉船沉物抵岸报告机制的关系。

2009 年，美国国务院向国会提交了拟议立法修改《泰坦尼克号海事纪念地法》以便执行《泰坦尼克协定》的议案，增加了民事责任和刑事责任等条款；同时，第 7 条规定美国商务部长对第 6 条禁止行为进行许可，第 15 条赋予商务部长与其它联邦机构联合实施沉船监督权，以避免盗捞和非科学性打捞。这些条款也都包含在等待参议院投票的 2012 年《泰坦尼克号海事纪念地保护法》（R.M.S. Titanic Maritime Memorial Preservation Act）。美国商务部颁布的 2017《综合拨款法》（Consolidated Appropriations Act）第 113 条规定，非经商务部长按照《泰坦尼克协定》批准，任何人不得进行会导致“泰坦尼克”号沉船和遗址被物理性改变或扰动的研究、勘探、打捞等行为。2018 年 8 月，商务部长委托 NOAA 局长对第 113 条行为授权。

②美国政府主张作为当事人介入海事案件

2000 年 7 月 28 日发布的法院命令禁止切入或分离船体[3]。2011 年赋予泰坦尼克号公司打捞报酬的判决对此也不断强调和重申[4]，但泰坦尼克号公司仍于 2020 年 3 月向法院提交动议

[1] Fathom Exploration, L.L.C. *v.* Unidentified Shipwrecked Vessel or Vessels, 857 F.Supp.2d 1269 (D. Alabama, 2012); Northeast Research, LLC *v.* One Shipwrecked Vessel, 729 F.3d 197 (2nd Cir., 2013)

[2] Zych *v.* Unidentified, Wrecked & Abandoned Vessel, 19 F.3d 1136 (7th Cir. 1994).

[3] R.M.S. Titanic, Inc. *v.* Wrecked & Abandoned Vessel, 286 F.3d 194, 198–99 (4th Cir.), cert. denied, 537 U.S. 885 (US 2002).

[4] R.M.S. Titanic, Inc. *v.* Wrecked and Abandoned Vessel, 742 F. Supp. 2d 784, 790 n.6 (E.D. Va. 2010).

要求修改前述命令，允许它有限切开马可尼套房（Marconi Suite）上部天花板，打捞拨打遇险电话的设备等文物。针对 NOAA 就该打捞活动的报告建议，法院就活动的教育、科学和文化利益，及其方案是否违反《泰坦尼克协定》存有异议。法院认为该公司是否需遵循《泰坦尼克协定》获得商务部授权与修改命令的本案无关；并要求泰坦尼克号公司详细列出活动和打捞文物保存的预期花销和资金来源，但仍需得到 NOAA 支持，以作为批准修改命令动议的前提。[1]

针对法院有条件地允许泰坦尼克号公司分离打捞的意见，美国提出以当事人身份介入案件，要求法院重新考量这一对美国实现《综合拨款法》《泰坦尼克协定》规定的利益明显不公的意见，并要求禁止泰坦尼克号公司进行任何会改变或破坏沉船现场的活动，但均被法院否决。美国还提出了请求中止程序的动议，认为法院在泰坦尼克号公司无《综合拨款法》第 113 条授权的情况下同意修改 2000 年命令的意见存在明显错误。法院予以驳回，并再次指出确认 NOAA 授权与修改命令无关。法院认为由于美国一直是以法庭之友的身份参与案件，故裁定介入动议待定。[2]

即便法院认为 2020 年探险活动符合《泰坦尼克协定》及其附件的大多数要求，但如果 NOAA 不认同打捞作业资金充足，仍会阻碍法院批准该公司的动议。此外，尤其是法院以 NOAA 不是正式当事方而对其批准和控制打捞活动是否合宪未予回应。如果未来美国得以当事人身份介入诉讼，便也不存在这个程序问题。总之，自《泰坦尼克协定》成文以来泰坦尼克号公司即筹划的改变沉船打捞方式，仍面临重重阻力。

三、结语

《水下公约》仅 71 个成员国，水下文化遗产保护的国际法规则尚属灰区。多边协议和国家行为对国家管辖范围以外海域历史沉船打捞国际规则的构建具有重要影响。《泰坦尼克协定》规定打捞权基于行政许可，从根本上保证了对沉船历史和考古价值的保护。它对国家管辖范围以外海域历史沉船探测、打捞规制首开先例，影响深远。尤其是《水下公约》迄今尚无司法实践，而更显《泰坦尼克协定》影响海事裁判的意义。美国政府如何使其国家理念和行政管理规则成为公海历史沉船保护的标准，一者在于沉船属性的选择和价值定位，二是国内法的长期建设和善用国际组织机制。

1.“泰坦尼克号”沉船的海事纪念地定位是形成《泰坦尼克协定》的基础

沉船的海事纪念地定位对获得其它国家认同及后续国际合作保护规则达成一致起到了关键作用。《泰坦尼克号海事纪念地法》被签署时，美国总统在声明中指明，沉船是海难和船舶

[1] R.M.S Titanic, Inc. *v.* Wrecked & Abandoned Vessel, 2020 WL 2835826 (E.D. Va. 2020).
[2] R.M.S Titanic, Inc. *v.* Wrecked & Abandoned Vessel, 2020 WL 4361153 (E.D. Va. 2020).

安全标准的首要标识，其重要性不仅来自灾难给后世的印记，也来自国际社会对海上生命安全的推动。[1]美国强调它牵头相关国际规则的出发点有灾难纪念、海上安全、科学文化等人类社会共通的基本价值。

《联合国海洋法公约》未规定物主、来源国、文化历史起源国权利冲突时如何处理。沉船作为遗址或纪念地相比作为海事法的商品的冲突少，对人类遗骸的尊重更是基于人道的优先，不扰动人类最终安息的沉船墓地是人类社会古往今来普遍永恒的原则。多数关于沉没军舰的双边协定也是如此，例如《爱沙尼亚、芬兰与瑞典关于爱沙尼亚号的协定》（Agreement between the Republic of Estonia, the Republic of Finland, and the Kingdom of Sweden regarding the MIS Estonia）第 2 条规定永不打捞沉船，第 3 条第一款规定禁止任何这处侵扰安息地的行为，明确指出由于沉船存有人类遗骸而不应被扰动。

2.通过国家实践引导国际规则的形成和解释

（1）国内法和领海历史沉船裁判为公海沉船保护奠定基础

美国领海内的历史沉船可以依据《被弃沉船法》不适用发现物法和救捞法，沉没于美国管辖海域的沉船可以依据《海洋保护区法》保护，海事法院可以管辖国家管辖范围以外海域的沉船打捞诉讼。美国海事法院对公海沉船的裁判理念不可避免地受到领海历史沉船裁判的影响，不论是把符合科学、考古、历史等公共利益作为发现物法中公平合法占有沉船前提的克莱因案（Joan M. KLEIN *v.* The Unidentified Wrecked and Sailing Vessel, etc.[2]），还是把取得行政许可作为打捞权合法占有要素，公共利益作为发布打捞权初步禁令条件的莱斯罗普案（Lathrop *v.* Unidentified, Wrecked and Abandoned Vessel[3]），把考古注意义务作为打捞尽责因素的哥伦布美洲公司案（Columbus-America Discovery Group, Inc. *v.* Atlantic Mutual Insurance Co.[4]）等都为“泰坦尼克号”系列案的判决，并把打捞行政许可作为公海沉船保护措施奠定了基础。

（2）历史沉船打捞海事裁量权对行政权的让渡

在不能依据国内法管辖“泰坦尼克”号沉船的情况下，美国争取通过行政许可对打捞行为进行规范。政府一步步地通过海事法院裁判使打捞公司适用沉船保护的国内法规则，甚至影响到海事法院的裁量权。《泰坦尼克协定》出现前，打捞权受制于《泰坦尼克号海事纪念地法》不扰动沉船，《泰坦尼克协定》成文后，打捞受 NOAA 监督，政府与打捞者通过司法部协商使 NOAA 有权通过法院程序落实打捞报酬所附条件。在目前诉讼中法院可能要改变的之

[1] Public Law No. 99-513.
[2] Joan M. KLEIN *v.* The Unidentified Wrecked and Sailing Vessel, 758 F.2d 1511 (11st Cir. 1985).
[3] Lathrop *v.* Unidentified, Wrecked and Abandoned Vessel, 817 F. Supp. 953 (M.D. Florida 1993)
[4] Columbus-America Discovery Group, Inc. *v.* Atlantic Mutual Insurance Co, 974 F.2d 450 (4th Cir.1992)，诉讼标的物为中美洲号沉船。

前命令的内容，正是《泰坦尼克协定》规定的行政许可，而法院与美国政府对此一打捞作业的态度完全相反。当《泰坦尼克号海事纪念地保护法》仍在等待被通过之时，该法其实也已有规定，任何在其生效前法院赋予的打捞权也不能排除对本法的遵守。[1]

海事法院在历史沉船打捞裁判中虽要考虑公共利益，但对公共利益的理解和保护方式、程度不同，对打捞者利益存在固有偏向。《泰坦尼克协定》通过前的裁判从未提及《泰坦尼克号海事纪念地法》。鉴于美国在海事裁判中的重要位置，《泰坦尼克协定》对美国生效后可望对海事法适用于历史沉船的原则产生进一步改变。司法机构和行政机构的协调将推进水下文化遗产保护，打捞权的内容将进一步受限，甚至可能影响打捞公司原有的文物占有和管理等权利，使打捞公海历史沉船的获利更不确定，进而影响商业打捞的意图，使历史沉船保护进入新阶段。

（3）《泰坦尼克协定》规则与美国利益的一致性

成员国在依美国主导形成的《泰坦尼克协定》管辖本国船只和公民的行为时，也间接地体现了美国的保护理念。不扰动存有人类遗骸沉船的理念与美国反对他国打捞该国军舰的国家主张一致。1980 年《美国国际法实践摘要》指出打扰沉没军舰，特别是存有逝者的军舰是不当行为，并认为此主张具有习惯国际法地位。[2]

这部协定基于美国国内法规则，实质上扩展了其对公海沉船的国家管辖权。美国政府主张作为海事案件一方的依据是美国的利益和该国际知名沉船的利益，意味着《泰坦尼克协定》成员国成为管辖范围以外海域沉船打捞诉讼的直接关系人。而在《联合国海洋法公约》和《水下公约》的缔约过程中，美国认为沿海国保护水下文化遗产是“悄进管辖”，强烈反对沿海国扩展管辖权甚至影响到水下文化遗产保护的一些关键规则。[3]美国对同一规则的态度和解释当然是基于自身利益的细化考量。

3.我国的借鉴和突破

从沉没军舰和国家船舶权利的复杂性来看，基于非侵入性原则的原址保护也利于维护我国权益。美国牵头“泰坦尼克”号沉船保护，可视作《水下公约》合作保护水下文化遗产协调国机制的实践，解释了该机制下未予明确的“确有联系国家”。《泰坦尼克协定》也显示了通过双多边协商形成开放签署国际条约的可行途径。我国以历史沉船科学研究和保护为原则，此与人类利益一致。基于专门机构人财物的保障优势，可以评估选择周边海域的水下文化遗

[1] 《泰坦尼克号海事纪念地保护法》第 17 条 f 款。

[2] Marian Nash Leich, *War vessels: abandoned or sunken vessels*, in Department of State (ed.), Digest of United States Practice in International Law 1980, US Government Printing Office, 1986, p. 999-1006.

[3] Alexander Proelss (ed.), *United Nations Convention on the Law of the Sea: A Commentary*, C.H. Beck/Hart/Nomos, 2017, p. 1958. UN, General Conference Twenty-eighth Session, *Preliminary study on the advisability of preparing an international instrument for the protection of the underwater cultural heritage*, 1995.

产牵头合作保护，把握住影响国际规则的话语权。

基于美国的海事法传统和对打捞方权利的重视，美国国会因为《泰坦尼克号海事纪念地保护法》尚未通过而只能利用《综合拨款法》使协定生效的事实，体现出了美国国会在历史沉船保护的行政权和打捞者的司法权之间的艰难抉择。《泰坦尼克协定》能否真正落实,目前尚未可知。中国法律重视对公共利益的保护。对于水下文化遗产保护，我们有着国家体制、国内立法和司法的先天优势。借鉴美国作法有利于我国引领水下文化遗产保护的国际治理。美国通过国家实践推动形成国际条约的 30 年历程，也提示我们推进国际治理需时颇久，并会多有反复，既需做好水下文化遗产日常普查监测等工作，也需细致、坚持地多方寻求突破，并充分利用国际社会关注水下文化遗产保护的契机，以推进实践。

International Governance of Underwater Cultural Heritage: From the View of the Agreement Concerning the Shipwrecked Titanic

WANG Jing*

Abstract: The global concern over the salvage of R.M.S. Titanic in the 1980s has promoted development of deep-sea survey, maritime adjudication, underwater cultural heritage protection, amendment of the law of finds, the salvage laws and regulations concerning historical shipwrecks. The 2001 UNESCO Convention for the Protection of the Underwater Cultural Heritage was established on these new developments. The U.S. spent 30 years to make its idea in the 1986 R.M.S. Titanic Maritime Memorial Act part of the Agreement Concerning the Shipwrecked Vessel R.M.S. Titanic. The negotiation process of this agreement shows us how the American national activities of UCH protection at the high sea influenced the idea, the methods and the rules of UCH international governance.

Key words: the Titanic, salvage, historical shipwreck, high sea, preservation in situ

This year of 2022 marks the 110th Anniversary of the sinking of the R.M.S. Titanic. This shipwreck laying at the bottom of the high sea has brought out deep influence to maritime adjudication and underwater culture heritage (hereinafter UCH) protection. The Agreement Concerning the Shipwrecked Vessel R.M.S. Titanic (hereinafter the Titanic Agreement) entered into force and opened for further signatories in 2019. It is another multiple treaty after the well-known Convention on the Protection of the Underwater Cultural Heritage (hereinafter the UCH Convention). As a precedent of UCH protection at the high seas, the Titanic case has not been much emphasized by the academics for its clearly rejecting application of American Law of Finds to historical wrecks and its limited application of the American Salvage Law, plus the actual influence of the adoption of this international agreement concerning The Titanic. Current researches have neither noticed the impact of the case concerning salvage company's claims over the relics from the

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shipwreck and the US government's insistence on being involved in the legal procedures. Current researches have neither paid much attention to the salvage methods which are closely related to the UCH protection. This international agreement requires salvage operations be pre-permitted by related governments of contracting party states. This indicates the trend that salvage of historical shipwrecks is to be regulated by professional standardized norms.

Identification of a historical shipwreck is rather difficult. Those sunk in the high seas are exempted from national administrative control, with exceptions of the International Seabed Authority regulations concerning reporting obligations on relics found,[1] the 1989 International Convention on Salvage allowing reserves on its application over historical relics,[2] and the UCH Convention clauses on party states' reporting obligations. These UCH found at the high seas are basically governed according to domestic maritime laws of various states. To govern any UCH at the high seas by a domestic maritime court without international approved norms. could be hard. And the United Nations Convention on the Law of the Sea (hereinafter the UNCLOS) that requires protecting UCH for the benefit of all mankind offers no classification of the relevant rights. The UCH Agreement requires coordination among relevant states for UCH found at the high seas, but offers no further substantial regulations for that coordination. Under this circumstance, state practices become significant for salvaging historical shipwrecks at the high seas.

Researches published are mainly emphasizing study of the International Agreement. This paper intends to find out how the US introduces protection of historical shipwrecks beyond the outer limits of national jurisdiction at the sea, by pushing and adopting the International Agreement.

I. Legal Status of the R.M.S. Titanic

The ship registered in the UK belonged and was operated by an UK company, The White Start Line, which was affiliated to another American mother company. In 1993, the R.M.S. Titanic, Inc., as the interest successor of the Titanic Ventures Limited Partnership, applied for exclusive salvage right at the Virginia East Federal Court. The Court published its shipwreck attachment order on local newspapers. An insurance company initiated an objection, but was dismissed by the Court. Then it reached an agreement with the R.M.S. Titanic, Inc.[3] No further claims of the shipwreck's ownership appeared. The Titanic sunk in 1912, at the location 340 nm away from the shore of Newfound Land, on the outer continental shelf of Canada. Among the 1500 and more victims, most of them are either English or American. Others are French. According to the UNCLOS Articles 149

[1] Regulations for Exploration and Exploitation for Polymetallic Nodules in the Area, Article 8 and Article 37. Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, Article 8 and Article 37. Regulations on Exploitation of Mineral Resources in the Area, Article 8 and Article 35.

[2] The 1989 International Convention on Salvage, Article 30(d): "when the property involved in maritime cultural property of prehistoric, archaeological or historic interest and is situated on the sea-bed", any State may reserve the right not to apply the provisions of this Convention.

[3] R.M.S. TITANIC, INC., successor-in-interest to Titanic Ventures, limited partnership, Plaintiff, *v.* The Wrecked And Abandoned Vessel, Its Engines, Tackle, Apparel, Appurtenances, Cargo, etc., 924 F. Supp. 714 1994 (ED Va, 1994).

and 303, these four relevant states should cooperate to protect the archeological and historical relics found in that area, for the benefit of the whole mankind.[1] However, The UNCLOS does not offer any norms on the rights of the property owner, the origin state, the cultural origin state, the archeology and historical origin state and the norms for settlement of disputing rights. In short, there is no substantial scheme of implementation.

The legal position of the Titanic shipwreck origins from its unique value. In the international circle, it is not only of the value of an ocean graveyard but also of a memorial site of cultural heritage. The incident, as the most serious maritime disaster, brought out global maritime standards and norms as the Convention for Safety of Life at Sea, and the International Maritime Organization (hereinafter the IMO). Construction of this "never sink", the largest and the most luxury cruise came from the then special social demand. It has historical value. And the admirable spirit of sacrifice shown in the marine perils, the impact of the accident and self-reconsideration over industrial and scientific technology, all make this shipwreck a carrier of humanity, sadness beyond the materials, bringing to people specific cultural and social value.

In 1985 when this famous shipwreck was found, it reminded the international community how marine scientific technology could possibly damage our UCH, and the necessity of establishing the related protection rules. The International Salvage Convention has made it a rule not to salvage historical shipwrecks and other UCH. Strongly it has supplemented the principle rules provided in the UNCLOS. The salvage activities of the Titanic pushed the International Law Association (ILA) to proposed the 1994 Draft of The Convention on Protection of Underwater Cultural Heritage. On this basis, the UNESCO further adopted the UCH Convention in 2001. The Titanic Agreement adopted by the UK, the US, Canada and France in 2000, and immediately entered into force for the UK, became an open treaty for everyone and the first substantial international regulation for protecting historical shipwrecks at the high seas.

Ⅱ. Formation of the "Titanic Agreement" for the Shipwreck Titanic

1. The US Proposed Exploring the Shipwreck Making It A Maritime Memorial Site

A. Establishing Legal Status of the Wreck by Domestic Legislation

A joint US-France exploration team found the Titanic shipwreck in 1985. Dr. Robert Ballard of the Wood Hole Oceanographic Institution suggested that the wreck should be kept complete as it is fragile, and the deceased should be undisturbed. While the ship body should not be interfered, objects could be retrieved from around the shipwreck for a future museum. Remote controlled

[1] United Nations Convention on the Law of the Sea, Article 149: "All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin."
United Nations Convention on the Law of the Sea, Article 303: "States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose."

underwater cameras could be utilized to show to the public the inside of the shipwreck. Considering the shipwreck's global historical meaning, its location in the international maritime zone, and the realistic issue that no present domestic legislation could be applicable to its protection, and thinking of the possible damage caused by any salvage activities, House of the US Congress began preparing a disposition legislation within a month after the Titanic finding. The US Congress acknowledged the shipwreck's national and international cultural and historical significance,[1] and promulgated the R.M.S. Titanic Maritime Memorial Act in 1986.

B. Confirming Aims and Contents of International Coordination

Article 2 of the R.M.S. Titanic Maritime Memorial Act indicates that the Congress acknowledges the practical meaning of deep ocean scientific research development and marine scientific engineering and the importance of culture and science over this shipwreck. Section b Paragraph 4 of this Article and Article 7 provides that disturbance and salvage of the shipwreck before international agreement or guidelines are established shall be prohibited. According to Article 5 and Article 6, NOAA is designated to consult (with other parties) for the international guidelines, and the Secretary of State is designated to carry out negotiation for the agreement. The guidelines and the agreement should be consistent with each other. The US thus started negotiation with the UK, France and Canada for the agreement to commemorate the deceased in the stress and to protect the scientific, cultural and historical value of the wreck site.

C. Conflict of Ship Wreck Protection Ideas Among Countries

a. No-disturbance and Scientific Research

To prevent stealing salvage, Dr. Robert Ballard placed a bronze plate at the shipwreck when he explored the wreck in 1986: "Any who may come hereafter leave undisturbed this ship and her contents as a memorial to deep water exploration." In the same year, debates among scientists and marine explorers were carried out. Dr. George Bass indicated that shipwreck should be protected for the public and future generations, and should not be disturbed and damaged for private interests. Protection of historical memorials and remains on land or underwater should be identical.[2]

A Canada-Russia-USA joint exploration team explored the Titanic marine environment with deep submarine device and produced a documentary film in 1991. Team members retrieved metal samples from around the shipwreck, and found through metal tests that the highly fragile material losing its extension in cold water might be relevant to the tragedy. They also collected hundreds of fish, rock, germ, coral and soil example. No materials from shipwreck were retrieved. The subsequent experiment by NOAA indicates that all organics at the Titanic wreck site exposed to the marine environment have vanished, while those organics in the ship wreck body with constant

[1] *HR Report on HR 99-3-3*, 99th Cong. 1st Sess., 1985, p. 4-8.
[2] James A. R. Nafziger, *The Titanic Revisited*, Journal of Maritime Law and Commerce, vol. 30, 1999, p. 312.

pressure, low temperature, low oxygen, no flowing current may remain for hundreds of years.[1]

b. Display of the Salvaged

The measures taken by the US government to forbid any entry and suspending salvage differed from the French government's thinking. The latter tended to retrieve relics form the Shipwreck and share that memory of the disaster with the world. In 1987, the French Institute for Research and Exploitation of the Sea (INFREMER), sponsored by the Ocean Research Exploration, Ltd. of the UK, utilized machine arms from the Nautile and successfully retrieved some objects from the shipwreck. The two parties agreed in advance that all objects retrieved should not been sold and should be exhibited to the public.[2] In that same year, the Titanic Ventures Limited Partnership of the US, together with the French Institute for Research and Exploitation of the Sea, retrieved about 1800 items from the shipwreck, and brought them to France. These included observatory bell alarming before colliding against the iceberg, the captain's speaker, chinas from the first class restaurant and purses with cash, gold coins and jewelries. According to the charter, all the man-made objects retrieved may be sold as one package to the public exhibition institution, but gold, cash and jewelries shall not be included.

2. Forming the Titanic Agreement with Difficulty

A. American Legislative and Judiciary Restrain

The 1987 Abandoned Shipwreck Act Article 6 provides that all shipwrecks without known ownership within the US territorial sea, listed in the National Register of Historical Places or qualified for the listing , should belong to the US federal government and be transferred to the state where the shipwreck locates.[3] Though the Act does not regulate ownership of shipwrecks out of the

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[1] *R.M.S. Titanic 2004 Expedition*, NOAA (visited on May 1, 2022), https://oceanexplorer.noaa.gov/explorations/04titanic/welcome.html.

[2] Nafziger, *Finding the Titanic: Beginning an International Salvage of Derelict Law at Sea*, Colum.-VLA Journal of Law & Arts, vol. 12, 1988, p. 339.

[3] Abandoned Shipwreck Act, Section 6: RIGHTS OF OWNERSHIP.

(a) UNITED STATES TITLE.

The United States asserts title to any abandoned shipwreck that is -

(1) embedded in submerged lands of a State;

(2) embedded in coralline formations protected by a State on submerged lands of a State; or

(3) on submerged lands of a State and is included in or determined eligible for inclusion in the National Register.

(b) Notice of shipwreck location, eligibility determination for inclusion in National Register of Historic Places

The public shall be given adequate notice of the location of any shipwreck to which title is asserted under this section. The Secretary of the Interior, after consultation with the appropriate State Historic Preservation Officer, shall make a written determination that an abandoned shipwreck meets the criteria for eligibility for inclusion in the National Register of Historic Places under clause (a)(3) of this section.

(c) TRANSGER OF TITLE TO STATES.

The title of the United States to any abandoned shipwreck asserted under subsection (a) of this section is transferred to the State in or on whose submerged lands the shipwreck is located.

(d) EXCEPTION.

Any abandoned shipwreck in or on the public lands of the United States is the property of the United States Government. Any abandoned shipwreck in or on any Indian lands is the property of the Indian tribe owning such lands.

(e) RESERVATION OF RIGHTS.

This section does not affect any right reserved by the United States or by any State (including any right reserved with respect to Indian lands) under—

(1) section 1311, 1313, or 1314 of this title; or

(2) section 414 or 415 of title 33.

territorial sea, the Congress has already confirmed that principle of legislation for maximizing the public interests. The Congressional House Committee on Merchant Marine and Fisheries particularly indicated that the Salvage Law and the Law of Finds are not helpful for the protection of marine heritage.[1] At the same time, together with a series of archeological legislations, maritime adjudications at the time when the Titanic related cases were decided, indicated more emphasis on the public interests than factors of abandon and consistent maritime general principles. They also tend to include the archeological attention obligations into the defined responsible salvages.

Beginning from 1994, the US Federal Court gave the R.M.S. Titanic, Inc. the exclusive salvage right,[2] so to avoid competing salvage activities might damage the shipwreck. But the court required the company to constantly carry out the salvage activities, so to maintain the status as the salvor in possession. The limitations given by the court to the salvage right include no-entry into the ship body, no selling of the savaged items, and attempting extending salvage right to shooting films and tourist rights, … etc., simply because the commercial interest of the salvaged objects is rather limited.[3]

B. Salvage of the Titanic Brings out the Opportunity of International Protection of UCH

The R.M.S. Titanic, Inc. and the French Institute for Research and Exploitation of the Sea worked together to have the objects retrieved be exhibited at the England National Museum, in the US, and France. However, several other museums refused exhibition for reasons that the records, the pack of items kept, the objects analysis and data publicized were from improper salvage activities.[4] Until 1994, the R.M.S. Titanic, Inc. and its previous legal entity, had retrieved more than 3000 objects from the Titanic site. At the same time, other salvage activities had not stopped. This condition of chaotic salvage induced international concerns on the protection of historical shipwrecks.

a. The Greenwich Declaration

The proposed international agreement initiated by France, the UK and Canada in 1986 received no response from the US until 1995. Motivated by shipwreck salvage and exhibition at the UK National Maritime Museum, the four countries began to exchange ideas. The National Maritime Museum further invited jurists, archeologists, historians, scientists and salvage operators to a Greenwich Conference to discuss protection and management of historical shipwrecks as the

(Pub. L. 100–298, §6, Apr. 28, 1988, 102 Stat. 433.)

[1] *HR Report No. 100-514*, Pt. 2, 1988, p.8.

[2] R.M.S. Titanic Inc *v.* Wrecked and Abandoned Vessel, 924 F. Supp. 714 (ED Va, 1994) "default judgment is entered against all potential claimants who have not yet filed claims [to the Titanic or its artifacts] and such claims are therefore barred and precluded so long as [R.M.S.T] remains salvor in possession."
The Fourth Circuit upheld the 1994 ruling that plaintiff Titanic Corporation was the owner of the Titanic disaster on 24 March 1999, 12 April 2002, and 31 January 2006.

[3] R.M.S. Titanic Inc *v.* Wrecked and Abandoned Vessel, 1996 WL 650135 (ED Va, 1996); R.M.S. Titanic Inc *v.* Wrecked and Abandoned Vessel, 9 F. Supp. 2d 624, 626 (ED Va, 1998). R.M.S. Titanic, Inc *v.* Haver, 171 F. 3d 943, 970 (4th Cir, 1999).

[4] Broad, *Show of Titanic Items is Attacked*, N.Y. Times, May 11, 1997.

Titanic. It was at that conference, countries other than the US showed their interests for an international agreement, and discussed the Draft of the UCH Protection Convention. A year later, the said National Maritime Museum formed the Greenwich Declaration in the second Conference organized by the International Maritime Organization (London). The Declaration acknowledged the significance of UCH to the human being, and clearly confirmed the reality that if disturbance and retrieving from the UCH were not based on the best archeological practice and under the national relevant agencies' guiding, irrevocable damages might be caused. This conference also discussed matters concerning adopting an international document by UNESCO.

b. Forming the Titanic Agreement by the US, Canada, the UK and France

Negotiation among the four governments' representatives started in 1997, and the Final Minutes of the International Agreement Concerning the Shipwrecked Vessel R.M.S. Titanic was signed in 1999. The final text was formulated in 2000, including 12 Articles and an Annex.

Article 2 of the Titanic Agreement provides that this shipwreck is a marine disaster memorial site and a historical shipwreck of international significance. The Agreement intends to avoid disturbance of human remains, to protect the completeness of the shipwreck and its objects, non-dissemination of the retrieved items and opening to the public. Contracting party states acknowledged that protection in situ is the best way of protection. And, under the condition of complying with the Annex, retrieving and exploring activities are allowed for educational, scientific and cultural interests and for avoiding obvious threats against the site and the objects. Article 4 provides that any entry should not lead to disturbance of the objects and human remains. Activities purposed for discovered objects at the site should comply with the Annex to the most extent. Any bestowed exclusive salvage right should not violate the principle of non-intrusion.

Article 4 of the Titanic Agreement also provides that all contracting party states shall take reasonable actions complying with this Agreement to control their nationals and vessels flying their flags, forbid them from having any behavior not complying with this agreement in their harbors, territorial seas and other territories. Considering that other countries' nationals and vessels may also arrive the shipwreck Titanic site and salvage, the shipwreck objects might also arrive other countries after their being retrieved, it should be helpful to have more contracting party states for implementing the provisions of this Agreement. Thus Russia, Japan and other countries with the deep ocean technology to arrive the site are informed of this International Agreement.

3. The Titanic Agreement Initiative and Its Significance

The Titanic Agreement opened for signatures in 2003. It provides that any two party states signed and accept its binding force will make the Agreement enter into force. The UK signed the Titanic Agreement in 2003 and it entered into force for the UK according to its 1997 Merchant Shipping and Maritime Security Act Article 24 concerning entry into force of bilateral and

multilateral agreements for protecting non-military shipwrecks out of the UK territorial seas. The US signed in 2004 and pronounced that the Agreement shall enter into force after the implementary provisions were adopted.

A. Consistency Between Annex of the Titanic Agreement and that of the UCH Convention

Annex of the Titanic Agreement was drafted referring to the International Charter on the Protection and Management of Underwater Cultural Heritage (hereinafter the Charter) promulgated by the International Council on Monuments and Sites (ICOMOS). Also referred to in the Annex are the Standards and Guidelines for Archeology and Historic Preservation promulgated by the US Interior Ministry and the Abandoned Shipwreck Act Guidelines promulgated by the US National Parks Bureau. The Charter eventually helped form the Rules Concerning Activities directed at Underwater Cultural Heritage (hereinafter the Rules) annexed to the 2001 UNESCO UCH Convention.

The consistency among the Annex of the International Agreement, the NOAA Guidelines and the Annex of the UCH Convention have made the US judicial practice for historical shipwreck salvage consistent with the international advanced ideas and regulations. In the 1997 case of Marex International, Inc. *v.* The Unidentified, Wrecked and Abandoned Vessel,[1] the court indicated in its decision that the Charter and the Annex of the UCH Convention can be applied as the standards to judge whether the lowest scientific requirement is satisfied or not.

B. Forming the Imperative Guidelines for Research, Exploration and Salvage of R.M.S. Titanic

Based on the 1996 ICOMOS Constitution and the US National Park Bureau Federal Archeological Items Standards, NOAA promulgated its Guidelines for Research, Exploration and Salvage of R.M.S. Titanic (hereinafter the Guidelines) in 2000. The Guidelines unequivocally provides the policy of preservation in situ, authorizes retrieving or exploring only for the purposes of educational, scientific and cultural interests. It also clearly requires non-disturbance of human remains, no-damaging technologies and non-intrusion investigation’s prior to retrieving or exploring, minimizing negative influence, recording and publicizing historical, cultural and archeological information to the public, and other ideas and operational measures. In view of the R.M.S. Titanic Maritime Memorial Act and its consistency between itself and the Titanic Agreement and the Guidelines, the Guidelines are of some policy compelling force.

[1] Marex International, Inc. *v.* The Unidentified, Wrecked and Abandoned Vessel, 952 F.Supp. 825 (S.D. Va 1997)

C. Restrained by NOAA When Federal Court Applies Law of Finds for Public Interests, for Salvage Activities and for Objects Salvaged

The Titanic Agreement establishes the legal status of the Titanic shipwreck, and confirms the principles of non-disturbance of human remains and maintaining cultural relics integrity. It further uniforms the positions of various party states' preservation in situ principle, the preconditions for explorative retrieving and for entry into the shipwreck activities. Because the frustrated expectation of salvage activities, the R.M.S. Titanic, Inc. pleaded to the District Court for transitive monetary reward from the salvage and for the ownership of the salvaged objects. The Court of the Forth Circuit decided in 2006 that application to for Law of Finds must be for purposes of public interests.[1] At the end of 2007, the R.M.S. Titanic, Inc. brought up formal litigation in the court. According to requirement of the court, the company submitted its promises of integrated collection, of management according to the Guidelines, the Titanic Agreement and its Annex plus the Federal Standards for Preserving Archeological Information. The conditions for obtaining any salvage reward would include abiding to the R.M.S. Titanic Maritime Memorial Act, carrying out salvage activities under the supervision of the NOAA Director as representative of the public interests, and permanent promises and conditions made by the court after consultation between the salvager, NOAA and the State Department on any objects salvaged.[2]

The judgment made by the American Maritime Court pointed out, for the first time, that the Law of Finds should not be applied to any historical shipwrecks not claimed by any owner at the high seas. Before this decision, although the court acknowledged that occupancy according to the Law of Finds might lead to private-like salvages, it still applied that law and gave ownership to the salvagers at the high seas.[3] The judgement protecting historical value of the Titanic has been praised as the pearl on top of the crown of the American Maritime Court. It has deep influence to the decisions concerning conflict between maritime interests and public interests. The following up decisions have gradually formed the legal principle that the Salvage Law should not be applicable when applying the Abandoned Shipwreck Act.[4]

D. Entry into Force of the Titanic Agreement Demands Administrative Permits for Contracting Party States' Salvages

The US formally accepted the Titanic Agreement in November 2019, and thus satisfied the

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[1] R.M.S. Titanic, Inc. *v.* Wrecked & Abandoned Vessel, 435 F.3d 521, 526 (4th Cir. 2006), para. 25-26.
"In addition to amending traditional salvage law, court orders on the source and use of salvage should include historical, archaeological and cultural purposes. The District Court applies the principles of traditional salvage law in a manner that benefits the owner (or lack of owner) and the public interest, while providing a reasonable return to the salvor."

[2] R.M.S. Titanic, Inc. *v.* Wrecked & Abandoned Vessel, 742 F. Supp. 2d 784, 792 (E.D. Va. 2010), 804 F. Supp. 2d 508, 509 (E.D. Va. 2011).

[3] Martha's Vineyard Scuba Headquarters, Inc. *v.* The Unidentified, Wrecked And Abandoned Steam Vessel, etc., 833 F. 2d 1059 (1st Cir., 1987)

[4] Fathom Exploration, L.L.C. *v.* Unidentified Shipwrecked Vessel or Vessels, 857 F.Supp.2d 1269 (D. Alabama, 2012); Northeast Research, LLC *v.* One Shipwrecked Vessel, 729 F.3d 197 (2nd Cir., 2013)

requirement for the Agreement's entry into force. Contracting party states regulate shipwreck salvage activities at the high seas through administrative permit, according to the Titanic Agreement Article 4 on jurisdiction in personam. In other words, the R.M.S. Titanic, Inc. needs NOAA's permit other than approval from the court. And NOAA enjoys the right to refuse its application. Although there were cases like the Zych *v.* Unidentified, Wrecked & Abandoned Vessel,[1] Believed to Be the "Seabird", which took administrative permit as requirement of legitimate salvages, but it is the Titanic Agreement that makes pre-permit by the administration a legal regulation. Other than this, the Titanic Agreement has also upgraded the principle of non-dissemination to the principle of preservation in situ for the defined public interest in maritime law.

a. Contracting Party States' Administrative Permit for Salvage at the High Sea by National and National Vessel

The UK promulgated its Protection of Wrecks (R.M.S. Titanic) Order in 2003, and required a designated area around the wrecked Titanic with 1000 meters diameter according to Article 24 of the Merchant Shipping and Maritime Security Act. This Order, different from the International Agreement, did not require administrative permit before any protection or preservation activities were taken. For merchant shipping part of the salvage activity, permit should be issued by the Secretary of State for Transportation. But it demands division of labor and coordination with the Department for Culture, Media and Sport and the Foreign and Commonwealth Office. Also related are the 1973 Protection of Wrecks Act which has a scheme of permit for salvage within the territorial sea, and the 1995 Merchant Shipping Act which has a scheme for reporting landing of salvaged shipwrecks and objects.

In 2009, the US Department of State submitted to the Congress a legislative proposal to amend the R.M.S. Titanic Maritime Memorial Act, so to implement the Titanic Agreement, and to add clauses for civil liabilities and criminal responsibilities. Also included in the proposed R.M.S. Titanic Maritime Memorial Preservation Act waiting for vote by the Senate, are Article 7 which authorizes the Secretary of Commerce to issue permit for the activities prohibited by Article 6, and Article 15 which empowers the Secretary of Commerce and other related federal government agencies to jointly supervise the shipwreck matters and to avoid stealth and non-scientific salvages. Article 113 of the 2017 Department of Commerce Consolidated Appropriations Act provides that without approval by the Minister of Commerce according to the Titanic Agreement, no one should carry out any research, exploration, salvage or other activities that would cause physical change or disturbance of the Titanic shipwreck and its wrecking site. In August 2018, the Minister of Commerce assigned that Article 113 right to the NOAA Director.

[1] Zych *v.* Unidentified, Wrecked & Abandoned Vessel, 19 F.3d 1136 (7th Cir. 1994).

b. Involvement of the US Government as Party in Maritime Cases

The 28 July 2000 court order forbade any cutting or severing the ship body.[1] The 2011 judgement giving the R.M.S. Titanic Ltd. award for salvage activities also repeatedly emphasized the forbiddance.[2] However, the company still pleaded to the court in March 2020 asking for amending the previous order and allowing it limited cutting off the ceiling of the Marconi Suite of the shipwreck to retrieve some objects of the emergency phone. The court disagreed with the NOAA proposed report concerning the educational, scientific and cultural interests of that activity, and whether that activity would violate the Titanic Agreement. The court believed that the company's complying with the Titanic Agreement and obtaining authorization from the Ministry of Commerce were irrelevant with its pleading for amending the 28 July 2000 court order， and thus ordered the R.M.S. Titanic Ltd. to list in detail its proposed activity, the expected budget for preserving the retrieved objects and its capital resources. However, the court pointed out that obtaining support from NOAA was still a pre-condition for granting amendment of the said order.[3]

Toward the court opinion concerning granting conditional permit for the R.M.S. Titanic Ltd. to sever and salvage the wrecked ship, the US asked to participate as a party in the case. The US suggested the court to reconsider its opinion that was obviously unfair to the interests of implementing the Consolidated Appropriations Act and the Titanic Agreement. Also it suggested the court to forbid the company to carry out any activities that would change or damage the wrecking site. Both suggestions were denied by the court. The US further proposed to suspend the procedures, suggesting that any approval for the amendment of the 2000 order before the company obtaining the Consolidated Appropriation Act Article 113 authorization should be of obvious mistake. The court dismissed the proposal, and appointed again that ensuring NOAA's authorization was irrelevant with the amendment of the 2000 court order. The court regarded the US as an amicus curiae in the court procedures, and suspended its involvement.[4]

Even if the court believes the R.M.S. Titanic Ltd. may comply with the Titanic Agreement and most of the requirements provided for in its Annex for the company's 2020 exploration activity, the court may still be blocked to approve the exploration, if NOAA does not think the R.M.S. Titanic Ltd. has sufficient capital to accomplish the salvage operation. Other than this, the court has not responded to the constitutional issue as whether NOAA can be a legitimate party to approve and control the salvage activities. If the US may participate in the litigation as a formal party, this procedural issue could be resolved. To sum up, the efforts made by the R.M.S. Titanic Ltd. to change the shipwreck salvage operations ever since codification of the Titanic Agreement are still

[1] R.M.S. Titanic, Inc. *v.* Wrecked & Abandoned Vessel, 286 F.3d 194, 198–99 (4th Cir.), cert. denied, 537 U.S. 885 (US 2002).
[2] R.M.S. Titanic, Inc. *v.* Wrecked and Abandoned Vessel, 742 F. Supp. 2d 784, 790 n.6 (E.D. Va. 2010).
[3] R.M.S. Titanic, Inc. *v.* Wrecked & Abandoned Vessel, 2020 WL 2835826 (E.D. Va. 2020).
[4] R.M.S. Titanic, Inc. *v.* Wrecked & Abandoned Vessel, 2020 WL 4361153 (E.D. Va. 2020).

facing real obstacles.

