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海洋法律与政策

Marine Law and Policy

服务海南自由贸易港 *Serving the Hainan Free Trade Port*

2021 年第 2 期 总第 2 期 （季刊）

Volume 2021 Number 2（Quarterly）

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编者言

《海洋法律与政策》(*Marine Law and Policy*)，ISSN 2709-3948, ISSN 2710-1738 (online)，是大海法领域中英双语对照的优秀国际学术期刊。本刊的目的在于支持 21 世纪海上丝绸之路的宏大愿景，服务中国（海南）自由贸易港的具体建设工作。这一平台希望能发挥纠合同志，引入智慧，交流经验与创新构想的功能，以为公私领域内的读者们服务。

本期《海洋法律与政策》刊发的论文包括了自贸港建设中的涉海问题、国际海事组织、海洋环境保护以及渔民权益保障等公私海洋法律问题。

近年来，中资船籍外移问题始终未能得到有效解决。中国政法大学国际法学院张丽英教授与她的硕士研究生肖怡婕就海南自由贸易港国际船舶登记制度的相关问题进行了深入分析。论文报告称：随着 2020 年《海南自由贸易港建设总体方案》的出台，海南省决定实施国际船舶登记制度。在吸取中国大陆经验教训的同时，借鉴中国香港、新加坡的经验，在放宽登记条件、减免税费征收、优化融资条件、简化登记程序等方面进行了一系列的制度革新，推出了相应的利好政策。尽管目前海南自贸港国际船舶登记制度已成功吸引不少中资方便旗回国登记，但由于制度发展还未完全成熟，过程中暴露出了不少问题。文章针对这些问题提出了进一步解决的方案。

IMO 成立 40 多年来，已从原先一个船舶航运安全及海洋污染防治的咨询建议机关逐渐转变为规则制定机关。而中国作为 IMO 成员国暨 A 类理事国，了解其规则动向，无疑对中国参与海洋活动具有重要意义。山东大学法学院的戴宗翰副教授系统梳理了“IMO 强制审核机制”的发展及内容，并通过法律解释途径厘清强制审核机制主要文件的立法意涵及效力，并提出我国应对审核挑战的相关建议，对我国身为“IMO 强制审核机制”被审国及海事大国而言，具有重要的现实意义。

我国加入了大量海洋环境保护国际公约，但由于我国在《宪法》中未对国际公约的适用方式作出规定，所以我国海洋环境保护法在实施过程中与部分国际公约的衔接存在着间隙。中国海洋大学法学院马英杰教授和她的研究生王子敏从我国《海洋环境保护法》与有关国际公约的衔接为视角，系统梳理了我国缔结和加入的海洋环境保护公约，通过探究其在我国的适用方式，指出两者在衔接过程中出现的间隙，并提出完善我国海洋环境保护法与有关国际公约有效衔接的建议和措施。

渔民的权益保障问题是关乎海洋经济发展与民生的重要问题。大连海洋大学的裴兆斌教授和他的研究生徐畅就法治渔村建设的相关问题进行了细致研究。文章针对目前渔村在法治建设中存在的诸多问题，从行政执法、政务服务和普法宣传三个方面，对行政机关提出了相应的法律意见。

本期《海洋法律与政策》还在“案例解析”的栏位介绍了两组案例。一组是关于涉海诉讼中“台风是否构成不可抗力”问题的案例总汇。一组是海南省高级人民法院 2020 年涉海案例评述。

作为海洋法律与政策领域内的新刊物，我们诚挚欢迎各位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，并以中英两种语文刊发。

编辑部 谨识

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北大法律信息网 http://www.chinalawinfo.com/

EDITOR's NOTE

Marine Law and Policy, ISSN 2709-3948, ISSN 2710-1738 (online), is a Chinese-English bilingual academic quarterly focusing on marine laws and policies. Aims of this journal are to support the vision of the 21st Century Maritime Silk Road and to serve the construction works of the Chinese Hainan Free Trade Port. As a platform, we look forward to inviting colleagues and wisdom from the world, so to exchange experiences and ideas, and to serve our dear readers.