Ⅲ. Conclusions

The UCH Convention has merely 71 contracting party states. International legal norms for protection of UCH still remain in the so-called gray area. Multilateral agreements and state practice are therefore important for constructing an international legal regime of protecting historical shipwrecks in ocean areas beyond the outer limits of national jurisdictions. The Titanic Agreement requires all salvage rights be based on administrative permit, and thus ensures the protection of shipwrecks' historical and archeological value. It has created a precedent and has deeply influenced exploration and salvage regulations for shipwrecks located in ocean areas beyond limits of national jurisdiction. Its influence on the future maritime adjudication becomes more evident, particularly when the UCH Convention has not yet been supported by any judicial practice. The US government may want to make its national ideas and administrative regulations internationally accepted as standards for protection of historical shipwrecks at the high seas. This would depend on: (1) How would we define the shipwrecks characteristics and how would we locate their values; and (2) Whether there would be long term construction of the national legal scheme and proper utilization of the international institutions.

1. Positioning the Titanic Maritime Memorial Site Creates Basis of the Titanic Agreement

Positioning the shipwreck's memorial site is a key factor for other countries' recognition and the following agreement on the international cooperative protection rules. When the R.M.S. Titanic Maritime Memorial Act was signed, the US President pointed out in his statement that this shipwreck is a primary indication of maritime disasters and vessel security standards. Its importance came from not only the impression of a maritime disaster, but also from the promotion of life safety at the sea by the international community.[1] The US emphasized that its initiating for promoting relevant international regulations has basic values of disaster memorial, marine safety and scientific culture commonly shared by the human society.

The UNCLOS has not provided for any norm for settlement of disputing rights among the countries of shipwreck's ownership, original nationality and origin of cultural history. Comparing with making the shipwreck a maritime commodity, to make it a remain site or a maritime memorial would bring up much less conflicts. Respect of human remains is based on the priority of humanity. It is a permanent general principle to avoid disturbance of any shipwreck where human rest forever in peace. Most of the bilateral agreements on wrecked naval ships are following the same principle. For example, the Agreement between the Republic of Estonia, the Republic of Finland, and the

[1] Public Law No. 99-513.

Kingdom of Sweden regarding the MIS Estonia Article 2 provides that the shipwreck shall never be salvaged. Article 3 specifically pointed out that the wreck should not be disturbed, because there were human remains in it, and any intrusion into the rest place shall be prohibited.

2. Forming International Rules and Their Interpretations Through National Practices

A. Domestic Laws and Judgments on Historical Shipwrecks in Territorial Seas are Foundation of Protecting Shipwrecks at the High Seas

Shipwrecks within the US territorial sea may not apply the Law of Finds and the Salvage Law, according to the US Abandoned Shipwreck Act. Shipwrecks within the waters under American Jurisdiction may be protected according to the Law of Marine Protection Zone. The US Maritime Court may exercise jurisdiction over shipwrecks out of the outer limits of national jurisdiction. Unavoidably the Maritime Court's decisions on historical shipwrecks at the high seas are influenced by previous decisions on historical shipwrecks within the territorial seas. These include the case of Joan M. KLEIN *v.* The Unidentified Wrecked and Sailing Vessel,[1] etc. that made consistency with scientific, archeological and historical public interests a precondition for equitable and legitimate occupancy of shipwreck defined in the Law of Finds; the case of Lathrop *v.* Unidentified, Wrecked and Abandoned Vessel[2] that made administrative permit a factor of legitimate occupation and salvage right, and made public interest a condition for issuing any preliminary injunction of salvage right; and the case of Columbus-America Discovery Group, Inc. *v.* Atlantic Mutual Insurance Co.[3] that made archeological attention obligation a factor of salvage responsibility; they all have constituted the basis for the Titanic series of judgment and making administrative permit for salvage a protective measure of shipwrecks at the high seas.

B. Assignment of Maritime Discretionary Power to Administration for Historical Shipwreck Salvage

Under the condition that domestic laws could not regulate the Titanic shipwreck, the US endeavored to regulate the relative salvage activities through administrative permit. Step by step, the US Government made domestic wreck protection laws be applied to the salvage companies through the Maritime Court decisions. This even influenced the discretionary power of the Maritime Court. Before the International Agreement, salvage right as restrained by the R.M.S. Titanic Maritime Memorial Act, could not disturb the shipwreck. After the Titanic Agreement, salvage became supervised by NOAA. Through consultation with the Department of Justice, the government and salvagers have to acknowledge the authority of NOAA that could fulfill all the conditions annexed to the salvage rewards. In the current litigation, content of the previous court

[1] Joan M. KLEIN *v.* The Unidentified Wrecked and Sailing Vessel, 758 F.2d 1511 (11st Cir. 1985).
[2] Lathrop *v.* Unidentified, Wrecked and Abandoned Vessel, 817 F. Supp. 953 (M.D. Florida 1993)
[3] Columbus-America Discovery Group, Inc. *v.* Atlantic Mutual Insurance Co, 974 F.2d 450 (4th Cir.1992), the subject of the action is the SS Central America.

order that might be amended by the court is exactly the administrative permit provided for in the Titanic Agreement. The court and the US government hold completely different opinions on the salvage operations. While the R.M.S. Titanic Maritime Memorial Preservation Act is waiting for the adoption, the Act has already included a provision that any salvage rights granted by the court before entry into force of the Act, shall not be exempted from complying with this Act.[1]

Although the Maritime Court has to take public interests into its judgments considerations on historical shipwreck salvages, the appreciation of public interest, the methods and contents of protection might be different. Inherent bias toward the salvager's interests might exist. Before the International Agreement, the court decisions never mentioned the R.M.S. Titanic Maritime Memorial Preservation Act. In view of the important position of the US in its maritime decisions, the Titanic Agreement might create further impacts to the maritime legal principles relating to salvage of historical shipwrecks after its entry into force to the US. Coordination between the judicial department and the administration would promote protection of the UCH. Substantial content of the salvage rights would be further limited，that could influence the salvage companies' previous rights concerning relics occupation and management. This may cause their salvage profit more unstable and further influence their intention for commercial salvages, and eventually bring the protection of historical shipwrecks into a new phase.

C. Consistency between the Titanic Agreement Rules and the American Interests

While the contracting party states are regulating their own ships and citizens according to the Titanic Agreement formulated by the US. They are indirectly realizing the protection ideas of the US. The idea of no-disturbance of shipwrecks with human remain in them is consistent with the American position of objection against salvage of American military vessels. The 1980 Digest of American International Law Practice indicates that disturbing military shipwrecks, particularly those with human remains in, is not proper. The US also claims that this idea has been established as an international customary law.[2]

This Titanic Agreement was reached according to the US domestic legal practices. Yet it was actually expanding the US jurisdiction over the shipwrecks at the high sea. By insisting on a party status in the related maritime cases based on its national interests and its interests over an internationally famous shipwreck, the US has indicated that all contracting party states are directly related parties in any litigations concerning shipwrecks salvage beyond national jurisdiction limits. Notably when the UNCLOS and the UCH Convention were under negotiation, the US regarded coastal states' involvement in UCH protection was "creeping jurisdiction", and strongly objected

[1] R.M.S. Titanic Maritime Memorial Preservation Act, Article 17(f).
[2] Marian Nash Leich, *War vessels: abandoned or sunken vessels*, in Department of State (ed.), Digest of United States Practice in International Law 1980, US Government Printing Office, 1986, p. 999-1006.

against several key factor articles that would give coastal states such expanded jurisdictions and influences over the UCH protection.[1] The different attitude and interpretation of the US are certainly based on its sophisticated consideration of its own self-interests.

3. Lessons for China and Our Breakthroughs

Considering the complexity of military shipwrecks and national vessel rights, the principle of non-intrusion and preservation in situ should also benefit us for protecting our own interests. American's promotion of protecting the shipwreck Titanic could be viewed as a useful practice of the scheme of coordination states under the UCH Convention. It has interpreted the undefined term of "confirmed connecting states."

The Titanic Agreement has also showed us a feasible way of making any international treaty opening for other signatories through multilateral negotiations. Our country has taken the principle of protecting historical shipwrecks for scientific researches. This fits the human society's common interest. Based on the fact that we have specific institution and ensured budget, we may estimate and select UCH in our surrounding waters, lead the protection activities, and hold the right of formulating the international rules we deem proper.

Because of the American maritime tradition and its emphasis of the salvage rights, it shows to us the difficulties faced by the US Congress when it had to choose between the administrative rights over protection of historical shipwrecks and the judicial rights over the salvage activities, and thus it had to adopt the Consolidated Appropriations Act to activate the not-yet in force R.M.S. Titanic Maritime Memorial Preservation Act. For the time being, it is unknown whether the Titanic Agreement will be truly implemented or not. In China, our laws constantly emphasize protection of common interests. We have the inherent privilege of a favorable national scheme and the domestic legislative and judicial environment to protect the UCH. Therefore, if we could take the US practice as a lesson, it shall benefit international governance of the UCH protection under our leadership. The thirty years long procedure of the US effort to formulate an international treaty through national practice, reminds us that promoting international governance will be difficult and time consuming. We need to not only effectively estimate and monitor the UCH around us, but also sophisticatedly and firmly seek breakthroughs in every aspects, and fully take advantage of the opportunity of international concerns over the UCH protection for practical moves.

Translator: DONG Lihua

[1] Alexander Proelss (ed.), *United Nations Convention on the Law of the Sea: A Commentary*, C.H. Beck/Hart/Nomos, 2017, p. 1958. UN, General Conference Twenty-eighth Session, *Preliminary study on the advisability of preparing an international instrument for the protection of the underwater cultural heritage*, 1995.

司法保护海洋生态环境实证研究（下）

上海市高级人民法院课题组*

【编者按】

由于本文篇幅较长，将分为“上”、“下”两部分刊出。本文上半部分已刊于上一期，为了方便读者阅读，特将全文章节目次列述如下：

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第三部分：对策分析 司法保护海洋生态环境的实现路径

实证研究的目的就在于发现现实中实际存在的问题，并在分析问题的过程中提出解决问题的办法。[1]本部分将从不同角度提出切实的解决方案，为我国司法权在海洋生态环境领域的充分发挥提供可行的建议。

一、研究完善现行立法 充分填补法律空白

自我国“海洋强国”战略被提出以来，理论界与实务界对相关法律规范的研究就不曾间断，已经取得了较多理论成果，为相应法律的制定、修改提供了理论支撑。但是，应当避免在法律的制定、修改的过程中以理论研究成果为导向的倾向。对司法保护海洋生态环境涉及的法律规范进行制定、修改必须从我国实际情况出发、以问题为导向，从而确立必要的新制度、新规则，克服现有制度和规则存在的不足，使各项制度之间能够协调适用。尤其是，我国于 2020 年 5 月颁布的《民法典》第 9 条延续了《民法总则》第 9 条的规定，进一步确立了“绿色原则”，彰显了中国特色社会主义法治的价值追求，旨在实现环境保护与生态平衡发展。[2] 作为民法在生态环境领域的基本原则之一，“绿色原则”难以在个案中直接适用，需要借助法律或司法裁判将其具体化。[3] 本部分的解决方案即是这一过程的具体体现，即在把握问题的基础上，以《民法典》规定的“绿色原则”为指引，探索我国相关法律制度的完善思路。

1.修改不适时的法律制度

完善司法保护海洋生态环境所依据的法律规范，应当以使其满足适时性的要求为目的。根据该目的的要求，涉及海洋生态环境治理的法律制度，应当根据司法实践的发展变化，删除已过时的内容，更新陈旧的规定，创设合理的、具有可操作性的新规定和新规则，修改不完善的规定，并在科学预测司法保护海洋生态环境趋势的基础上，考虑此种趋势，使修改后的制度具备先进性和一定的超前性。例如，为实际发挥司法鉴定在涉海洋生态环境案件审理中的事实查明作用，我国应从多角度健全现有海洋生态环境损害司法鉴定规则，保证鉴定结果能够对查明损害事实提供帮助。

以上海市为例，目前专门的司法鉴定机构仅有一家，即司法部下设的司法鉴定科学研究院，但其鉴定事项并不包括生态环境损害的鉴定，也不具备相应的人员和条件。对此，国家海洋局在上海市设立的东海环境监测中心具备相应的专业人员与硬件设施，但接受委托从事司法鉴定并非该中心的职责范围。上海市另有一家上海海事司法鉴定中心，其人员在鉴定海

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[1] 苏力：《强化问题意识，推进法律实证》，载《法学》，2013 年第 4 期，第 16 页。

[2] 马密、黄荣、常国慧：《<民法典>绿色原则的司法适用：实践样态与优化路径——以<民法总则>第 9 条的司法适用为基点》，载《法律适用》，2020 年第 23 期，第 49 页。

[3] [德]卡尔·拉伦茨：《法学方法论》，陈爱娥译，商务印书馆 2003 版，第 353 页。

洋生态环境损害领域专业性较强，但因其为高校内设机构，硬件设备受到较多制约，故其综合实力也不强。从行政管理角度而言，我国各沿海地区应当统筹各类相关机构的优势，使其互相弥补缺点，从而进行资源的有效整合，由具备相应条件的机构共同设立一家能够客观、科学从事海洋生态环境损害司法鉴定的机构，为涉海案件的审理提供技术支持。

目前对司法鉴定的研究，大多着眼于提升鉴定程序本身的科学性，但对鉴定意见在诉讼中的实质审查有所疏忽。[1]鉴定意见作为法定证据的一种，法院负有主动审查其证据效力的义务，具体应当从以下几个角度出发：一是对鉴定机构的资质进行事前的审查，在司法鉴定实施之前通过听证等形式听取各方当事人对鉴定机构资质方面的意见，要求鉴定机构、鉴定人提供能够反映其具备相应资质的材料；对具备相应资质的鉴定机构准许其实施鉴定，反之则重新确定鉴定机构。二是对鉴定的事项进行审查，要求鉴定机构实施须尽可能全面，以求能够全面反映损害与结果的因果关系以及损害的程度。三是对鉴定的标准进行审查。我国在海洋生态环境损害领域现有国家标准 77 项，行业标准 225 项，国家标准中本身还存在相互引用的情况。[2]法院应当对鉴定机构、鉴定人采用的鉴定标准进行严格审查，考察该标准是否适用于涉案的损害类型、对该标准的引用是否全面具体、以及是否采用了该标准规定的技术方法开展鉴定工作。四是对鉴定的程序进行审查。司法实践中，不少鉴定报告未对鉴定过程进行记载无法客观反映鉴定过程。为了能够在庭审中对鉴定报告进行充分、有效的质证，法院应当要求鉴定人保留全程的录音录像，与鉴定报告一并出具；并且，鉴定人应当将每一步骤的操作规范逐一开释，展现样品采集、储存以及运输的每个环节。各方当事人可对鉴定人采取的每一项步骤提出异议，并由法院审查该项步骤是否应当重新实施。

2.完善不协调的法律规范

我国在以宪法为基础和核心的前提下，各个法律部门、各种法律渊源和各个法律文件应当处于一种互相协调而不抵触、彼此配合而不重复的状态，此即立法学理论中的法制统一原则。[3]根据该原则的要求，在一般法的制定、修改过程中，应当重视涉及海洋生态环境领域特殊问题的兼容、解决，从而保证我国整个法律体系的协调性。

仍以损害海洋生态环境的刑事责任为例，从全球范围来看，基于环境保护意识的增强，各国立法对损害海洋生态环境的行为都在立法上逐步从民事赔偿转向刑事责任。不论是从司法保护海洋生态环境的现实需要出发，还是基于与世界立法接轨的情势考虑，我国目前都应当尽快完善海洋刑事法律制度。如此有利于我国形成系统的涉海法律体系。考察目前《刑法》

[1] 常林：《谁是司法鉴定的“守门人”——关于<司法鉴定管理问题的决定>实施五周年成效评析》，载《证据科学》，2010 年第 5 期，第 628 页。

[2] 参见《国家海洋局关于印发现行有效海洋国家标准和行业标准目录的通知》，载《国家海洋局公报》2015 年第 2 号。

[3] 沈宗灵：《法理学》，北京大学出版社 2014 年版，第 243 页。

第 338 条的表述，应当通过相应司法解释，对其内涵作进一步明确，具体存在以下几点值得讨论之处：

一是关于该类犯罪的主观方面。此问题在实践与理论中的争议最为突出，主要有以下几种观点：一、过失说，认为本罪的主观方面为过失，即行为人应当预见到自己排放、倾倒或者处置有害物质的行为可能造成海洋环境严重污染的后果，但因为疏忽大意没有预见，或者已经预见而轻信能够避免。[1]二、故意说，认为本罪的主观方面为故意，即行为人明知违反国家规定排放、倾倒或者处置有毒有害物质会发生污染环境的结果，并且希望或者放任这种结果发生。[2]三、复杂罪过说，又称双重罪过说、混合罪过说，认为本罪既可以由故意构成，也可以由过失构成，本罪的罪过形式为故意和过失。[3]经过分析、比较上述观点的理论和依据，故意说的观点更为合理。故意的社会危害性大于过失犯罪，在客观事实基本相同的情况下，不应出现社会危害性小的行为构成犯罪，而社会危害性大的行为反而不构成犯罪的局面。目前，《刑法》中并无与污染环境罪对应的故意犯罪存在，故认为该罪的主观方面为过失或包含过失都是不妥当的。但在司法适用的具体过程中，可以考虑扩大间接故意形态的适用范围，从而在一定程度上弥补故意说在处罚范围上的局限性。司法实践中，虽然存在行为人积极追求侵害海洋生态环境后果的直接故意心态，但这绝非常态，行为人对侵害后果大多持放任的间接故意心态。[4]例如，在“重庆云光化工有限公司等污染环境”一案中，被告人夏勇为被告重庆云光化工有限公司（以下简称云光公司）员工，其在未审查被告人张必宾是否具备危险废物处置能力的情况下，将重庆长风化学工业有限公司委托云光公司处置的工业废水直接转交张必宾处置，最终致使当地环境受到严重污染。四川省宜宾市兴文县法院认为，被告人夏勇明知其将工业废水转交张必宾处置的行为会导致环境严重污染的后果，但其放任该结果的发生，最终造成了相应后果；以被告人夏勇构成污染环境罪，判处其有期徒刑 2 年，并处罚金 2 万元。2013 年 6 月 18 日，最高法院将该起案例作为四起污染环境犯罪典型案例之一公布，充分体现其对此种司法实践的认同。

二是关于该类犯罪的客观方面，应当参照《海洋环境保护法》第 95 条的规定作进一步细化，即明确排放是指把污染物排入海洋的行为，包括泵出、溢出、泄出、喷出和倒出；处置是指在处理固体废物时利用焚烧、填埋等方式。

三是关于该类犯罪的既遂形态，应不限于危害结果，对可能造成严重危害的污染行为同

[1] 高铭暄、马克昌：《刑法学》，北京大学出版社、高等教育出版社 2016 年版，第 582 页。
[2] 张明楷：《刑法学（下）》，法律出版社 2016 年版，第 1131 页。
[3] 秦鹏、李国庆：《论污染环境罪主观面的修正构成解释和适用：兼评 2013“两高”对污染环境罪的司法解释》，载《重庆大学学报（社会科学版）》，2016 年第 2 期，第 153 页。
[4] 侯艳芳：《污染环境罪疑难问题研究》，载《法商研究》，2017 年第 3 期，第 116 页。

样应当将其入刑。因为，生态价值才是刑事法律介入环境保护的出发点。[1]若待实害结果发生再行追究行为人的责任，则刑事司法的预防作用就荡然无存。[2]

四是关于该类犯罪的罚则。除了吸收《刑法》第 338 条规定的罚金、拘役和有期徒刑以外，还可增设复原海洋生态环境等非刑罚措施作为补充，强制行为将损害的海洋生态环境恢复至受损之前的水平，具体的措施可以为限期治理、劳役代偿、赔偿损失、责令补救等。

3.填补急需的立法空白

如前所述，我国海洋生态环境领域涉及的法律规范都比较原则、笼统，可操作性多有不强。由此，有必要针对部分特殊问题创设专门的制度。比如，海上有毒有害物质污染损害已引起国际社会的高度重视，随着 1996 年国际海事组织（IMO）通过了《国际海上运输有毒有害物质损害责任及赔偿公约》（以下简称《HNS 公约》）及其 2010 年议定书（以下简称《2010 年 HNS 公约》）的出台，世界各国纷纷启动其国内立法的相关研究，权衡加入该公约的合理性。我国基于各方面的考量，并未选择加入《HNS 公约》。因此，在国内法中创设相应的制度规范就更具必要性。由于海上有毒有害物质污染损害的污染源为船舶运输，故增设的规范应纳入修改后《海商法》的体系之中，同时参照《2010 年 HNS 公约》的立法逻辑。一方面，有毒有害物质污染损害与油污损害具有一定的共性，针对部分问题可以适用《海商法》中相同的理论。另一方面，针对有毒有害物质的特性应当创设专门的法律规定：一是授权国务院交通运输主管部门对有毒有害物质的定义进行明确。二是规定承运人对因托运人未提供所运物质的危害性和毒性信息所造成的损害可以免责。三是对船舶载运的有毒有害物质造成的损害规定单独的责任限额与责任限制基金。

二、达成法律观点共识 统一司法裁判规则

“同案同判”、“类似情况类似处理”是对司法裁判的基本要求，同时也是司法公信力的生命所在。对于涉海洋生态环境案件中部分争议较大的法律适用和利益平衡问题，各法院应当尽快达成一致的处理方式。

1.明确法律适用

（1）明确受理法院

《民事诉讼法》第 28 条规定：“因侵权行为提起的诉讼，由侵权行为地或者被告住所地人民法院管辖。”此为确定环境侵权案件管辖的一般原则，但由于该条款的内容过于宽泛，极易引发交叉管辖等问题，故实践中难以实际起到确定案件管辖的作用。2020 年修正的《最高人民法院关于审理生态环境损害赔偿案件的若干规定（试行）》中细化了环境侵权案件的管辖依

[1] 何勤华：《20 世纪外国刑事法律的理论与实践》，法律出版社 2006 年版，第 136 页。
[2] 郝艳兵：《风险刑法：以危险犯为中心展开》，中国政法大学出版社 2012 年版，第 280 页。

据，但其第 2 条规定，因海洋生态环境损害要求赔偿的，不适用该司法解释。故涉海洋生态环境案件也不适用该司法解释的规定。综合考察我国出台的各项司法解释，发现仅有 2018 年施行的《最高人民法院关于审理海洋自然资源与生态环境损害赔偿纠纷案件若干问题的规定》（以下简称《海洋环境生态损害赔偿案件司法解释》）对诉请海洋生态环境损害赔偿案件的管辖作了具体规定。该司法解释第 2 条明确该类案件由海事法院专属管辖，具体通过损害行为发生地、损害结果地或采取预防措施地确定地域管辖。因此，涉海洋生态环境案件的管辖应以该条款为依据，即由损害行为发生地、损害结果地或采取预防措施地海事法院受理，普通法院受理该类案件的，应将其移送至有管辖权的海事法院审理。如损害行为发生地、损害结果地或采取预防措施地涉及两家以上海事法院，且涉及的法院对管辖问题无法达成一致意见的，则应适用《民事诉讼法》确定的规则，即由涉及的海事法院共同报请最高法院确定管辖。值得注意的是，《海洋环境生态损害赔偿案件司法解释》第 12 条第 3 款规定："人民法院审理因船舶引起的海洋自然资源与生态环境损害赔偿纠纷案件，法律、行政法规、司法解释另有特别规定的，依照其规定。"即针对诸如船舶油污损害赔偿责任纠纷等涉及船舶的案件，若《海商法》《海事诉讼特别程序法》对案件管辖有特别规定的，则应适用该特别规定。

（2）明确公益诉讼起诉主体

海洋生态环境公益诉讼案件的审理能够取得何种实质性的进步，根本上取决于司法权力能够在多大程度上引导经济发展与海洋环境保护之间的利益分配与再平衡。[1]司法实践应当明确海洋生态环境公益诉讼的起诉主体，统一对适格原告的认识：

首先，《海洋环境保护法》第 89 条第 2 款并非关于海洋生态环境公益诉讼的规定。狭义的民事公益诉讼必须同时具备两项特征：一是诉讼的目的在于维护社会公共利益；二是原告与案件不存在直接利害关系。[2]但从该条款的表述来看，其规定的行为是"破坏海洋生态、海洋水产资源、海洋保护区"，损害是"给国家造成重大损失"，故此种侵权行为的被侵权人是国家，享有损害赔偿请求权的权利人也是国家。[3]行使海洋环境监督管理权的部门是"代表"国家进行索赔，本质上与案件存在直接的利害关系，依然属于私益诉讼。[4]有观点将此种诉讼称为"国家代表人诉讼"[5]或者"代为索赔"[6]。综合该条款在实践中的适用情形，司法裁判也都基本认同这一观点。例如，在康菲溢油案中，国家海洋局依据《海洋环境保护法》提出赔偿要求的方式并非诉讼，这些案例足以说明该条款并非关于海洋生态环境公益诉讼的规定。

[1] 单红军、王恒斯、王婷婷：《论我国海洋环境公益诉讼的若干法律问题》，载《环境保护》，2016 年 Z1 期，第 79 页。
[2] 李浩：《民事诉讼法学》，法律出版社 2016 年版，第 261 页。
[3] 孙思琪、金怡雯：《中国海洋环境民事公益诉讼法律依据论辩——以<海洋环境保护法>第 89 条第 2 款的解释论为中心》，载《浙江海洋大学学报（人文科学版）》，2017 年第 4 期，第 4 页。
[4] 吕忠梅：《环境法学概要》，法律出版社 2016 年版，第 267 页。
[5] 吕忠梅：《环境法学概要》，法律出版社 2016 年版，第 267 页。
[6] 韩德培：《环境保护法教程》，法律出版社 2015 年版，第 376 页。

其次，有权提起海洋生态环境公益诉讼的主体为检察机关与社会组织。《民事诉讼法》第58 条规定，有权提起公益诉讼的主体为“法律规定的机关”、“有关组织”和“检察机关”。而根据前文得出的结论，《海洋环境保护法》并未赋予某类行政机关此种职责；在《环境保护法》中亦无此种规定。可见，海洋生态环境公益诉讼的起诉主体仅有“检察机关”与“有关组织”两类，行政机关被排除在外。结合我国海洋生态环境治理的现实情况，此种立法安排具有其内在逻辑：一方面，公益诉讼权利与行政机关的环境管理权利与环境保护职责存在一定的内在矛盾；[1]另一方面，我国《行政强制法》设立了行政代履行制度，承担环境保护职责的行政机关不必通过公益诉讼要求责任人履行相关义务；其有权通过代履行或委托他人代履行，就相关费用通过行政程序要求责任人承担。[2]

最后，海洋生态环境公益诉讼应以检察机关提起为主。我国的环境公益诉讼长期面临立案难、取证难、胜诉难的问题。[3]例如，在大连市环保志愿者协会与大连中石油国际储运有限公司一案中，该组织以公益诉讼向责任人索赔逾 6 亿元，其中遇到的最大困难即为举证。“对水底生物污染、对海滩的污染情况，需要职能部门提供数据，但去了后要不到。”而有关行政部门也存在难处，“能提供的数据都提供了，但因为缺少法律规定，有些数据确实无法提供”。[4]对于此类问题，有关社会组织在短期内均难以克服，而检察机关应对“三难”问题则有十分明显的优势：一是检察机关拥有独立地位，具备立案的条件。二是检察机关拥有法律规定的调查取证权，能够完成相应的举证。三是检察机关拥有诉讼方面的专业优势，可解决胜诉难的问题。因此，现阶段，海洋生态环境公益诉讼应以检察机关提起为主，同时适当吸收社会组织的力量，通过其公共性和非政府性切实了解公众需求，[5]促进海洋生态环境多元治理结构的形成。

（3）明确权利基础

一切因海洋生态环境损害致使其海洋环境权利或海洋环境法益受损的主体，均具备向责任人提起索赔的请求权基础。司法应当从保护海洋环境权利与海洋环境法益的根本角度出发，正确认定相应索赔主体的请求权基础。

以前文所述养殖户的索赔权利为例，虽然《渔业法》与《海域使用管理法》规定了两项证书要求，但是否具备该两项证书，并非原告具备请求权基础的必要条件。实践中，存在大

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[1] 最高人民法院环境资源审判庭：《最高人民法院关于环境民事公益诉讼司法解释理解与适用》，人民法院出版社 2015 年版，第 26 页。

[2] 全国人大常委会法制工作委员会：《中华人民共和国环境保护法释义》，法律出版社 2014 年版，第 200 页。

[3] 李艳芳、吴凯杰：《论检察机关在环境公益诉讼中的角色与定位——兼评最高人民检察院<检察机关提起公益诉讼改革试点方案>》，载《中国人民大学学报》，2016 年第 2 期，第 3 页。

[4] 范春生、闫平：《环境公益诉讼取证难立案难：或因地方保护主义所致》，载半月谈网 2015 年 9 月 29 日，http://www.banyuetan.org/chcontent/jrt/2015929/154838.html。

[5] 张峰：《环境公益诉讼起诉主体的顺位设计刍议》，载《法学论坛》，2017 年第 2 期，第 141 页。

量养殖户未取得证书，但当地政府部门实际许可其从事养殖、捕捞的情况。如前所述，政府部门不予发证，可能系出于某种政策特殊考虑。故在养殖户实质已获“许可”的情况下，以证书不全为由否定其请求权基础，并不妥当。而且，根据《民法典》侵权责任编的规定，其所保护的对象为“民事权益”，[1]即民事利益也是我国侵权法律体系所保护的对象。[2]最高法院于 2021 年 12 月 31 日下发的《全国法院涉外商事海事审判工作座谈会会议纪要》[3]第 81 条第 3 款指出：“被侵权人就养殖损害主张赔偿时，应当提交证据证明其在事故发生时已经依法取得海域使用权证和养殖许可证；养殖未经相关行政主管部门许可的，人民法院对收入损失请求不予支持，但被侵权人举证证明其无需取得使用权及养殖许可的除外”。可见，最高法院也认同这一观点。对此，样本案件“栾树海等 21 人与康菲石油中国有限公司、中国海洋石油总公司海上污染损害责任纠纷”一案[4]中的做法值得借鉴。该案一审法院认为，该案养殖户自原养殖权利人处承包养殖海域，支付承包费用，履行了合法承包手续，且实际从事养殖行为，当地政府部门对此从未提出异议。并且，在事故发生后，当地政府核实并清理了涉案海域，并以此为依据发放赔偿补偿款，上述养殖户均在赔偿补偿范围内。因此，可以认定当地政府部门实际许可上述养殖户进行养殖生产，其就涉案损害，具备向责任方提起索赔的请求权基础。后续，该案一审法院的做法也得到了二审和再审法院的支持。

再以前文所述清污单位的索赔权为例，船舶溢油事故的情况瞬息万变，若不及时进行控制，损害后果将不堪设想。故多数情况下由海事机关直接委托清污单位立即采取清污措施。考察理论界与实务界对清污费用性质的诸项观点，司法应当将清污费用的索赔权认定为民事债权；对于责任人而言，清污费用属于民事责任。《海洋环境保护法》第 90 条规定：“造成海洋环境污染损害的责任者，应当排除危害，并赔偿损失”。可见，法律已明确海洋生态环境损害赔偿责任属于民事责任。清污费用作为海洋生态环境损害赔偿的一种，自然也应当属于民事债权。此种定性也是目前国际社会的通行做法。[5]我国加入的《1969 年国际油污损害民事责任公约的 1992 年议定书》（以下简称《民事责任公约》）、《1992 年国际油污损害赔偿基金公约》与《燃油公约》都体现了“污染者付费的原则”，将船舶油污损害赔偿纳入民事赔偿的范围之内。我国司法在此类案件的处理中，应当与上述公约的宗旨与国际通行做法保持一致。并且，就法律公平价值的角度而言，此种做法有利于保障责任人与清污单位双方的利益。因为只有将清污费用认定为民事债权，肇事船东才可依据《海商法》的规定享受海事赔偿责任限制。若海事赔偿责任限制基金不足以全额支付清污费用，清污单位还可通过相关制度安排，

[1] 《民法典》第 1164 条规定：“本编调整因侵害民事权益产生的民事关系。”
[2] 程啸：《侵权责任法》，法律出版社 2015 年第二版，第 121-122 页。
[3] 法（民四）明传（2021）60 号。
[4] （2012）津海法事初字第 1 号、（2016）津民终 69 号、（2017）最高法民申 14 号。
[5] 帅月新：《船舶油污事故中强制清污费用索赔问题分析》，载《世界海运》，2019 年第 12 期，第 50 页。

向船舶油污损害赔偿基金申请赔偿。相反，若将清污费用认定为行政法上的义务，则清污单位便无法从肇事船东设立的海事赔偿责任限制基金中受偿，也无法从船舶油污损害赔偿基金中获得赔付，有悖于法律公平价值的体现。《全国法院涉外商事海事审判工作座谈会会议纪要》第 82 条指出："清污单位受海事行政机关指派完成清污作业后，清污单位就清污费用直接向污染责任人提起民事诉讼的，人民法院应予受理"。可见，最高法院层面也已明确肯定了清污单位直接向责任人进行索赔的权利基础。

（4）明确责任主体（化解国内法与国际公约规定矛盾）

对于海洋生态环境损害赔偿的责任主体以及该原则的内涵，应当结合涉海洋生态环境案件的具体情况进行综合理解。对于我国国内法与国际公约规定的表面冲突问题，现阶段应当在司法适用的过程中通过技术性的手段予以解决。

以互有过失船舶碰撞所致油污损害的责任主体问题为例，首先，应厘清司法实践中对此的不同做法及其主要理由。第一种观点认为，应由漏油船先承担污染损害赔偿责任，漏油船赔偿后，有权向责任方追偿。我国加入的《民事责任公约》与《燃油公约》即体现了这一原则。样本案件中，"达飞佛罗里达"轮与"舟山"轮碰撞案的一、二审判决[1]以及宁波海事法院对"佐罗"轮与"埃林顿"轮碰撞案的一审判决也采纳了此种观点。[2]目前《海商法（修改送审稿）》中的"船舶油污损害赔偿责任"一章，经吸收各方意见后亦采纳此种观点。[3]第二种观点认为，漏油船与非漏油船应按碰撞比例向受损方承担按份责任。在"闽燃供 2 号"轮溢油一案中，广东高院在二审中即采纳此种观点。[4]第三种观点认为，受损方既有权向漏油方主张全部赔偿责任，也有权按碰撞比例分别向漏油船与非漏油船主张赔偿责任。样本案件中，"达飞佛罗里达"轮与"舟山"轮碰撞案的再审判决即采纳此种观点。[5]

综合考察以上各种观点，第一种观点系该领域内的传统观点，也是目前国际上较为通行的做法。目前《海商法》该部分的修改工作更考虑其与我国参加的公约的一致性，所以也持此种观点。然而，国际公约虽然有其合理性和优越性，由于其本质是国际社会的利益平衡，故往往缺乏系统的理论指导。若《海商法》一味追求国际化就会使司法实践难以充分维护本国利益，最终妨碍其在国内的适用。[6]

司法实践应当在适用国际公约的基础上对其条文的内涵进行适度的调整、突破，使其能够适应本国土壤。上述第三种观点即是此种思想的直接体现。司法应当在认定漏油船对油污

[1] 参见（2015）甬海法商初字第 442 号、（2017）浙民终 581 号。
[2] 参见广东海建律师事务所主任许光玉在 2021 年 11 月 27 日第四届广州海法论坛上的发言。
[3] 参见大连海事大学法学院副院长韩立新在 2021 年 11 月 18 日"新时代中国特色船舶污染损害赔偿机制的建设和完善"专题研讨会上的发言。
[4] 参见（2000）粤高法经二终字第 328 号。
[5] 参见（2018）最高法民再 368 号。
[6] 郭瑜：《海商法的精神——中国的实践和理论》，北京大学出版社 2005 年版，第 14 页。

损害承担全部责任的基础上，同时肯定受损方直接向非漏油船依据碰撞比例主张损失的合理性。认定非漏油船也应直接向受损方承担责任，有利于加强司法对受损方的保护。我国从事国际航线营运、载运 2000 吨以上散装货油的船舶基本都参加了强制保险，但载运 2000 吨以下散装货油的船舶以及沿海运输的油船，参加保险的数量极少，仅占总数的 10%，即小船数量多、事故多，而赔付能力差。当两船碰撞导致一船漏油的情况下，漏油船的赔偿能力往往不足。[1]例如，2000 年 11 月 14 日，油船“德航 298”轮在珠江口虎门大桥附近水域与“宝赛利”轮发生碰撞，事故造成“德航 298”轮船体严重破损，所载的 230 立方米燃料油全部泄露入海域，受污染水域面积约 390 平方公里。因“德航 298”轮未购买油污责任保险，油污受损方又无途径向“宝赛利”轮一方进行索赔，造成该案损失几乎未受任何赔偿。在上述情形下，若肯定受损方对非漏油船的索赔权利，则其一方面可依据油污损害赔偿法律关系，请求漏油船承担责任；另一方面则可依据船舶碰撞法律关系，向非漏油船主张索赔。如此，受损方能够获得尽可能充分的赔偿。

2.平衡权利与责任

（1）扩大损害赔偿范围

《海洋环境保护法》第 89 条第 1 款规定：“造成海洋环境污染损害的责任者，应当排除危害，并赔偿损失”。《海洋环境生态损害赔偿案件司法解释》进一步明确，海洋生态环境损害赔偿的范围包括预防措施费用、恢复费用、恢复期间损失和调查评估费用四类。《船舶油污司法解释》第 9 条将船舶油污损害的赔偿范围规定为预防措施、财产损害、收入损失与恢复措施四类，与《海洋环境保护法》第 89 条基本对应，但就认定标准等问题通过其他条款作了更为详细的规定。在上述赔偿范围内，恢复费用与恢复期间损失两项内容由于可量化的程度较低，司法实践中对其通常难以准确认定。

关于恢复费用，目前应当拓宽其实现的路径。一般而言，海洋生态环境修复有直接修复和替代性修复两种路径，前者优先适用，后者系前者无法实现时的补充。[2]根据样本案件可以发现，目前司法实践所涉及的恢复费用基本都为直接修复涉及的费用，大多没有达到理想效果。对此，应当重视替代性修复的补充作用，包括同地区异地点、同功能异种类、同质量异数量、同价值异等级等形态。[3]此种修复路径同样要求将海洋生态环境修复至受损前的功能和状态。若上述措施均难以实现修复目的，还可以要求责任方就此赔偿损失。例如，在“Zoe

[1] 余妙宏：《船舶碰撞责任下因果关系之考量———兼论船舶互有过失碰撞所致油污损害的责任主体》，载《中国海商法年刊》，2018 年 1 月，第 27 页。

[2] 石春雷：《论环境民事公益诉讼中的生态环境修复——兼评最高人民法院司法解释相关规定的合理性》，载《郑州大学学报（哲学社会科学版）》，2017 年第 2 期，第 25 页。

[3] 最高人民法院环境资源审判庭：《最高人民法院关于环境民事公益诉讼司法解释理解与适用》，人民法院出版社 2015 年版，第 303 页。

Colocotroni”轮一案中，[1]涉案船舶在波多黎各沿海搁浅，溢出 5000 吨石油，造成两个红树属植物生长的沼泽区受到污染，海洋生物的数量大幅减少。由于受污染地区已经堆积了污染沉积物，故受损的生态已不具备重建的可能。美国联邦上诉法院对此认为，损害赔偿的范围应当是将自然资源恢复或重建至受损前状态的合理支出费用；因此，在无法实现恢复、恢复费用过高或自然恢复过程漫长的情况下，应当要求责任人实施替代性的修复计划，例如获得公园用地或者在类似的地点建造森林。我国最高法院目前也已存在相关判例支持替代性修复路径，相关做法值得借鉴。[2]

关于恢复期间损失，在学理上又称纯经济损失，法院在相关案件的审理过程中应当对此予以科学的考量：一方面，受害者因海洋生态环境损害造成的损失中，只有少数与财产损害直接相关，大多属于纯经济损失，司法应对其充分考虑；[3]另一方面，世界各国的法律制度长期以来都对侵权行为所致的纯经济损失予以限制，因为“赔偿的闸门一旦打开，远因索赔将汹涌而来，赔偿义务人将不堪重负”，因而司法需要在赔付与不予赔付之间划出明确的界限。[4]具体而言，纯经济损失在司法实践中有两种表现形式：一是渔业损失，即因海洋生态环境遭受损害，造成渔业效益降低，相关方由此受到的损失。课题样本中涉及“康菲溢油”事故的 395 件案件中，索赔方的主张中均涉及此种类型的损失，最终，受理法院仅支持了其实际财产损失。在“Exxon Valdez”轮一案中，[5]美国法院也作出了相同的认定：1989 年，“Exxon Valdez”轮造成油污事故后，有渔民以 1989 年及之后年份所捕获的鲑鱼价格下降为由，要求该轮赔偿其相应损失。美国法院认为，船舶油污损害赔偿应当仅限于油污损害导致水中生物的实际减少造成的损失，未受到溢油污染以及贸易活动未受阻碍的索赔应当被排除在外。可见，对于渔业损失，司法旨在结合损害行为与损失结果之间的因果关系，严格考察渔业经营的损失是否与海洋污染事故存在直接、密切的关系，从而防止纯经济损失遭到索赔方的滥用。二是文化、旅游损失。现阶段，我国的海洋生态环境损害赔偿包含此种损失的较少，在样本案件中也未发现存在涉及此种损失的司法裁判，但在国外已存在比较具有代表性的案例。例如，1999 年 12 月，马耳他籍油轮“埃瑞克”号在大西洋海域断裂溢油，造成法国周边海域大面积污染。法国高等法院经过 8 年调查，于 2008 年 1 月作出判决，其中包括对几个受影响地区的经济损失、城市形象损失、道德损失和环境损失的赔偿及高额的罚金。[6]截止 2008 年 9 月 24 日，针

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[1] See Commonwealth of Puerto Rico et al. *v.* Zoe Colocotroni, 456 F. Supp. 1327 (D. C. P. R. 1978); Commonwealth of Puerto Rico et al. *v.* Zoe Colocotroni, 628 (F. 2d 652 1st Cir. 1980); cert. denied, 450 US 912, 1981.

[2] 张辉：《论环境民事公益诉讼的责任承担方式》，载《法学论坛》，2014 年第 6 期，第 65 页。

[3] 徐国平：《论船舶油污纯经济损失的赔偿范围》，载《法学评论》，2005 年底 1 期，第 55 页。

[4] [德]克雷斯蒂安·冯·巴尔：《欧洲比较侵权行为法（下卷）》，张新宝、焦美华译，法律出版社 2001 年版，第 39 页。

[5] In re The Exxon Valdez, [Order No.188] 1995 A. M. C. 1426, 1427, (D. Alaska 1994).

[6] 刘家沂：《海洋生态损害的国家索赔法律机制与国际溢油案例研究》，海洋出版社 2010 年版，第 217 页。

对该起事故提交的旅游索赔总共有 3695 件，确认赔偿的有 3207 件。[1]可见，对于旅游、文化收入损失，只要索赔方的诉求符合条件，并且能够举证证明，司法即可予支持。

（2）督促履行公开职责

在海洋生态环境的治理中，应当重视行政信息公开的工具价值，提升我国的海事行政透明度，提升各方主体对相应行政行为的理解和认同。司法应当促进海洋生态环境领域工作机制的不断完善，督促、协助海事行政主管机关提高其行政信息公开工作水平，从而形成海事司法与海事行政的工作合力。例如，2020 年，上海海事法院与上海海事局共同签署了《合作备忘录》，建立了互动交流、协助配合与优势互补三项工作机制，重点聚焦海事信息通报的协同工作。[2]又如，上海海事法院在审理“张争、黄晓婷、叶红、赵燕萍与上海市海洋局、中华人民共和国自然资源部政府信息公开纠纷”一案中，[3]行政相对人与行政机关就政府答复信息公开申请的时间产生了争议。上海海事法院在该案审理完结后，就信息的公开程序向上海市海洋局发送了沪海法建（2021）字第 9 号司法建议书，并得到该单位的积极回应，从而加强了该单位相关工作人员对政策制度的理解和掌握，提升了其工作水平。海事司法机关的上述举措均有效增强了海事行政信息的透明度，对保障上海国际航运中心建设发挥了积极的作用。

三、适度突破现有框架 形成一定创新成果

对于我国海洋生态环境法律制度与海洋开发利用实践、海洋经济发展之间的鸿沟，应当通过现有手段以灵活形式应对解决。从而实现在法律依据尚未改变的情形下，寻得解决问题的途径，为日后制度的修改夯实基础。

1.探索适用海事赔偿责任限制国际公约

《海商法》规定的海事赔偿责任限额与目前的航运经济发展状况与司法实践已存在明显脱节，同时又明显低于国际通行标准。现阶段应当优先着眼于从司法实践中寻求突破，以司法实践引导立法进程。国内外司法实践中已有多起案例对海事赔偿责任限制尝试了突破，但考察相关裁判，发现其都是因船东存在故意或重大过失，从而认定其丧失责任限制权利，仅适用于个案的处理，不具有普遍的复制性和参考性。例如，在“Clan Gordon”轮一案中，[4]涉案船舶在装有两舱压载水的情况下，船长为增加航速，命令排掉所装压载水。在压载水即将排完之时，船舶因改变航向造成船体倾斜，继而翻沉。而在该案发生一年之前，与涉案船舶结构相同的姊妹船也发生过类似事故，该船的建造人曾特别提醒该涉案船舶的所有人如何避免此类事故。但是，该船所有人却从未将该情况告知船长。英国上议院由此判决船舶所有人因

[1] 国家海洋局海洋发展战略研究所数据。

[2] 参见《共同助力上海国际航运中心建设 上海海事法院与上海海事局签署合作备忘录》，载微信公众号“上海海事法院”，2020 年 8 月 13 日。

[3] （2020）沪 72 行初 1 号。

[4] The “Clan Gordon”, [1923] 16 Ll. L. Rep. 367.

不能证明其不存在过失，故不享有责任限制的权利。

目前，世界范围内已有较多国家加入《1976 年海事赔偿责任限制公约》1996 年议定书的 2012 年修正案。该修正案已成为目前国际社会公认的标准。近年来在我国海域内发生事故的船舶，其很大比例的船籍国为该公约的缔约国或加入国，即其船籍国已明示认同 2012 年修正案的限额标准。司法裁判可在个案中，思考通过海事国际私法的手段，诸如法律规避理论等，突破性地尝试以上述 2012 年修正案规定的限额作为认定当事船舶责任限额的标准。若能形成可参照的做法，则可尽快实现我国标准与国际标准的接轨。

2.加速落实海事审判“三合一”模式

落实海事审判“三合一”诉讼制度改革有利于海事法院聚合各涉海单位力量，形成海洋生态环境司法保护合力，同时利用海事法院及其派出法庭的合理布局，形成海洋生态司法保护闭环。

关于海事法院刑事管辖权的法律依据问题，目前海事法院通过最高人民法院的复函意见与上级法院指定的形式受理海事刑事案件，该形式作为过渡阶段的变通做法并无不可，具备一定的法理依据。而且，《刑事诉讼法》第 28 条规定：“专门人民法院案件的管辖另行规定”，即已从立法层面赋予专门法院刑事审判权，而且并未限制“另行规定”的层级，为涉海刑事案件管辖的改革提供了基础。《最高人民法院关于深化人民法院司法体制综合配套改革的意见——人民法院第五个五年改革纲要（2019-2023）》中提出，要“规范专门法院建设，根据经济社会发展需要，研究完善专门法院的设立标准”。《海事法院受案范围的规定》第 65 条也明确赋予海事法院对损害海洋生态环境相关案件的审判权。由此可见，由海事法院审理损害海洋生态环境犯罪案件于法有据。但从长期角度看，海事司法条线应当加快对该问题的论证和研究，通过打造海洋生态环境精品刑事案件，加强全国海事司法条线的工作交流，出台涉海洋生态环境刑事案件类案办案指南，在立法工作的前期着眼于夯实理论和实践基础，促进配套制度的尽快出台。毕竟，海事法院行使海事案件的刑事管辖权，不仅可以构成我国对所辖海域一贯性行使司法主权的证据，[1]而且该司法管辖权本身就形成了一种“元叙事”。它是软实力的一种，相比于军事和行政力量等硬实力，这种司法管辖权恰恰更能公示中国对海洋空间的合法控制和占有。[2]这对我国面对如今复杂、多变、充满挑战的国际形势与“海洋强国”战略的实施具有重大现实意义。从这个意义上，海事法院推行“三合一”的目的并非意图通过刑事管辖权扩张其司法权力，而是通过统一管辖，“克服海洋法律碎片化带来的冲突和矛

[1] 张文广：《完善海洋法治维护国家利益》，载《人民法院报》，2019 年 8 月 3 日，第 2 版。
[2] 牟文富：《海洋元叙事：海权对海洋法律秩序的塑造》，载《世界经济与政治》，2014 年第 7 期，第 79 页。

盾”，[1]从而提升我国的海洋环境法律意识，塑造我国的海洋环境故事，形成以我国为主导的海洋生态环境法律秩序。

结语部分：为我国“海洋强国”战略实施贡献司法智慧和力量

自党的十八大报告首次完整提出“海洋强国”战略目标以来，该项目标经过了长期坚持和持续发展，如今已成为我国的基本国策。[2]保护海洋生态环境，是我国“海洋强国”战略实施的重要组成部分。在海洋生态环境治理领域，司法权具独特的手段和价值，[3]应当对其予以充分认识和利用。通过分析司法权在新时期海洋生态环境治理领域的内涵和使命，对海洋生态环境司法保护开展创新探索，深化司法保护海洋生态环境机制的创新，此即本课题的研究任务和目的。

随着海洋经济发展的不断深入和“海洋强国”战略地位的日益突出，海事司法不能仅满足于其成立伊始的职能设定。[4]海洋生态环境案件的涉外性决定了海事司法已成为我国司法的重要对外窗口，对海洋生态环境案件进行公正、高效、专业的审理，关系到我国司法环境的国际声誉以及对国外航运主体的吸引力，对提升我国航运软实力的具有重要的意义。海事司法并非陆上司法在海上的简单延伸，其有独立的历史脉络与特殊的价值取向。新形势下，海事司法在保护公民、法人合法权益的基础上，还应承载推动涉海法律制度发展的职责，肩负维护国家海洋权益的使命，为我国“海洋强国”战略的实施贡献司法的智慧和力量。

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[1] 初北平、曹兴国：《海法概念的国际认同》，载《中国海商法研究》，2015 年第 3 期，第 19 页。

[2] 金永明：《新时代中国海洋强国战略治理体系论纲》，载《中国海洋大学学报（社会科学版）》，2019 年第 5 期，第 23 页。

[3] B.Francois, *Ocean governance and human security: ocean and sustainable development international regimen, current trends and available tools*, UNITAR Workshop on human security and the sea. Hiroshima, Japan, 2005.

[4] 司玉琢、曹兴国：《海洋强国战略下中国海事司法的职能》，载《中国海商法研究》，2014 年第 3 期，第 11 页。

An Empirical Study on Judicial Protection of Marine Ecological Environment (II)

Research Team of Shanghai High People's Court*

[Editor's note]

We have divided this article into two parts since it is too long. The rest part of the article is presented in this issue, while the previous part had been published in last issue. For the perusal of our readers, the article's contents are listed below:

* Research Team of Shanghai High People's Court. This paper is the research achievement of a major project of Shanghai Judicial Think Tank in 2021.

Leading researcher of the project: WU Jinshui, vice president of Shanghai High People's Court, member of the Judiciary Committee, senior judge of the second rank; research team members: WANG Shan, chief judge of the Maritime Tribunal of Shanghai High People's Court; ZHOU Yan (penner of this paper), senior judge of the third rank of the Maritime Tribunal of the Shanghai High People's Court; XIN Hai, chief judge of the Maritime Tribunal of the Shanghai Maritime Court; CAI Jian (penner of this paper), assistant judge of the Maritime Tribunal of Shanghai Maritime Court.

Part Three. Countermeasure Analysis: The Road to Judicial Protection of Marine Ecological Environment

The purpose of conducting empirical studies lies in discovering real problems in practice and proposing corresponding solutions after analysis.[1] Practical solutions from different perspectives will be offered in this part in order to provide feasible suggestions on how to bring China's judicial power into full play especially in the field of marine ecological and environmental protection.

I. Study and Improve the Current Legislation to Fully Fill the Legal Gap

Theoretical and practical research on relevant legal norms has been carrying out uninterruptedly ever since the initiative for building China into a strong maritime country was put forward, and much research has drawn conclusions, laying the theoretical foundation for the formulation and revision of relevant laws. How to formulate and revise relevant laws and regulations, however, should not completely and solely rely on theoretical research results. Instead, the formulation and revision of the legal norms involved in the judicial protection of the marine ecological environment must be based on the actual condition in China and be problem-oriented. This will lead to the establishment of new systems and rules that are only of necessity rather than redundant, making up for the existing systems and rules and complementing each other. Article 9 of the Civil Code promulgated in May 2020, which remains the same as that of the General Rules of the Civil Law, is a case in point. Then it further includes the "Green Principle", highlighting the pursuit of socialist rule of law with Chinese characteristics and aiming to strike a balance between development and environmental and ecological conservation.[2] As one of the basic principles of civil law concerning ecology and environment, it is difficult to directly apply the "Green Principle" to individual cases, which means it should be further specified and interpreted by laws or judicial decisions.[3] Solutions offered in this part can show how the "Green Principle" is applied and specified; that is, after analyzing relevant problems, the "Green Principle" will serve as a guide to explore and provide insights on how to improve the relevant legal system in China.

1. To Amend the Outdated Legal System

The purpose of revising the legal norms and regulations, on which judicial protection of marine ecological environment is based, is to make them become more applicable and adaptive to the current situation. To meet this end, relevant authorities should consider deleting the outdated contents, updating the obsolete provisions, creating reasonable and operable new provisions, and

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1 SU Li, *Cultivating Questioning Awareness and Promoting Legal Empirical Studies*, Law Science, 2013, No. 4, p. 16.

2 MA Mi, HUANG Rong & CHANG Guohui, *Pragmatic Modes and Optimized Path for the Judicial Application of Green Principles in the Civil Code: Based on the Judicial Application of Article 9 in "the General Principles of Civil Law"*, Journal of Law Application, 2020, No. 23, p. 49.

3 [Germany] Karl Larenz, Methodenlehre der Rechtswissenschaft, translated by CHEN Ai'e, The Commercial Press, 2003, p. 353.

amending the imperfect ones in the legal system in relation to marine ecological environmental governance. They should also make scientific predictions about the future of judicial protection of marine ecological environment before amending the legal system so that the modified system could be more advanced and applicable. For example, in order to make full use of the role of forensic appraisal in the fact finding in the trial of cases involving marine ecological environment, China should improve the existing rules of forensic appraisal of damage to marine ecological environment from multiple perspectives to ensure that the appraisal results can help find out the facts.

In Shanghai, for example, there is only one specialized forensic appraisal institution, namely Academy of Forensic Science under the jurisdiction of the Ministry of Justice, but what it appraises does not include the identification of ecological and environmental damage, nor does it equip with qualified personnel or advanced facilities. In this regard, the East China Sea Environmental Monitoring Center set up by the State Oceanic Administration in Shanghai does have qualified professional staff and advanced hardware facilities, but this center is not responsible for accepting the commission to be engaged in forensic appraisal. There is another maritime forensic appraisal center in Shanghai whose personnel are more professional when it comes to appraising damage to the marine ecological environment, but this center is affiliated with a university, which means that its hardware and equipment may not be so advanced, thus reducing its overall strength. In terms of administrative management, relevant institutions in coastal areas and regions in China should be properly rearranged so as to complement each other. Resources, in this way, can be effectively integrated and utilized. An objective and scientific institution responsible for forensic identification involving marine ecological and environmental damage, which is co-founded by the corresponding institutions with qualifications, can provide technical support for the trial of marine-related cases.

Most of the current studies on judicial appraisal only focus on how to make the appraisal process itself more scientific without carefully reviewing the appraisal report in litigation.[1] The appraisal report can be considered as a kind of legal evidence, and the court is obliged to evaluate its evidentiary value through the following aspects: firstly, the court should check the qualifications of appraisal institutions in advance. Before conducting the appraisal, the court should listen to the views of the parties on the qualifications of appraisal institutions by means of hearings and other forms, and should also require the appraisal institution and the appraiser to provide relevant materials that can prove their qualifications. Appraisal institutions with appropriate qualifications are allowed to conduct the appraisal, but for those without relevant qualifications, the court should find a new one. Secondly, the court should review the list of items awaiting to be appraised. The

[1] CHANG Lin, *Who is the "Gate-keeper" of Expert Opinions? - Evaluating on the Implementation of "the Decision on the Management of Forensic Science by the Standing Committee of the National People's Congress" during Five Years*, Evidence Science Vol.18 No.5 2010, p. 628.

appraisal institution is required to try its best to conduct a sweeping review in order to objectively reveal the causal relationship between the damage and the results caused and the extent of damage. Thirdly, the court should review the standard of appraisal. There are a total of 77 national standards and 225 industrial standards existing in the field of marine ecological damage in China. It is also possible that the national standards themselves overlap one another.[1] The court should strictly examine the appraisal standards adopted by the appraisal institution and the appraiser, and find out whether the standards are applicable to the type of damage involved, whether the references to the standards are comprehensive and specific, and whether the technical methods specified in the standards are used in the process of appraising. Finally, the court should review the procedures of the appraisal. In judicial practice, many appraisal reports do not record the appraisal process, thus failing to prove that the process is objective. To be able to effectively examine the appraisal report, the court should require the appraiser to retain the entire audio and video recording, together with the appraisal report; and, the appraiser should explain each step of the appraisal process, showing every detail of the whole process including sample collection, storage and transportation. The parties involved may raise objections to each step taken by the appraiser, and the court shall determine whether the step should be re-implemented or not.

2. To Improve Inconsistent Legal Norms

Under the premise that the Constitution of the People's Republic of China is the basis and core of China's legal system, each legal department, legal source and legal document should be in harmony with each other without contradicting or overlapping one another. That is what people call the principle of unity of legal system when it comes to law-making.[2] According to this principle, in the process of formulation and revision of general laws, attention should be paid to how to solve various problems in the field of marine ecology and environment, thus contributing to forming a coordinated legal system in China.

Taking criminal liability for damage to marine ecological environment as an example and judging from a global perspective, the legislation of various countries has gradually shifted from civil compensation to criminal liability for acts that damage marine ecological environment, which can be attributed to the increasing environmental awareness. China should improve its marine criminal legal system as soon as possible, whether it is based on the real needs of the judicial protection of the marine ecological environment, or just out of the consideration for keeping up with the world legislation. This is conducive to the formation of a systematic legal system related to the sea in China. Regarding the current provisions stipulated in Article 338 of the Criminal Law,

[1] See Notice of the State Oceanic Administration on the Issuance of the Catalogue of Current Valid Marine National Standards and Industry Standards, in State Oceanic Administration Bulletin, No. 2, 2015.

[2] CHEN Zongling, *Jurisprudence*, Peking University Press, 2014, p. 243.

relevant judicial interpretations should be adopted to further clarify the connotations. What follows is worth discussing:

Firstly, on the subjective aspect of this type of crime, there are divided views among practice and theory: (1) Some people are in favor of the theory of negligence. They believe the perpetrators are negligent. To put it specifically, the perpetrators should foresee that their discharge, dumping or disposal of hazardous substances may cause serious pollution to the marine environment, but out of negligence and carelessness they did not foresee, or they have foreseen but are too confident in their ability to avoid the damage.[1] (2) Some people support the theory of intent. They believe the perpetrators are intentional. In other words, the perpetrators knew that the discharge, dumping or disposal of toxic and hazardous substances in violation of national regulations will do great harm to the environment, and they even hope or allow the damage to occur.[2] (3) Other people take a middle ground. They uphold that the subjective fault of crime of polluting environment should include intent and negligence. The perpetrators are both intentional and negligent.[3] A thorough analysis of the above three views proves that the theory of intent is the most reasonable one. Crimes committed by intent will bring more harm to society than those committed by negligence. However, in some similar cases, less harmful acts are considered as crimes while other acts that bring greater harm to society are regarded not violating laws and regulations, which should not happen. At present, no corresponding intentional crime of polluting environment has been stipulated in the Criminal Law, making it inappropriate to determine the crime to be caused by negligence, whether directly or indirectly. However, in judicial application, it is suggested that the scope of application of indirect intention be expanded so as to overcome, at least to a certain extent, the limitations of the abovesaid intentional theory on the range of punishment. In judicial practice, cases where the perpetrators actually intend to ruin the marine environment did exist, but that is not always the case. Most perpetrators are unintentional and do not deliberately cause damage to the marine environment.[4] For example, in the case of “Chongqing Yunguang Chemical Co., Ltd. and Others Polluting the Environment”, the defendant XIA Yong, an employee of the Chongqing Yunguang Chemical Co., Ltd. (hereinafter referred to as Yunguang Corporation) without examining whether the defendant ZHANG Bibin had the ability to dispose of hazardous waste beforehand, directly asked ZHANG Bibin to handle the industrial wastewater which was supposed to be handled by Yunguang Corporation. The improper handling of the industrial wastewater eventually brought huge damage

[1] GAO Mingxuan & MA Kechang, *Criminal Law*, Peking University Press and Higher Education Press, 2016, p. 528.
[2] ZHANG Mingkai, *Criminal Law*, Law Press · China, 2016, p. 1131.
[3] QIN Peng & LI Guoqing, *On Amended Constitution to Interpretation and Application of Subjective Side of the Crime of Polluting the Environment and a Review of Judicial Interpretation of the Crime of Polluting the Environment by the Supreme People's Court and the Supreme People's Procuratorate in 2013*, Journal of Chongqing University(Social Science Edition) , 2016(2), P. 153.
[4] HOU Yanfang, *A Study of Difficult Issues Involving Environmental Pollution Offences*, Studies in Law and Business, No. 3, 2017, p. 116.

to the local environment. From the perspective of the People's Court of Xingwen County, Yibing City, Sichuan Province, the defendant XIA Yong knew that the industrial wastewater handled by ZHANG Bibing would cause huge damage to the environment, but he did nothing to prevent that from happening, thus resulting in pollution to the environment. The court decided that the defendant committed the crime of polluting the environment and sentenced him a two-year imprisonment with a fine of 20,000 yuan. The Supreme Court later released the details of this case as one of the four typical cases involving the crime of polluting the environment on 18 June 2013, which shows its recognition of such judicial practice.

Secondly, with regard to the objective aspect of this type of crime, the provisions of Article 95 of the Marine Environmental Protection Law should be further refined. It should clarify that "discharge" refers to the act of discharging pollutants into the sea, including pumping, spilling, leaking, spraying and pouring; and "disposal" refers to the use of incineration, landfill and other means while disposing of solid waste.

Thirdly, regarding the determination of offenses, whether the defendant commits the crime of polluting the environment should not be defined only by the harm caused; those acts that may cause serious harm to the environment should also be deemed as committing the crime. This is because preserving ecological values is the main motivation to classify environmental offenses as criminal offenses.[1] If the perpetrator will not be held accountable until the actual harm occurs, the preventive role of criminal justice will be useless.[2]

Fourthly, the scope of penalties should be broadened. In addition to the provisions concerning fines, detention and fixed-term imprisonment specified in Article 338 of the Criminal Law, nonpunitive measures such as restoration of the marine ecological environment can be added as a supplement, forcing the perpetrator to restore the damaged marine ecological environment to the level before it was damaged. Specific measures can include a limited period for restoration, labor service in lieu of compensation, compensation for damages, ordering remediation measures and so on.

3. To Fill Legislative Gaps on Demand

As mentioned earlier, the legal norms involved in the field of marine ecological environment in China are rather general, and they should be more applicable. It is, therefore, of necessity to create a special system for certain special issues. For example, pollution damage by toxic and hazardous substances at sea has attracted great attention from the international community, and with the adoption of the International Convention on Liability and Compensation for Damage in

[1] HE Qinhua, *The Theory and Practice of Foreign Criminal Law in the 20th Century*, Law Press · China, 2006, p. 136.
[2] HAO Yanbing, *Risk Criminal Law: Research Centered on Potential Damage Offence*, China University of Political Science and Law Press, 2012, p. 280.

Connection with the Carriage of Hazardous and Noxious Substances by Sea by the International Maritime Organization (IMO) in 1996 (hereinafter referred to as the HNS Convention) and its 2010 Protocol (hereinafter referred to as the 2010 HNS Protocol), countries around the world have conducted surveys on their domestic legislation and weighed whether to join the HNS Convention or not. China has not chosen to accede to the HNS Convention due to various considerations. Therefore, formulating corresponding provisions in China's domestic law is of great necessity. As pollution damage caused by toxic and hazardous substances at sea derives from the transport of ships, additional norms should be included in the revised Maritime Law of the People's Republic of China while referring to the provisions stipulated in the 2010 HNS Protocol. For one thing, there is something in common between pollution damage caused by toxic and hazardous substances and oil pollution damage, which makes it sensible to apply the same provisions in the Maritime Law to certain cases. For another, specialized legal provisions on toxic and hazardous substances should be created in order to better handle relevant cases: firstly, the competent transport authorities under the State Council should be authorized to define toxic and hazardous substances. Secondly, the carrier should be exempted from liability for damage caused by the shipper's failure to provide information on the hazards and toxicity of the substance being transported. Thirdly, a separate liability limit and liability limitation fund should be set up for damage caused by toxic and hazardous substances carried by ships.

II. Reach Consensus on Legal Views and Unify Judicial Rules

Basically, judicial decisions are in accordance with the principles that "like cases should be treated alike" and "relevant judgments can be cited for similar cases", which is also the core of judicial credibility. For issues like legal application and balance of interests concerning marine ecological environmental cases, the courts should reach a consensus on how to deal with them as soon as possible.

1. To Clarify the Application of the Law

A. Clarify Which Court has the Right to Handle Such Cases

Article 28 of the Civil Procedure Law of the People's Republic of China provides that "an action involving a tort shall come under the jurisdiction of the people's court of the place where the tort was committed or where the defendant is domiciled." This is a general principle for determining the jurisdiction of environmental tort cases, but this article is way too broad and general, which is very likely to give rise to problems such as cross-jurisdiction. Therefore, it is difficult for this article to play its full role in practice when determining the jurisdiction of such cases. The jurisdictional basis of environmental tort cases has been clarified in the Several Provisions of the Supreme People's Court on the Trial of Cases on Compensation for Damage to the Ecological Environment (for Trial Implementation) which was amended in 2020. But Article 2 in

the amendment provides that claims for compensation for damage to the ecological environment do not apply to this law. The provisions of this law, therefore, do not apply to cases involving the marine ecological environment. A comprehensive examination of various judicial interpretations issued in China reveals that the Provisions of the Supreme People's Court on Several Issues concerning the Trial of Cases Involving Disputes over Compensation for Damage to Marine Natural Resources, Ecology and Environment (hereinafter referred to as the Judicial Interpretation on Compensation for Damage to the Marine Natural Resources), which came into effect in 2018, is the only regulation containing specific provisions on the jurisdiction of cases involving compensation for damage to the marine ecological environment. Article 2 of the Judicial Interpretation on Compensation for Damage to the Marine Natural Resources specifies that such cases shall be under the exclusive jurisdiction of maritime courts and relevant lawsuits shall be under the jurisdiction of the maritime court of the place where the pollution occurs, the place that is suffering from the harmful consequences, or the place where preventative measures are taken. The jurisdiction of cases involving marine ecological environment, therefore, should be determined in accordance with this article. In other words, such cases should be handled by the maritime courts of the right place. Other courts should transfer such cases to relevant maritime courts for trial. If more than two maritime courts are involved in the place where the damage occurs, the place that is suffering from the harmful consequences or the place where the preventive measures are taken, and the courts involved cannot agree on the issue of jurisdiction, the rules established in the Civil Procedure Law shall be applied, i.e. the maritime courts involved shall jointly report to the Supreme Court to determine the jurisdiction. It is worth noting that Article 12(3) of the Judicial Interpretation on Compensation for Damage to the Marine Natural Resources provides that "When a people's court tries a case involving compensation for damage to marine natural resources, ecology and environment caused by vessels, where there are other special provisions prescribed by laws, administrative regulations, and judicial interpretations, such special provisions shall prevail." That is to say, for cases involving ships such as disputes over liability for oil pollution damage from ships, if the Maritime Law of the People's Republic of China and the Special Maritime Procedure Law of the People's Republic of China do include special provisions on the jurisdiction of the case, such provisions shall be applied.

B. Clarify the Subject of Public Interest Litigation

Whether progress can be made in the trial of public interest litigation concerning marine ecological environment largely depends on the judicial power. To put it specifically, how the judicial power helps strike a balance between economic development and marine environmental

protection can have a vital impact on the trial of such cases.[1] Judicial practice should clarify the main subjects of prosecution in marine environmental public interest litigation and reach a consensus on eligible plaintiffs.

First, Article 89(2) of the Marine Environmental Protection Law is not a provision on marine environmental public interest litigation. A civil public interest lawsuit in the narrow sense must meet two requirements: first, the purpose of the lawsuit is to protect the public interest; second, the plaintiff is not an interest party in the case.[2] However, in this article, the act refers to "damaging marine ecology, marine aquatic resources and marine protected areas" and the damage refers to "causing significant losses to the State". It can be seen that the State is the infringed party in such infringement, so the State has the right to claim compensation for damages.[3] The authority exercising the right to supervise and manage the marine environment is "acting on behalf of" the State, and is actually an interested party in the case, thus making it a private interest litigation rather than a public interest one.[4] Some people have referred to this type of action as a "representative of the State"[5] or a "representative claim"[6]. In general, judicial decisions are also in line with this view based on the application of this provision in practice. For example, in the ConocoPhillips oil spill case, the State Oceanic Administration claimed for compensation in accordance with the Marine Environmental Protection Law without filing a lawsuit, and such cases are enough to show that this provision is not the one related to public interest litigation for marine ecology.

Secondly, the main bodies entitled to initiate public interest litigation on the marine ecological environment are the procuratorial organs and social organizations. Article 58 of the Civil Procedure Law provides that the subjects entitled to initiate public interest litigation are "legally designated institutions", "relevant organizations", and "the people's procuratorate". The Marine Environment Protection Law does not confer such a duty on certain types of administrative authorities, as concluded above, nor is there any such provision stipulated in the Environmental Protection Law. Obviously, the only two types of public interest litigation bodies for marine ecology and environment are "the people's procuratorate" and "relevant organizations", with administrative organs being excluded. Taking into account the actual condition of marine ecological governance in China, such a provision has its own logic: for one thing, there is an inherent contradiction between the right of public interest litigation and the administrative authority's environmental management

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1 SHAN Hongjun, WANG Hengsi & WANG Tingting, *Study of Several Legal Issues on Marine Environmental Public Interest Litigation*, Environmental Protection, 2016, No. Z1, p. 79.

2 LI Hao, *Civil Procedure Law*, Law Press · China, 2016, p. 261.

3 SUN Siqi & JIN Yiwen, *On the Legal Basis of Civil Public Interest Litigation for Marine Environment - Focusing on the Interpretative Theory of Article 89(2) of Chinese Marine Environment Protection Law*, Journal of Zhejiang Ocean University (Humanities Science), 2017, No. 4, p. 4.

4 LV Zhongmei, *Environmental Law in a Nutshell*, Law Press · China, 2016, p. 267.

5 LV Zhongmei, *Environmental Law in a Nutshell*, Law Press · China, 2016, p. 267.

6 HAN Depei, *A Course in the Law of Environmental Protection*, Law Press · China, 2015, p. 376.

and environmental protection duties;[1] for another, China has established a system of performance on behalf of the party concerned in Administrative Compulsion Law of the People's Republic of China, so that the administrative authority responsible for environmental protection does not have to require the responsible person to fulfill the relevant obligations through public interest litigation; the administrative authority has the right to perform on behalf of the party concerned or entrust someone else to perform, and it can demand the party concerned to bear the relevant costs incurred through administrative procedures.[2]

Finally, public interest litigation in marine ecology should be initiated mainly by the procuratorial authorities. Environmental public interest litigation in China has long faced difficulties in filing cases, obtaining evidence and winning lawsuits.[3] For example, in the case of Dalian Environmental Protection Volunteers Association and Dalian PetroChina International Storage and Transportation Corporation Ltd., the association claimed over 600 million yuan from the responsible party in a public interest litigation, in which the biggest barrier encountered was finding the proof. "If you want to know the condition of pollution on underwater life and beaches, you will need to obtain data from functional departments, but you can't get it when you go there." The administrative departments concerned also have their own concerns, saying that "the data that are available have been provided, but we really cannot provide certain kinds of data without legal provisions."[4] In the short term, it is hard for social organizations to resolve such problems, whereas the procuratorial authorities have obvious advantages in dealing with these problems: firstly, the procuratorial authorities are independent and are able to file cases. Secondly, the procuratorial authorities have the power to investigate and collect evidence as provided for by law. Thirdly, the procuratorial authorities are professionals in litigation, thus increasing the possibility of winning cases. Therefore, at this stage, public interest litigation in the marine ecological environment should be mainly initiated by the procuratorial organs with the help of social organizations if needed. The combination of governmental and non-governmental power will be more effective in understanding the needs of the public[5] and contribute to the formation of a pluralistic governance structure of the marine ecological environment.

C. Clarifying the Basis of Rights

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[1] Adjudication Tribunal for Environment and Resources of the Supreme People's Court of the People's Republic of China, *Interpretation and Application of the Supreme People's Court on Environmental Civil Public Interest Litigation*, People's Court Press, 2015, p. 26.

[2] Legislative Affairs Commission of the Standing Committee of the National People's Congress, *Interpretation of the Environmental Protection Law of the People's Republic of China*, Law Press · China, 2014, p. 200.

[3] LI Yanfang & WU Kaijie, *Role of Procuratorates in the Environmental Public Interest Litigation*, Journal of Renmin University of China, No. 2, 2016, p. 3.

[4] FAN Chunsheng & YAN Ping, *Why Is It Difficult for Environmental Public Interest Litigation to Obtain Evidence and File: Maybe due to Local Protectionism*, China Comment (September 29, 2015), http://www.banyuetan.org/chcontent/jrt/2015929/154838.html.

[5] ZHANG Feng, *The Sequence Design of Environmental Public Litigation Subject*, Legal Forum, No. 2, 2017, p. 141.

All parties whose marine environmental rights or legal interests in the marine environment have been undermined due to the polluted marine ecosystem shall have the right to claim for compensation from those responsible. The judiciary should focus on how to ensure and protect the rights and legal interests of the marine environment and clarify who shall have the right to claim for compensation.

As mentioned before, the right of those engaging in aquaculture to claim for compensation is a case in point. There are provisions pertaining to the two certificates in the Fisheries Law of the People's Republic of China and the Law of the People's Republic of China on the Administration of Sea Areas, but whether the two certificates are acquired by the plaintiff is not necessary in determining whether he or she has the right to claim for compensation. In practice, many people engage in aquaculture without obtaining the certificates, but the local government departments actually permit them to do so. As mentioned above, the government departments do not issue the certificates because of some policies. Therefore, it is inappropriate to deny the right of a person engaging in aquaculture to claim for compensation simply on the grounds that he or she didn't obtain certificates when he or she has in fact received a "permit". Moreover, according to the Tort Liability section of the Civil Code, this section regulates the civil-law relations arising from the infringement of "the civil-law rights and interests"[1]; that is to say, civil interests are also under the protection and regulation of China's tort law system.[2] Article 81(3) of the Minutes of the National Symposium on the Foreign-related Commercial and Maritime Trial Work of Courts,[3] which was issued by the Supreme Court on 31 December 2021, stipulates that when the infringed party claims compensation for damage to his or her aquaculture business, he or she shall submit evidence to prove that he or she had obtained a sea use right certificate and a breeding license in accordance with the law at the time of the accident; if he or she has not been permitted by the relevant administrative department, the people's court shall not support the claim for loss of income, except where the infringed party proves that he or she did not need to obtain the license. As can be seen, the Supreme Court also agrees with this view. In this regard, the sample case of LUAN Shuhai and others and ConocoPhillips China Ltd. and China National Offshore Oil Corporation in a dispute over liability for offshore pollution damage[4] is worthy of reference. The court of first instance held that those engaging in aquaculture in the case had contracted the aquaculture area from the original right holder and paid the contract fee. They carried out the legal contracting procedures and did engage in aquaculture, which was never opposed by the local government. Moreover, after the

[1] Article 1164 of Civil Code of the People's Republic of China:" This Book regulates the civil-law relations arising from the infringement of the civil-law rights and interests".

[2] CHENG Xiao, *Tort Law*, Legal Press · China, 2015, second edition, p. 121-122.

[3] Law (Minsi) Ming Zhuan (2021) No. 60.

[4] (2012) Jinhai Fashi Chu Zi No. 1, (2016) Jinminzhong No. 69, (2017) Zuigaofa Minshen No. 14.

accident, the local government verified and cleared the sea area involved and issued compensation amount accordingly, and the above-mentioned people who engage in aquaculture were within the scope of compensation. Therefore, it could be concluded that the local government authorities had actually permitted the aforementioned people to engage in aquaculture, and that they had the right to claim compensation from the responsible party for the damage. Subsequently, the decision of the court of first instance in the case was also upheld by the court of second instance and retrial.

Take, as an example, the right of the cleaning unit to claim for compensation as discussed above. The state of an oil spill from a ship is changing rapidly, and if not controlled in a timely manner, the resulting consequences would be huge. In most cases, therefore, the maritime authority would directly entrust the cleaning unit to take immediate clean-up measures. Both theoretical and practical views on the clean-up costs suggest that the judiciary should view the right to claim clean-up costs as a creditor's right to secure his or her claims in a civil activity; for those responsible, clean-up costs are a civil liability. Article 90 of the Marine Environment Protection Law provides that "Any party that is directly responsible for a pollution damage to the marine environment shall relieve the damage and compensate for the losses". From this, the law has made it clear that the liability for compensation for damage to the marine ecological environment is a civil liability. As a type of compensation for damage to the marine environment, the clean-up costs should also be regarded as a civil claim. This consensus also finds its manifestation in the current common practice of the international community.[1] The 1992 Protocol to the 1969 International Convention on Civil Liability for Oil Pollution Damage (hereinafter referred to as the Civil Liability Convention), the 1992 International Convention on the Compensation Fund for Oil Pollution Damage, and the Bunker Oil Convention, to which China is a party, all follow the principle that those who cause damage to the environment shall be responsible for the cleaning costs incurred, making the compensation for oil pollution damage from ships fall into the scope of civil compensation. In dealing with such cases, China's judiciary should be consistent with the objectives of these conventions and international practice. What's more, from the perspective of legal fairness, such an approach is conducive to protecting the interests of both the responsible person and the cleaning unit. Only if the cleaning costs incurred are recognized as a civil claim can the shipowner be entitled to the limitation of maritime liability under the Maritime Law. If the maritime liability limitation fund is not sufficient to cover the full amount of the cleaning costs, the cleaning unit can also apply for compensation from the Ship Oil Pollution Damage Compensation Fund through relevant procedures. On the contrary, if the cleaning costs are regarded as an obligation under administrative law, the cleaning unit will not be able to receive compensation from

[1] SHUAI Yuexin, *Analysis of Claims for Mandatory Clean-up Costs in Oil Pollution Incidents Caused by Ships*, World Shipping, No. 12, 2019, p. 50.

the maritime liability limitation fund established by the shipowner, nor will it be able to obtain compensation from the Ship Oil Pollution Damage Compensation Fund, which goes against the value of fairness in law. Article 82 of the Minutes of the National Symposium on the Foreign-related Commercial and Maritime Trial Work of Courts states: If, after it has cleaned up the polluted area assigned by the maritime administrative organ, the cleaning unit brings a civil action directly against the person responsible for the pollution in respect of the cleaning cost, the people's court shall accept the case. It can be seen that the Supreme Court has also clearly affirmed the basis of the right of the cleaning unit to claim directly against the person responsible.