In this issue of ***Marine Law and Policy,*** we have included articles on public and private marine legal issues, such as issues of ship registration, issues on the International Maritime Organization functions, issues on marine environment protection, and those on protection of the fisherman's rights and interests.

In recent years, the Chinese-funded ships' emigration problem has not been effectively solved. Professor ZHANG Liying and her graduate student XIAO Yijie made an in-depth analysis on the relevant issues of the ship registration system in the Hainan Free Trade Port. In their report, the authors pointed out that with the promulgation of the Overall Plan for the Construction of Hainan Free Trade Port in 2020, Hainan provincial authorities has decided to leverage the opportunity to deepen its opening-up. Against this backdrop, the international ship registration system was introduced, which was devised by referring to the experience of Chinese Hong Kong and Singapore. A series of institutional reforms and innovations have been carried out in relaxing registration conditions, deducting and exempting taxes and fees, optimizing financing requirements and streamlining registration procedures. Additionally, a batch of initiatives exclusive to Hainan Free Trade Port has been launched. At present, the International Ship Registration System in the Hainan Free Trade Port has successfully attracted many Chinese-funded ships under Flags of Convenience to return for registration. However, due to the immature development of the system, many problems have gradually been exposed in practice, such as the practical implementation of favorable policies, tax base erosion, and the supervision of ships. All these need to be further solved and optimized by continuously improving the relevant supporting facilities and legal norms in the future. This article offers valuable suggestions to respond to these issues.

Since its establishment over 40 years ago, the IMO has evolved from an advisory and consultancy agency on shipping safety and marine pollution prevention to a rule-making institution. As a member of the IMO, especially as a Category A member, it is of great significance for China to understand the trend of its rules and regulations. Associate Professor DAI Zonghan of Shandong University Law School conducted an in-depth study on the IMO Mandatory Audit Scheme. His paper aims to analyze the development and contents of the IMO mandatory audit scheme, clarify the legal effect of main documents relating to the mandatory audit scheme, and put forward suggestions for China to cope with the challenges occurring during the audit procedures. As an audited state of IMO mandatory audit scheme and a big maritime power, this is of great practical importance for China.

China has acceded to a large number of international conventions on marine environment protection. Since the PRC Constitution does not provide any application mode of international treaties, there are loopholes or gaps in the connection between China's Marine Environment Protection Law and some related international conventions in the process of their domestic implementation. Professor MA Yingjie of Ocean University of China Law School and her graduate student WANG Zimin sort out the

marine environment protection conventions that China has concluded or acceded to, and point out the loopholes in the process of their application in China. Suggestions for improving the effective connection between China's Marine Environment Protection Law and those relevant international conventions are put forward.

The protection of fishermen's rights and interests is an important topic related to the development of the marine economy and People's livelihood. Professor PEI Zhaobin from Dalian Ocean University and his graduate student XU Chang conducted a detailed study on the construction of "Rule of Law in Fishing Villages". However, there are still some deficiencies that need to be amended, for the current construction of Chinese villages under the rule of law, especially for the construction of fishing villages in China. Because of these existing deficiencies, this paper suggests that people should start changing three aspects, i.e., strengthening administrative law enforcement, upgrading government service, and improving law popularization. The paper also analyzes the causes, and puts forward corresponding legal opinions to the competent administrative agencies.

Other than the above-mentioned articles, in this issue, we have also introduced two collections of cases in the "Case Study" section. The first one is a summary of cases about "typhoon and force majeure" in maritime litigations. The second one is a review of cases on marine matters as decided by the Higher People's Court of Hainan Province in 2020.