D. Clarifying the Subject of Liability (Resolving the Inconsistence between the Provisions of Domestic Law and International Conventions)

How to determine the subject of liability for compensation for damage to the marine ecological environment and how to apply this principle should be taken into account the actual circumstances of cases involving the marine ecological environment. Apparently, the inconsistence and imcompatibility between China's domestic law and the provisions of international conventions should be resolved at this stage through technical means in the process of judicial application.

Taking the issue of how to determine the subject of liability for oil pollution damage caused by collision of mutually at-fault vessels as an example, the top priority is to sort out different approaches to this issue in judicial practice and figure out the main reasons behind them. There are three different views on this issue. The first view is that the oil spill vessel should first bear the responsibility of compensation for pollution damage, and after the oil spill vessel has compensated, it has the right to seek reimbursement from the responsible party. This is how the Civil Liability Convention and the Bunker Oil Convention, to which China is a party, have stipulated. In the sample cases, this view was also upheld and adopted by the first and second trial judgments of the collision case between the vessel "CMA CGM Florida" and the vessel "Zhoushan"[1] and the judgment of the Ningbo Maritime Court on the collision case between the vessel "El Zorro" and the vessel "Ellington"[2]. This view, after taking into account the opinions of various parties, has been adopted by the Maritime Law(Revised Draft) on its chapter "Liability for Vessel-induced Oil Pollution Compensation".[3] The second view holds that an oil spill vessel and a non-oil spill vessel should be held liable to the damaged party in proportion to the collision. In the case of the oil spill of the vessel "Min Yan Gong No. 2", the Guangdong High Court adopted this view in the second

[1] See (2015) Yonghai Fashang Chu Zi No. 442, (2017) Zheminzhong 581.
[2] See the speech by XU Guangyu, Director of Guang Yu & Co. Law Firm, at the 4th Guangzhou Maritime Law Forum on November 27, 2021.
[3] See the speech by HAN Lixin, Vice Dean of the Law School of Dalian Maritime University, at the seminar on "Construction and Improvement of the Ship Pollution Damage Compensation Mechanism with Chinese Characteristics in the New Era" on November 18, 2021.

trial.[1] The third view is that the damaged party has the right to claim full liability from the oil spill party, as well as the right to claim liability from the oil spill vessel and the non-oil spill vessel respectively in proportion to the collision. In the sample cases, this view was adopted in the retrial judgment of the collision case between the vessel CMA CGM Florida and the vessel Zhoushan.[2]

A thorough analysis finds that the first view is actually the traditional view in this field and is more common in the international practice. The first view is also reinforced during the current revision of the Maritime Law as its consistency with the conventions to which China is a party is being taken into account. However, although international conventions have their own rationality and superiority, there is a lack of systematic theoretical guidance because they are in fact a product of balanced interests between the international community. If the Maritime Law were to pursue complete consistence with the international community, it would make it difficult to adequately safeguard the interests of China in judicial practice and ultimately hinder its application in China.[3]

Based on judicial practice, relevant provisions on international conventions should be further adjusted, if necessary, so that they can be better applied in China. The third view above is a direct manifestation of such thinking. In addition to holding the oil spill vessel fully liable for the oil pollution damage, the judiciary should also consider it reasonable for the damaged party to claim damages directly from the non-spill vessel based on the proportion of the collision. To hold the non-oil spill vessel directly liable to the damaged party is conducive to strengthening the judicial protection of the damaged party. In China, ships that are engaged in the operation of international routes, carrying more than 2000 tons of bulk cargo oil are basically insured, but among those carrying less than 2000 tons of bulk cargo oil and oil tankers engaging in coastal transport, the number of insured ships is relatively small, only accounting for 10% of the total. To put it differently, small ships are large in number and are likely to involve in accidents, but they are unbale to pay the injured party in most cases. In cases where a collision between two vessels results in an oil spill from one vessel, chances are that the vessel spilling oil is unable to pay the compensation and relevant costs arising from the accident.[4] For example, the oil tanker “Dehang 298” collided with the vessel “Bow Cecil” in the waters near Humen Bridge at the mouth of the Pearl River, Guangdong province, on 14 November 2000, and the accident caused serious damage to the hull of the tanker “Dehang 298”, resulting in a leak of 230 cubic meters of fuel oil into the sea and polluting an area of about 390 square kilometers. As the tanker “Dehang 298” had not bought any liability insurance relating to oil pollution and there was no way for the damaged party

[1] See (2000) Yue Gao Fa Jing No. 328.
[2] See (2018) Zuigaofa Minzai No. 368.
[3] GUO Yu, *The Spirit of Maritime law - Chinese Practice and Theory*, Peking University Press, 2005, p. 14.
[4] YU Miaohong, *Causation under the responsibility of ship collision-Concurrently discussing the responsible party for the oil pollution damage arising from collisions by ships both to blame*, Annual of China Maritime Law, January 2018, p. 27.

to claim compensation from the other vessel "Bow Cecil", the loss in the case was hardly compensated. Under the above circumstances, if the damaged party's right to claim against the non-oil spill vessel is confirmed, it can ask the vessel spilling oil to take its responsibility according to relevant legal provisions and regulations, and at the same time claim against the non-oil spill vessel for compensation under the legal relationship of ship collision. In this way, the injured party will be able to obtain compensation as much as possible.

2. To Balance Rights and Responsibilities

A. Expanding the Scope of Compensation for Damage

Article 89(1) of the Marine Environment Protection Law provides that "the person responsible for causing damage to the marine environment pollution shall eliminate the hazards and compensate for the losses caused". The Judicial Interpretation on the Trial of Cases Involving Damages for Harm to Ecology and Environment further clarifies that the scope of compensation for damage to the marine ecological environment includes four categories: costs of preventive measures, restoration costs, losses during restoration, and investigation and assessment costs. Article 9 of Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Cases of Disputes over Compensation for Vessel-induced Oil Pollution Damage also stipulates that the scope of compensation for oil pollution damage from ships is divided into four categories, namely, preventive measures, property damage, loss of income, and restoration measures, which basically corresponds to Article 89 of the Marine Environment Protection Law, but more detailed provisions are made regarding the recognition criteria and other issues. All too often, within the above-mentioned scope of compensation, it is difficult to accurately determine restoration costs and loss during restoration due to difficulties in measurement.

With regard to the restoration costs, the approach to restoring the damaged environment should be broadened. Generally speaking, there are two ways to restore the marine ecosystem, i.e. direct restoration and alternative restoration, with the former taking precedence and the latter supplementing the former when it is not available.[1] According to the sample cases, the restoration costs involved in the current judicial practice are basically the costs involved in direct restoration, and most of them fail to achieve the desired effect. In this regard, attention should be paid to the complementary role of alternative restoration.[2] Alternative restoration also needs to bring the damaged marine ecosystem into its original condition just like it has never been damaged before. If the restorative measures fail to achieve their desirable purpose, the responsible party may be

[1] SHI Chunlei, *On Ecological Restoration in Environmental Civil Public Interest Litigation: A Review of the Relevant Provisions of the Judicial Interpretation of the Supreme People's Court*, Journal of Zhengzhou University, No. 2, 2017, p. 25.

[2] Adjudication Tribunal for Environment and Resources of the Supreme People's Court of the People's Republic of China, *Interpretation and Application of the Supreme People's Court on Environmental Civil Public Interest Litigation*, People's Court Press, 2015, p. 303.

required to compensate for the damage and loss. For example, in the case of the Zoe Colocotroni,[1] the ship ran aground off the coast of Puerto Rico and spilled 5,000 tonnes of oil, resulting in the contamination of two mangrove swamp areas and a significant reduction in the population of marine life. The damaged ecological system was no longer likely to be restored as contaminated sediments had accumulated in the polluted areas. The US Federal Court of Appeals has held that damages should be limited to the reasonable cost of restoring or reestablishing the natural resource to its pre-damaged state; therefore, where restoration is not possible and is too expensive or the natural recovery process is lengthy, the person responsible should be required to implement an alternative restoration plan, such as acquiring parkland or creating a forest in a similar location. Similar judgements made by the Supreme Court in favor of alternative restoration also exist in China, indicating that such a practice is worthy of reference.[2]

The losses incurred during the restorative period are also called pure economic losses, which should be worked out by the courts during the trial of relevant cases: for one thing, only a few of the losses caused by the damage to the marine ecosystem are directly related to property damage, and most of them are pure economic losses, which should be taken into account by the judiciary while determining the losses;[3] for another, the legal systems of countries all over the world have long restricted compensation for pure economic losses caused by tort. That's because "once the floodgate of compensation is opened, the compensation obligor will be overwhelmed by a flood of ensuing claims", and therefore justice needs to draw a clear line between compensable and not compensable cases.[4] Specifically, pure economic losses in judicial practice can be divided into two types: the first one is the losses concerning fishery, i.e. the loss suffered by the relevant parties due to the damaged marine ecosystem, further leading to a reduction in the profits of the fishery industry. Of the 395 cases in the sample involving the ConocoPhillips oil spill, all of the claimants' claims included this type of loss, but only the actual property damage was confirmed by the receiving court in the end. In the Exxon Valdez case,[5] the US court made the same finding: After the oil pollution incident caused by the Exxon Valdez in 1989, fishermen sought compensation from the vessel for their losses on the basis that the price of salmon caught in 1989 and subsequent years had decreased. The US courts have held that compensation for oil pollution damage from ships should be limited to losses caused by the actual reduction in the number of marine life as a result of the oil pollution damage, and that claims that were not contaminated by the oil spill and trade activities that were not

[1] See Commonwealth of Puerto Rico et al. *v.* Zoe Colocotroni, 456 F. Supp. 1327 (D. C. P. R. 1978); Commonwealth of Puerto Rico et al. *v.* Zoe Colocotroni, 628 (F. 2d 652 1st Cir. 1980); cert. denied, 450 US 912, 1981.

[2] ZHANG Hui, *Assumption of Responsibility in Environmental Public Interest Civil litigation*, Legal Forum, No. 6, 2014, p. 65.

[3] XU Guoping, *On the Scope of Compensation for Pure Economic Loss from Oil Pollution from Ships*, Law Review, No. 1, 2005, p. 55.

[4] Christian von Bar, The Common European Law of Torts: Volume Two, translated by ZHANG Xinbao & JIAO Meihua, Law Press · China, 2001, p. 39. (in Chinese)

[5] In re The Exxon Valdez, [Order No.188] 1995 A. M. C. 1426, 1427, (D. Alaska 1994).

impeded should be excluded. As can be seen, justice aims to take a thorough examination on the causal relationship between the act of damage and the losses incurred to see whether there is a direct and close relationship between the loss of the fishing operation and the marine pollution incident, thus preventing the right to claim for pure economic losses from being abused by the claimant. The second type of pure economic losses is related to culture and tourism. Currently, in China, marine ecological damage compensation seldom involves such loss, and no judicial decisions involving such loss have been found in the sample cases, but there have been some typical cases abroad. For example, in December 1999, the Maltese tanker, Erika, broke off and spilled oil in the Atlantic Ocean, causing extensive pollution in the waters around France. After an eight-year investigation, the French High Court handed down a judgment in January 2008, which included compensation for economic loss, loss of urban image, moral and environmental damage and high fines for several affected areas.[1] As of 24 September 2008, a total of 3,695 tourism claims had been submitted in relation to the accident, with 3,207 cases being confirmed.[2] Therefore, in terms of losses relating to tourism and cultural income, the judiciary will support the claimant's claim as long as it meets the conditions and can be proven.

B. Supervising Information Disclosure

In the governance of the marine ecological environment, attention should be paid to the value of administrative information disclosure, to make China's maritime administration more transparent, and to gain all parties' understanding and support of the corresponding administrative decisions. Justice should help facilitate the continuous improvement of the working mechanism in the field of marine ecology and environment, and supervise the competent maritime administrative organs to improve their work of information disclosure so as to make sure cooperation between maritime justice and maritime administration. For example, the Shanghai Maritime Court and the Shanghai Maritime Bureau jointly signed a Memorandum of Cooperation in 2020, establishing three working mechanisms of interaction and exchange, assistance and cooperation, and complementary advantages, which aims to work on maritime information notification together.[3] Another example is related to the case of "ZHANG Zheng, HUANG Xiaoting, YE Hong, ZHAO Yanping and the Shanghai Municipal Oceanic Bureau and the Ministry of Natural Resources of the People's Republic of China in a dispute over government information disclosure",[4] which was handled by the Shanghai Maritime Court. In this case, a dispute arose between the administrative counterpart

[1] LIU Jiayi, *Study of International Oil Spill Cases and Legal Mechanism of State Claim on Marine Ecological Damage*, China Ocean Press, 2010, p. 217.

[2] Data from China Institute for Marine Affairs.

[3] See *Working together to help build Shanghai International Shipping Center, Shanghai Maritime Court and Shanghai Maritime Bureau sign memorandum of cooperation*, on the WeChat official account of "Shanghai Maritime Court of PRC", August 13, 2020.

[4] (2020)Hu 72 Xing Chu No. 1.

and the administrative organ over the time of the government's response to the information disclosure application. After the conclusion of the case, the Shanghai Maritime Court sent a judicial recommendation letter to the Shanghai Municipal Oceanic Bureau regarding the procedures for information disclosure, and received a positive response from the Bureau. This in turn helps the relevant staff of the Bureau better understand relevant policies as well as improves their working efficiency. All the measures listed above and taken by the maritime judiciary have contributed to making the maritime administrative information more transparent and have played a positive role in safeguarding the construction of Shanghai as an international shipping center.

Ⅲ. Make Necessary Changes to the Existing Framework and Be Innovative

The gap between the legal system for China's marine ecological environment and the practice of marine utilization and the development of marine economy should be narrowed down in a flexible manner through the existing means. In this way, the problem can be solved even without changing the legal basis, thus laying a solid foundation for the future revision of the system.

1. To Explore Applicable Conventions on Limitation of Liability for Maritime Claims

The maritime liability limit stipulated in the Maritime Law is obviously out of line with the current economic development of shipping and judicial practice, and at the same time is obviously lower than the international standard. At this stage, priority should be given to seeking a breakthrough from judicial practice, thus accelerating the legislative process. Numerous cases in domestic and international judicial practice have attempted to transcend the limitation of maritime liability. When examining the relevant decisions, however, it is found that they are all based on the shipowner's willfulness or gross negligence, thus finding that he or she lost the right to limitation of liability. Such decisions are only applicable to certain cases and can not be applied to all cases. For example, in the case of the Clan Gordon,[1] the ship involved was carrying ballast water in two holds, but the captain ordered to drain all the ballast water in order to increase speed. The ship changed its course at the end of the drainage, causing the ship to pitch and then sink. A year before the case, a similar accident had occurred on a sister ship of the same structure as the vessel in question, and the builder of the vessel had specifically warned the shipowner on how to avoid such accidents. However, the shipowner never informed the captain of the ship of this fact. Therefore, the House of Lords in the UK ruled that the shipowner was not entitled to a limitation of liability because he could not prove that he was not negligent.

At present, a relatively large number of countries worldwide have acceded to the 2012 Amendment to the 1996 Protocol to the Convention on Limitation of Liability for Maritime Claims, 1976. This amendment has been recognized as the current internationally accepted standard. A large

[1] The "Clan Gordon", [1923] 16 Ll. L. Rep. 367.

proportion of ships involved in accidents in China's waters in recent years have been domiciled in countries that are either contracting parties or acceding parties to the Convention. That is to say, their countries of domicile have expressly endorsed the 2012 Amendment's limitation standard. While handling some individual cases, it is recommended that the judiciary make some new breakthrough by applying private maritime international law, such as the doctrine of legal avoidance. The judiciary may consider using the limits set out in the 2012 Amendment as the standard for determining the limits of liability of the ship in question. If relevant judicial practice can serve as a reference, China's relevant provisions and standards will be in line with those of the international community as soon as possible.

2. To Reinforce the Implementation of the "Three-in-one" Trial Mode

The implementation of the maritime trial "three in one" litigation system reform is conducive to uniting all related departments by the maritime court, thus making a concerted effort to protect marine ecological environment. At the same time, the maritime court can also dispatch its courts, if necessary, so as to ensure marine ecological judicial protection in an all-round way.

Regarding the legal basis of the criminal jurisdiction of the maritime court, the maritime court currently accepts maritime criminal cases through the reply letter of the Supreme People's Court and the order designated by the higher court, which is not inappropriate as an alternative practice in the transitional stage with a certain legal basis. Moreover, Article 27 of Criminal Procedure Law of the People's Republic of China provides that "the jurisdiction over cases in special People's Courts shall be stipulated separately." This provision shows that special courts have been granted the right to adjudicate criminal cases from the legislative level. And the wording "shall be stipulated separately" does not specific, which provides room for the reform of the jurisdiction of maritime criminal cases. As proposed in the Opinions of the Supreme People's Court on Deepening the Comprehensive Reform of the Judicial System of the People's Courts - Outline of the Fifth Five-Year Reform of the People's Courts (2019-2023), "the construction of specialized courts should be standardized, and in accordance with the needs of economic development in society, the criteria for the establishment of specialized courts should also be improved". Article 65 of Provisions on the Scope of Cases to Be Accepted by Maritime Courts also clearly empowers the maritime courts to adjudicate cases related to damage to the marine ecological environment. It is thus clear that it is justified by law for the maritime courts to try cases concerning crimes of polluting the marine environment. But in the long run, whether the maritime courts have the right to handle cases concerning crimes of polluting the marine environment deserves further discussion and studied. More importantly, all cases involving this type of crimes should be sorted out and analyzed, and relevant law practitioners should exchange their views while handling such cases so as to contribute their own efforts in the creation of a guideline on how to handle cases involving

crimes of polluting the marine environment. Theoretical research and practical experience should be given top priorities especially in the early stage of the legislation so that supporting systems can be launched as soon as possible. After all, the exercise of criminal jurisdiction by the maritime courts in maritime cases can not only provide evidence that is in lined with the fact that China has consistently had judicial sovereignty over the sea areas under its jurisdiction,[1] and the jurisdiction itself forms a "meta-narrative". It is a form of soft power, which is a better indicator of China's legitimate control and possession of maritime space than hard power, such as military and administrative power.[2] This is of great relevance to China in the face of the complex, volatile and challenging international situation, injecting new life to build China into a strong maritime country. In this sense, the purpose of the maritime court's implementation of "three in one" is not to expand its judicial power through criminal jurisdiction, but to "overcome the inconsistence and contradictions brought about by the fragmented maritime law" through unified jurisdiction.[3] This is conducive to a growing legal awareness of maritime environment in China, creating China's own stories about maritime environment and forming a maritime ecological and environmental legal custom led by China.

Conclusion: To Contribute Judicial Wisdom and Strength to Building China into a Strong Maritime Country

Ever since the goal of "building China into a strong maritime country" was put forward for the first time in the report made in the CPC 18th National Congress, this goal has been upheld continuously over a long period of time and has now become a basic policy of China.[4] Protecting the marine ecological environment is an integral part of the goal of building China into a strong maritime country. In the field of marine ecological environment management, the judiciary has its own role to play,[5] which should be fully understood and utilized. By analyzing the connotation and mission of judicial power in the field of marine ecological environment governance in the new era, this paper explores how to create new ways to protect the marine ecological environment and deepen the innovation of judicial protection mechanism of marine ecological environment, which also makes its task and purpose.

With the continuous development of the marine economy and the increasing prominence of the goal of "building China into a strong maritime country", maritime justice cannot only be satisfied

[1] ZHANG Wenguang, *Improving the Rule of Law in the Sea to Safeguard National Interests*, in People's Court Daily, August 3, 2019, p. 2.

[2] MOU Wenfu, *Meta-Narratives on the Sea: The Influence of Sea Power upon the Formation of the Maritime Legal Order*, World Economics and Politics, No. 7, 2014, p. 79.

[3] CHU Beiping & CAO Xingguo, *A Study of International Recognition of the Concept of Sea Law*, Chinese Journal of Maritime Law, No. 3, 2015, p. 19.

[4] JIN Yongming, *China's Strategic Governance System of Building a Marine Power in a New Era*, Academic Journal of Ocean University of China(Social Science), No. 5, 2019, p. 23.

[5] B.Francois, *Ocean governance and human security: ocean and sustainable development international regimen, current trends and available tools*, UNITAR Workshop on human security and the sea. Hiroshima, Japan, 2005.

with the functions set at its inception.

[1] It is inevitable that marine ecological environment cases will sometimes involve other countries, which makes it an important way for foreign countries to take a closer look at China's maritime justice. Therefore, the fair, efficient and professional trial of marine ecological environment cases is related to the international reputation of China's judicial justice and the attractiveness to foreign shipping entities, which is of great significance to improve China's soft power of shipping. Maritime justice is not a simple extension of land-based justice at sea, but has its own unique history and special value. Under the new situation, maritime justice should not only keep protecting the legitimate rights and interests of citizens and legal persons, but also carry the responsibility of promoting the development of the maritime legal system. It should shoulder the mission of safeguarding national maritime rights and interests and contribute to making the goal of "building China into a strong maritime country" a reality.

Translator: LI Jiaxin

[1] SI Yuzhuo & CAO Xingguo, *Functions of China's Maritime Judicature under Sea Power Strategy*, No. 3, 2014, p. 11.

基于发展研究综述论审慎推行和扩大沿海捎带

栾宇*

摘要：沿海捎带业务自 1992 年首次在官方文件中提及，就被学界和业界广泛讨论。在学术界热烈讨论沿海捎带业务是否应该被开放之余，政策趋向反映出国家对这个问题的态度，即在上海自贸区进行试行。那么，便出现了新的需要讨论的问题，即沿海捎带业务是否有必要继续推行以及是否要做其他扩大开放力度的规定。解决这个问题需要从以下几个方面分析讨论：第一，要追根溯源，做捎带一词的辨义和相关规定所在文件的追溯；第二，要整体评价对这一业务持支持和审慎态度的考虑因素；第三，既然 2013 年开始在上海自贸区试行捎带业务，说明正在探索尝试对这一业务的放开，既然有这样的意向，可以先根据集装箱运输行为是否是真正意义上捎带的意思表示区别对待。我国是航运大国，从年造船产能、海运量、注册运力、顶级吞吐量大港拥有数量等各项指标来看，都不需要在沿海捎带或沿海运输权方面做过多开放。就我国现状来看，恰当的做法是维持目前在自贸试验区试行沿海捎带的做法，还不到完全放开或考虑完全放开这一领域的时候。但是需要注意的一点是沿海运输权是否开放，跟一个国家的整体的对外开放不必然的相等。不开放沿海运输权并不等于我国整体的经济贸易是不开放的。那么在审慎放开的情况下，许多现有问题仍需解决，各利益相关方的需求仍需满足，但方向应转向发展国内水运运输等方面而非局限于沿海捎带。

关键词：沿海捎带；审慎放开；意思表示；国内水运

一、引言

2013 年发布的《关于在上海实行中资非五星旗国际航运船舶沿海捎带的公告》将沿海捎带业务合法化、规范化和可操作化，在学术界以及利益相关企业中都引起了很大的关注。根据国函[2021]115 号《国务院关于同意在中国（上海）自由贸易试验区临港新片区暂时调整实施有关行政法规规定的批复》，在中国（上海）自由贸易试验区临港新片区内允许符合条件的外国、香港特别行政区和澳门特别行政区国际集装箱班轮公司利用其全资或控股拥有的非五星旗国际航行船舶，开展大连港、天津港、青岛港与上海港洋山港区之间，以及上海港洋山

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港区为国际中转港的外贸集装箱沿海捎带业务试点。国务院交通运输主管部门通过运价备案检查、班轮航线备案和信息化等手段，加强对从事沿海捎带业务船舶的管理。2021 年 9 月 1 日施行的《海南自由贸易港国际船舶条例》，其第三十条的规定意味着我国首次对外资船舶开放（海南）省内水上运输和水上施工市场。换句话说，在海南省全境，我国原本完全保留的沿海运输甚至国内水上市场已转变为完全自由的。我国政府部门官方发布这样的信息正是我国“促进更高水平对外开放”落到实处的体现。[1]

实际上，关于一个国家沿海运输垄断，国际上主要的航运国家的法律基本上都做了只保留给本国船舶运输的规定。比如说美国、日本、希腊、英国等航运发达国家，都制订了严格的限制性（水上）贸易航行的本国保留法律制度（cabotage,以下简称“水上本国保留”）。[2]在他们的法律里面也都有将“本国”航运业务保留给本国船舶运输的规定。所以从一定的意义上来讲，我国海商法的这一规定，实际上是舶来品，即外国的法律先规定的，我国在制定海商法的时候也做类似的规定。

作为我国航运市场的热点问题，对于沿海捎带的争论从该词 1992 年首次出现于官方文件中就没有停止过。从 2013 年上海试行该业务以后直到现在，几乎所有沿海港口城市的自由贸易试验区方案中都涉及到关于沿海捎带业务的规定。这个规定实际上是（有条件地）突破了我国海商法第四条的规定。沿海捎带涉及政治、法律、经济等多个方面，涉及船舶所有人、经营人、从事航运业务的相关企业（包括我国的和外国的）、港口（包括我国试行港口、其他港口和“对等原则”适用国相关港口）等等诸多主体，和以上各方的利益平衡等很多问题。海南自贸港的完全放开是对沿海捎带的一种推行和扩大，其施行、效果和未来走向都值得特别关注与讨论。正如於世成教授在第四届世界油商大会（IPEC 2021）暨第三届自由贸易港（区）国际海事法律论坛上发言中提到，本问题作为当前我国国际航运市场热点问题之一，外国班轮公司乃至外国班轮公司所属国家对于我国关于沿海捎带乃至沿海运输权的下一步政策方向都非常关注。那么，在对未来相关政策方向进行决策之前，我们确有必要就当前现实，将此问题讨论清楚。

二、“沿海捎带”一词辨义分析

“沿海捎带”一词是近年被学术界和实务界等各界从业人士热烈讨论的业内词语。该词来

[1] 习近平主席提出，“我们将继续沿着中国特色社会主义道路大步向前，坚持全面深化改革，坚持高质量发展，坚持扩大对外开放，坚持走和平发展道路，推动构建人类命运共同体。中国将采取一系列重大改革开放举措，加强制度性、结构性安排，促进更高水平对外开放。”习近平主席在第二届“一带一路”国际合作高峰论坛开幕式上的主旨演讲《齐心开创共建“一带一路”美好未来》，2019 年 4 月 26 日。

[2] 该制度包含但不限于我国海商领域所称沿海运输权或航空领域所称国内运输权。其定义根据不同字典、不同国家国内法、不同国际组织等有不尽相同的解释，即存在国家层面、区域层面和国际层面的区别，且所表达的意思有时是限制性的，有时是非限制性的，并会根据不同运输方式有不同分类，本文在使用时对其做了适当狭义界定。

源于实务操作。在进一步讨论该操作或业务之前，需要先界定其含义和范围。沿海捎带具有沿海运输的实质，且行为主体为非五星旗船舶，理论界对这一点达成了普遍共识。

赵姝将沿海捎带归为沿海运输的一种表现形式，即外国籍船舶在国际贸易运输中途经一国港口中转时，承接该国国内沿海港口之间的直线运输业务。[1]施元红、於世成在系统回顾和梳理关于沿海捎带业务政策时，从实际业务方面将其描述为：进出口集装箱在国际干线船舶上的互转业务，并不包括全部的内外贸同船问题，包括出口捎带和进口捎带。[2]谢燮指其为外资方便旗运输企业在中国沿海港口间从事外贸集装箱的国内段运输。

上述在定义沿海捎带时并没有对行为客体，即所捎带的集装箱是空箱或是重箱进行区分。徐光华等根据交通运输部曾提的外轮捎带一词做这一问题的研究，将沿海捎带解释为外籍船舶在我国沿海港口之间从事外贸集装箱重箱的国内段运输。[3]丁一等研究相关海运网络模型的时候使用了这一解释。林春辉、廖一帆专门研究了国际班轮沿海捎带重箱可能对港航业各单元及沿海运输保留造成的影响，将捎带重箱归于海上集装箱运输方式中的海上联运，即通过外贸内支线，从国内起运港运往另一个国内港口换装干线船者，并提出如果政策放宽，这一方式将成为第三种支线运输方式。[4]覃抒戎结合当前我国沿海捎带业务实际存在与运行的地域提出我国目前的沿海捎带具体指向的是以上海港为国际中转港的外贸进出口集装箱在国内对外开放港口与上海港之间的捎带业务。[5]这些研究在定义沿海捎带时特别强调了捎带的是“重箱”，或者研究对象即是被捎带的重箱。但是“重箱”的所谓捎带是否可以被归为捎带或者是否还可以用捎带一词定性或命名这项业务，笔者有不同意见。

捎带这个词根据《汉语词典》的解释为：在主要的之外附带。该词是港航企业从事实务操作的人员最初开始使用的，虽然无法考证第一次使用捎带来称呼一个运输业务的是谁、是在什么业务之中，但是做一般性推断，既然使用这个词称呼该业务，那么该业务一定是符合其原意的，也就是在主要的运输之外顺便的、附带的运输。然而重箱则明显不符合“主要的运输业务之外的”意义。因此，笔者认为如果是“捎带”则客体就是空集装箱，而重箱不存在捎带，不适合搭配该词或将任何装有货物的集装箱运输业务称为“捎带重箱”。那么，这里值得注意的是，如果在政策文件中继续使用捎带一词，有必要做具体解释。否则，捎带这个词在一般看来或依照“习惯”更倾向于表达捎带空箱。但是依据现在公布的规章文件来看，其中使用“捎带业务”处并没有区分空箱和重箱，而实际操作中则是既包括空箱也包括重箱。

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[1] 赵姝：《沿海捎带业务解读》，载《航海技术》2015 年第 4 期，第 68-71 页。

[2] 施元红、於世成：《我国新形势下沿海捎带业务创新政策回顾和展望》，载《中国航海》2019 年第 4 期，第 114-118，140 页。

[3] 徐光华：《沿海捎带集装箱舱位分配与动态定价模型》，载《上海海事大学学报》2015 年第 2 期，第 1-7 页。

[4] 林春辉、廖一帆：《"国际班轮沿海捎带重箱"政策动议刍议(上)》，载《水运管理》2004 年第 8 期，第 26-29 页。

[5] 覃抒戎：《自贸区视野下的沿海捎带相关法律问题探讨》，华东政法大学 2015 年硕士学位论文。

三、“沿海捎带”文件追溯

1992 年 11 月 10 日《国务院关于进一步改革国际海洋运输管理工作的通知》第四条中首次提到对沿海捎带的决定：对国内船公司目前无力开辟的航线或航班密度不够的航线，应本着对等原则吸引外资班轮或侨资班轮挂靠我国港口，但不得经营沿海运输。这是在运力不足的情况下，并且不违背《中华人民共和国海商法》（以下简称《海商法》）第四条规定的规定。

交通部（交办发［1992］596 号文）发布《关于深化改革、扩大开放，加快交通发展的若干意见》第二条加快改革开放步伐，进一步解放和发展运输生产力的条文中，第五点指出：适度开放国内运输市场。根据我国运输市场需求情况，在有利于引进发展资金、先进技术装备和科学经营管理方式的条件下，经部批准，适度发展中外合资公路、水路运输企业，从事我国境内公路、沿海和内河运输。

2003 年交通部发布的《关于同意国际班轮公司在我国沿海主要港口之间调运空集装箱的函》中确定：取得交通部核发的国际班轮运输经营资格登记证书的班轮公司均可从事我国沿海港口之间空集装箱调运。文件中的这一规定已于 2014 年 09 月 28 日在《交通运输部关于取消调整水运行业管理事项的公告》中公告取消。海关总署《关于国际集装箱班轮公司在我国沿海港口调运空集装箱海关手续问题的通知》允许国际班轮公司在我国沿海调拨空箱。由以上文件可以发现，截止到 2003 年，相关规定中允许捎带的更多的是指空箱。一方面是符合刚刚通过并施行的《海商法》的规定，另一方面是符合捎带的本来涵义。

2013 年交通部发布《关于在上海试行中资非五星旗国际航行船舶沿海捎带的公告》允许中资航运公司利用全资或控股拥有的非五星旗国际航行船舶，经营以上海港为国际中转港的外贸进出口集装箱在国内对外开放港口与上海港之间的捎带业务（以下称“试点捎带业务”）。其中只解释了公告所称“中资航运公司”但并未具体解释“捎带业务”的内容和范围。也是自此沿海捎带才被广泛讨论，各界的观点和意见不一。

《国内水路运输管理条例》（2017 年 3 月 1 日第二次修订）第十一条规定：外国的企业、其他经济组织和个人不得经营水路运输业务，也不得以租用中国籍船舶或者舱位等方式变相经营水路运输业务……第十六条亦规定：水路运输经营者不得使用外国籍船舶经营水路运输业务。但是，在国内没有能够满足所申请运输要求的中国籍船舶，并且船舶停靠的港口或者水域为对外开放的港口或者水域的情况下，经国务院交通运输主管部门许可，水路运输经营者可以在国务院交通运输主管部门规定的期限或者航次内，临时使用外国籍船舶运输。

《中华人民共和国国际海运条例》（2019 年 3 月 2 日实施）第二十二条中有规定：外国国际船舶运输经营者不得经营中国港口之间的船舶运输业务，也不得利用租用的中国籍船舶或

者舱位，或者以互换舱位等方式变相经营中国港口之间的船舶运输业务。2002 年《中华人民共和国国际海运条例》中第五十七条规定：外国国际船舶运输经营者未经国务院交通主管部门批准，不得经营中国内地与香港特别行政区、澳门特别行政区之间的船舶运输业务，不得经营中国内地与台湾地区之间的双向直航和经第三地的船舶运输业务。2013 年、2016 年和 2019 年三次修订保留了相同内容条款。由此可见，在我国海事公法或航运公法（public maritime law）制度体系中，外籍船舶沿海运输是被禁止或严格限制的。如果按笔者前文所述将捎带重箱按其本质归为沿海运输的话，那么除了在上海自贸区等实行试点捎带业务的特殊港口、地区外，目前该业务在我国其他地区同样是应被禁止或严格限制的。

综上，只有 2013 年交通部发布《关于在上海试行中资非五星旗国际航行船舶沿海捎带的公告》和《国函[2021]115 号国务院关于同意在中国（上海）自由贸易试验区临港新片区暂时调整实施有关行政法规规定的批复》是允许“试点捎带业务”的。而其他法律、法规，无论时间先后，均不允许非中资五星旗船舶从事沿海运输。可见，我国对于沿海运输保留是持严格态度的。因此，对于捎带业务开放问题也应审慎处之。

四、现有研究对沿海捎带态度不一

对待沿海捎带业务，有主张促进放开和主张审慎对待或不宜放开两种对立的态度和观点。秉持不同观点的学者或者其他业内利益相关方的出发点不同，所处的位置和立场不同，因此关注点和维护的利益也不同。所以，较难找到一个判断对错的标准，但这种争论对于我国航运政策制定将会产生一定的方向性影响。

1.呼吁开放并推行的观点

王道军站在外籍船舶立场阐述了外轮代表马士基希望在自贸区放开沿海捎带的愿望和诉求。如果站在港口角度来说，我国有沿海对外开放优势、先进的港口，尤其是集装箱运输发展领先的港口，会希望进一步开放，不要有限制。因为运输集装箱的船舶的国籍对集装箱吞吐量等衡量港口的指标是没有影响的反而可能会有助益，所以港口会希望甚至有呼吁和要求国家全面开放沿海运输。为解决沿海捎带在自贸区试行的法律困境，谭学文提出可以在自贸区调整适用《海商法》第四条的规定。叶善椿研究沿海捎带业务如何在自贸区发展，并提出了若干建议。可见其是以支持开放的态度为前提的。范金林在对上海自贸区试行沿海捎带业务进行 SWOT 分析之后建议“我国要做到逐步开放‘国货国运’的比例”。[1]张壮、刘彦平提出适当放开沿海捎带的相关建议，及对航运中心的建设的影响。

还有一些研究并没有如上述研究正面谈论是否支持开放沿海捎带业务，但是通过分析其

[1] 范金林：《上海自贸试验区沿海捎带政策的 SWOT 分析》，载《中国港口》2016 年第 5 期，第 31-33 页。

中所研究的相关问题可以理解为他们对这一业务开放是持支持态度的。丁一等研究轴辐式海运网络优化问题时，其前提为：“在我国政府发布《中国（上海）自由贸易试验区总体方案》前，中国的沿海运输权仍保留给中国航运公司和中国籍船舶，不对外国籍船舶开放，使得运往国外的货物在国内港口若装上外国籍船舶，将不可在国内其他港口中转，只能直接驶往国外，无疑增加了我国港口对境外枢纽港的依赖性。”[1]后续同样是在考虑允许沿海捎带的基础上，研究发现规模经济系数越大，规模经济效应趋向越不明显，同时总成本有一定的增长；总成本与枢纽港个数的关系里，当枢纽港个数在 6 个或 7 个时，网络总体运输成本实现最小化，在允许沿海捎带的情况下，现在作为枢纽港的釜山港和香港的大部分业务将转移至深圳港和上海港。由此可以推断，该学者应该是支持开放沿海捎带的。

徐光华等研究在允许沿海捎带的情况下，船公司如何将舱位分配给直达箱和捎带箱，以及相应的定价策略，以使船公司收益最大化。这在一个角度上来说是回答了林春辉和廖一帆在《“国际班轮沿海捎带重箱”政策动议刍议（上）》中提出的相应问题。与此同时，也是将研究建立在同意开放沿海捎带的基础之上。

2.保持审慎、不提倡开放的观点

相比于支持开放的观点，更多的学者对这项业务的态度还是较为慎重和保留的。林春辉、廖一帆从很多方面对沿海捎带重箱问题做了很有价值和很值得思考、考查、验证、解答的讨论。其中提到“新的政策提议（指开放沿海捎带重箱）对这些货流（买方市场货源）是没有吸引力的……”“宽松的政策使他们（指船东）多了一种选择，偶一为之固可满足一些客户的要求，但这却不会是他们自觉努力的方向。”“我们难以肯定‘捎带重箱’是否有足够大的吸引力引导大量货物回流。”可以发现他们对开放沿海捎带充满忧虑。沿海捎带业务是政策性开放亦或不开放更多的是基于经济考虑，吸引货物回流是经济效果之一，但是是否开放了就能达到很好的效果，从目前的形势来看，情况并不乐观。

马得懿主张要谨慎地看待在上海自贸区试行捎带业务这一政策。张文广同样认为“‘沿海捎带’政策应综合评估，积极完善，审慎推广”。[2]李巧玲认为在自贸区允许沿海捎带并不能代表我国在适度放开沿海运输权，而是分析了“中资航运公司”内涵和实质之后发现，这一政策是给予中资方便旗船一些利益的做法。我国近期仍然倾向于对沿海运输权加以保留。[3]

张耀元将开放沿海捎带问题放置于 WTO 最惠国待遇语境下，论证这一政策并不与其相悖。但“尽管在 WTO 自由贸易之下，对涉及一国沿海利益的相关问题仍应当审慎对待，在

[1] 丁一、刘朝德、林国龙：《基于沿海捎带的轴辐式海运网络优化模型》，载《中国管理科学》2015 年第 S1 期，第 830-835 页。

[2] 张文广：《自贸区“沿海捎带”政策应审慎推广》，载《人民法治》2016 年第 12 期，第 26-28 页。

[3] 李巧玲：《基于自贸区沿海捎带政策对我国沿海运输权的思考》，载《海峡法学》2018 年第 1 期，第 3-8 页。

沿海捎带政策中仍应当始终坚持沿海运输权这一根本权利，从而确保将这种沿海运输的利益保留给我国企业。”[1]中国加入 WTO 的承诺常常是外籍航运公司呼吁开放沿海捎带时的理由，但是我国在减让表中对沿海运输服务做了明确地保留，因此这并不能作为一个强有力的理由。

王静改通过对比世界三大类沿海运输开放程度，“结合中国当今的实际国情，中国沿海运输权不容放弃”。[2]谢燮更认为“严格隔离沿海和远洋航运市场是航运市场开放的基本准则。不允许外籍航运公司经营沿海航运市场，即使合资和参股经营也应禁止；同样，不允许中资方便旗船舶经营沿海业务，同时不允许任何形式的沿海捎带行为（包括到釜山换舱单的变相捎带），取消在上海自贸区开展的中资方便旗船沿海捎带业务。”[3]这类观点充分地表达了学者反对开放沿海捎带的态度。

纵观上述两方观点，笔者更倾向于后者。其原因可从以下因素进行考虑和衡量。

五、审慎对待考虑的因素

在秉持审慎、不提倡开放观点的学者的研究中提到了非常多需要考虑、评估和权衡的问题和因素。林春辉、廖一帆（2004）在政策发布最初就提出了几个十分值得考察的问题。“捎带重箱”业务实际处理的规模有多大？捎带的重箱中有多少是原先准备运到临近中转港口的？中国港口会因此获得多大的箱量增长？短期出现的增长中有多少是真实的因为捎带重箱产生的？虽然这些问题的角度是单一的，但是却是很实际的利益问题，而它们的答案都是衡量沿海捎带是否应该被开放的经济层面的重要依据；也是船东、港口等方面的提倡者应关注的数据，如果未来依然欲呼吁开放的话，便须提出这些方面的相关数据证明；而如果试行一段时间之后这些问题相关数据得出的结果差强人意，那么谨慎处之将会有益。

有人提出沿海捎带重箱可能会影响船公司调整其航线和停靠港口，这将有利于我国港口发展。但是这样的做法即使真实发生，会是船公司的一时偶然为之还是会因此长久调整航线布局和班轮密度实未可知。考虑船公司是否会调整航线的时候，还需要注意有一些在枢纽、巨头附近正在发展的、本来可以更好地发展的中大型港口是否会因为这样减少直航航线，是否会在航线布局调整的时候不再被选做基本港等。如果枢纽港借由中转业务增量极大发展，那附近非枢纽港的发展有可能出现马太效应，因为航线不是静态不变的。王利在讨论放开沿海捎带业务对天津港的影响时表示，“通过外轮捎带给天津港的中转箱也十分有限。更有可能发生的情况是天津港开始为大连港、青岛港和上海港提供集装箱喂给服务，进而因为中转箱的流失，对天津港的国际干线航班产生不利影响。”[4]这个业务如果不限于在试点，而是全国

[1] 张耀元：《自贸区沿海捎带政策与 WTO 最惠国待遇法律问题研究》，载《南海法学》2018 年第 6 期，第 63-72 页。
[2] 王静改：《国内外沿海运输权开放程度探析》，载《港口经济》2014 年第 7 期，第 15-18 页。
[3] 谢燮：《新时期我国航运市场扩大开放的方向》，载《水运管理》2015 年第 5 期，第 1-4 页。
[4] 王利：《放开“沿海捎带”业务对天津港的影响探讨》，载《滨海时报》2013 年 11 月 25 日，第 8 版。

范围推行实施，还会遇到诸如“港口和港口之间是否已经有航线可以直通航行，”“国际班轮的沿海运行方向是否可以‘捎带’”等航线布局和地域限制的问题。这些问题都是港口需要实际评估的问题，政策带来的改变是否会令港口得以发展需要数据和证据进一步确定。

沿海捎带付诸实践还有可能出现法律适用不明确、冲突、混乱等问题。第一，一旦发生事故等需要进行归责、索赔的情况，适用哪部法律或法规的规定，是适用内水的相关规定还是国际运输的相关规定？认定主体责任、赔偿额度等也还没有文件加以规定和明确，更没有实操规则和经验。第二，有人提出开放沿海捎带重箱可以减少方便旗船的数量，吸引其改挂五星旗。但是对方便旗船“回籍”的吸引力和实际效果是不是能够达到预期尚未可知，恐将未达。对于目前在自贸区试行沿海捎带业务的中资非五星旗船的法律适用是否也要做特殊化对待，也没有相关规定进行明确。第三，沿海捎带重箱的服务对象是特定的，但是从逻辑上来说，是不应该对其适用范围做出限制的，那相关法律、法规条文应如何规定就成为问题。第四，其适用外延难以控制，船公司在未来很可能以同样的理由进一步要求扩大服务范围，到时如何应对也将成为需要考虑的问题；或者，外籍船公司通过合营协议等方式做出的扩展在实践中是很难区分的。这种扩大可能演变成，扩大到所有船东，扩大到所有国家，扩大到整个沿海运输领域，那就变成了我国单方面向世界开放沿海运输。

此外，在审慎态度之下，沿海捎带问题需要考虑的因素还包括国家安全、船舶登记制度影响、辅助性行业的影响等等很多方面。结合世界大多数国家保留的做法，并且开放会比保留产生更多的问题，沿海捎带的推行和扩大也并不完全符合我国的航运政策目的，因此对于沿海捎带业务我国政策应保持审慎的态度。究其根源，沿海捎带是为了国际航运可以更经济、高效的操作和运营，在联合国 91 个有水上本国保留法律规定的成员国中，做限制性规定的国家执行例外或豁免规定的绝大多数理由是其运力不足，由此可见，我国并没有必要开放沿海捎带业务。

六、适当开放可体现空箱捎带

政策允许沿海捎带业务本质是适当开放我国沿海运输业务市场，让以前不适格的主体可以得到准入，参与到这项业务中来。保留沿海捎带甚至保留沿海运输并不与我国持续开放、更高水平开放的政策相悖。相反，航运领域一直都是我国开放政策的先行者。但是由于沿海捎带的实质是沿海运输权，沿海运输权又是于多方面来讲都十分重要的一项权利，具体哪些主体可以享有这项权利，自然是法律、法规需要做出明确规定的。那么，如果要做出放开的尝试甚至做进一步推行的话，要做适当的、有限制性的、部分的放开。笔者认为可以根据所捎带集装箱本身的不同做不同程度的放开。这样的建议是从实际业务出发的，而且可能也更

为贴近国家允许沿海捎带业务开展的初衷。同时，这样做也可以更好的满足外籍船舶想要利用沿海捎带提高效率、节约成本等经营管理上的目的和需求。

具体来说，将捎带空箱与捎带重箱区别对待，或者说，根据行为人主观意图将集装箱分为捎带箱和非捎带箱，是因为捎带空箱与捎带重箱在性质上有本质的不同。捎带空箱只是涉及运输工具本身的一种自动调拨行为，[1]属于企业运营管理范畴，在这样的意图驱动下才是真正意义上的“捎带”。然而，国际航行船舶沿海捎带重箱却完全是另一个范畴的问题。虽然严格意义上来讲，捎带空箱也具有沿海运输的本质，但是可以说其沿海运输的“成份”和程度很低；而捎带重箱则是外贸货物在我国港口之间的自由调运，是完全意义的沿海运输。换句话说，如果是真实意图意义上的捎带箱是可以被允许的，乃至可以考虑在试行后推行，但如果不是则不应被允许。国外也有类似规定，比如菲律宾，根据菲律宾 2015 年《外国船舶共同装载法》，菲律宾允许来自海外的空集装箱在国内两个港口之间转运。但是该法第 8 条仍然禁止外国船舶从事国内货物运输。[2]

从民法角度讲，行为人的具体事实行为受其意思表示的支配。意思表示是法律行为的灵魂。用不同的法律规定规制不同的法律行为，首先就是判断该法律行为是何种法律行为，也就是判断其意思表示。依据《民法典》第一百三十三条、第一百三十四条、第一百四十条相关规定，[3]认定行为要分析意思表示。我国对沿海运输是严格限制的，如果运输行为人的意思表示（主观与客观相结合）是调拨或捎带，目的是为平衡空箱箱量、同一集装箱货物需要在两个或以上不同国内港完成装货（这种拼箱情况目前不被码头允许，所以不能操作，但是这种捎带如果变为可行未免不是一种节约陆路运输成本的新思路），则是可以被允许和支持、促进的；如果运输行为人的意思表示是沿海运输，一般为国内港口一港运至另一港换装船，甚至已完成运输交予收货人，则仍属于严格限制、被禁止的范畴。不过，这一建议也存在不足，不足之处在于操作性即判断的标准或者证据制度难以确定。

七、发展内水运输置换开放沿海捎带

在不开放沿海捎带业务的情况下，可以分析诉求方、呼吁方遇到的问题，从其他方面做出调整或改进，从而找到替代性的路径，而不是只关注沿海捎带业务是否开放这一个方法。可以作为替代路径的发展方向或改革方面其实很多，此处仅就其中最重要的一条路径进行讨

[1] 谭学文：《自贸区试行沿海捎带的法律困境与突破》，载《人民司法》2018 年第 10 期，第 102-106 页。

[2] 参见 An Act Allowing Foreign Vessels to Transport and Co-Load Foreign Cargoes For Domestic Transshipment and For Other Purposes, Sixteenth Congress of the Republic of the Philippines, Second Regular Session, June 15, 2015.

[3] 《民法典》第 133 条：“民事法律行为是民事主体通过意思表示设立、变更、终止民事法律关系的行为。”
第 134 条：“民事法律行为可以基于双方或者多方的意思表示一致成立，也可以基于单方的意思表示成立。”
第 140 条：“行为人可以明示或者默示作出意思表示。 沉默只有在有法律规定、当事人约定或者符合当事人之间的交易习惯时，才可以视为意思表示。”

论，即国内港口之间的水运运输。

从另一个很实际的角度讲，如果同一船舶在沿海多个港口挂靠装卸货物的话，必然使得始发港口到最终目的港口之间的运输时间增长。那么，原本追求该航线速度的货主是否还会选择该航线的船舶运输就将成为未知数。此时，沿海捎带未必会给航运企业的利益带来增长。从沿海捎带业务中受益较多的只是转港不转船的中转船舶。所以在这个问题上我们需要考虑的是如何发展国内支线运力而不是强调开放沿海捎带。

国内港口之间的水运运输始终和国际航运运输有着千丝万缕的联系。货物在中转前的国内港口之间水运，或是从内陆港口经长江等内河运往沿海港，或是沿海港口之间运输。作为水路运输的第一程运输只有在运力方面、船班密度、运输的航程等方面做到完全配合、满足国际班轮运输的要求，才能解决非五星旗船在沿海港口之间所谓捎带重箱的需求问题。这需要我国从事国内水运的船公司及其他相关各方做出很大努力。作为沿海捎带重箱的替代方案，国内支线水运要能够完全承接国际班轮远洋航线在沿海中转港之前的货物运输，这对从事国内港口之间运输的船公司提出了要求和挑战。

八、结论

沿海捎带是我国坚持改革开放、坚持创新的思想体现，是政策支持航运业发展的尝试。从最初允许沿海捎带空箱到热烈讨论沿海捎带重箱，再到如今，上海自贸区开始试行非五星旗船捎带业务，甚至于海南自贸港的完全自由都是具体的体现。开放乃至推行具有捎带意思表示的业务，可以给业务各方带来好处；而非捎带意思表示的业务则应严格归入沿海运输，审慎对待、严格限制。当前以上海自贸区为试点进行的沿海捎带业务的试行是对这一政策的最好检验。在试点的实际工作中可以权衡各方面利弊与得失，从而以实践得出的经验性证据与这一政策的评估指标和标准，得出放开与否、孰好孰坏的结论。所以尝试没有错，尝试总是可以检验出一个设想或做法是否适宜，但是如果想广泛推行，在那之前需要十分慎重的考虑。因此，试行沿海捎带业务无可厚非，并且有其积极意义。总之，沿海捎带或者沿海运输市场是否开放，根本来讲，从政治角度不能损害我国安全，从商业利益角度不能因小失大。无论何种做法，重要的是其结果符合相应政策调整的原因、目的与设想效果。对沿海捎带业务的讨论，要明确其根本出发点是如何提升我国港航企业的国际竞争力，而不是单纯地讨论是否开放沿海捎带业务的问题。

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Coastal Piggyback Business Should Be Prudently Promoted and Expanded Based on Its Development Research Review

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Abstract: The coastal piggyback business has been widely discussed by the academic community and people in industry since it was first mentioned in the official document in 1992. While the question of whether the coastal piggyback business should be opened is hotly discussed in the academic community, we see China's attitude towards this issue through its policy of taking the Shanghai Free Trade Zone to pilot. Then, a new issue that needs to be discussed is whether it is necessary to continue to promote the coastal piggyback business and whether other provisions should be made to expand its opening. Addressing the problem, we need to analyze and discuss the following aspects. First, we should trace back to the source, distinguish the meaning of the phrase "coastal piggyback" and trace documents containing relevant regulations. Second, we should evaluate the factors taken into account including both supportive and prudent attitudes towards this business in an overall manner; Third, the piggyback business was piloted in Shanghai Free Trade Zone in 2013, indicating that China is exploring and trying to open this business. Due to such intention, we can first make differential treatment according to whether container transportation belongs to piggyback judged by its declaration of will. As China is a major shipping country with good indicators in annual shipbuilding capacity, shipping volume, registered capacity and the number of large ports with top throughput, there is no need to open wider in terms of coastal piggyback or cabotage rights. As far as China's current situation is concerned, it is appropriate to maintain the current practice of trying out coastal piggyback in pilot free trade zones. It is not yet time to fully open or consider fully opening this business. However, it should be noted that the opening of a country's cabotage right is not necessarily equal to its overall opening to the outside. The fact that China's cabotage right is not open does not mean that its overall economy and trade are not open. Under the circumstance of prudently liberalizing coastal piggyback business, many existing problems still need to be solved and the needs of various interested parties still need to be met. But the direction should be shifted to the development of domestic water transport rather than limited to coastal piggyback business.

Keywords: coastal piggyback business; prudently open; declaration of will; domestic water transport

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Ⅰ. Introduction

The Announcement of the Ministry of Transport on Trial Coastal Transportation Incidental in Shanghai by Chinese Non-five-star-flag International Navigation Ships was issued in 2013, which legalized, standardized and operationalized the coastal piggyback business. This has caused a great deal of concern in the academic community as well as among interested enterprises. According to the Official Reply of the State Council on Approving Temporary Adjustments to the Implementation of the Provisions of Relevant Administrative Regulations in the Lin-Gang Special Area of China (Shanghai) Pilot Free Trade Zone (GH [2021] No. 115), within the Lin-Gang Special Area of the China (Shanghai) Pilot Free Trade Zone, qualified international container liner companies from foreign countries, Hong Kong Special Administrative Region or Macao Special Administrative Region are allowed to use their wholly-owned or holding non-five-star-flag international navigation ships to pilot coastal piggyback business for international containers between Dalian Port, Tianjin Port, Qingdao Port and Yangshan Port area of Shanghai Port as well as foreign trade containers with Shanghai Yangshan Port as international transfer port. The competent authorities of transport and communications under the State Council strengthen the management of ships engaged in coastal piggyback business using freight rate registration and check, liner route registration and informatization. Regulations of Hainan Free Trade Port on International Vessels were implemented on 1 September 2021, and its Article 30 means that China opened its domestic water transport and over-water construction operations to international vessels for the first time. In other words, in the whole territory of Hainan Province, the coastal transportation and even the over-water market that were originally completely reserved have been entirely liberalized. Such official information released by Chinese authorities, reflects that China is implementing the policy of "promoting a higher level of opening up".[1]

In fact, when it comes to a country's monopoly for cabotage right, laws of the major shipping countries in the world basically stipulate that the right is reserved only for their own ships. For example, countries that water transportation is well developed such as the United States, Japan, Greece, and the United Kingdom are all legal countries with national reservation legal systems of strictly restrictive (over-water) trade navigation (cabotage, hereinafter referred to as national

[1] President Xi Jinping proposed that:" We will continue to the path of socialism with Chinese characteristics, adhere to comprehensively deepening the reform and the high-quality development, stick to expanding opening up and the path of peaceful development, and promote the building of a community of shared future for mankind. China will take a series of major measures in reform and opening up and strengthen institutional and structural arrangements to promote a higher level of opening up." The keynote speech,*Working Together to Deliver a Brighter Future for Belt and Road Cooperation*, at the opening ceremony of the Second Belt and Road Forum for International Cooperation, April 26, 2019

reservation over water).[1] They also have provisions in their laws to reserve "domestic" shipping business for their own ships. Therefore, in a certain sense, this provision in China's Maritime Law is actually an imported product. It was first stipulated by foreign laws, and China has made similar provisions when formulating its maritime law.

The controversies about coastal piggyback, a hot issue in China's shipping market, have never stopped since the word first appeared in official documents. From the business piloted in Shanghai in 2013 to now, almost all coastal port cities in China have formulated relevant regulations on it in their pilot free trade zones scheme. The regulations actually (conditionally) break Article 4 of the Maritime Law of the People's Republic of China. Coastal Piggyback involves many aspects such as politics, law and economy, as well as many subjects such as ship owners, operators, relevant enterprises engaged in the shipping business (including domestic and foreign ones), ports (including pilot ports in China, other ports and ports where the "principle of reciprocity" applies). It also faces many problems such as balancing the interests of the above parties. The full liberalization of the Hainan Free Trade Port is an approach to promote and expand Coastal Piggyback. The implementation, effect and development trend of this policy deserve our special attention and discussion. As Professor YU Shicheng mentioned in his speech at the Fourth International Petroleum and Natural Gas Enterprises Conference (IPEC 2021) & the Third International Pilot Free Trade Port (Zone) Maritime Law Conference, coastal piggyback is one of the hot issues in China's international shipping market at present, and foreign liner companies and even the countries to which foreign liner companies belong are all very concerned about our following policies on coastal piggyback and even the cabotage right. Therefore, it is necessary to have a clear understanding of the current reality through discussion before making decisions on future related policies.

Ⅱ. Distinguish and analyze the meaning of the phrase "coastal piggyback"

The phrase "coastal piggyback" is an industry term that has been hotly discussed by the academic community, practitioners and people from all walks of life in recent years. It comes from practical operation. We need to define its meaning and scope before further discussing its operation or business. Coastal piggyback has the essence of coastal transportation, and its behavior subjects are non-five-star flagships. To this point, the theorists have reached a consensus.

ZHAO Shu classifies coastal piggyback into coastal transportation. That is to say, when foreign ships transit through a country's port on their way for international trade transportation, the

[1] This system includes, but is not limited to, the cabotage right referred to in China's maritime field, or the cabotage right referred to in the aviation field. Its definition has different interpretations according to different dictionaries, national laws of different countries and international organizations. That is, there are differences at the national, regional and international levels. The meaning expressed is sometimes restrictive, sometimes non-restrictive, and will be classified according to different modes of transport. This paper has made an appropriately narrow definition when using it.

ships undertake the straight-line transport business among domestic coastal ports of that country.[1] When SHI Yuanhong and YU Shicheng systematically review and analyze the policies on coastal piggyback business, they describe it from the perspective of practical operation as a mutual transit business of import and export containers on ships in international routes, excluding issues that domestic and foreign trade containers are transported by the same ship, including export piggyback and import piggyback.[2] XIE Xie points out that it is a business that foreign transportation enterprises with the flag of convenience engaged in the domestic transportation of foreign trade containers between China's coastal ports.

The above definitions about coastal piggyback do not distinguish whether the behavior object is an empty container or a loaded container. XU Guanghua et al. do research on this according to the phrase "coastal transportation incidental by foreign ships" proposed by the Ministry of Transport, and explain it means that foreign ships are engaged in shipping loaded foreign trade containers between coastal ports within China.[3] DING Yi et al. use this explanation when studying the relevant maritime transport network model. LIN Chunhui and LIAO Yifan especially study the possible impacts of international liners carrying laden containers on the various units of the port and shipping industry. They categorize the coastal piggyback of carrying laden containers as ocean through transport which is a way of container transport at sea. That is, containers are transported from a domestic port of departure to another domestic port for transshipment by trunk ships through domestic branch lines of foreign trade. They also propose that if the policy is relaxed, this mode will become the third kind of branch transport mode.[4] QIN Shurong, in combination with the actual existence and operation regions of the current coastal piggyback business in China, proposes that China's current coastal piggyback refers to the business of foreign trade import and export containers with shanghai port as the international transit port between domestic open ports and Shanghai port.[5] When defining coastal piggyback, these studies particularly emphasize that what ships are carrying are "loaded containers", or their research objects are laden containers. However, the author has different opinions on whether the so-called piggyback of "loaded container" can be classified as coastal piggyback or whether it can be characterized as or named coastal piggyback.

The phrase of piggyback, according to the Chinese Dictionary, is interpreted as "incidental to the main". The term was first used by personnel engaged in practical operations in ports and

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1 Zhao Shu, *Interpretation of Coastal Piggyback Business*, Marine Technology, 2015(4), p.68-71.

2 Shi Yuanhong & Yu Shicheng, *Innovation Policy Toward Coastal Piggyback Business in Container Transportation under New Situation in China: Retrospect and Prospect*, Navigation of China, 2019(4), p.114-118, 140.

3 Xu Guanghua, *Slot Allocation and Dynamic Pricing Model for Coastal Shipping Containers*, Academy of Science & Technology, Shanghai Maritime Univ., 2015(2), p.1-7.

4 Lin Chun-hui & Liao Yi-fan, *Comments on the Proposed Concession for Carriage of Loaded Containers between Chinese Ports for Transshipment by Liners in International Trade(1)*, Shipping Management, 2004 (8), p.26-29.

5 Qin Shurong, *Discussion on Related Legal Issues of Coastal Piggyback in the View of Free Trade Zone*, Master's thesis from East China University of Political Science and Law, 2015.

shipping enterprises. Although it is impossible to verify who is the first one to use the phrase to refer to a transportation business or what business it was used in, we can generally infer that this business must conform to the phrase's original meaning, that is, incidental transportation in addition to the main transportation. However, laden containers obviously do not conform to the meaning of "incidental to main transportation business". Therefore, the author believes that if it is "piggyback", the object should be empty container. Carrying laden containers is not piggyback and not suitable for the term. Any container transport business containing loaded goods should not be called "piggyback of laden containers". It is worth noting here that if "piggyback" continues to be used in policy documents, giving the word a specific explanation is necessary. Otherwise, the word "piggyback" is more likely to say empty shipping containers incidentally from a general point of view or according to "habits". However, according to the regulatory documents published now, there is no distinction between empty and loaded containers in the use of "incidental transportation business". In practice, "coastal piggyback" includes both empty and loaded containers.

Ⅲ. Trace Documents of "Coastal Piggyback"

The decision on coastal piggyback was first mentioned in Article 4 of Circular of the State Council Regarding Further Reform of the Administration of International Ocean Shipping Industry on 10 November 1992 that we should attract foreign liners or liner ships invested by overseas Chinese to visit our ports on the principle of reciprocity for the routes that domestic shipping companies are unable to open up at present or the routes with insufficient ship density. But coastal transportation is not allowed. The rule is under the condition of insufficient transportation capacity, not against the provisions of Article 4 of the Maritime Law of the People's Republic of China (hereinafter referred to as Maritime Law).

The Ministry of Transport issued Opinions on Deepening the Reform, Expanding the Opening up and Accelerating the Development of Transportation (Jiao Ban Fa [1992] No. 596). In the second article, it is stipulated to accelerate the pace of reform and opening up and further liberate and develop transport productivity. The fifth item of the second article points out that the domestic transport market should be moderately opened. Following the demand of the transport market within China, under the condition that it is conducive to the introduction of development fund, advanced technical equipment and science-based management methods, with the approval of the Ministry, we should appropriately develop Sino-foreign joint ventures to engage in the domestic road, coastal and inland river transportation.

The Letter on Approving International Liner Companies to Dispatch Empty Containers between Major Coastal Ports of China was issued by the Ministry of Transport in 2003, in which it was determined that the liner companies that have obtained the qualification registration certificate

for international liner transportation issued by the Ministry of Transport could engage in the transfer of empty containers between coastal ports of China. This provision in the document was announced to be canceled in the Announcement of the Ministry of Transport on Canceling and Adjusting the Administration Issues of the Water Transport Industry on 28 September 2014. The Notice on Customs Procedures for International Container Liner Companies to Dispatch Empty Containers at China's Coastal Ports was issued by the General Administration of Customs, allowing international liner companies to allocate empty containers between China's coastal ports. It can be seen from the above documents that, as of 2003, most of the containers allowed to be picked up in coastal piggybacks refer to empty ones. On the one hand, it is in line with the Maritime Law, which has just been passed and implemented, and on the other hand, it is also in accordance with the original meaning of "piggyback".

In 2013, the Ministry of Transport issued the Announcement of Ministry of Transport on Trial Coastal Transportation Incidental in Shanghai by Chinese Non-five-star-flag International Navigation Ships, allowing Chinese-funded shipping companies to use wholly-owned or holding non-five-star-flag international navigation ships to deal in the piggyback business of containers of foreign import and export with Shanghai Port as international transit port between domestic ports opening to the outside world and Shanghai Port (hereinafter referred to as "pilot piggyback business"). But only the "Chinese-funded shipping companies" mentioned in the announcement were explained, and the content and scope of the "piggyback business" were not specifically defined. Since then, coastal piggyback has been widely discussed by people from all walks of life, and their opinions have been split.

Article 11 of the Regulation on the Administration of Domestic Water Transport (revised for the second time on March 1, 2017) stipulates that foreign enterprises, other economic organizations and individuals shall not conduct waterway transport business, nor shall they conduct in any transport business in disguised form by renting Chinese ships or cabins. Article 16 also stipulates that waterway transport operators shall not use foreign vessels to engage in waterway transport business. Article 16 also stipulates that waterway transport operators shall not use foreign ships to conduct waterway transport business. However, in case domestic Chinese ships cannot meet the transportation requirements applied for, and the ports or waters where the ships call are open to the outside, the waterway transport operators may, with the permission of the competent authorities of transport and communications under the State Council, temporarily use foreign ships for transportation within the time limit or voyage specified by the competent authorities of transport and communications under the State Council.

It is stipulated in Article 22 of the Regulations of the People's Republic of China on International Maritime Transportation (Issued on 2 March 2019) that foreign international shipping

operators shall not provide shipping business between Chinese ports, nor use leased Chinese ships or shipping space to provide shipping business between Chinese ports in disguised form by methods such as exchanging shipping space. Article 57 of the Regulations of the People's Republic of China on International Maritime Transportation in 2002 stipulates that foreign international ship transport operators shall neither provide the shipping business between mainland of China and the Hong Kong Special Administrative Region and the Macao Special Administrative Region without the approval of the competent authorities of transport and communications under the State Council, nor provide both-way direct shipping business or shipping business through a third place between the mainland of China and Taiwan. In the three amendments in 2013, 2016 and 2019, the same articles were retained. It can be seen that in the system of China's public maritime law, foreign ships are prohibited or strictly restricted from providing coastal transport services. If, on the basis of the author's previous statement, coastal piggyback of laden containers is classified as coastal transportation according to its nature, foreign ships should also be prohibited or strictly restricted from providing coastal transport services in other regions of China, except for special ports and regions that pilot piggyback business such as Shanghai Free Trade Zone.

To sum up, "Pilot piggyback business" is only allowed in the Announcement of the Ministry of Transport on Trial Coastal Transportation Incentive in Shanghai by Chinese Non-five-star flag International Navigation Ships and the Official Reply of the State Council on Approving Temporary Adjustments to the Implementation of the Provisions of Relevant Administrative Regulations in the Lin-Gang Special Area of China (Shanghai) Pilot Free Trade Zone (GH [2021] No. 115). Other laws and regulations, regardless of when they are made, do not allow non-Chinese-funded five-star flagships to engage in coastal transportation. It can be seen that China adopts a strict attitude towards coastal transportation reservations. Therefore, the openness of the piggyback business should also be treated with caution.

IV. Existing Research Shows Different Attitudes towards Coastal Piggyback

There are two opposing ideas on the coastal piggyback business. One is we need to promote the liberalization of the business, and the other is we should be cautious about it or not open. Scholars and other interested parties in the industry with different views have different points of concern and different interests to protect due to different starting points and positions. Therefore, it is difficult to find a shared criterion to judge right and wrong. But such debates on the issue will impact the formulation of China's future shipping policy.

1. The View of Promoting the Liberalization of the Coastal Piggyback Business

From the standpoint of foreign ships, WANG Daojun elaborates on the aspirations and demands of MAERSK, the representative of foreign vessels, to open coastal piggyback in free trade

zones. From the perspective of ports, China has the advantage of opening up coastal areas and advanced ports. Ports with leading container transport especially hope to further open with no restrictions. Because the nationality of the ship transporting containers has no influence on the indicators such as container throughput to measure the port. On the contrary, it may be helpful to improve such indicators. Therefore, the port side hopes and even calls for the country to fully open coastal transport. To solve the legal dilemma of coastal piggyback's trial implementation in free trade zones, TAN Xuewen proposes to adjust related regulations in free trade zones to apply to Article 4 of the Maritime Law. YE Shanchun studies how to develop the coastal piggyback business in free trade zones and puts forward some suggestions. We can see that his research is based on the position of supporting the opening of the business. FAN Jinlin, after doing a SWOT analysis of the pilot coastal piggyback business in Shanghai Free Trade Zone, suggests that "China should gradually improve 'domestic goods delivered by domestic transportation'".[1] ZHANG Zhuang and LIU Yanping put forward relevant suggestions to appropriately liberalize coastal piggyback, and studied its impact on the construction of shipping centers.

Some studies, not as the above studies do, do not directly talk about whether the researchers support the opening of the coastal piggyback business or not, but we can understand that they hold a positive attitude towards opening the business by analyzing the issues they studied. The premise for DING Yi et al. to study the optimization of the maritime hub-and-spoke transport network is: "Before the release of The Framework Plan for China (Shanghai) Pilot Free Trade Zone by the Chinese government, China's coastal transport rights were still kept for Chinese shipping companies and Chinese ships, not foreign ships. This makes it impossible for goods destined for foreign countries to be transshipped at other domestic ports if they were loaded on foreign ships at domestic ports, and the goods can only be directly transported to foreign countries. This undoubtedly increases the dependence of Chinese ports on overseas hub ports."[2] Later, on the basis of allowing coastal piggyback, the study found that the larger the coefficient of economies of scale is, the less obvious the economies of scale effect is, with a certain increase of the total cost; For the relationship between the total cost and the number of hub ports, when the number of hub ports is 6 or 7, the overall transport cost of the network is minimized. With the permission of coastal piggyback, most businesses of Busan Port and Hong Kong Port, now as hub ports, will be transferred to Shenzhen Port and Shanghai Port. It can be inferred that the scholar supports the opening of coastal piggybacks.

XU Guanghua et al. study, when coastal piggyback is allowed, how shipping companies

[1] Fan Jinlin, *SWOT Analysis of Coastal Piggyback Policy in Shanghai Pilot Free Trade Zone*, China Ports, 2016(5), p31-33.
[2] Ding Yi, Liu Chaode & Lin Guolong, *An Optimizing Model of Hub-and-spoke Shipping Network Considering Maritime Cabotage*, Chinese Journal of Management Science, 2015(S1), p.830-835.

allocate shipping space to direct containers and piggyback containers, as well as the corresponding pricing strategies to maximize the revenue of shipping companies. In a sense, they give an answer to the corresponding questions put forward by LIN Chunhui and LIAO Yifan in Comments on the Proposed Concession for Carriage of Loaded Containers between Chinese Ports for Transshipment by Liners in International Trade (1). Meanwhile, their research is also based on the idea of supporting opening coastal piggybacks.

2. The View of Being Cautious or not Opening Coastal Piggyback Business

Compared with the view of supporting the opening of coastal piggybacks, more scholars have more prudent and conservative attitudes toward this business. LIN Chunhui and LIAO Yifan made many valuable discussions on coastal piggyback of laden containers in many aspects, which are worth thinking about, testing, verifying, and answering. They mentioned that "the proposal in new policy (referring to the opening of coastal piggyback of laden containers) is not attractive to the goods flows (the supply of goods in the buyer's market) ..."; "The loose policy gives them (referring to the ship owners) a new choice that they can occasionally do to meet the requirements of some customers, but that's not what they're actively trying to do; "We are not sure whether 'coastal piggyback of laden containers' has enough attraction to attract a large number of goods back." It can be seen that they are full of worries about opening coastal piggyback. Whether the policy allows opening coastal piggyback business or not depends more on its effects on the economy, among which attracting goods back is an important indicator. However, whether opening this business can achieve a good effect in promoting the economy is still being determined. Currently, it seems that the situation is not optimistic.

MA Deyi advocates that we should prudently treat the policy of trial piggyback in Shanghai Free Trade Zone. Similarly, ZHANG Wenguang believes that "the 'coastal piggyback' policy should be comprehensively evaluated, actively improved and prudently promoted".[1] LI Qiaoling believes the fact that China frees up coastal piggyback in free trade zones does not mean China is moderately liberalizing the cabotage right. After analyzing the connotation and essence of "Chinese-funded shipping companies", it is found that the policy provides a way to give certain benefits to Chinese flagships of convenience. Recently, China still tends to retain its cabotage right.[2]

ZHANG Yaoyuan puts the issue of opening coastal piggybacks in the context of the most favored nation's treatment of WTO, demonstrating the policy is not contrary to it. However, "although under the free trade of WTO, we should still treat the relevant issues involving a country's coastal benefits with caution. cabotage, as a country's fundamental right, should always

[1] Zhang Wenguang, *"Coastal Piggyback" Policy in Free Trade Zone Should be Prudently Developed*. People Rule of Law, 2016(12), p.26-28.

[2] Li QiaoLing, *Thought on the Right to Transport in China's Coastal Areas based on Goods-carrying Policy in Free Trade Zones*, Cross-strait Legal Science, 2018(1), p.3-8.

be reserved in the coastal piggyback policy, to ensure that the benefits of this coastal transport are reserved for Chinese enterprises."[1] China's promise to join the WTO is often the reason that foreign shipping companies call for the opening of coastal piggybacks. But the reason is not strong because China has explicitly reserved coastal transport services in the Schedule.

WANG Jinggai, by comparing the degree of openness of three major types of coastal transport worldwide, said that "in combination with China's currently actual conditions, China must not give up the cabotage right".[2] XIE Xie believes that "the basic principle of opening the shipping market is to strictly separate the coastal and ocean shipping markets. Foreign shipping companies should not be allowed to provide coastal transportation services, and even joint ventures and joint stock companies should also be prohibited. Similarly, Chinese flagships of convenience are not allowed to deal in coastal businesses, and any form of coastal piggybacks is not allowed (including the disguised piggyback in the way of replacing shipping bills in Busan). The coastal piggyback business carried out in Shanghai Free Trade Zone should be canceled. "[3] Such opinions fully show the attitudes of some scholars against opening coastal piggybacks.

According to the above two sides, the author prefers the latter. The reasons can be considered and measured from the following factors.

V. Factors Considered for Prudent Approaching

In the research of scholars who hold the view of prudent open or not open, many problems and factors that need to be considered, evaluated and estimated have been put forward. LIN Chunhui and LIAO Yifan (2004) put forward several issues worth investigating as soon as the policy was released, such as how large is the actual operation scale of the "piggyback of laden containers" business. What is the proportion of laden containers shipped incidentally that were originally prepared to be transported to the nearby transit ports? How much container volume growth will Chinese ports get? How much of the short-term increase in the volume of containers is actually caused by carrying laden containers incidentally? Although the perspective of these questions is from a single dimension, the answers are closely related to actual interests and important proof in the economy to measure whether coastal piggybacks should be opened; The answers are also data that advocates of openness such as shipowners and ports should pay attention to. If China still wants to call for opening coastal piggybacks in the future, the relevant data to prove it benefits these aspects must be provided; However, if the data on these issues are not satisfied after a trial period, it will be good to be cautious about opening coastal piggybacks.

It was pointed out that the coastal piggyback of laden containers may influence shipping

[1] Zhang Yaoyuan, *Research on the Policy of Coastal Container Transshipment in FTA and Most Favored Nation Treatment in WTO*, The South China Sea Law Journal, 2018(6), p.63-72.
[2] Wang Jinggai, *Analysis of the Openness of Domestic and Foreign Coastal Transportation*, Port Economy, 2014(7), p.15-18.
[3] Xie Xie, *The Direction of China's Shipping Market Opening Up in the New Era*, Shipping Management, 2015(5), p.1-4.

companies to adjust their routes and ports of call, which will be conducive to the development of ports in China. But even if the shipping company does this, what we still do not know is if it is occasional, or if the company will adjust the route layout and liner density for a long time. When considering whether the shipping company will adjust its route, what we should also pay attention to is medium and large ports developing near hubs and giants, which could have developed better. If their direct routes will be reduced because of this? If they will not be selected as base ports when the shipping company adjusts the route layout? If the hub port develops greatly by virtue of the growth of the transit business, the development of nearby non-hub ports may appear to be the Matthew Effect. The reason is the shipping route is not static. When discussing the impact of liberalizing the coastal piggyback business on Tianjin Port, WANG Li said, "The transit containers brought to Tianjin Port by foreign ships are also very limited. It is more likely that Tianjin Port will start to provide container feeder services for Dalian Port, Qingdao Port and Shanghai Port. Then the loss of transit containers will have a negative impact on the international trunk shipping of Tianjin Port."[1] If this business is not limited to pilot, but is implemented nationwide, it will encounter problems of route layouts and regional restrictions, such as "whether there is a direct route between ports," and "whether the coastal operation direction of international liner can 'piggyback' ". These problems all need to be assessed in the actual situation by the port. Whether the changes brought about by the policy will enable the port to develop needs to be further confirmed by data and evidence.

Some problems may arise when the coastal piggyback is put into practice, such as ambiguity, contradiction and confusion of law application as follows. First, which laws or regulations are applicable to imputation and claims in case of accidents? Is it applicable to the relevant provisions of inland waterway transport or international transport? There is also no document to define the main responsibilities and compensation amount, let alone practical rules and experience. Second, it was said that the number of flagships of convenience would decrease after the opening of the coastal piggyback of laden containers, attracting them to change to the five-star flag. However, However, we have yet to determine the actual effect of the approach to attract the flagships of convenience. It is unknown whether the result can meet the expectations. Should we also make special treats for the legal application of the Chinese non-five-star-flagships that are currently piloting coastal piggyback business in free trade zones? There are still no relevant provisions to clarify this question. Third, the service object of the coastal piggyback of laden containers is specific. However, logically speaking, its scope of application should not be restricted. Then, how to formulate relevant laws and regulations becomes a new problem. Four, it is difficult to control

[1] Wang Li, *Discussion on the Influence of Liberalizing "Coastal Piggyback" Business on Tianjin Port*, Binhai Times, November 25, 2013, at 8.

the extension of its legal application; The shipping company is probably further requesting to expand the scope of services for the same reason in the future. At that time, how to deal with this requirement will also become a problem to be considered; Or, foreign shipping companies expand through joint venture agreements or other ways, which is difficult to be identified in practice. This expansion may evolve into an expansion that extends to all ship owners, all countries, and even the entire coastal transport field, which becomes China's unilateral opening of coastal transport to the world.

Beyond that, in a prudent manner, the factors to be considered when opening coastal piggyback also include national security, the impact of the ship registration system, the impact of auxiliary industries, and many other aspects. Considering the fact that most countries in the world retain the business and opening up will cause more problems than reservations, the promotion and expansion of coastal piggybacks do not fully meet the purpose of China's shipping policy. Therefore, China should maintain a prudent attitude toward the coastal piggyback business. The root of this is that the opening of coastal piggyback is to enable international shipping to operate and handle in a more economical and efficient way. 91 countries in member states of the United Nations have laws of national reservation over water. The overwhelming reason for the enforcement of exceptions or exemptions by countries with restrictive provisions is that their transport capacity is insufficient. It can be seen that there is no need for China to open the coastal piggyback business.

VI. Appropriately Open Coastal Piggyback with the Declaration of Will to Ship Empty Container Incidental

The essence of the policy to allow coastal piggyback business is to properly open China's coastal transport market, so that previously unqualified subjects can be admitted to participate in this business. The retention of coastal piggyback or even coastal transportation does not contradict China's policy of continuously opening up to a higher level. On the contrary, the shipping sector has always been the pioneer in China's opening up. However, the essence of the coastal piggyback is the cabotage right, which is a very important right for interested parties. It is naturally necessary for laws and regulations to make clear which subjects can enjoy such rights. Then, if we want to make an attempt to liberalize the coastal piggyback, or even further promote it, we should do appropriate, restrictive and partial liberalization. The author thinks that we can open coastal piggyback to different degrees according to the different containers. Such a suggestion is based on practical business, and may also be closer to the original purpose of China to allow coastal piggyback business. At the same time, opening in this way can also better meet the objectives and needs of foreign ships in terms of operation and management, such as using the business to improve efficiency and save costs.