As a new 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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海南自由贸易港国际船舶登记制度的相关问题分析

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摘要：近年来，中资船籍外移问题并没有得到有效解决，给我国造成了财政收入部分丧失、航运大国地位削弱以及不利于国家安全等负面影响。虽然自2007年起，我国就开始探索中资方便旗回归的对策，先后进行了特案免税制、“中国洋山港”保税船舶登记、天津东疆保税港区和上海自贸区国际船舶登记试点等一系列尝试，但最终召回的船舶数量依旧十分有限。随着2020年《海南自由贸易港建设总体方案》的出台，海南省决定抓住开放的契机，实施国际船舶登记制度。海南这次不仅吸取了过往的经验教训，还借鉴了中国香港、新加坡的经验，在放宽登记条件、减免税费征收、优化融资条件、简化登记程序方面进行了一系列的制度改革与创新，推出海南自由贸易港专属的国际船舶登记程序规定[1]、企业所得税优惠政策[2]、高端紧缺人才个人所得税政策[3]、“零关税”进口交通工具及游艇管理办法（试行）[4]。目前，海南自贸港国际船舶登记制度已成功吸引不少中资方便旗回国登记，但由于制度发展还未完全成熟，不少问题逐渐在实践中暴露，比如利好政策实际落地问题、税基侵蚀问题以及船舶监管问题等。这些都需要日后不断完善相关配套设施及法律制度来进一步解决和优化。

关键词：中资方便旗；海南自贸港；国际船舶登记

一、海南自贸港吸引中资方便旗船回国登记的必要性

* 张丽英，中国政法大学国际法学院教授，博士生导师，中国政法大学海商法研究中心主任，中国法学会世界贸易组织法研究会常务理事，中国国际经济法学会常务理事，中国海事仲裁委员会仲裁员。本文系国家社科基金专项课题项目：“一带一路”国际合作框架机制设计（项目批准号：18VSJ050）的阶段性研究成果。

** 肖怡婕，中国政法大学国际法硕士研究生。

1 《海南自由贸易港国际船舶登记程序规定》，中华人民共和国海南海事局2020 年 11 月 3 日发布。

2 《关于海南自由贸易港企业所得税优惠政策的通知》，财税〔2020〕31号，海南省财政厅、国家税务总局2020 年 6 月 30 日发布。

3 《关于海南自由贸易港高端紧缺人才个人所得税政策的通知》，财税〔2020〕32号，海南省财政厅、国家税务总局2020 年 6 月 23日发布。

4 《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）》，财政部、海关总署、税务总局2020 年 12 月 30 日发布。

（一）方便旗船缺乏监管容易引发安全问题

目前，全球有 35 个国家被 ITF[1]认定为方便旗国，且大部分为发展中国家。[2]采取开放登记的国家多采用宽松的船舶监管、优惠的税收政策、较少的登记限制、低廉的劳动力吸引外国船舶来本国登记。据 2020 年 UNCTAD[3]的数据显示，若以船舶登记吨位和船队价值为标准，巴拿马、利比里亚、马绍尔群岛是世界船舶登记排名前三的国家。截止到 2020 年 1 月 1 日，以上三个国家的船舶吨位接近全球船舶吨位的一半即高达 42%，[4]且都为 ITF 认定的方便旗国（见表 1）。

表 1 2018 年 ITF 认定的 35 个方便旗国家和地区[5]