To be specific, discrimination in coastal piggyback of empty containers and laden containers, or, the act that the actor divides the containers into piggyback and non-piggyback according to his or her subjective intention, is due to the essential difference between these two acts. Shipping empty containers incidentally is only an autonomous transfer behavior involving the transportation tool itself, [1]which belongs to the issue of operation management in enterprises. Driven by such intention, the act is really "piggyback". However, the piggyback of laden containers of international navigation ships belongs to another issue. Although strictly speaking, empty shipping containers incidental also has the essence of coastal transportation, it can be said that its "composition" and degree of coastal transportation are very low; But shipping laden containers incidental is the free transfer of foreign trade goods between Chinese ports, which belongs to coastal transportation in a full sense. In other words, if the behavior belongs to the piggyback in the sense of true intention, it should be allowed, or even considered to be promoted after the trial. However, if not, the behavior should not be permitted. There are similar regulations abroad, such as in the Philippines. It allows empty containers from overseas to be transshipped between two domestic ports according to its 2015 Joint Loading of Foreign Ships Act. However, Article 8 of the Act still prohibits foreign ships from shipping domestic goods.[2]

From the perspective of civil law, the specific factual behavior of the actor is subject to his or her declaration of will. Declaration of will is the soul of a legal act. To regulate different juridical acts with different legal provisions, the first step is to judge what kind of juridical act it is, that is, to judge its declaration of will. According to the relevant provisions of Articles 133, 134 and 140 of the Civil Code,[3] the determination of an act requires the analysis of the declaration of will. China has strict restrictions on coastal transportation. If the declaration of will (judged by the combination of subjectivity and objectivity) of the transport actor is the allocation or piggyback for the purpose of balancing the volume of empty containers, and the same container needs to be loaded at two or more different domestic ports [this kind of LCL(less than container load) is not allowed by ports at present, so it cannot be operated; but if this kind of piggyback becomes feasible, it is a new idea to save land transport costs], the behavior should be allowed, supported and promoted; If the declaration of will of the transportation actor is coastal transportation, which generally means the

[1] Tan Xuewen, Legal Dilemma and Breakthrough of Trial Coastal Carrying Business in Free Trade Zones, The People's Judicature, 2018(10), p.102-106.

[2] See An Act Allowing Foreign Vessels to Transport and Co-Load Foreign Cargoes For Domestic Transshipment and For Other Purposes, Sixteenth Congress of the Republic of the Philippines, Second Regular Session, June 15, 2015.

[3] Civil Code of the People's Republic of China:"
Article 133: Juridical acts are acts of the parties to civil legal relations to create, modify, or terminate civil legal relationships through a declaration of will.
Article 134: Juridical acts may be formed based on the unanimous declaration of will by two or more parties or based on the declaration of will by a single party.
Article 140: An actor may expressly or tacitly declare his or her will. Will may be deemed tacitly declared only when it is in accordance with any law, is agreed upon by the parties, or conforms to the trading practices between the parties."

goods are transported from one domestic port to another for transshipment, or even the goods have been delivered to the consignee after the transportation, such behaviors should still be strictly restricted and prohibited. However, this proposal also has shortcomings in its operability. It is difficult to determine the criteria or the evidence system for judgment.

VII. Develop Inland Water Transportation to Replace the Opening up of Coastal Piggyback

Without the opening up of the coastal piggyback business, we can analyze the problems encountered by the demand and the appealing party, to make adjustments or improvements from other aspects to find an alternative way, rather than just focusing on whether the coastal piggyback business is open. There are many development directions or reforms that can be used as alternative paths. Here, we will discuss only one of the most important paths, that is, water transport between domestic ports.

From another practical perspective, if the same ship stops at multiple coastal ports to load or unload cargo, its transportation time between the departure port and the final destination port will inevitably increase. Then, it is unknown whether the cargo owner who originally pursued the speed of the route will still choose ships on this route. At this time, the coastal piggyback business may bring no benefit growth to shipping enterprises. The only ships that benefit more from the coastal piggyback business are transit ships, with the goods transferred between ports but not ships. So, what we need to consider in this issue is how to develop domestic regional transport capacity rather than emphasizing the opening of coastal piggybacks.

International shipping transport has always been closely linked with domestic water transport. Before transshipment, goods need to be transported by water between domestic ports, or from inland ports to coastal ports via the Yangtze River and other inland rivers, or between coastal ports. As the first form of transportation, water transport only can solve the problem of the demand for so-called shipping laden containers incidental between coastal ports only by cooperating with international liner transportation in terms of capacity, density, voyage and other aspects and meeting the requirements of international liner transportation. To do this, China’s shipping companies engaged in domestic water transport and other relevant parties need to make great efforts. As an alternative to coastal piggyback of laden containers, water transport in domestic branch lines should be able to fully undertake the cargo transport of international liners in ocean routes before arriving at the coastal transit port. This is both a requirement and a challenge for shipping companies engaged in transportation between domestic ports.

VIII. Conclusion

Freeing up coastal piggyback reflects that China is adhering to reform and opening up and

innovation. We attempt to support the development of the shipping industry with policies. All the facts from China's permission to coastal piggyback of empty containers to our hot discussion about the coastal piggyback of laden containers, to trial coastal transportation incidental in Shanghai Free Trade Zone by non-five-star-flagships, even to the complete liberalization of Hainan Free Trade Port, are the expression of above ideas. Opening and even promoting the business with a declaration of will of incidental can bring benefits to all business parties; The business without a declaration of will of incidental should be strictly classified into coastal transportation, and treated with caution and severely restricted. At present, the trial coastal piggyback business in Shanghai Free Trade Zone is the best test of this policy. In the practical work in the pilot Shanghai Free Trade Zone, we can weigh the gains and losses in all aspects, to draw a conclusion on opening up or not, which is better and which is worse based on empirical evidence from practice and the evaluation indicators and standards of this policy. So, there is nothing wrong with trying, and trying can always test whether an idea or practice is appropriate. But if we want to promote the business in a wider range, we need to consider carefully before doing so. Therefore, the trial of coastal piggyback business is beyond reproach and of positive significance. In a word, the opening of the coastal piggyback or coastal transport market, fundamentally speaking, should not damage China's security from a political perspective, and should not be penny-wise and pound-foolish from a commercial perspective. No matter what is done, the results must conform to the reason, purpose and envisaged effect of the corresponding policy adjusted. For the discussion of the coastal piggyback business, we should make it clear that the fundamental starting point is how to improve the international competitiveness of Chinese port and shipping enterprises, rather than simply discussing whether to open the coastal piggyback business.

Translator: CHENG Lan

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

关于办理海洋自然资源与生态环境公益诉讼案件若干问题的规定

5 月 11 日，《最高人民法院 最高人民检察院关于办理海洋自然资源与生态环境公益诉讼案件若干问题的规定》发布，自 2022 年 5 月 15 日起施行。

据了解，出台海洋自然资源与生态环境公益诉讼司法解释，是最高人民法院、最高人民检察院贯彻落实党中央决策部署，加大海洋自然资源与生态环境司法保护力度，积极回应社会关切的重要举措。司法解释的颁布实施，对于完善海洋自然资源与生态环境保护法律体系，统一法律适用标准，规范海洋自然资源与生态环境公益诉讼案件办理，具有重要意义。

《最高人民法院、最高人民检察院关于办理海洋自然资源与生态环境公益诉讼案件若干问题的规定》已于 2021 年 12 月 27 日由最高人民法院审判委员会第 1858 次会议、2022 年 3 月 16 日由最高人民检察院第十三届检察委员会第九十三次会议通过，现予公布，自 2022 年 5 月 15 日起施行。

最高人民法院 最高人民检察院

2022 年 5 月 10 日

法释〔2022〕15 号

最高人民法院 最高人民检察院关于办理海洋自然资源与生态环境公益诉讼案件若干问题的规定

（2021 年 12 月 27 日最高人民法院审判委员会第 1858 次会议、2022 年 3 月 16 日最高人民检察院第十三届检察委员会第九十三次会议通过，自 2022 年 5 月 15 日起施行）

为依法办理海洋自然资源与生态环境公益诉讼案件，根据《中华人民共和国海洋环境保护法》《中华人民共和国民事诉讼法》《中华人民共和国刑事诉讼法》《中华人民共和国行政诉讼法》《中华人民共和国海事诉讼特别程序法》等法律规定，结合审判、检察工作实际，制定本规定。

第一条　本规定适用于损害行为发生地、损害结果地或者采取预防措施地在海洋环境保护法第二条第一款规定的海域内，因破坏海洋生态、海洋水产资源、海洋保护区而提起的民事公益诉讼、刑事附带民事公益诉讼和行政公益诉讼。

第二条　依据海洋环境保护法第八十九条第二款规定，对破坏海洋生态、海洋水产资源、海洋保护区，给国家造成重大损失的，应当由依照海洋环境保护法规定行使海洋环境监督管理权的部门，在有管辖权的海事法院对侵权人提起海洋自然资源与生态环境损害赔偿诉讼。

有关部门根据职能分工提起海洋自然资源与生态环境损害赔偿诉讼的，人民检察院可以支持起诉。

第三条　人民检察院在履行职责中发现破坏海洋生态、海洋水产资源、海洋保护区的行为，可以告知行使海洋环境监督管理权的部门依据本规定第二条提起诉讼。在有关部门仍不提起诉讼的情况下，人民检察院就海洋自然资源与生态环境损害，向有管辖权的海事法院提起民事公益诉讼的，海事法院应予受理。

第四条　破坏海洋生态、海洋水产资源、海洋保护区，涉嫌犯罪的，在行使海洋环境监督管理权的部门没有另行提起海洋自然资源与生态环境损害赔偿诉讼的情况下，人民检察院可以在提起刑事公诉时一并提起附带民事公益诉讼，也可以单独提起民事公益诉讼。

第五条　人民检察院在履行职责中发现对破坏海洋生态、海洋水产资源、海洋保护区的行为负有监督管理职责的部门违法行使职权或者不作为，致使国家利益或者社会公共利益受到侵害的，应当向有关部门提出检察建议，督促其依法履行职责。

有关部门不依法履行职责的，人民检察院依法向被诉行政机关所在地的海事法院提起行政公益诉讼。

第六条　本规定自 2022 年 5 月 15 日起施行。

海南省游艇产业发展规划纲要（2021-2025）

海南省游艇产业发展规划纲要

（2021-2025 年）

海南省交通运输厅

2022 年 6 月

目 录

前 言

游艇是衡量一座国际滨海城市开放程度、休闲环境品质和文化创新活力的重要指标和元素之一，是世界先进自贸港和著名旅游消费目的地的重要名片。

作为中国唯一的热带海岛省份，海南管辖 200 万平方公里的“蓝色国土”，海岸线长达 1944 公里，环岛四周有 70 多个优质海湾，600 多个热带海岛，是世界海洋旅游爱好者向往的目的地，也是发展游艇产业的一块宝地，游艇产业已逐步成为海南经济发展的战略性新兴产业。

游艇产业覆盖面广、链条长，包括产业链上游的游艇设计、制造，中游的游艇流通、销售、消费以及下游的会展、赛事、教育培训、金融保险等支持和辅助产业。

海南省游艇产业起步较早，经历了 2008-2012 年的起步及高速增长期，2013-2017 年的稳定发展期以及 2018 年以来的新一轮快速发展期，已经形成了一定的产业规模和相对完整的游艇产业链，全省游艇产业发展形势十分向好。但是，全省游艇产业发展不均衡不充分的问题仍然突出，顶层设计和规划有待完善，基础设施建设有待加强，产业协同发展水平有待提升，营商环境有待优化，安全绿色智慧发展水平有待提高，体制机制改革及政策创新有待深化，与海南游艇产业改革发展创新试验区建设的要求还有差距和不足。

为贯彻落实党中央、国务院关于打造海南国际旅游消费中心的战略部署，落实《海南自由贸易港建设总体方案》等

文件精神，促进海南省游艇产业高质量发展，当好海南自由贸易港建设的先行官和排头兵，编制《海南省游艇产业发展规划纲要》。规划纲要涉及区域包括全省行政区划（不含三沙市）的沿海、江河、湖泊和适于旅游的水库。规划期为2021-2025 年，展望至 2035 年。

一、规划背景

（一）发展现状

1.基本实现游艇产业上中下游全覆盖

海南游艇产业起步较早，经过多年发展已经形成了一定的产业规模和相对完整的游艇产业链，游艇产业发展形势持续向好。2021 年，全省游艇产业规模达 43 亿元，同比增长 43.33%，涵盖设计制造、维修保养、产品销售、驾驶培训、金融保险、运营服务、会展赛事、休闲消费、租赁管理、文化传播等。截至 2021 年底，全省共有游艇上中下游企业 700 余家，其中上游企业 30 余家、中游企业约 500 余家、下游企业 100 余家，分别占比 4.9%、79.5%、15.6%，产业链中游企业占主导。

专栏 1.1 海南游艇产业构成表

产业链		产业构成	企业数量	占比
上游	设计	研发：游艇设计、游艇技术研究（新材料、模具、新工艺、新能源等）	2	0.28%
	制造	制造工业：原材料工业、游艇制造工业、游艇装配工业	22	3.12%
	配套	专业发动机、发电机、仪器仪表、导航设备、螺旋桨、帆具、涂料、安全设备、卫生洁具、电器设备、控制线路等	4	0.57%
中游	销售	品牌总代理、游艇销售、现有游艇经营	24	3.4%
	消费服务	游艇俱乐部、游艇水上休闲、水上运动、游艇培训、游艇代管、保养维护、游艇租赁等	462	65.53%

下游	支持和辅助	游艇仓储保管、游艇转运、金融服务、安全服务、报关检验、资产评估、服务外包、特种保险、航道服务、信息服务、气象服务、搜救服务、水域及生物资源环保、文化传播（媒体、赛事、论坛、会展）、产业政策等	191	27.09%

2.基本形成全省游艇码头设施布局网络

全省游艇码头基本上呈现出“两核、四群”的发展态势，形成了以海口、三亚为核心，带动周边发展的格局，满足目前游艇产业的市场需求。截至 2021 年底，全省已建成运营 13 个游艇码头，共有 2289 个泊位，保税仓 10 个，干泊位 149 个。其中，公共泊位 632 个。从游艇码头布局来看，主要分布在海口、三亚、陵水、万宁等市县。从码头性质来看，现有码头大部分属于游艇俱乐部码头，由游艇会建立，并采用会员制模式经营，且大多数游艇会是地产公司的附属机构，为地产的配套项目，主要面对高端客户，基础设施建设相对完善，配有游艇码头、水上泊位、干仓、会所、游艇维修保养车间等配套设施。

专栏 1.2 海南游艇码头泊位一览表

序号	游艇码头名称	地区	泊位数
1	华彩杰鹏国际游艇会	海口	68
2	新埠岛国际游艇会	海口	140
3	美源国际游艇会	海口	112
4	海口市国家帆船基地公共码头	海口	610
5	鸿洲国际游艇会	三亚	450

6	半山半岛帆船港	三亚	325
7	星华游艇码头	三亚	72
8	三亚鹿回头广场游艇游船公共码头	三亚	22
9	龙王庙码头	三亚	11
10	玛瑞纳酒店码头	三亚	3
11	雅居乐清水湾国际游艇会	陵水	299
12	富力湾国际游艇会	陵水	96
13	华润石梅湾国际游艇会	万宁	81
合计			2289

3.注册登记游艇规模位居全国前列

截至 2021 年底，全省辖区游艇登记注册量为 1709 艘，同比增长 33.72%，占全国总量的 17.39%，全省游艇登记量保持逐年较快增长趋势。从结构来看，20 英尺以下的小型运动快艇、钓鱼艇等仍占绝大部分，占比达到 70%以上。从船型来看，中型豪华游艇的船型基本上以飞桥型和运动型为主，船身长度以 20-65 英尺（约 6-20 米）为主，也有少量达到 80 英尺以上的超豪华游艇和公务艇。

4.游艇多层次人才培养模式基本形成

全省共有与游艇领域相关专业的高等院校 18 所，专业涉及旅游管理、会展经济与管理、海洋工程与技术、船舶电子电气工程、海事管理、航海技术、轮机工程技术、休闲体育等，每年向社会输送人才近千人。截至 2021 年底，全省共有游艇操作人员培训机构 9 家，主要分布于海口、三亚、陵

水，持有游艇驾驶证的操作人员达 5242 人，同比增长 35.8%，占全国总量的 13.52%。

专栏 1.3 海南游艇教育相关高等院校一览表			
高等院校名称	专业名称	高等院校名称	专业名称
海南大学	海洋工程与技术、旅游管理、会展经济与管理	海南师范大学	旅游管理
海南热带海洋学院	船舶电子电气工程、海事管理、旅游管理、会展经济与管理	三亚学院	旅游管理、会展经济与管理
海口经济学院	休闲体育、旅游管理、会展经济与管理	海南科技职业大学	航海技术、轮机工程技术、水路运输与海事管理、水路运输安全管理、旅游管理
海南职业技术学院	国际航运业管理（游艇服务与管理方向）、休闲服务与管理、旅游管理	海南经贸职业技术学院	旅游管理
海南体育职业技术学院	休闲体育	海南外国语职业学院	旅游管理
海南软件职业技术学院	旅游管理	海南工商职业学院	休闲服务与管理
海南健康管理职业技术学院	旅游管理	琼台师范学院	旅游管理
三亚理工职业学院	旅游管理	三亚城市职业学院	旅游管理
三亚航空旅游职业学院	航海技术、轮机工程技术、船舶电子电气技术、旅游管理	三亚中瑞酒店管理职业学院	旅游管理、会展策划与管理

专栏 1.4 海南游艇培训机构一览表	
机构名称	培训项目
海南詹尼游艇船员培训有限公司	游艇操作人员（一等、二等）
海南美安游艇产业发展有限公司	游艇操作人员（一等、二等）
海南海飞游艇驾驶培训有限公司	游艇操作人员（二等）
海南航达信息咨询有限责任公司	游艇操作人员（二等）
三亚翟墨海洋意识文化发展有限公司	游艇操作人员（一等、二等）
海南南舶航海服务有限公司	游艇操作人员（一等、二等）
海南聚悦航海有限责任公司	游艇操作人员（一等、二等）
海南司楠游艇产业发展有限公司	游艇操作人员（二等）
海南栢烁航海职业技能培训有限公司	游艇操作人员（二等）

5.游艇消费市场迎来爆发式增长

近年来，全省游艇旅游发展形势总体良好，尤其是近几年呈现快速上升的发展趋势。据统计，2021 年全省游艇出海累计达 16.9 万艘次，接待出海游客达 113 万人次，较 2020 年分别同比增长 49.74%和 49.87%，较 2019 年（疫情前）分别同比增长 74.97%和 39.82%，全年接待出海游客首次突破百万人次

专栏 1.5 海南游艇消费市场情况一览表				
年份	全年出海艘次	同比	全年出海人次	同比
2018 年	78628	–	672051	–
2019 年	96782	23.09%	810474	20.60%
2020 年	113083	16.84%	756116	-6.71%
2021 年	169336	49.74%	1133192	49.87%

6.游艇政策创新不断激发市场活力

近年来，海南省委省政府高度重视游艇产业的发展，先后出台了《海南省促进邮轮游艇产业加快发展政策措施》《中国（海南）自由贸易试验区琼港澳游艇自由行实施方案》《海南省游艇租赁管理办法（试行）》《海南自由贸易港“零关税”进口交通工具及游艇管理办法（试行）》《海南省游艇租赁管理办法（试行）实施细则》《海南省租赁游艇检验暂行规定》等文件，并出台了全国首部针对游艇产业的地方性立法《海南自由贸易港游艇产业促进条例》，加快完善全省游艇产业政策法规体系，推进全省游艇产业高质量发展。

（二）突出矛盾

1.产业链发展不充分

目前，全省游艇产业主要以中游的销售及消费为主，上游的设计、制造以及下游的支持和辅助产业发展较弱，尤其是上游的游艇设计、制造基本处于起步和初级阶段，依赖国外进口；中游游艇销售及消费服务企业同质化竞争现象十分严重，巨大的市场潜力尚未得到充分释放；下游支持和辅助产业发展依然不充分，游艇金融保险、教育培训等现代服务业发展缓慢，高端游艇设计和管理人才匮乏；全省公共游艇码头占比较低，锚地、水上加油站、游艇训练基地、游艇维修车间、加水设施、污物处理装置、气象通讯系统等配套设施规划建设也相对滞后。

2.市场活力不足

游艇可航行游玩的沿岸水域较为紧缺,游艇游玩的目的

地和特色产品匮乏；城市迅速扩张，临海区域的用地、用海空间日益紧张，阻碍了游艇产业配套布局、提质升级发展；大部分游艇码头普遍采用会籍制，会籍费高，非会员停泊费用价格更高，导致游艇购买后日常管养成本过高，抑制了游艇大众消费；完成游艇租赁备案企业数量较少，游艇租赁市场无证经营、同质化竞争等现象依然存在，降低了游艇租赁市场吸引力，阻碍了游艇租赁业务的发展。

（三）形势要求

1.落实海南自贸港建设要求，当好自贸港建设排头兵

海南自由贸易港建设是习近平总书记亲自谋划、亲自部署、亲自推动的改革开放重大举措，是党中央着眼国内国际两个大局，深入研究、统筹考虑、科学谋划作出的战略决策。总体方案明确提出海南自由贸易港建设要大力发展旅游业，设立游艇产业改革发展创新试验区。这是国内首次明确提出设立游艇产业改革发展创新试验区，对于助推海南游艇产业高质量发展，示范带动全国游艇产业快速发展，具有十分重要的意义和作用。

2.服务“双循环”新发展格局，激发游艇市场消费潜力

海南是我国最大的经济特区和唯一的热带岛屿省份，具有发展游艇产业独特的区位和资源优势。海南要充分发挥背靠国内超大规模市场优势和内在需求，不断吸引和促进全球游艇要素在海南聚集，不断推进海南游艇产业发展，打造世界著名旅游目的地，构建“以国内大循环为主体、国内国际双循环相互促进的新发展格局”，激发海南游艇市场消费潜

力，实现海南游艇产业高质量发展。

3.服务海南全面深化改革，打造国际游艇旅游消费中心

《中共中央 国务院关于支持海南全面深化改革开放的指导意见》明确提出将海南打造成为国际旅游消费中心的战略定位。游艇产业是海南国际旅游消费中心的重要组成部分，是培育旅游消费新业态的重要抓手，要在游艇“制度创新+优惠政策+法制保障”等方面下功夫，充分发挥游艇产业在海南自由贸易港和国际旅游消费中心建设中的先行官和排头兵作用，主动担当，服务海南全面深化改革和国际游艇旅游消费中心建设。

4.全球游艇产业向亚太转移，打造游艇产业发展新高地

全球游艇市场虽仍以美国、意大利、法国等欧美发达国家占主导，但随着中国等发展中国家经济的快速发展，全球游艇产业重心正逐渐向亚太国家转移。我国国民生产总值（GDP）总额已突破 100 万亿元，人均 GDP 达到 1 万美元，进入中等偏上收入国家行列，未来我国游艇产业发展前景十分广阔。海南具有发展游艇产业得天独厚的资源和政策优势，未来随着促进海南游艇产业发展政策的逐步落地实施，特别是海南自由贸易港政策对海南游艇要素集聚带来的巨大拉动作用，海南有望成为亚太地区游艇产业发展新高地。

二、总体要求

（一）指导思想

以习近平新时代中国特色社会主义思想为指导，全面贯彻党的十九大和十九届二中、三中、四中、五中、六中全会

精神，深入贯彻习近平总书记对海南发展的重要指示批示精神，落实《海南自由贸易港建设总体方案》和《海南省建设国际旅游消费中心的实施方案》要求，围绕建设海南国际旅游消费中心的战略定位，对标国际发达国家（地区）游艇产业发展经验，坚持新发展理念，坚持高质量发展，以开放促开发，以制度创新促市场活力，以优化营商环境促产业要素集聚，打造特色鲜明、布局合理、功能完备、优势互补的海南游艇产业发展格局，形成具有国际竞争力的海南游艇产业链，将海南打造成为具有较强国际影响力的高水平游艇产业改革发展创新试验区。

（二）基本原则

——创新驱动，开放融合。坚持立足国内和放眼全球相统筹，深入实施创新驱动战略，以理念、制度、科技、政策、管理创新引领海南游艇产业发展，以开放促发展，培育发展新动能，加快转变发展方式，实现与相关产业融合发展，提升海南游艇产业国际影响力。

——统筹规划，突出重点。统筹海南游艇产业链上下游要素资源，充分利用各市县区资源优势，科学、系统、全面推进海南游艇产业发展。深入挖掘海南地域特色，聚焦产业发展定位，发挥优势补齐短板，以点带面突出重点，实现海南游艇产业链上下游全面发展。

——示范引领、分步实施。充分发挥当前消费环节政策、制度、运营模式等创新的示范引领作用，带动全省游艇产业高质量发展。分阶段、分步骤有序推动海南公共游艇码头等

基础设施建设，有序推进海南游艇产业相关法规完善与创新，有序实现游艇产业上下游联动发展。

——生态优先，协调发展。践行“绿水青山就是金山银山”的发展理念，全面集约和高效利用岸线、土地、海域等自然资源，加强生态环保，提升安全水平。协调海南游艇产业与城市、工业、区域经济发展关系，发挥地域特色和比较优势，实现区域协调、错位发展。

——以人为本，服务大众。坚持党的领导，坚持以人民为中心，充分运用海南旅游资源丰富、背靠国内国外超大规模市场优势，以满足大众消费需求和人民获得感为导向，积极普及游艇消费文化，营造大众化的游艇发展与消费氛围，实现游艇旅游消费进万家。

（三）发展目标

到 2025 年，海南游艇产业链体系基本形成，游艇制造和服务水平与国际接轨，游艇消费场景更加多元，游艇产业安全、绿色、智慧发展水平国内一流，国际知名游艇品牌逐渐进驻海南，游艇行业龙头企业初步形成，海南特色游艇产业发展模式初步形成，游艇消费成为城市消费新增长点，游艇产业成为海南自贸港建设的先导产业，海南成为中国最具吸引力的游艇消费地，初步建成具有较强国际影响力的高水平游艇产业改革发展创新试验区。

——游艇基础设施服务网络进一步完善，游艇码头泊位（含干泊位）数突破 3394 个，其中公共游艇码头泊位（含干泊位）总量突破 1508 个。

——游艇消费市场规模大幅增长，全岛注册游艇数突破 2446 艘，全年游艇旅游总人数达到 136 万人次。

——产业体系更加完善，竞争力显著提升，产业规模突破 100 亿元，其中上游维修及制造业规模达到 20 亿元，中游消费及流通规模达到 60 亿元，下游码头支持和服务规模达到 20 亿元。

——游艇企业数量突破 1580 家，游艇产业链相关从业人员达到 20000 人。

海南省“十四五”游艇产业规划主要指标

序号	类别	指标名称	单位	2019 年末（疫情前）	“十三五”末	“十四五”末	属性
1	基础设施	码头泊位（含干仓）数量	个	2426	2426	3394	预期性
2		其中：公共游艇码头泊位（含干仓）数量	个	632	632	1508	预期性
3	市场规模	注册游艇数量	艘	1077	1278	2446	预期性
4		游艇旅游总人数	万人次	81	75	136	预期性
5	产业发展	产业规模	亿元	20	30.6	100	预期性
6		其中：游艇制造业规模	亿元	0.4	0.6	20	预期性
7		游艇企业数量	家	243	402	1580	预期性

展望到 2035 年，海南游艇产业形成以游艇设计和制造为基础，游艇销售和消费为核心，游艇赛事会展、金融保险、教育培训等服务业为延伸的具有中国特色的现代游艇产业

体系，游艇消费场景丰富，游艇安全、绿色、智慧发展水平国际一流，游艇旅游成为海南城市发展名片，海南成为全球知名的游艇旅游消费目的地，全面建成具有较强国际影响力的高水平游艇产业改革发展创新试验区。

三、优化游艇产业布局

打造以海口和三亚为重点，以三亚中央商务区等海南自由贸易港重点园区为核心，其他市县为补充，功能齐备、特色鲜明、协调发展的“一环、两核、多点”全省游艇产业总体空间布局；以游艇设计和制造为基础，游艇销售与消费为核心，游艇赛事会展、金融保险、教育培训等服务业为延伸的全省游艇产业总体发展布局，实现陆地资源与海洋资源相统筹、产业布局与空间布局相统一、全省统筹与市县差异化发展相衔接。

1.游艇设计与制造产业

（1）游艇设计业

发挥海口作为省会城市政治、经济、文化中心和交通枢纽地位，三亚作为海南重要的游艇旅游消费地优势，临高作为海南海洋装备产业先行区，重点在海口国家高新区、三亚崖州湾科技城、三亚中央商务区、临高金牌港产业园等海南自由贸易港重点园区布局游艇设计产业。

（2）游艇制造业

结合先进制造业基地发展定位，以儋州市（洋浦经济开发区）为依托，联合临高县，布局游艇制造产业，打造海南游艇加工制造带。

2.游艇消费服务产业

（1）游艇码头

海口重点布局公共游艇码头，服务大型赛事、水上体育休闲运动以及大众游艇消费的需要，保持合理的公共码头和游艇俱乐部码头比例；三亚重点布局公共游艇码头和游艇俱乐部码头，满足中高端消费群体对高端游艇消费需求，以及大众消费群体对海上休闲旅游的需求，并保留一部分游艇赛事对码头的需求；陵水、万宁重点结合地方特色，发展水上休闲运动等特色活动，保持合理的公共码头和游艇俱乐部码头比例，满足区域性游艇旅游消费需求；其他市县重点根据当地需求，以公共码头为主推进游艇码头建设，满足本地游艇旅游消费需求。

（2）游艇维修中心

近期在三亚鸿洲国际游艇会、三亚半山半岛帆船港、三亚南边海布局游艇维修中心，同时在儋州洋浦经济开发区和临高金牌港产业园建设游艇制造产业基地并配套维修中心。中远期在海口、儋州、陵水、万宁等地建设游艇维修中心，均衡布点便于消费者就近维修。

（3）旅游目的地

与《海南省旅游发展总体规划（2017-2030）》《海南省海洋经济发展“十四五”规划》《海南省“十四五”旅游文化广电体育发展规划》充分衔接，结合文化旅游产业园区、旅游综合体、旅游景区、特色产业小镇、美丽乡村以及特色文化街区等滨海旅游项目，海洋牧场、海岛等海上旅游项目，

布局一批适合游艇游玩的旅游目的地。

（4）开放水域和口岸

持续推进东营、博鳌、石梅湾神州半岛、海棠湾、南山、龙沐湾、棋子湾和临高角等 8 个境外游艇临时开放水域继续开放，结合海南自由贸易港游艇产业发展需求，适时扩大临时开放水域范围。

在现有三亚鸿洲游艇会码头开放口岸的基础上，完善陵水清水湾游艇码头、三亚半山半岛帆船港的查验配套设施，验收后尽快对外启用。

（5）游艇驿站和综合服务中心

基于海南游艇公共码头和环岛公路驿站规划网络布局，“十四五”期间推进在文昌、儋州等地选址建设游艇旅游驿站，提供供水、供油、供电、公厕、停车场、餐饮等游艇停泊配套基础服务。中远期结合产业发展需求，逐步在琼海、陵水、万宁、临高、昌江、乐东等地选址建设游艇旅游驿站，逐步形成环岛驿站网络。在海口、三亚布局建设海南游艇综合服务中心，提供集游艇停泊、综合维修保养、供油供水、商务休闲、餐饮娱乐、旅游住宿、销售展示、培训、金融保险等为一体的综合性、一站式服务。

（6）游艇交易中心

按照适度集中、便利交易、公平有序的原则，合理确定游艇交易服务机构的布局安排。依托三亚中央商务区、海口江东新区游艇产业聚集优势，高标准建设游艇综合交易中心及具有区域优势的游艇交易场所。

3.游艇支持和辅助产业

（1）游艇教育培训

近期以市场需求为导向，重点在海口和三亚布局游艇培训机构，培训游艇操作和服务人员；在临高布局中盈游艇与航海装备培训中心，培训专业游艇产业生产和服务人才；依托海南热带海洋学院、海南科技职业大学、三亚航空旅游职业学院等高等院校，培育游艇专业技术人才和服务型人才。远期引进境内外知名游艇教育培训机构，在相关高等院校研究设立游艇设计建造、游艇维修保养、游艇操作与管理、游艇服务与管理以及游艇会展等全门类专业，培育高端管理型和复合型人才。

（2）游艇赛事

在三亚半山半岛帆船港、万宁石梅湾国际游艇会、海口市国家帆船帆板基地公共码头等布局克利伯环球帆船赛、世界（青年）帆船锦标赛、环海南岛国际大帆船赛、中国杯帆船赛、中国帆船年度盛典、“司南杯”帆船赛等国内外帆船游艇赛事。

（3）游艇会展

在海口、三亚等地重点布局游艇会展，重点支持中国国际消费品博览会游艇展、海天盛筵、国际游艇产业博览会、游艇产业创新发展研讨会等游艇相关会展活动。鼓励具备基础设施条件的游艇会积极筹办国际性游艇会展。

四、构建现代游艇产业体系

（一）大力扶持游艇设计、制造业发展

充分发挥海南自贸港政策优势，吸引国际知名游艇设计、制造企业落户海南或在海南设立分公司，鼓励国内知名游艇设计、制造企业在海南设立总部或分部。鼓励海南本土游艇设计和制造企业转型发展，加大技术研发和创新投入，提升游艇设计、制造企业核心竞争力。夯实现有游艇制造产业发展基础，实现游艇制造链条延伸和价值增值，以高质量供给适应引领创造新需求，集聚国内游艇制造要素，打造国内高端游艇制造业基地。充分利用海南自由贸易港原辅料“零关税”政策、加工增值货物内销免关税政策等，拓展高端游艇组装制造业务。打造一批具有核心竞争力、国际品牌影响力的游艇设计、建造龙头企业，提升海南游艇设计、制造企业整体服务质量和水平。

专栏 4.1 海南游艇制造产业基地重点建设项目
实施类建设项目。新开工项目：海南临高中盈锦龙游艇制造基地。位于临高金牌西港，由游艇大型制造基地、超级游艇高端智能再制造技术研发中心、游艇设计科研中心、技术标准研发中心等组成。 海南临高全景游艇产业基地。位于临高金牌港开发区，由游艇总成核心区、总成配套服务区、配件制造加工区三大部分组成。 **续建项目：**海南洋浦游艇产业基地。位于儋州洋浦经济开发区，由游艇制造区、展示交易区和配套服务区等组成。

（二）促进游艇服务产业发展

指导游艇租赁企业依法依规进行游艇租赁业务备案，规

范游艇租赁市场经营秩序，促进全省游艇消费市场健康有序发展。衔接地方产业发展定位，鼓励琼海博鳌、文昌铺前、陵水黎安等地结合自身产业特色，实现游艇与康养、休闲、教育等产业融合发展，打造游艇消费新增长极。大力发展三亚鸿洲卡纳游艇维修基地、三亚半山半岛帆船港维修中心，新建三亚中央商务区南边海游艇产业创新服务综合体，在儋州洋浦经济开发区和临高金牌港产业园建设游艇制造产业基地并配套游艇维修。根据国家相关政策，研究探索开展游艇保税维修及再制造业务，推动游艇维修、保养、补给等业务加快发展。

专栏 4.2 海南游艇维修中心重点建设项目
实施类建设项目。新开工项目：三亚中央商务区南边海游艇产业创新服务综合体。计划占地约 23 亩，拟支持提供检验评测、内饰翻新等服务。 临高中盈锦龙游艇维修中心。开展超级游艇制造维修，实现游艇零配件升级更换和游艇重舾装维护，提升超级游艇综合性能。

（三）探索创新游艇交易服务产业发展

支持三亚中央商务区设立游艇保税展示销售区，打造海南国际游艇综合交易中心，吸引全球游艇资源要素聚集；支持海口成立游艇交易机构，服务区域性游艇销售结算。鼓励游艇交易活动在船舶交易服务机构进行，进一步提高便利化水平，规范交易服务，提供交易动态信息，拓展现有游艇交易鉴证、评估、勘验等专业服务功能，保障游艇交易市场公平有序，促进游艇交易和相关业务发展。鼓励采取金融租赁、融资租赁等方式的交易活动。对老旧游艇进入海南依照有关

规定实行管理措施。

专栏4.3 海南游艇交易中心重点建设项目
实施类建设项目。续建项目：海南国际游艇综合交易中心项目。位于三亚中央商务区，通过深度开发互联网和金融工具，创新游艇资产交易、金融租赁、游艇保险、金融担保、使用权交易等具体支撑业务，对标国际游艇市场规则，建立全球游艇资源配置平台。 **研究类建设项目。**海口国际游艇交易中心项目。以消博会游艇展举办为契机，通过支持鼓励国内外游艇制造商、销售商、专业协会等到海口设立分支机构或子公司，充分用好用足自贸港游艇“零关税”等政策，构建区域性游艇销售结算场所。

（四）补齐游艇支持辅助产业短板

大力促进游艇金融保险、资产评估、文化传播、法律咨询等现代服务业发展，建立功能完备、服务优质、高效便捷的海南游艇现代服务业体系。支持游艇企业发行企业债券，优化融资结构。鼓励金融机构对游艇产业市场主体提供贷款、融资担保等金融服务。支持保险机构提供有关财产保险、意外伤害保险等产品和服务，拓宽业务范围，创新服务模式。开发海南游艇产业指数，定期公布交易指数和消费指数。鼓励社会资本设立游艇产业发展基金，依法依规支持游艇产业领域重大项目建设和高成长型、初创型企业发展。

（五）发展游艇国际赛事和大型会展

以承办克利伯环球帆船赛等国际游艇帆船赛事、举办环海南岛国际大帆船赛等自主品牌高端游艇帆船赛事为重点，积极融入粤港澳大湾区游艇帆船交流赛、“一带一路”国际

帆船赛分站赛，不断丰富海南游艇帆船赛事，提升海南游艇帆船赛事吸引力和专业度，建立健全游艇帆船赛事体系，努力扩大海南游艇赛事国内外影响力。重点支持中国国际消费品博览会游艇展、三亚海天盛筵、海南（国际）游艇产业博览会做大做强，打造一批在国内外具备一定影响力的游艇展会。

专栏 4.4 海南游艇赛事重点项目

实施类项目。环海南岛国际大帆船赛。由国家体育总局和海南省人民政府主办，是海南倾力打造的大型高端国际品牌赛事。赛事旨在进一步推动海南国际旅游消费中心建设，更好地向世界宣传、推介海南，提高海南的国际知名度，培育打造强势水上运动赛事品牌。

克利伯环球帆船赛。由克利伯风险投资公司组织，面向全球业余帆船爱好者，比赛每两年举办一届，是世界上最具影响力的航海赛事之一，争取今后每届比赛均在海南选址设置经停港。

研究类项目。“一带一路”国际帆船赛由中国帆船帆板运动协会、广西壮族自治区体育局、广西北海市人民政府主办，设立了泰国普吉、中国北海、新加坡和马来西亚兰卡威四个分站赛事，是首个以“一带一路”国家为重点，服务“一带一路”倡议和国际陆海贸易新通道建设的体育交流赛事，争取将海南融入其中一个分站赛。

专栏 4.5 海南游艇会展重点项目

实施类项目。中国国际消费品博览会游艇展。中国国际消费品博览会由商务部和海南省人民政府共同举办，是全国首个以消费精品为主题的国家级展会。游艇展作为消博会的重要子活动，设置了水上展区进行实船展览和陆上展

区用于展示游艇制造商、配套装备、游艇租赁等上下游产业，主要开展游艇制造业及上下游招商，打造游艇业界交流平台。

海南（国际）游艇产业博览会。由海南省交通运输厅、海口市人民政府、海南省旅游和文化广电体育厅、海南广播电视总台主办，交通运输部水运科学研究院协办。定位为全省规模最大，形式最为多样，内容最为丰富的综合性游艇展，目标打造成为具有国际影响力的国际游艇展。展览项目包括游艇展示、游艇体验、游艇销售、游艇亲子文化活动、游艇运动表演、相关配套活动等。

三亚海天盛筵。举办地点位于三亚鸿洲游艇码头。由鸿洲集团主办，海南海天盛筵会展有限公司、鸿洲国际游艇会共同协办。定位为打造全国知名的高端奢侈品展览。展览项目包括豪华游艇、私人飞机、名车等各领域知名品牌产品。

五、完善游艇产业基础设施网络

（一）加快海南游艇码头设施建设

在海口、三亚、琼海、文昌、陵水、临高、儋州（含洋浦经济开发区）、昌江等选址新建公共游艇码头（含超级游艇码头和泊位）、进出港航道、系泊和防台锚地、下水坡道、陆上干仓、避风港、燃料补给、维修保养、油污水和废弃物回收、安保消防、应急救援等公共游艇码头基础设施，系统解决游艇公共基础设施和服务设施不足问题。有序推进游艇俱乐部游艇码头建设，形成功能齐全、布局完善、结构合理的游艇码头基础设施网络。

序号	所在市县	公共游艇码头名称	泊位数（个）	岸线长度（m）	陆域面积（万 m^2）	水域面积（万 m^2）
1	海口	南海明珠游艇码头	150	400	1	6
2		海甸溪游艇码头	200	800	0.3	8

3		秀英游艇码头	200	700	1	8
4		江东新区游艇码头	300	1000	2	8
5	文昌	清澜游艇码头	140	200	1	6
6		高隆湾游艇码头	150	150	1.2	4
7	琼海	潭门游艇码头	200	300	1.2	4
8		博鳌游艇码头	200	400	1	5
9	万宁	龙滚河口游艇码头	100	200	1	6
10		港北游艇码头	100	200	1	6
11		小海游艇码头	150	200	1	6
12		姥爷海游艇码头	200	600	1.5	6
13		日月湾游艇码头	200	600	1.5	6
14	陵水	新村港游艇码头	200	400	1	4
15		土福湾游艇码头	200	400	1	4
16	三亚	南边海游艇码头	260	500	1	7
17		肖旗港游艇码头	398	600	1.5	30
18	乐东	望楼游艇码头	200	600	0.5	4
19		龙沐湾丹霞游艇码头	300	300	0.5	4
20		莺歌海游艇码头	–	–	–	–
21	东方	鱼鳞洲游艇码头	–	150	1	2
22		敦头港游艇码头	200	100	0.8	2
23	昌江	昌化港游艇码头	150	100	0.8	2
24	儋州	海花岛游艇码头	280	1040	0.4	21
25		新英湾游艇码头	200	300	1	4
26	临高	金牌港游艇码头	218	600	1	5
27	澄迈	盈滨半岛游艇码头	200	300	1	6
合计			5096	11140	26.2	174

（二）推进环岛游艇驿站和综合服务中心建设

高标准规划建设一批布局合理、功能完善的环岛游艇驿站和综合服务中心，构建服务本省、辐射东南亚的游艇驿站服务网络。以海口西海岸、三亚南边海为重点，打造集游艇停泊、综合维修保养、供油供水、商务休闲、餐饮娱乐、旅

游住宿、销售展示、培训、金融保险等为一体，提供综合性、一站式配套服务的游艇综合服务中心，不断提升全省游艇产业服务标准和质量，促进产业要素不断聚集，带动全省游艇产业链上下游高质量发展。将三亚国际游艇中心打造成为全省首个游艇综合服务中心。与环岛旅游公路充分融合，重点在文昌木兰、临高金牌、儋州火山海岸、昌江棋子湾、陵水清水湾、琼海潭门等岸段选址建设游艇驿站，提供供水、供油、供电、公厕、停车场、餐饮等游艇停泊配套基础性服务，打造海南游艇驿站试点示范工程。

专栏 5.2 游艇综合服务中心重点建设项目
实施类项目。三亚国际游艇中心（三亚游艇综合服务中心），集游艇商业文化与文创办公于一体，包括游艇展示销售中心、特色商业餐饮、滨水活力公共空间、海洋文化创意展示区，结合高端餐饮、商业办公综合体，打造综合游艇销售 3S 店聚集区。建成后定期举办主题展会，以水上泊位+博览中心+室内展场+户外光地的形式，整合全球资源，与世界领先游艇会建立合作，联合举办游艇会展，开展游艇国际交易。

（三）完善口岸基础设施建设

按照“一线放开、二线管住”制度设计，合理布局、按需设立开放口岸，加大对软硬件设施的改造力度，高标准建设开放口岸和“二线口岸”基础设施、监管设施，满足海南自由贸易港封关运作的口岸设施条件，打造与高水平对外开放相匹配的营商环境。加快推动三亚半山半岛帆船港、清水湾游艇码头对外开放，提高游艇口岸通关便利化水平。根据《海南自由贸易港口岸布局方案》，在完善对外开放口岸功

能的基础上，增设“二线口岸”功能。

专栏 5.3 游艇开放口岸基础设施建设项目

实施类项目。新开工项目：秀英港区邮轮游艇泊位参照水运客运Ⅲ级口岸进行建设。根据需要对旅检大厅进行改造升级，改扩建海关、边检业务技术设施，增配联检单位需要的查验设备。

“十四五”重点推动三亚鸿洲游艇会码头、三亚半山半岛帆船港、清水湾游艇会码头口岸查验设施设备建设项目。对“一线”开放口岸增设“二线口岸”功能，参照《口岸建设标准》水运客运Ⅲ级口岸进行建设。三亚鸿洲国际游艇会码头和清水湾游艇会码头需改扩建旅检大厅和联检单位机务技术设施、三亚半山半岛帆船港需建设旅检大厅和联检单位机务技术设施。

六、拓展游艇消费市场

（一）创新游艇旅游航线及消费产品

地方政府依照有关规定划定并公布游艇活动水域，进一步拓展游艇旅游航线和目的地，形成游艇码头、游艇俱乐部、游艇海上活动水域、游艇海上旅游航线和旅游目的地组成的游艇旅游网络和节点系统。鼓励游艇企业开发多样化的游艇旅游航线，建立短途海上观光体验游、中长距离商务和深度游、跳岛海岛观光和探险游等长短距离相结合、大众化与定制化相补充的游艇旅游精品航线体系。加快推进“游艇+”服务产品研发，打造游艇海钓游、潜水观光游、游艇+低空旅游、游艇婚纱摄影、游艇夜航、登岛探险、高端游艇派对、航海夏令营、帆船拓展团建等一批适合游艇游玩的海上精品旅游产品。探索建设现代化海洋牧场综合体，拓展海洋牧场功能，打造集休闲体验、科普教育、商务活动、餐饮住宿等

多种休闲方式于一体的海上旅游目的地综合服务。结合内陆市县旅游发展需求，探索开发万泉河等内河游艇旅游产品。

专栏6.1 游艇旅游航线及目的地开发
研究类项目。跳岛海岛观光和探险游航线。挖掘现有岛屿资源，重点对海甸岛、新埠岛、北港岛、东屿岛、分界洲岛、蜈支洲岛、西岛等已开发岛屿进行再开发与再利用，游客乘坐游艇登上已开发岛屿体验海岛风光和海岛探险。 支持中国船舶集团在东方市八所港外海域规划建设海上养殖文旅综合体平台，以耕海牧渔大型海洋综合体（海上驿站）+邮轮游艇+深海养殖产业园+游弋养殖工船+海钓潜水海上休闲体验等打造旅游养殖融合经济发展带。

（二）提升游艇旅游消费服务水平

积极培育和推进“互联网+游艇”的发展模式，深化电商融合，打造互联网推广销售服务平台。加强与电商平台合作，探索创新型消费模式，通过互联网形成辐射效应，拓展服务范围，提升服务精准性。制定游艇旅游消费服务标准与规范，强化游艇旅游企业质量意识和规范意识，优化游艇旅游服务流程，畅通游艇旅游投诉渠道，逐步建立和完善游艇旅游消费服务质量评价体系，加强对服务质量的跟踪与评估。以三亚为试点，创新游艇旅游消费治理体系，加强游艇租赁市场价格监管，构建健康有序的游艇旅游消费市场秩序。

专栏6.2 游艇旅游消费服务标准与规范编制重点
海南游艇旅游服务标准。以游艇消费服务全流程为重点，从航前准备、接待服务、离船服务以及服务管理等方面制定统一标准，并对游艇的自身设

施设备、环境与卫生、安全与应急等方面进行明确。

海南游艇行业自律规范。从行业道德、行业经营、监督管理等多个方面制定自律规范，重点围绕严格执行相关法律法规、认真执行行规行约、向客户提供优质规范的服务、避免恶性竞争等事项对行业相关企业行为进行引导。

（三）加强游艇旅游消费推广宣传

依托举办大型游艇旅游推介会、投放媒体广告、网红直播等方式，打造游艇旅游宣传矩阵，加大对海南游艇旅游消费的宣传力度。充分利用好游艇赛事、官方论坛、精品展会等平台，举办游艇试乘、游艇试驾、帆船联赛等活动，提升海南游艇旅游的大众参与度，实现营销活动的线上体验和线下消费相结合、本土文化和国际时尚相结合、品牌传播和文旅消费相结合，塑造海南游艇产业良好的品牌影响力与知名度，提高海南游艇旅游消费市场的渗透度，扩大海南游艇旅游的影响力。

（四）培育大众游艇旅游文化

落实海洋旅游、游艇旅游进教材，推进游艇、帆船等水上旅游项目进校园，引导中小学生从小认识海洋、了解海洋、重视海洋。积极举办大众参与式游艇、帆船赛事，提升大众认知程度，扩大游艇旅游消费吸引力。在三亚中央商务区规划建设海洋文化中心，宣扬海洋文化内涵，传播游艇发展历史，营造游艇旅游消费氛围，建立大众游艇消费文化。

七、促进游艇产业智慧绿色安全发展

（一）建设游艇产业信息平台

将“北斗+AIS”及VDES（甚高频数据交换系统）等技术

应用于游艇动态跟踪监管，实现游艇的航行轨迹、动态位置、航速及船艇相关信息的实时掌控和动态监管。推动建立游艇综合管理“单一窗口”，作为省社管平台的组成部分，对游艇、人员等要素开展实时监测和监管，加强数据有序共享，强化信息化、数字化和无感式管理，增强风险防控管理能力。鼓励社会资本运用“互联网+”技术建设游艇综合服务平台，提供游艇旅游消费、租赁服务、物资供应、维护保养、游艇交易、评估评价等“一站式”服务，促进游艇企业规模化、品牌化、网络化经营。

（二）促进游艇产业绿色发展

落实“碳达峰”“碳中和”相关工作要求，加强碳排放管控，加快形成绿色低碳游艇产业发展格局。践行“绿水青山就是金山银山”的理念，推广清洁能源和可再生能源在游艇产业各环节的应用，推进绿色游艇设计与研发，鼓励游艇绿色装备和清洁能源使用科技攻关，推广电推发动机等绿色装备的使用，推动游艇制造业向智能化、绿色化和服务型转变。积极推动游艇码头及其配套基础设施绿色化升级改造。推进游艇码头污染物接收设施建设，加强与城市垃圾公共转运、处理设施的衔接。

（三）提升游艇产业安全管理水平

推动企业加大安全生产和科研技术研发投入，强化船舶检验等机构的技术支持保障。严格落实地方政府属地责任和行业部门的监管责任，引导企业自建安全管理体系，严格落实企业主体责任。依托海上搜救中心，健全海上安全应急管

理和指挥体系，整合水上应急救助资源，建立健全安全应急协调保障机制，优化应急处置力量布局，加强搜救经费、应急装备和应急物资保障，提升游艇应急救援能力。强化游艇俱乐部、管理公司以及游艇从业人员的安全防范意识，保障游艇航行安全。

八、优化游艇产业营商环境

（一）进一步强化法制保障

落实《海南自由贸易港游艇产业促进条例》，创建省政府统筹领导、部门分工协作、市县政府具体落实的新型管理机制。围绕游艇产业全链条各环节，从统筹规划、用地用海保障、基础设施配套、资金支持、金融保险、人才教育、研发设计制造、科技创新、交易服务、培训考证、消费产品开发等方面，提出支持和促进措施，为推动游艇产业高质量发展提供坚强的法制保障。

（二）进一步加强制度集成创新

落实《海南自由贸易港建设总体方案》要求，在符合国土空间规划,不突破生态保护红线、自然岸线管控、生态环保、国防安全等要求前提下，探索优化游艇码头岸线、土地、海域使用的手续办理。积极开展游艇技术创新。探索实施游艇分级分类管理制度。进一步完善游艇夜航制度。结合零关税交通工具及游艇相关政策实施，探索吸引游艇制造世界知名企业在自贸港设立办事机构，推行直购直销新路径。

（三）加快推进“单一窗口”建设

加强游艇产业相关管理部门间的分工合作、协同执法，

推动游艇相关监管部门通过游艇综合管理“单一窗口”实施对游艇的联合登临监管服务和核验检查，实现相关监管部门之间“信息互换、监管互认、执法互助”，提升执法效能和服务水平。

（四）加快推进游艇信用体系建设

以守信激励、失信惩戒为原则，以公共信用综合评价为基础，建立健全海南游艇产业信用评价体系。以游艇租赁市场为试点，制定出台《海南省游艇租赁市场信用评价管理办法》，定期开展海南游艇租赁市场信用评价，对企业的经营行为实施分级分类监管。依法依规建立游艇租赁市场严重失信主体名单和联合惩戒制度。支持建立市场自发的激励机制，为产业注入竞争力，实现优胜劣汰。

九、推进游艇领域专业人才聚集

（一）加大游艇人才培养力度

完善产学研用人才培养机制，支持游艇企业与科研院所、高等院校、职业院校和技工院校开展合作办学，共同建设游艇人才培养基地。鼓励社会资本投资创办游艇培训机构，培养具有游艇驾驶、维修等实际操作技能的专业技术型人才。创新游艇驾照培训模式，降低培训成本，培育更多游艇操作人员。完善游艇产业各环节的职业资格认证体系，培养游艇产业发展所需要的专业化人才，提升游艇产业从业人员整体素质和水平。推进游艇运动进校园，加大海南青少年帆船运动培训力度，激励中小学、高等院校开展校园游艇帆船运动，培育游艇消费新兴群体。

（二）吸引游艇高端人才聚集

利用海南重大引才引智工程，搭建全球游艇领域人才引进、技术交流和服务平台，加大游艇产业重点领域高端人才引进力度。大力吸引国内外游艇产业相关高端智库、科研机构落户海南或在海南设立分支机构，聘请游艇产业领域国内外知名专家、学者来海南任职或兼职。积极建设集“高新技术产品研发、科技成果交易转化、项目投融资、人才和技术引进”等于一体的游艇产业科技创新创业基地。在三亚中央商务区规划建设游艇设计制造产学研基地，培养游艇设计高端人才。

（三）强化游艇产业人才激励

针对游艇产业发展做出重大科技、产品创新等贡献的，根据成果情况进行评级奖励。鼓励各类企业通过股权、期权、分红等激励方式，完善游艇科技成果、知识产权归属和利益分享机制，提高骨干团队、主要发明人受益比例。进一步优化游艇专业人才出入境管理手续，落实游艇产业高层次人才相关政策，享受相应的落户、住房、子女教育、医疗保障、个人所得税优惠等服务保障待遇，提升海南对国内外游艇专业人才的吸引力。

十、实施保障

（一）加强组织领导

强化海南省推进邮轮游艇产业发展领导小组作用，不断完善工作机制，优化工作方式，进一步健全完善工作联席会议制度，定期协调全省游艇产业发展过程中遇到的问题，促

进游艇产业高质量发展。充分发挥相关行业协会组织的作用，搭建起政府与企业间沟通协调平台，及时收集和反映企业诉求，协助解决企业经营过程中面临的问题，担负起制定行业规范和标准，维护行业公平竞争，引导行业自律等职责。各市县依据本规划，结合自身发展条件，制定相应实施方案，加强对规划实施情况的跟踪监测和定期评估，确保规划各项任务保质保量落地实施。

（二）加大要素保障

加大用海用地保障力度，对符合市县国土空间总体规划的码头建设项目，保障合理用海用地需求。发挥市场配置资源的决定性作用，落实好《海南省促进经济高质量发展若干财政措施》，支持游艇产业高质量发展。鼓励社会资本加大对游艇公共码头建设的投入，发挥“海政易”“海政通”等平台架构作用，加大对游艇综合管理“单一窗口”的监督管理。探索建立海南游艇产业发展基金，发挥金融对全省游艇产业的支持作用。充分发挥社会资源力量，吸引社会投资，鼓励民间资本投资游艇产业。充分发挥重点园区在招商引资、促进游艇集聚中的作用，依法依规给予入区企业一定的财税政策优惠和资金扶持，促进全省游艇产业要素集聚和高质量发展。

（三）加强监督评估

建立规划实施的考核评价机制，加强规划实施跟踪，完善游艇产业监管与服务体系，及时把握游艇产业发展过程中出现的新情况、新问题，适时调整规划和相关政策。组织邀

请专家学者或委托第三方机构对规划实施情况定期开展评估，提出意见和建议，进一步增强规划的指导性、操作性和实效性。加大规划宣传力度，形成全社会关心游艇产业发展，参与规划实施和共同监督的良好氛围。

（四）加强风险防控

坚持底线思维，实现游艇风险防控由应急管理理念向公共风险治理防范理念转变。做好全岛封关运作对全省游艇产业安全监管、游艇企业安全生产以及游艇反走私等方面影响的风险防控。可以委托第三方机构对规划重大决策事项及规划实施过程中可能出现的风险开展评估。加强公共卫生防控救治体系建设，做好游艇和游客公共卫生安全防控。

十一、环境影响评价

（一）规划实施对环境可能造成影响的分析和评估

坚决贯彻习近平生态文明思想，坚持生态优先、绿色发展。本规划与《海南省国民经济和社会发展第十四个五年规划和二〇三五年远景目标纲要》《海南省国土空间规划（2020-2035 年）》《海南省“十四五”综合交通运输规划》《海南省海洋经济发展“十四五”规划》以及各市县国土空间规划等进行充分衔接,将生态保护红线作为保障和维护区域生态安全的底线，依法依规实施强制保护。规划须将“三线一单”生态环境分区管控作为重要依据，加强协调性分析，充分体现生态保护红线及生态空间、环境质量底线、资源利用上线的环境管控要求。

规划的实施会对生态环境造成一定影响。游艇码头建设

运营过程会产生废水、废气及固体废弃物，若不进行妥善收集及处理会降低工程周边海洋及大气环境质量并间接影响海洋生物资源及人居环境。一旦发生溢油事故，将对海域水质、珊瑚礁、红树林等生态系统造成重大污染影响。

海南作为生态文明体制改革样板区、陆海统筹保护发展实践区、生态价值实现机制试验区和清洁能源优先发展示范区，生态环境保护和资源利用要求高，规划实施将加大区域生态保护、环境质量改善及环境风险防范的压力。规划在控制开发规模、优化布局及功能定位，强化生态环境保护和风险防范措施，有效预防或者减轻规划实施可能带来的不良环境影响的基础上，从环境保护角度总体可行。

（二）预防和减轻不良环境影响的对策措施

生态优先，绿色发展。严格控制开发的总体规模与强度，坚持“保护优先、避让为主”原则，加强对沿线环境敏感区保护，避让永久基本农田、生态保护红线、自然保护地、饮用水水源保护区等环境敏感区域，节约集约利用岸线、土地等资源，提高利用效率。

强化环境污染防治，严守环境质量底线。妥善处理处置船舶污染物，针对周边基础设施建设情况提出有效可行的污水、固体废物污染防治措施。严格控制船舶大气污染物排放，打造绿色、低碳运输方式。强化噪声污染防治，采取有效措施防止对周边居民造成不利影响。

加强生态保护和修复。码头建设和运营应选用生态环保的结构、材料、工艺，减缓不良生态环境影响。尽量避让重

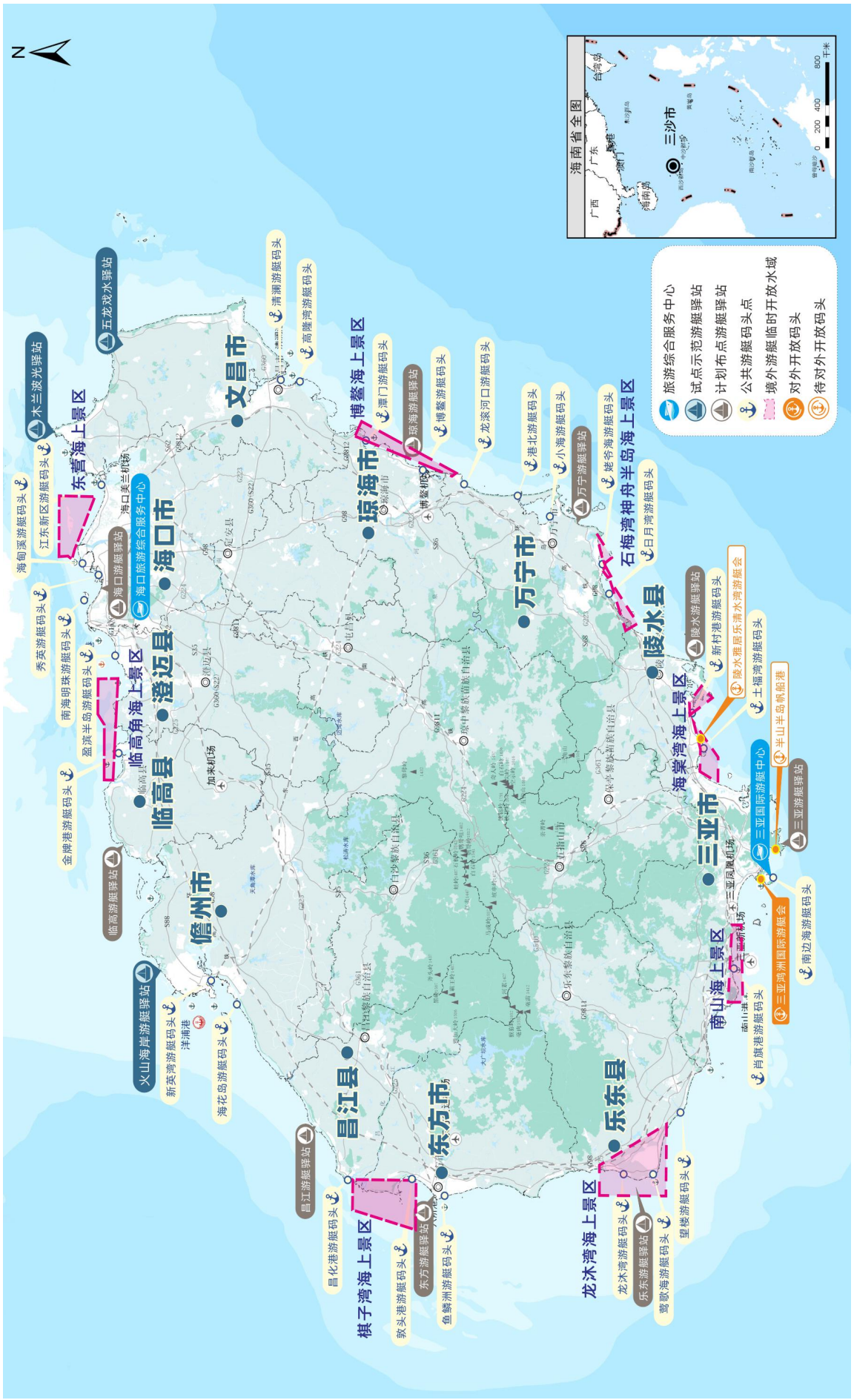
要鱼类“三场”、避开主要繁殖期、实施增殖放流等严格的水生生物保护措施，规划应包含生态修复内容和实施要求。

加强环境风险防范。落实环境风险防范的主体责任，强化环境风险防范体系建设，形成与规划实施后环境风险相匹配的应急能力，制定突发环境事件应急预案，并按要求报相关部门备案。

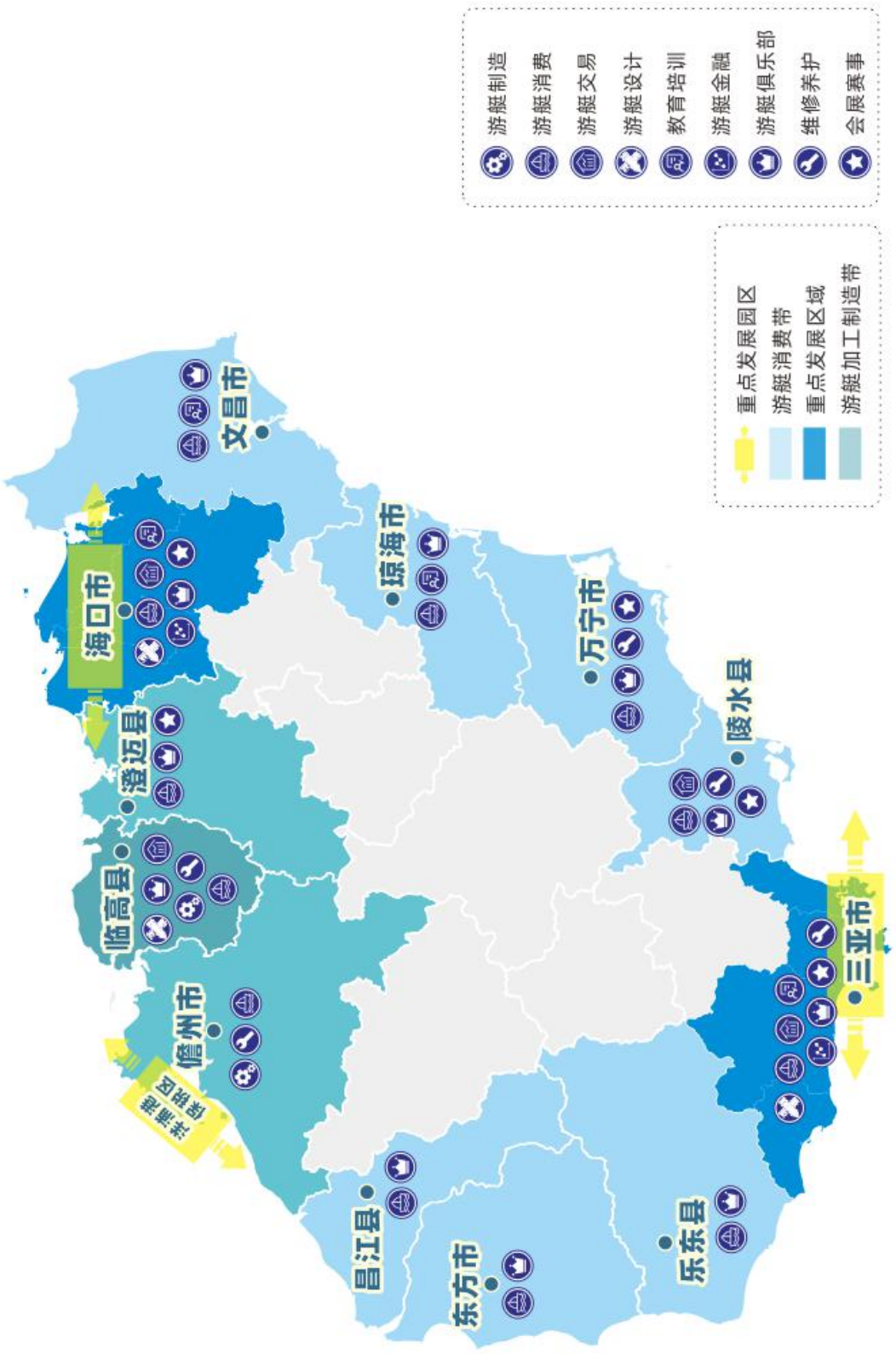
附表 名词解释表

名词	含义
游艇	指游艇所有人、游艇俱乐部用于游览观光、休闲娱乐、商务等活动且具备机械推进动力装置的船舶（含具有机械辅助动力的帆艇），不包括摩托艇、皮划艇、冲锋舟、无机械动力帆船以及长度小于 5 米船艇等船舶。
游艇租赁	指以游览观光、休闲娱乐、商务等活动为目的，由游艇租赁业务经营人以整船租赁方式，向承租人提供游艇，并配套游艇驾驶和保障服务，不改变游艇私用属性的一种租赁活动。
公共游艇码头	指作为社会公共服务设施对公众开放的游艇码头。
游艇俱乐部码头	指仅为加入游艇俱乐部的会员提供停泊服务的游艇码头。
游艇干仓	指陆地上用于存放游艇的仓库。
游艇驿站	指提供供水、供油、供电、公厕、停车场、餐饮等游艇停泊配套基础服务，供游艇航行中途暂时停泊休息的地方。
游艇综合服务中心	指集游艇停泊、综合维修保养、供油供水、商务休闲、餐饮娱乐、旅游住宿、销售展示、培训、金融保险等为一体，提供综合性、一站式配套服务的场所。

附件 1 海南省游艇基础设施布局规划图



附件 2 海南省游艇产业布局规划图



缔结条约管理办法

中华人民共和国国务院令

第 756 号

《缔结条约管理办法》已经国务院常务会议通过，现予公布，自 2023 年 1 月 1 日起施行。

总理　李克强

2022 年 10 月 16 日

缔结条约管理办法

第一条　为了规范缔结条约工作程序，加强对缔结条约事务的管理，根据《中华人民共和国缔结条约程序法》（以下简称缔约程序法）和有关法律规定，制定本办法。

第二条　国务院或者国务院有关部门缔结条约、协定和其他具有条约、协定性质的文件（以下统称条约），办理相关事务，适用本办法。

第三条　外交部在国务院领导下管理缔结条约的具体事务，指导、督促国务院有关部门依照法定程序办理缔结条约工作。

国务院有关部门在各自职权范围内负责办理缔结条约的相关工作。

第四条　除中华人民共和国宪法、法律和国务院另有授权外，地方各级政府无权缔结条约。

第五条　下列条约，除法律另有规定外，应当以中华人民共和国名义缔结：

（一）友好合作条约、和平条约等政治性条约；

（二）有关领土和划定边界的条约，包括划定陆地边界和海域边界的条约；

（三）有关司法合作的条约，包括司法协助、引渡、被判刑人移管、承认与执行外国法院判决或者仲裁裁决的条约；

（四）其他涉及重大国家利益的条约。

特殊情况下，经国务院审核决定，前款所列条约可以中华人民共和国政府名义缔结。

第六条　下列条约，应当以中华人民共和国政府名义缔结：

（一）涉及国务院职权范围的条约；

（二）涉及两个以上国务院有关部门职权范围的条约；

（三）其他需要以中华人民共和国政府名义缔结的条约。

特殊情况下，经国务院审核决定，前款所列条约可以中华人民共和国政府部门名义缔结。

第七条　国务院各部、委员会、中国人民银行、审计署、具有行政管理职能的直属机构、根据法律规定或者国务院授权承担行政管理职能的国务院其他机构，可以就本部门职权范围内的事项，以中华人民共和国政府部门名义缔结条约。

第八条　条约内容涉及政治、外交、经济、社会、安全等领域重大国家利益的，应当将条约草案及条约草案涉及的重大问题按照有关规定报告党中央。

第九条　以中华人民共和国名义或者中华人民共和国政府名义谈判条约的，由外交部或者国务院有关部门会同外交部在启动谈判前不少于 20 个工作日报请国务院决定。

第十条　以中华人民共和国政府部门名义谈判条约，有下列情形之一的，由国务院有关部门会同外交部在启动谈判前不少于 20 个工作日报请国务院决定：

（一）条约内容涉及外交、经济、安全等领域的重大国家利益；

（二）条约内容涉及国务院其他部门职权范围；

（三）其他应当报请国务院决定的情形。

第十一条　条约谈判中，对经国务院决定的条约中方草案所作改动有下列情形之一的，应当重新报请国务院决定：

（一）对中华人民共和国依据该条约享有的权利或者承担的义务有重大影响；

（二）对中华人民共和国在有关重大问题上的立场有影响；

（三）与中华人民共和国法律、行政法规或者中华人民共和国依据其他条约承担的国际义务不一致；

（四）其他应当报请国务院决定的情形。

第十二条　以中华人民共和国名义或者中华人民共和国政府名义签署条约，或者有本办法第十条规定情形之一的，应当由外交部或者国务院有关部门会同外交部在签署前不少于 10 个工作日报请国务院决定。

确因特殊情况未按前款规定时限报批的，应当向国务院说明理由。

第十三条　条约签署前，国务院有关部门法制机构应当从法律角度对条约进行审查。

以中华人民共和国名义或者中华人民共和国政府名义签署，且根据缔约程序法或者有关规定应当报请国务院审核并建议提请全国人民代表大会常务委员会决定批准或者加入，或者报请国务院核准、决定加入或者接受的条约，内容与中华人民共和国法律、行政法规或者与中华人民共和国依据其他条约承担的国际义务不一致的，国务院有关部门应当在条约签署前不少于 30 个工作日征求司法部的意见。

第十四条　下列情形，国务院有关部门应当在签署条约的请示中予以说明：

（一）拟签署的条约内容与中华人民共和国法律、行政法规或者与中华人民共和国依据其他条约承担的国际义务是否一致；有不一致的，应当提出解决方案；根据本办法第十三条规定应当征求司法部意见的，还应当附司法部的意见；

（二）拟签署的条约是否需要征询香港特别行政区政府、澳门特别行政区政府的意见以及征询意见的情况；

（三）拟签署的条约属于多边条约的，是否需要作出声明或者保留以及声明或者保留的内容。

第十五条　条约的谈判代表或者签署代表需要出具全权证书的，国务院有关部门应当至少提前 10 个工作日书面通知外交部办理相关手续，并向外交部提供国务院同意委派该谈判代表或者签署代表的批件。

条约的谈判代表或者签署代表需要出具授权证书的，由谈判代表或者签署代表所属的国务院有关部门办理。授权证书的格式由外交部规定。

第十六条　下列条约，应当由外交部或者国务院有关部门会同外交部自签署之日起 180 日内报请国务院审核，并建议提请全国人民代表大会常务委员会决定批准：

（一）友好合作条约、和平条约等政治性条约；

（二）有关领土和划定边界的条约，包括划定陆地边界和海域边界的条约；

（三）有关司法合作的条约，包括司法协助、引渡、被判刑人移管、承认与执行外国法院判决或者仲裁裁决的条约；

（四）与中华人民共和国法律有不同规定或者履行条约需要新制定法律的条约；

（五）涉及中央预算调整的条约；

（六）内容涉及立法法第八条规定的只能制定法律的条约；

（七）有关参加政治、经济、安全等领域重要国际组织的条约；

（八）对外交、经济、安全等领域国家利益有重大影响的条约；

（九）条约规定或者缔约各方议定须经批准的条约；

（十）外交部或者国务院有关部门商外交部建议须经批准的条约。

因特殊情况需要延长前款规定时限的，应当在期限届满前向国务院说明理由。

第十七条　下列条约，应当由外交部或者国务院有关部门会同外交部自签署之日起 180 日内报请国务院核准：

（一）有关边界管理和边防事务的条约；

（二）有关管制物资贸易或者技术合作的条约；

（三）有关军工贸易和军控的条约；

（四）与中华人民共和国行政法规有不同规定或者履行条约需要新制定行政法规的条约；

（五）影响中央预算执行但不涉及预算调整的条约；

（六）涉及中华人民共和国行政法规规定的税收制度的条约；

（七）涉及扩大重要和关键行业外资准入的条约；

（八）对外交、经济、安全等领域国家利益有较大影响的条约；

（九）条约规定或者缔约各方议定须经核准的条约；

（十）外交部或者国务院有关部门商外交部建议须经核准的条约。

因特殊情况需要延长前款规定时限的，应当在期限届满前向国务院说明理由。

第十八条　加入本办法第十六条所列范围的多边条约，应当由外交部或者国务院有关部门会同外交部报请国务院审核，并建议提请全国人民代表大会常务委员会决定。

第十九条　接受多边条约或者加入本办法第十七条所列范围的多边条约，应当由外交部或者国务院有关部门会同外交部报请国务院决定。

第二十条　报请国务院审核并建议提请全国人民代表大会常务委员会决定批准或者加入条约的，应当由外交部或者国务院有关部门会同外交部向国务院报送请示，并附送国务院提请全国人民代表大会常务委员会决定批准或者加入该条约的议案说明、条约作准中文本及其电子文本或者中译本及其电子文本，以及国务院审核同意的条约谈判和签署请示。

属于多边条约的，还应当附送多边条约缔约方的批准、核准、加入和接受情况或者缔约方清单。

第二十一条　报请国务院核准、决定加入或者接受条约的，应当由外交部或者国务院有关部门会同外交部向国务院报送审核并建议核准、决定加入或者接受该条约的请示，并附送条约作准中文本及其电子文本或者中译本及其电子文本，以及国务院审核同意的条约谈判和签署请示。

属于多边条约的，还应当附送多边条约缔约方的批准、核准、加入和接受情况或者缔约方清单。

第二十二条　条约报送部门在将条约报请国务院审核前，应当对条约作准中文本或者中译本进行认真审核，确保内容及其文字表述准确、中外文本一致，格式符合规范要求。

条约报送部门在将条约报请国务院审核前发现条约作准中文本有重大错误的，应当与相关国家、国际组织或者国际会议沟通，并在报送国务院的请示中就沟通情况和修改结果作出说明。

第二十三条　根据缔约程序法和有关规定，需要报国务院备案或者送外交部登记的条约，国务院有关部门应当自条约签署之日起 90 日内办理。

第二十四条　根据本办法第十六条、第十七条、第十八条、第十九条规定报请国务院审核并建议提请全国人民代表大会常务委员会决定批准或者加入，或者报请国务院核准、决定加入或者接受的条约由司法部审查，提出法律意见。

第二十五条　缔结多边条约，除本办法第二十七条规定的情形外，国务院有关部门应当在报请国务院审核并建议提请全国人民代表大会常务委员会决定批准或者加入前，或者报请国务院核准、决定加入或者接受前，通过外交部分别征询香港特别行政区政府、澳门特别行政区政府意见。多边条约规定缔约方不限于主权国家，且根据《中华人民共和国香港特别行政区基本法》和《中华人民共和国澳门特别行政区基本法》，香港特别行政区、澳门特别行政区有权单独签订的，可以不征询香港特别行政区政府、澳门特别行政区政府意见。

缔结双边条约，需要征询香港特别行政区政府、澳门特别行政区政府意见的，由国务院有关部门会同外交部和国务院港澳事务机构参照前款规定办理。

第二十六条　根据本办法第二十五条规定，外交部征询香港特别行政区政府、澳门特别行政区政府意见的事项包括：

（一）条约是否适用于香港特别行政区、澳门特别行政区；

（二）拟对条约作出的有关声明或者保留是否适用于香港特别行政区、澳门特别行政区；

（三）香港特别行政区、澳门特别行政区是否需要作出其他声明或者保留；

（四）条约已经适用于香港特别行政区、澳门特别行政区，且为香港特别行政区、澳门特别行政区作出声明或者保留的，原声明或者保留是否继续有效。

第二十七条　涉及外交、国防事务的条约，或者根据条约性质、规定应当适用于中华人民共和国全部领土的条约，国务院有关部门应当在报请国务院审核并建议提请全国人民代表大会常务委员会决定批准或者加入前，或者报请国务院核准、决定加入或者接受前，通过外交部通知香港特别行政区政府、澳门特别行政区政府条约将适用于香港特别行政区、澳门特别行政区。

拟对条约作出的声明或者保留，涉及外交、国防事务的，依照前款规定办理。

第二十八条　国务院有关部门应当自收到全国人民代表大会常务委员会批准或者加入条约的决定之日起或者自收到国务院核准、决定加入或者接受条约的批复之日起 20 个工作日内，书面通知外交部办理制作、交存或者交换批准书、核准书、加入书或者接受书的具体手续。国务院有关部门对于交存或者交换时机有特别安排的，应当作出说明。

需要向多边条约保存机关通知不接受多边条约的，国务院有关部门应当于条约规定的期限届满至少 10 个工作日前书面通知外交部办理具体手续。

外交部在交存或者交换批准书、核准书、加入书或者接受书时应当提交政府声明。政府

声明应当包括条约是否适用于香港特别行政区、澳门特别行政区的内容。

第二十九条　缔结双边条约，需要与缔约另一方相互通知已完成条约生效需要履行的国内法律程序的，国务院有关部门应当自完成批准、核准或者备案手续之日起 20 个工作日内或者在报送外交部登记时，书面通知外交部办理。