• Antigua and Barbuda 安提瓜和巴布达（北美洲国家）	• Jamaica 牙买加（北美洲岛国）
• Bahamas 巴哈马群岛（拉丁美洲国家）	• Lebanon 黎巴嫩（亚洲国家）
• Barbados 巴巴多斯（拉丁美洲国家）	• Liberia 利比里亚（非洲国家）
• Belize 伯利兹城（拉丁美洲国家）	• Malta 马耳他（南欧岛国）
• Bermuda (UK) 百慕大群岛（北大西洋西部群岛）	• Madeira 马德拉群岛（大西洋的群岛）
• Bolivia 玻利维亚（南美洲西部国家）	• Marshall Islands (USA) 马绍尔群岛（美国）
• Cambodia 柬埔寨（亚洲国家）	• Mauritius 毛里求斯（非洲国家）
• Cayman Islands 开曼群岛（位于拉丁美洲）	• Moldova 摩尔多瓦（东欧内陆国家）
• Comoros 科摩罗群岛（非洲国家）	• Mongolia 蒙古
• Cyprus 塞浦路斯（亚洲国家）	• Myanmar 缅甸
• Equatorial Guinea 赤道几内亚（非洲国家）	• Netherlands Antilles 荷属安的列斯群岛（拉丁美洲群岛）
• Faroe Islands (FAS) 法罗群岛（欧洲国家）	• North Korea 朝鲜
• French International Ship Register (FIS) 法国国际船舶登记处	• Panama 巴拿马（中美洲国家）
• German International Ship Register (GIS) 德国国际船舶登记处	• Sao Tome and Príncipe 圣多美和普林西比岛（非洲国家）
• Georgia 乔治亚州（美国）	• St Vincent 圣文森特岛（北美洲国家）
• Gibraltar (UK) 直布罗陀	• Sri Lanka 斯里兰卡（亚洲国家）
• Honduras 洪都拉斯（北美洲国家）	• Tonga 汤加（南太平洋岛国）
	• Vanuatu 瓦努阿图（西南太平洋岛国）

而且据国际海事组织（IMO）统计，世界上接近 70%的船队都悬挂方便旗[6]，由此可见全球方

1 全称为国际运输工人联盟组织（International Transport Workers Federation），1896 年成立，总部设在英国伦敦。其成立多年来一直对方便旗船进行抵制。主要措施有：1.迫使方便旗船所有人与该组织签订协议，提高方便旗船船员的工资和福利待遇等；2.对未结盟签约的方便旗船所有人进行抵制，使其在有该组织分支机构的港口不能装卸货物。

2 International Transport Workers' Federation, *Flags of Convenience* (Nov. 06, 2018), https://www.itfglobal.org/en/sector/seafarers/flags-of-convenience.

3 全称为联合国贸易和发展会议（United Nations Conference on Trade and Development），是联合国系统内唯一综合处理发展和贸易、资金、技术、投资和可持续发展领域相关问题的政府间机构，每年会依当年全球海运状况发布《海运评述》。

4 United Nations Conference on Trade and Development，*Review of Maritime Transport*(2020), United Nations Publications(Dec. 20, 2020), https://unctad.org/publications.

5 参见国际运输工人联合会（ITF）官网，https://www.itfglobal.org/en/sector/seafarers/flags-of-convenience.

6 International Maritime Organization, *The Structure and Operations of the Liberian Registry*，Liberian Registry (March 5. 2020), https://wwwcdn.imo.org/localresources/en/OurWork/Legal/Documents/IMLIWMUSYMPOSIUM/9%20Panel%203_Ladas.pdf.

便旗的数量不容小觑。然而，就在方便旗数量不断增多的同时，因登记国监管缺失而引发的问题也随之暴露。航行安全方面，方便旗国设置的船舶登记门槛低、安全技术要求不高，吸引不少船况不佳的船舶入籍登记[1]，给国际航行埋下安全隐患。交易安全方面，方便旗船隐瞒了船舶真正所有人身份，不利于船旗国有效监管，实践中常出现海运欺诈、交通事故人身损害索赔落空等情况。[2]海上安全方面，方便旗船经常成为武器走私、隐匿金钱、贩运货物和人员等非法活动的工具，成为恐怖主义的温床[3]；环境保护方面，方便旗国一般缺乏环境及生态保护立法，与方便旗船有关的海洋污染、违规捕捞事件时有发生。[4]