第三十条　适用于香港特别行政区、澳门特别行政区的条约，国务院有关部门应当自条约对中华人民共和国生效的手续办理完毕之日起 20 个工作日内，将条约适用于香港特别行政区、澳门特别行政区的情况，通过外交部通知香港特别行政区政府、澳门特别行政区政府。

第三十一条　条约扩展适用于香港特别行政区、澳门特别行政区的，国务院有关部门应当参照本办法第二十五条、第二十六条的规定通过外交部分别征询香港特别行政区政府、澳门特别行政区政府意见，并会同外交部提出建议，报请国务院决定。

外交部应当根据国务院批复，向多边条约保存机关提交多边条约扩展适用于香港特别行政区、澳门特别行政区的政府声明，或者与双边条约缔约方达成条约适用于香港特别行政区、澳门特别行政区的具体安排。

第三十二条　根据缔约程序法第十四条的规定保存条约签字正本的，国务院有关部门应当自条约签署之日起 90 日内将条约签字正本送外交部保存，并附送条约作准中文本或者中译本、作准外文本和相关电子文本。

多边条约拟由中华人民共和国作为正本保存国的，国务院有关部门应当事先商外交部同意，并由外交部履行保存机关职责。

第三十三条　国务院核准、决定加入或者接受的条约或者向国务院备案的条约，应当及时由国务院公报予以公布。

以中华人民共和国政府部门名义缔结的条约，国务院有关部门应当及时予以公布。

第三十四条　外交部应当编辑出版《中华人民共和国条约集》，并建设和维护数字化的条约数据库。

第三十五条　撤回或者修改对条约作出的声明或者保留，依照作出声明或者保留的程序办理，但本办法第三十一条规定的情形除外。

全国人民代表大会常务委员会或者国务院决定撤回或者修改对条约作出的声明或者保留的，国务院有关部门应当自撤回或者修改决定作出之日起 20 个工作日内，书面通知外交部办理通知多边条约保存机关的手续。

第三十六条　本办法自 2023 年 1 月 1 日起施行。

联合国船舶司法出售国际效力公约

本公约缔约国，

重申其相信平等互利基础上的国际贸易是促进各国间友好关系的一个重要因素，

铭记航运在国际贸易和运输中的关键作用、海上和内河航行所使用船舶的巨大经济价值以及司法出售作为实现请求权的一种手段的功能，

考虑到向购买人提供充分的法律保护可以对船舶司法出售中的变现价格产生惠及船舶所有人与包括担保权利人和船舶融资人在内的债权人的积极影响，

希望为此目的拟订统一规则，促进向相关当事人传送关于拟实施的司法出售的信息，以及包括为船舶登记等目的赋予出售后不附带任何抵押权或其同种权利和任何对船权的船舶司法出售以国际效力，

兹商定如下：

第 1 条　　目的

本公约规范赋予购买人清洁物权的船舶司法出售的国际效力。

第 2 条　　定义

在本公约中：

1.船舶的“司法出售”系指符合下列条件的对船舶的任何出售：

（1）该出售由法院或其他公共机构命令、核准或确认，并以公开拍卖或由法院监督和核准的非公开协议的方式实施；以及

（2）该出售所得款项供有关债权人分配；

2.“船舶”系指在可供公开查询的船舶登记簿登记的任何船舶或其他船艇，并可以成为根据司法出售国法律能够导致被司法出售的扣押或其他类似措施的客体；

3.“清洁物权”系指不附带任何抵押权或其同种权利和任何对船权的物权；

4.“抵押权或其同种权利”系指设立于船舶之上并在船舶登记簿或登记该

船舶的同等登记簿所在国进行了登记的任何抵押权或其同种权利；

5.“对船权”系指各种类型和各种方式产生的可以通过扣押、查封或其他手段对船舶主张的任何权利，其中包括船舶优先权、担保性权利、物上负担、使用权或留置权，但不包括抵押权或其同种权利；

6.“已登记的对船权”系指在船舶登记簿或登记该船舶的同等登记簿或另设的登记抵押

权或其同种权利的任何登记簿登记的任何对船权；

7.“船舶优先权”系指根据可适用的法律被认定为附于船舶之上的优先权或其同种权利的任何对船权；

8.船舶“所有人”系指在船舶登记簿或登记该船舶的同等登记簿被登记为该船舶的所有人的任何人；

9.“购买人”系指在司法出售中船舶被出售给其的任何人；

10.“后续购买人”系指从第 5 条所述的司法出售证书记载的购买人购买船舶的人；

11.“司法出售国”系指在其境内实施船舶司法出售的国家。

第 3 条　　适用范围

1.本公约仅适用于符合下列条件的船舶司法出售：

（1）司法出售是在一个缔约国内实施的；以及

（2）在出售之时船舶实际处于司法出售国的领土内。

2.本公约不适用于军舰或海军辅助舰艇或由一国拥有或经营的并在临近司法出售前仅用于政府非商业服务的其他船舶。

第 4 条　　司法出售通知书

1.司法出售应当根据司法出售国的法律实施，该法律也应当载有司法出售完成之前质疑司法出售的程序并确定本公约中的出售时间。

2.虽有第 1 款的规定，但第 5 条下的司法出售证书只应当在根据第 3 款至第 7 款的规定在船舶司法出售之前发出司法出售通知书的前提下方可签发。

3.司法出售通知书应当发送给：

（1）船舶登记机关或登记该船舶的同等登记机关；

（2）所有抵押权或其同种权利以及已登记的对船权的享有人，前提是登记该权利的登记簿以及根据登记国法律需要登记的任何文书均可开放供公众查询，并且登记簿的摘要和登记文书的副本可从登记机关获取；

（3）所有船舶优先权人，前提是他们已经根据司法出售国的规则和程序就受船舶优先权担保的请求权通知了实施司法出售的法院或其他公共机构；

（4）当时的船舶所有人；及

（5）在该船舶获准光船租赁登记的情况下：

①在光船租赁登记簿登记为该船舶的光船承租人的人；及

②光船租赁登记机关。

4.司法出售通知书应当根据司法出售国法律发出，并应当至少包含附件一述及

的信息。

5.司法出售通知书还应当：

（1）在司法出售国可获得的报刊或其他出版物上予以公告发布；及

（2）发送给第 11 条所述的存放处以供公布。

6.就向存放处发送通知书而言，如果司法出售通知书并非以存放处工作语文编写，则应当附有附件一所述信息的任何一种工作语文的译本。

7.在确定需向其发送司法出售通知书的任何人的身份或地址时，下列各项为可依赖的充分信息：

（1）船舶登记簿或登记该船舶的同等登记簿或对船舶进行光船租赁登记的登记簿所记载的信息；

（2）登记抵押权或其同种权利或已登记的对船权的登记簿所记载的信息，条件是该信息有别于船舶登记簿或同等登记簿所载信息；及

（3）根据第 3 款第（3）项通知的信息。

第 5 条　　司法出售证书

1.在根据司法出售国法律赋予船舶清洁物权的司法出售完成后，并且该司法出售的实施符合该法律的要求和本公约的要求，实施司法出售的法院或其他公共机构或司法出售国的其他主管机构应当根据其规则和程序，向购买人签发司法出售证书。

2.司法出售证书应当充分采用附件二所载范本的格式并记载以下事项：

（1）关于该船舶的出售符合司法出售国法律要求和本公约要求的说明；

（2）关于司法出售已赋予购买人对该船舶的清洁物权的说明；

（3）司法出售国的名称；

（4）证书签发机构的名称、地址以及联系方式；

（5）实施司法出售的法院或其他公共机构的名称及出售日期；

（6）船舶和船舶登记机关或登记该船舶的同等登记机关的名称；

（7）该船舶的国际海事组织编号，或在无法提供该编号时能够识别该船舶的其他信息；

（8）临近司法出售前的船舶所有人的名称及住所或主要营业地地址；

（9）购买人的名称及住所或主要营业地地址；

（10）证书的签发地点和日期；及

（11）证书签发机构的签名或盖章或以其他方式对证书真实性的确认。

3.司法出售国应当要求将司法出售证书迅速发送给第 11 条所述的存放处予以公布。

4.司法出售证书和证书的任何译本应当免于认证或类似手续。

5.在不影响第 9 条和第 10 条的情况下，司法出售证书是其所载事项的充分证据。

6.司法出售证书可采用电子记录的形式，前提是：

（1）其所含信息可以调取以供后续查询使用；

（2）使用了一种可靠方法来识别证书签发机构；及

（3）使用了一种可靠方法来甄别除附加任何背书以及正常通信、存储和显示过程中产生的任何改动之外在电子记录生成后对电子记录的任何更改。

7.司法出售证书不得仅以其系电子形式为由而被拒绝。

第 6 条　　司法出售的国际效力

已签发第 5 条所述的司法出售证书的司法出售应当在每一其他缔约国具有赋予购买人对船舶清洁物权的效力。

第 7 条　　登记机关的行动

1.经购买人或后续购买人的请求并出示第 5 条所述的司法出售证书，缔约国的登记机关或其他主管机构应当在不违反第 6 条的前提下根据其规则和程序，视不同情况：

（1）从登记簿中注销在司法出售完成前已经登记的附着于该船舶的任何抵押权或其同种权利和任何已登记的对船权；

（2）从登记簿中注销该船舶，并签发注销证书以办理新的登记；

（3）将该船舶登记在购买人或后续购买人的名下，前提是该船舶和拟把船舶登记在其名下的人符合登记国法律的要求；

（4）根据司法出售证书记载的任何其他相关事项对登记簿进行更新。

2.经购买人或后续购买人请求并出示第 5 条所述的司法出售证书，准予该船舶光船租赁登记的缔约国的登记机关或其他主管机构应当从光船租赁登记簿中注销该船舶，并签发注销证书。

3.如果司法出售证书并非以登记机关或其他主管机构官方语文签发，登记机关或其他主管机构可以要求购买人或后续购买人出示经核证的该官方语文的译本。

4.登记机关或其他主管机构还可要求购买人或后续购买人提交司法出售证书经核证的副本供其存档。

5.如果登记机关或其他主管机构所在国的法院根据第 10 条认定第 6 条下的司法出售效力明显违反该国公共政策，则第 1 款和第 2 款不适用。

第 8 条　　不得扣船

1.如果因在船舶司法出售前产生的请求权而向缔约国法院或其他司法机构申请扣押船舶

或对船舶采取任何其他类似措施，经出示第 5 条所述的司法出售证书，法院或其他司法机构应当驳回该申请。

2.如果船舶因在船舶司法出售前产生的请求权而被缔约国法院或其他司法机构命令扣押或采取类似措施，经出示第 5 条所述的司法出售证书，法院或其他司法机构应当命令解除对该船舶的扣押。

3.如果司法出售证书并非以法院或其他司法机构的官方语文签发，法院或其他司法机构可以要求证书出示人出示经核证的该官方语文的译本。

4.如果法院或其他司法机构视不同情况认定驳回申请或命令解除对船舶的扣押将明显违反该国公共政策，则第 1 款和第 2 款不适用。

第 9 条　　对撤销和中止司法出售的管辖权

1.司法出售国的法院拥有对于审理撤销在其境内实施并赋予船舶清洁物权的船舶司法出售或中止其效力的任何请求或申请的专属管辖权，此项管辖权延伸适用于就质疑第 5 条所述司法出售证书的签发所提出的任何请求或申请。

2.缔约国法院应当拒绝就撤销在另一缔约国实施的赋予船舶清洁物权的船舶司法出售或中止其效力的任何请求或申请行使管辖权。

3.司法出售国应当要求，把撤销已根据第 5 条第 1 款签发证书的司法出售或中止其效力的法院决定迅速发送给第 11 条所述存放处以供公布。

第 10 条　　司法出售不具国际效力的情形

船舶司法出售在司法出售国以外的另一缔约国将不具有第 6 条规定的效力，条件是该缔约国法院认定该效力将明显违反该国的公共政策。

第 11 条存放处

1.存放处应当为国际海事组织秘书长或由联合国国际贸易法委员会指定的某一机构。

2.在收到根据第 4 条第 5 款发送的司法出售通知书、根据第 5 条第 3 款发送的司法出售证书或根据第 9 条第 3 款发送的决定书后，存放处应当以及时的方式按照收到时的格式和语文予以公布。

3.存放处还可以接收虽已批准、接受、核准或加入本公约但本公约尚未对其生效的国家发来的司法出售通知书并可予以公布。

第 12 条　　缔约国主管机构之间的联系

1.为本公约之目的，缔约国的主管机构应当被授权直接与任何其他缔约国的主管机构进行通信联系。

2.本条规定概不影响缔约国之间可能存在的有关民商事司法协助的任何国际协定的适

用。

第 13 条　　与其他国际公约的关系

1.本公约的规定概不影响《内河航行船舶登记公约》（1965 年）及其《关于扣押和强制出售内河航行船舶的第 2 号议定书》的适用，包括对该公约或议定书的任何后续修订书。

2.在不影响第 4 条第 4 款的情况下，也已加入《关于向国外送达民事或商事司法文书和司法外文书公约》（1965 年）的本公约缔约国可使用该公约所规定的途径以外的其他途径向国外发送司法出售通知书。

第 14 条　　赋予国际效力的其他依据

本公约的规定概不排除一国根据任何其他国际协定或可适用的法律赋予在另一国实施的船舶司法出售以效力。

第 15 条　　不受本公约规范的事项

1.本公约的规定概不影响：

（1）司法出售所得款项分配的程序或优先顺序；或

（2）向司法出售前拥有船舶或对船舶享有所有权权利的人提出的任何对人请求权。

2.此外，本公约不规范根据第 9 条第 1 款行使管辖权的法院作出的决定在可适用的法律下的效力。

第 16 条　　保存人

兹指定联合国秘书长为本公约保存人。

第 17 条　　签署、批准、接受、核准、加入

1.本公约开放供各国签署。

2.本公约须经签署国批准、接受或核准。

3.本公约自开放供签署之日起向未签署本公约的所有国家开放以供加入。

4.批准书、接受书、核准书或加入书应当交存保存人。

第 18 条　　区域经济一体化组织的参与

1.由主权国家组成并对本公约规范的某些事项拥有权限的区域经济一体化组织同样可以签署、批准、接受、核准或加入本公约。在前述情况下，如果区域经济一体化组织对本公约所规范事项拥有权限，该组织享有的权利和承担的义务应当与缔约国相同。就第 21 条和第 22 条而言，由区域经济一体化组织交存的文书不应被额外计入由其成员国交存的文书。

2.区域经济一体化组织应当作出声明，列明权限已由其成员国转移给该组织的受本公约规范的具体事项。根据本款作出声明后，如果权限的分配发生包括权限又有新的转移等任何变化，区域经济一体化组织应当迅速通知保存人。

3.在本公约中，凡述及“一国”、“各国”、“缔约国”或“各缔约国”之处，根据需要同等适用于区域经济一体化组织。

4.本公约不影响区域经济一体化组织在本公约之前或者之后通过的有关下列事项的规则的适用：

（1）涉及司法出售通知书在此类组织成员国之间的传送；或

（2）涉及可在此类组织成员国之间适用的管辖权规则。

第 19 条　非统一法律制度

1.如果一国在本公约所涉事项上拥有适用不同法律制度的两个或多个领土单位，该国可以声明本公约延伸适用于其全部领土单位或仅适用于其中某个或某些领土单位。

2.根据本条所作声明应当载明适用本公约的领土单位。

3.如果一国未根据第 1 款作出任何声明，本公约应当适用于该国的全部领土单位。

4.如果一国在本公约所涉事项上拥有适用不同法律制度的两个或多个领土单位：

（1）凡述及该国法律、规则或程序之处，应当视情况被解释为是指在相关领土单位生效的法律、规则或程序；

（2）凡述及该国主管机构之处，应当视情况被解释为是指相关领土单位的主管机构。

第 20 条　声明的程序和效力

1.根据第 18 条第 2 款和第 19 条第 1 款所作声明，应当在签署、批准、接受、核准或加入之时作出。对签署之时所作的声明，须在批准、接受或核准之时予以确认。

2.声明及其确认应当以书面形式作出，并正式通知保存人。

3.声明在本公约对相关国家生效之时同时生效。

4.根据第 18 条第 2 款和第 19 条第 1 款作出声明的任何国家均可随时以书面形式正式通知保存人修改或撤回其声明。所作修改或撤回应当在保存人收到通知之日起 180 天后生效。如果保存人在本公约对相关国家生效前收到修改或撤回的通知书，该修改或撤回应当在本公约对该国生效之时同时生效。

第 21 条　生效

1.本公约于第三份批准书、接受书、核准书或加入书交存之日起 180 天后生效。

2.当一国在第三份批准书、接受书、核准书或加入书交存之后批准、接受、核准或加入本公约，本公约于该国交存批准书、接受书、核准书或加入书之日起 180 天后对其生效。

3.本公约仅适用于在其对司法出售国生效后命令或核准的司法出售。

第 22 条　修订

1.任何缔约国均可向联合国秘书长提交修订案以建议对本公约进行修订。秘书长应当立

即将所提修订案转发各缔约国，提请其就是否赞成召开缔约国会议以对该修订提案进行审议和表决发表意见。自转发之日起 120 天内，如果有不少于三分之一的缔约国赞成召开这一会议，秘书长应当在联合国主持下召开会议。

2.缔约国会议应当尽一切努力就每项修订案达成协商一致。如果竭尽一切努力而仍未能协商一致，作为最后手段，该修订案须有出席会议并参加表决的缔约国的三分之二多数票赞成方可通过。就本款而言，区域经济一体化组织的投票不应被计入在内。

3.获得通过的修订案应当由保存人提交给所有缔约国批准、接受或核准。

4.获得通过的修订案应当在第三份批准书、接受书或核准书交存之日起 180 天后生效。修订案一经生效，即应当对已经表示同意受其约束的缔约国具有约束力。

5.对于在第三份批准书、接受书或核准书交存后批准、接受或核准修订案的缔约国，该修订案应当于该缔约国交存批准书、接受书或核准书之日起 180 天后对其生效。

第 23 条　　退约

1.缔约国可以书面形式正式通知保存人宣布其退出本公约。退约可仅限于适用本公约的、非统一法律制度的某领土单位。

2.退约于保存人收到通知之日起 365 天后生效。通知中申明退约生效需更长期限的，退约于保存人收到通知之日后该更长期限期满时生效。本公约将继续适用于退约生效前已经签发了第 5 条所述司法出售证书的司法出售。

本公约正本一份，阿拉伯文、中文、英文、法文、俄文和西班牙文文本同为作准文本。

船舶司法出售国际效力公约附件一　　司法出售通知书所应包含的基本信息

1.关于为《联合国船舶司法出售国际效力公约》的目的发送司法出售通知书的说明

2.司法出售国的名称

3.命令、核准或确认司法出售的法院或其他公共机构

4.司法出售程序的参考编号或其他识别符号

5.船舶的名称

6.登记机关

7.国际海事组织编号

8.（在无法提供国际海事组织编号时）能够识别该船舶的其他信息

9.所有人的名称

10.所有人住所或主要营业地地址

11.（在以公开拍卖进行司法出售时）公开拍卖的预定日期、时间和地点

12.（在以非公开协议进行司法出售时）由法院或其他公共机构命令的司法出售的时限等全部有关事项

13.确认司法出售赋予船舶清洁物权的说明或在司法出售是否赋予清洁物权不确定时就司法出售不赋予清洁物权情况的说明

14.司法出售国法律要求的其他信息，特别是被视为系保护通知书接收人利益所必需的任何信息

船舶司法出售国际效力公约附件二　　司法出售证书范本

根据《联合国船舶司法出售国际效力公约》第 5 条的规定签发兹证明：

（1）下述船舶已通过符合司法出售国法律要求和《联合国船舶司法出售国际效力公约》要求的司法出售方式售出；并且

（2）司法出售已赋予购买人对该船舶的清洁物权。

1.司法出售国

2.本证书签发机构

2.1 名称

2.2 地址

2.3 电话/电传/电子邮件，如可提供

3.司法出售

3.1 实施司法出售的法院或其他公共机构的名称

3.2 司法出售的日期

4.船舶

4.1 名称

4.2 登记机关

4.3 国际海事组织编号

4.4（在无法提供国际海事组织编号时）能够识别该船舶（证书请随附照片）的其他信息

5.临近司法出售前的所有人

5.1 名称

5.2 住所或主要营业地地址

6.购买人

6.1 名称

6.2 住所或主要营业地地址

在　　（地点）　　于　　（日期）

签发机构的签名和/或盖章或以其他方式对证书真实性的确认

United Nations Convention on the International Effects of Judicial Sales of Ships

The States Parties to this Convention,

Reaffirming their belief that international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

Mindful of the crucial role of shipping in international trade and transportation, of the high economic value of ships used in both seagoing and inland navigation, and of the function of judicial sales as a means to enforce claims,

Considering that adequate legal protection for purchasers may positively impact the price realized at judicial sales of ships, to the benefit of both shipowners and creditors, including lienholders and ship financiers,

Wishing, for that purpose, to establish uniform rules that promote the dissemination of information on prospective judicial sales to interested parties and give international effects to judicial sales of ships sold free and clear of any mortgage or hypothèque and of any charge, including for ship registration purposes,

Have agreed as follows:

Article 1 Purpose

This Convention governs the international effects of a judicial sale of a ship that confers clean title on the purchaser.

Article 2 Definitions

For the purposes of this Convention:

(a) “Judicial sale” of a ship means any sale of a ship:

(i) Which is ordered, approved or confirmed by a court or other public authority either by way of public auction or by private treaty carried out under the supervision and with the approval of a court; and

(ii) For which the proceeds of sale are made available to the creditors;

(b) “Ship” means any ship or other vessel registered in a register that is open to public inspection that may be the subject of an arrest or other similar measure capable of leading to a judicial sale under the law of the State of judicial sale;

(c) “Clean title” means title free and clear of any mortgage or hypothèque and of any charge;

(d) “Mortgage or hypothèque” means any mortgage or hypothèque that is effected on a ship and registered in the State in whose register of ships or equivalent register the ship is registered;

(e) “Charge” means any right whatsoever and howsoever arising which may be asserted against a ship, whether by means of arrest, attachment or otherwise, and includes a maritime lien, lien, encumbrance, right of use or right of retention but does not include a mortgage or hypothèque;

(f) “Registered charge” means any charge that is registered in the register of ships or equivalent register in which the ship is registered or in any different register in which mortgages or hypothèques are registered;

(g) “Maritime lien” means any charge that is recognized as a maritime lien or privilège maritime on a ship under applicable law;

(h) “Owner” of a ship means any person registered as the owner of the ship in the register of ships or equivalent register in which the ship is registered;

(i) “Purchaser” means any person to whom the ship is sold in the judicial sale;

(j) “Subsequent purchaser” means the person who purchases the ship from the purchaser named in the certificate of judicial sale referred to in article 5;

(k) “State of judicial sale” means the State in which the judicial sale of a ship is conducted.

Article 3 Scope of application

1. This Convention applies only to a judicial sale of a ship if:

(a) The judicial sale is conducted in a State Party; and

(b) The ship is physically within the territory of the State of judicial sale at the time of that sale.

2. This Convention shall not apply to warships or naval auxiliaries, or other vessels owned or operated by a State and used, immediately prior to the time of judicial sale, only on government non-commercial service.

Article 4 Notice of judicial sale

1. The judicial sale shall be conducted in accordance with the law of the State of judicial sale, which shall also provide procedures for challenging the judicial sale prior to its completion and determine the time of the sale for the purposes of this Convention.

2. Notwithstanding paragraph 1, a certificate of judicial sale under article 5 shall only be issued if a notice of judicial sale is given prior to the judicial sale of the ship in accordance with the requirements of paragraphs 3 to 7.

3. The notice of judicial sale shall be given to:

(a) The registry of ships or equivalent registry with which the ship is registered;

(b) All holders of any mortgage or hypothèque and of any registered charge, provided that the register in which it is registered, and any instrument required to be registered under the law of the State of registration, are open to public inspection, and that extracts from the register and copies of such instruments are obtainable from the registry;

(c) All holders of any maritime lien, provided that they have notified the court or other public authority conducting the judicial sale of the claim secured by the maritime lien in accordance with the regulations and procedures of the State of judicial sale;

(d) The owner of the ship for the time being; and

(e) If the ship is granted bareboat charter registration:

(i) The person registered as the bareboat charterer of the ship in the bareboat charter register; and

(ii) The bareboat charter registry.

4. The notice of judicial sale shall be given in accordance with the law of the State of judicial sale, and shall contain, as a minimum, the information mentioned in annex I.

5. The notice of judicial sale shall also be:

(a) Published by announcement in the press or other publication available in the State of judicial sale; and

(b) Transmitted to the repository referred to in article 11 for publication.

6. For the purpose of communicating the notice to the repository, if the notice of judicial sale is not in a working language of the repository, it shall be accompanied by a translation of the information mentioned in annex I into any such working language.

7. In determining the identity or address of any person to whom the notice of judicial sale is to be given, it is sufficient to rely on:

(a) Information set forth in the register of ships or equivalent register in which the ship is registered or in the bareboat charter register;

(b) Information set forth in the register in which the mortgage or hypothèque or the registered charge is registered, if different to the register of ships or equivalent register; and

(c) Information notified under paragraph 3, subparagraph (c).

Article 5 Certificate of judicial sale

1. Upon completion of a judicial sale that conferred clean title to the ship under the law of the State of judicial sale and was conducted in accordance with the requirements of that law and the requirements of this Convention, the court or other public authority that conducted the judicial sale or other competent authority of the State of judicial sale shall, in accordance with its regulations and procedures, issue a certificate of judicial sale to the purchaser.

2. The certificate of judicial sale shall be substantially in the form of the model contained in

annex II and contain:

(a) A statement that the ship was sold in accordance with the requirements of the law of the State of judicial sale and the requirements of this Convention;

(b) A statement that the judicial sale has conferred clean title to the ship on the purchaser;

(c) The name of the State of judicial sale;

(d) The name, address and the contact details of the authority issuing the certificate;

(e) The name of the court or other public authority that conducted the judicial sale and the date of the sale;

(f) The name of the ship and registry of ships or equivalent registry with which the ship is registered;

(g) The IMO number of the ship or, if not available, other information capable of identifying the ship;

(h) The name and address of residence or principal place of business of the owner of the ship immediately prior to the judicial sale;

(i) The name and address of residence or principal place of business of the purchaser;

(j) The place and date of issuance of the certificate; and

(k) The signature or stamp of the authority issuing the certificate or other confirmation of authenticity of the certificate.

3. The State of judicial sale shall require the certificate of judicial sale to be transmitted promptly to the repository referred to in article 11 for publication.

4. The certificate of judicial sale and any translation thereof shall be exempt from legalization or similar formality.

5. Without prejudice to articles 9 and 10, the certificate of judicial sale shall be sufficient evidence of the matters contained therein.

6. The certificate of judicial sale may be in the form of an electronic record provided that:

(a) The information contained therein is accessible so as to be usable for subsequent reference;

(b) A reliable method is used to identify the authority issuing the certificate; and

(c) A reliable method is used to detect any alteration to the record after the time it was generated, apart from the addition of any endorsement and any change that arises in the normal course of communication, storage and display.

7. A certificate of judicial sale shall not be rejected on the sole ground that it is in electronic form.

Article 6 International effects of a judicial sale

A judicial sale for which a certificate of judicial sale referred to in article 5 has been issued

shall have the effect in every other State Party of conferring clean title to the ship on the purchaser.

Article 7 Action by the registry

1. At the request of the purchaser or subsequent purchaser and upon production of the certificate of judicial sale referred to in article 5, the registry or other competent authority of a State Party shall, as the case may be and in accordance with its regulations and procedures, but without prejudice to article 6:

(a) Delete from the register any mortgage or hypothèque and any registered charge attached to the ship that had been registered before completion of the judicial sale;

(b) Delete the ship from the register and issue a certificate of deletion for the purpose of new registration;

(c) Register the ship in the name of the purchaser or subsequent purchaser, provided further that the ship and the person in whose name the ship is to be registered meet the requirements of the law of the State of registration;

(d) Update the register with any other relevant particulars in the certificate of judicial sale.

2. At the request of the purchaser or subsequent purchaser and upon production of the certificate of judicial sale referred to in article 5, the registry or other competent authority of a State Party in which the ship was granted bareboat charter registration shall delete the ship from the bareboat charter register and issue a certificate of deletion.

3. If the certificate of judicial sale is not issued in an official language of the registry or other competent authority, the registry or other competent authority may request the purchaser or subsequent purchaser to produce a certified translation into such an official language.

4. The registry or other competent authority may also request the purchaser or subsequent purchaser to produce a certified copy of the certificate of judicial sale for its records.

5. Paragraphs 1 and 2 do not apply if a court in the State of the registry or of the other competent authority determines under article 10 that the effect of the judicial sale under article 6 would be manifestly contrary to the public policy of that State.

Article 8 No arrest of the ship

1. If an application is brought before a court or other judicial authority in a State Party to arrest a ship or to take any other similar measure against a ship for a claim arising prior to a judicial sale of the ship, the court or other judicial authority shall, upon production of the certificate of judicial sale referred to in article 5, dismiss the application.

2. If a ship is arrested or a similar measure is taken against a ship by order of a court or other judicial authority in a State Party for a claim arising prior to a judicial sale of the ship, the court or other judicial authority shall, upon production of the certificate of judicial sale referred to in article 5, order the release of the ship.

3. If the certificate of judicial sale is not issued in an official language of the court or other judicial authority, the court or other judicial authority may request the person producing the certificate to produce a certified translation into such an official language.

4. Paragraphs 1 and 2 do not apply if the court or other judicial authority determines that dismissing the application or ordering the release of the ship, as the case may be, would be manifestly contrary to the public policy of that State.

Article 9 Jurisdiction to avoid and suspend judicial sale

1. The courts of the State of judicial sale shall have exclusive jurisdiction to hear any claim or application to avoid a judicial sale of a ship conducted in that State that confers clean title to the ship or to suspend its effects, which shall extend to any claim or application to challenge the issuance of the certificate of judicial sale referred to in article 5.

2. The courts of a State Party shall decline jurisdiction in respect of any claim or application to avoid a judicial sale of a ship conducted in another State Party that confers clean title to the ship or to suspend its effects.

3. The State of judicial sale shall require the decision of a court that avoids or suspends the effects of a judicial sale for which a certificate has been issued in accordance with article 5, paragraph 1, to be transmitted promptly to the repository referred to in article 11 for publication.

Article 10 Circumstances in which judicial sale has no international effect

A judicial sale of a ship shall not have the effect provided in article 6 in a State Party other than the State of judicial sale if a court in the other State Party determines that the effect would be manifestly contrary to the public policy of that other State Party.

Article 11 Repository

1. The repository shall be the Secretary-General of the International Maritime Organization or an institution named by the United Nations Commission on International Trade Law.

2. Upon receipt of a notice of judicial sale transmitted under article 4, paragraph 5, certificate of judicial sale transmitted under article 5, paragraph 3, or decision transmitted under article 9, paragraph 3, the repository shall make it available to the public in a timely manner, in the form and in the language in which it is received.

3. The repository may also receive a notice of judicial sale emanating from a State that has ratified, accepted, approved or acceded to this Convention and for which the Convention has not yet entered into force and may make it available to the public.

Article 12 Communication between authorities of States Parties

1. For the purposes of this Convention, the authorities of a State Party shall be authorized to correspond directly with the authorities of any other State Party.

2. Nothing in this article shall affect the application of any international agreement on judicial

assistance in respect of civil and commercial matters that may exist between States Parties.

Article 13 Relationship with other international conventions

1. Nothing in this Convention shall affect the application of the Convention on the Registration of Inland Navigation Vessels (1965) and its Protocol No. 2 concerning Attachment and Forced Sale of Inland Navigation Vessels, including any future amendment to that convention or protocol.

2. Without prejudice to article 4, paragraph 4, as between States Parties to this Convention that are also parties to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965), the notice of judicial sale may be transmitted abroad using channels other than those provided for in that convention.

Article 14 Other bases for giving international effect

Nothing in this Convention shall preclude a State from giving effect to a judicial sale of a ship conducted in another State under any other international agreement or under applicable law.

Article 15 Matters not governed by this Convention

1. Nothing in this Convention shall affect:

(a) The procedure for or priority in the distribution of proceeds of a judicial sale; or

(b) Any personal claim against a person who owned or had proprietary rights in the ship prior to the judicial sale.

2. Moreover, this Convention shall not govern the effects, under applicable law, of a decision by a court exercising jurisdiction under article 9, paragraph 1.

Article 16 Depositary

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

Article 17 Signature, ratification, acceptance, approval, accession

1. This Convention is open for signature by all States.

2. This Convention is subject to ratification, acceptance or approval by the signatory States.

3. This Convention is open for accession by all States that are not signatories as from the date it is open for signature.

4. Instruments of ratification, acceptance, approval or accession are to be deposited with the depositary.

Article 18 Participation by regional economic integration organizations

1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a State Party, to the extent that that organization has competence over matters governed by this Convention. For the purposes of articles 21 and 22, an

instrument deposited by a regional economic integration organization shall not be counted in addition to the instruments deposited by its member States.

2. The regional economic integration organization shall make a declaration specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

3. Any reference to a "State", "States", "State Party" or "States Parties" in this Convention applies equally to a regional economic integration organization where the context so requires.

4. This Convention shall not affect the application of rules of a regional economic integration organization, whether adopted before or after this Convention:

(a) In relation to the transmission of a notice of judicial sale between member States of such an organization; or

(b) In relation to the jurisdictional rules applicable between member States of such an organization.

Article 19 Non-unified legal systems

1. If a State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may declare that this Convention shall extend to all its territorial units or only to one or more of them.

2. Declarations under this article shall state expressly the territorial units to which this Convention extends.

3. If a State makes no declaration under paragraph 1, this Convention shall extend to all territorial units of that State.

4. If a State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention:

(a) Any reference to the law, regulations or procedures of the State shall be construed as referring, where appropriate, to the law, regulations or procedures in force in the relevant territorial unit;

(b) Any reference to the authority of the State shall be construed as referring, where appropriate, to the authority in the relevant territorial unit.

Article 20 Procedure and effects of declarations

1. Declarations under article 18, paragraph 2, and article 19, paragraph 1, shall be made at the time of signature, ratification, acceptance, approval or accession. Declarations made at the time of signature are subject to confirmation upon ratification, acceptance or approval.

2. Declarations and their confirmations shall be in writing and formally notified to the

depositary.

3. A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned.

4. Any State that makes a declaration under article 18, paragraph 2, and article 19, paragraph 1, may modify or withdraw it at any time by a formal notification in writing addressed to the depositary. The modification or withdrawal shall take effect 180 days after the date of the receipt of the notification by the depositary. If the depositary receives the notification of the modification or withdrawal before entry into force of this Convention in respect of the State concerned, the modification or withdrawal shall take effect simultaneously with the entry into force of this Convention in respect of that State.

Article 21 Entry into force

1. This Convention shall enter into force 180 days after the date of the deposit of the third instrument of ratification, acceptance, approval or accession.

2. When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the third instrument of ratification, acceptance, approval or accession, this Convention shall enter into force in respect of that State 180 days after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

3. This Convention shall apply only to judicial sales ordered or approved after its entry into force in respect of the State of judicial sale.

Article 22 Amendment

1. Any State Party may propose an amendment to this Convention by submitting it to the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within 120 days from the date of such communication at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations.

2. The conference of States Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus are exhausted and no consensus is reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the States Parties present and voting at the conference. For the purposes of this paragraph, the vote of a regional economic integration organization shall not be counted.

3. An adopted amendment shall be submitted by the depositary to all States Parties for ratification, acceptance or approval.

4. An adopted amendment shall enter into force 180 days after the date of deposit of the third

instrument of ratification, acceptance or approval. When an amendment enters into force, it shall be binding on those States Parties that have expressed consent to be bound by it.

5. When a State Party ratifies, accepts or approves an amendment following the deposit of the third instrument of ratification, acceptance or approval, the amendment shall enter into force in respect of that State Party 180 days after the date of the deposit of its instrument of ratification, acceptance or approval.

Article 23 Denunciation

1. A State Party may denounce this Convention by a formal notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.

2. The denunciation shall take effect 365 days after the date of the receipt of the notification by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the date of the receipt of the notification by the depositary. This Convention shall continue to apply to a judicial sale for which a certificate of judicial sale referred to in article 5 has been issued before the denunciation takes effect.

DONE in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

Annex I

Minimum information to be contained in the notice of judicial sale

1. Statement that the notice of judicial sale is given for the purposes of the United Nations Convention on the International Effects of Judicial Sales of Ships

2. Name of State of judicial sale

3. Court or other public authority ordering, approving or confirming the judicial sale

4. Reference number or other identifier for the judicial sale procedure

5. Name of ship

6. Registry

7. IMO number

8. (If IMO number not available) Other information capable of identifying the ship

9. Name of the owner

10. Address of residence or principal place of business of the owner

11. (If judicial sale by public auction) Anticipated date, time and place of public auction

12. (If judicial sale by private treaty) Any relevant details, including time period, for the judicial sale as ordered by the court or other public authority

13. Statement either confirming that the judicial sale will confer clean title to the ship, or, if it is not known whether the judicial sale will confer clean title, a statement of the circumstances under which the judicial sale would not confer clean title

14. Other information required by the law of the State of judicial sale, in particular any information deemed necessary to protect the interests of the person receiving the notice

Annex II

Model certificate of judicial sale

Issued in accordance with the provisions of article 5 of the United Nations Convention on the International Effects of Judicial Sales of Ships

This is to certify that:

(a) The ship described below was sold by way of judicial sale in accordance with the requirements of the law of the State of judicial sale and the requirements of the United Nations Convention on the International Effects of Judicial Sales of Ships; and

(b) The judicial sale has conferred clean title to the ship on the purchaser.

1.	**State of judicial sale**	.....
2.	**Authority issuing this certificate**	
2.1	Name	.....
2.2	Address	.....
2.3	Telephone/fax/email, if available	.....
3	**Judicial sale**	
3.1	Name of court or other public authority that conducted the judicial sale	.....
3.2	Date of the judicial sale	.....
4	**Ship**	
4.1	Name	.....
4.2	Registry	.....
4.3	IMO number	.....
4.4	(If IMO number not available) Other information capable of identifying the ship	(Please attach any photos to the certificate) .....
5	**Owner immediately prior to the judicial sale**	

5.1	Name	.....
5.2	Address of residence or principal place of business	.....
6	**Purchaser**	
6.1	Name	.....
6.2	Address of residence or principal place of business	.....

At ..... **On** .....

(place) (date)

.....

Signature and/or stamp of issuing authority or other confirmation of authenticity of the certificate

《海洋法律与政策》稿约

《海洋法律与政策》(Marine Law and Policy)，国际刊号：2709-3948,电子刊号：2710-1738，是大海法领域中英双语对照的优秀国际学术期刊。本刊秉承实事求是的精神，力求刊发海内外与海洋法律、海洋政策相关的一切优秀研究成果，热忱欢迎广大专家、学者不吝赐稿，兹立稿约如下:

一、鼓励英文著述，同一学术水准稿件，英文著述将优先录用。

二、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，不考虑稿件作者的身份和以往学术经历，只有学术水准和学术规范的要求。

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（一）英文学术期刊

Charles A. Reich, The New Property, 73 Yale Law Journal 733, 737-738 (1964).

Stephen J. Choi & Adam C. Pritchard, Behavioral Economics and the SEC, Stanford Law Review, Vol.56:1, p.1-73 (2003).

（二）英文报纸文章

Andrew Rosenthal, White House Tutors Kremlin in How a Presidency Works, New York Times, June 15, 1990.

（三）英文书籍

William P. Alford, To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization, Stanford University Press, 1995, p.98.

页码为复数的，也写 p.，不写 pp.。

Jürgen Habermas, Between Facts and Norms: Contribution to a Discourse Theory of Law and Democracy, translated by William Rehg, MIT Press, 1996, p.330-336.

（四）英文网页

Stephen McDonell, When China Began Streaming Trials Online, BBC NEWS (Sept. 30, 2016), https://www.bbc.com/news/blogs-china-blog-37515399.

（五）其他

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Natural Resources Defense Council *v.* Gorsuch, 685 F.2d 718 (D.C. Cir. 1982); Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

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