（二）中资船外移的情况及负面影响

根据联合国贸发会（UNCTAD）2020 年数据，中国船队规模以约 2284 万载重吨（228,371,455DWT）位居世界第三位，船舶数量共计 6125 艘。其中，中国船籍数量（4569 艘）远超于外国船籍数量（2300 艘），但若以载重吨计，中国籍船舶仅占比 43.56%，超过一半以上均为外国船籍。由此算得的中国籍船舶平均吨位约为 2.1 万吨，而中国拥有的外国籍船舶平均吨位却高达 5.6 万吨，是中国籍船舶吨位的两倍之多。[5]这说明，我国船队中的中国籍船舶数量虽多，却普遍呈现吨位小的特点；悬挂外国方便旗的船舶数量虽少，但吨位都比较大。而且，根据 2008-2020 年中国船舶登记及载重情况（见表 2），可以清楚的看到，外国船籍所占比重虽有下滑，却依然保持在一半以上的程度，自 2015 年起甚至还出现了上涨的趋势。

1 袁雪、王倩楠：《中资方便旗船回归的困境突破与对策》，载《知与行》 2015 年第 3 期，第 56 页。

2 Hamad, *Flag of Convenience Practice，A Threat to Maritime Safety and Security*, IJRDO-Journal of Social Science and Humanities Research, Vol.1:1, p. 207-230 (2016).

3 Yale University, *Crimes Under Flag of Convenience*, Yale Global Online(Dec. 22, 2020),https://yaleglobal.yale.edu/content/crimes-under-flags-convenience.

4 Dempsey, P. S.&Helling L. L., *Oil Pollution by Ocean Vessels - An Environmental Tragedy: The Legal Regime of Flags of Convenience, Multilateral Conventions, and Coastal States*, Denver J. Int. Law Policy, Vol.10:1, p.3-4 (2016).

5 United Nations Conference on Trade and Development，*Review of Maritime Transport*(2020), United Nations Publications(Dec. 20, 2020), https://unctad.org/publications.

年份	船舶数量	外国船籍数量	外国船籍船舶载重吨	外国船籍船舶载重吨占比
2008	3,303	1,403	50,530,684	59.53
2009	3,499	1,555	55,594,490	59.91
2010	3,633	1,609	63,426,314	61.00
2011	3,629	1,569	72,285,422	58.29
2012	3,651	1,607	61,762,042	57.20
2013	5,313	2,648	123,142,883	64.79
2014	5,406	--	126,928,000	63.00
2015	4,966	1,996	83,746,441	53.15
2016	4,960	1,915	84,778,140	53.36
2017	5,206	--	89,282,495	53.97
2018	5,512	1,956	99,455,000	54.30
2019	6,125	2,138	115,307,656	55.92
2020	6,869	2,300	128,892,849	56.44

表 2 2008-2020 年中国船舶登记及载重情况[1]

若大量中资船移籍海外的现实局面无法有效破解，长此以往将会给我国的财政、航运、国防以及国家形象等造成诸多不利影响：

1. 导致我国财政收入部分流失

在外国登记的一大批中资船舶由于未在本国登记，不受我国政府直接管控，使得本应向我国缴纳的税费也随之流失。后来，2017 年 4 月我国停征船舶登记费[2]，使得 2017 年以前因船籍外移而丧失的登记费不会再视为是我国财政收入损失的一部分。可是，虽然船舶登记费取消了，但船舶吨税、车船税、印花税等依然是船舶登记后必须缴纳的税费。2020 年，登记为外国船籍的中国船舶平均吨位约为 5.6 万吨。[3]依照我国车船税征收标准计算[4]，每多一艘中国船舶在外国进行登记，我国财政收入就要流失近 16.8-33.6 万元。

2. 削弱我国航运大国的地位和形象

一国商船队悬挂本国国旗的船舶吨位的大小，是衡量一个国家航运地位的关键要素。[5]但不少吨位大、船龄小的优质国轮在海外登记，加速了我国船队的老化。不仅如此，国轮船队总吨位的下降还会阻碍中国船级社入籍规模的继续扩大，不利于中国船级社地位的提升。而上述问题，都

1 数据来源：联合国贸发会（UNCTAD） 2008-2020 年间出版的 13 份《海运评述》。

2 《关于清理规范一批行政事业性收费有关政策的通知》（财税〔2017〕20 号）：自 2017 年 4 月 1 日零时起，取消或停征 41 项中央级设立的行政事业性收费，其中包括：……船舶登记费、船舶及船用产品设施检验费……

3 United Nations Conference on Trade and Development，*Review of Maritime Transport* (2020), United Nations Publications (Dec. 20, 2020), https://unctad.org/publications.

4 《中华人民共和国车船税法》（价费字［2019］191 号）：船舶的具体适用税额由国务院在本法所附《车船税税目税额表》规定的税额幅度内确定。……机动船舶净吨位每吨征税 3 元至 6 元……

5 叶洋恋：《船舶登记法律制度研究》，华东政法大学 2013 年博士学位位论文，第 35-37 页。

会成为我国向航运强国转变的障碍，削弱我国航运大国的地位。

3. 不利于我国国家安全

根据表 2 可以看出，2020 年从事国际航行船舶中国船舶接近 1/3 都已经登记为外国国籍。剩余 2/3 悬挂五星红旗的船舶，其吨位不足中国船舶载重总吨位 1/2。当前国际局势呈现紧张状态，如果发生战争或局部争端，中国大量移籍海外的船舶，将不能为我国政府所用。就目前情形来看，我国对国际航行船舶的需求呈上升趋势，无论是我军参与国际维和活动，还是海外后勤保障基地建设、远洋支援运输，都需要大量的国际船舶。但由于各级国防动员部门很难掌握方便旗船舶的实际情况,使得战时或紧急情况下难以对中资方便旗进行快速调度。[1]

（三）我国以往吸引中资方便旗船回国登记的尝试效果不佳

2007 年 6 月交通部发布公告[2]，自 2007 年 7 月 1 日至 2009 年 6 月 30 日期间实施特案免税登记政策。按照规定，若中资船舶于 2005 年底前在境外取得国籍且满足船龄等条件，就能享受特案免税登记政策的优惠[3]，期间共四批 55 艘中资“方便旗”被召回。[4]为了吸引更多的中资方便旗，交通运输部分别于 2009、2011 年两次延长该政策的实施期限，最终特案免税登记政策被延长到了 2015 年 12 月 31 日。[5]可是延长期间回归的中资“方便旗”船仅有 16 艘[6]，特案免税登记政策收效甚微。

2016 年，交通运输部发布公告[7]，将免征中资“方便旗”船关税和进口环节增值税的政策延长至 2019 年 9 月 1 日。与之前的政策相比，调整完善后的税收优惠政策不再要求各类进口船符合旧船舶进口的相关规定。从 2016 年至 2019 年间，共计 80 艘中资“方便旗”船回国登记。[8]

为了进一步吸引中资“方便旗”船回归，我国开始探索国际船舶登记制度。2011 年“中国洋山港”试点保税船舶登记政策；2013 年天津东疆保税港区在全国率先实施国际船舶登记政策；2014 年，交通部批复同意上海“国际船舶登记制度试点方案”[9]，放宽船舶登记、外籍船员配备等限制，允许登记主体外资比例高于 50%，但是效果仍然不佳。天津东疆港自 2013 年以来，只吸引了 12 艘中资方便旗回国登记。[10]若究其原因，主要还是因为我国严苛的登记条件、高额的税费征收；同时，相对较弱的融资环境和繁琐的登记程序也是其中的重要原因。

因此，为了减少方便旗带来的安全隐患，缓解中资船舶海外移籍对我国不良影响，海南自贸

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1 刘宝新、刘嘉生：《中资方便旗船国防动员问题研究》，载《军事交通学院学报》 2018 年第 20 卷 1 期，第 15-18、41 页。.

2 《关于实施中资国际航运船舶特案免税登记政策的公告》，交通部公告〔2007〕18 号，交通部水运局 2007 年 6 月 13 日发布。

3 《关于实施中资国际航运船舶特案免税登记政策的公告》（交通部公告〔2007〕18 号）明确要求，“在 2007 年 7 月 1 日至 2009 年 6 月 30 日期间报关进口、办理船舶登记的中资船舶，符合下列条件的，免征关税和进口环节增值税：（一）在 2005 年 12 月 31 日以前已经在境外登记；（二）船龄范围：1、船龄在 4—12 年的油船（包括沥青船）、散装化学品船等；2、船龄在 6—18 年的散货船、矿砂船等；3、船龄在 9—20 年的集装箱船、杂货船、多用途船、散装水泥船等。”

4 参见中华人民共和国交通运输部网站，http://www.mot.gov.cn/fenxigongbao/，2020 年 12 月 23 日访问。

5 袁雪、王倩楠：《中资方便旗船回归的困境突破与对策》.载《知与行》 2015 年第 3 期，第 58 页。

6 参见中华人民共和国交通运输部网站，http://www.mot.gov.cn/fenxigongbao/，2020 年 12 月 23 日访问。

7 《关于实施中资“方便旗”船回国登记进口税收政策的公告》，财关税﹝2016﹞42 号，财政部、海关总署、国家税务总局 2016 年 8 月 31 日发布。

8 参见中华人民共和国交通运输部网站，http://www.mot.gov.cn/fenxigongbao/，2020 年 12 月 23 日访问。

9 《中国（上海）自由贸易试验区国际船舶登记制度试点方案》，上海海事局 2014 年 1 月 21 日发布。

10 参见中华人民共和国交通运输部网站，http://www.mot.gov.cn/fenxigongbao/，2020 年 12 月 23 日访问。

港决定建立“中国洋浦港”船籍港，开展国际船舶登记业务。[1]通过吸取以往教训、学习境内外知名港口经验，海南自贸港在国际船舶登记制度方面进行了一系列的制度完善和创新，期待在吸引中资方便旗回归方面能有更好的成效。

二、海南自贸港国际船舶登记制度的相关政策及法律规定

（一）国际船舶登记制度的含义

目前，可将世界上所有国家的船舶登记制度分为三种：严格船舶登记制度、开放船舶登记制度、国际船舶登记制度。其中，国际船舶登记制度不会像严格船舶登记制度一样对船舶所有人国籍、船员配备、出资比例、技术安全等进行多方面严格的限制[2]；也不似开放船舶登记制度对船舶的登记、监管过于放松，即国际船舶登记制度是介于二者之间的一种宽严相济的新登记制度。[3]

以往，我国都是实行严格船舶登记制度，直到 2013 年天津东疆保税港和 2014 年上海自由贸易区的建立，才开始区域性地尝试国际船舶登记制度，让前来登记的船舶可享受税收、登记等一系列优惠待遇。而此次海南自贸港正是接过天津东疆保税港和上海自由贸易区的国际船舶制度建设的接力棒，对该制度的施行进行新一轮的探索与试点。

（二）海南自贸港国际船舶登记制度的分析

截至 2020 年 1 月 1 日，拥有船舶最多的五个经济体是希腊、日本、中国、新加坡和中国香港，共占世界总吨位的 50%以上。[4]其中，70%以上的船队（按吨位计）注册悬挂外国国籍，只有新加坡和中国香港保持外国船籍占比低于 50%，分别为 41.32%和 26.31%。[5]通过数据的比对不难发现，新加坡和中国香港在控制船籍外移方面颇有成效。究其原因，关键在于二者宽严相济的国际船舶制度，既能通过一系列优惠政策保证船舶登记数量，又能通过严格监控登记船舶的质量。因此无论是香港旗还是新加坡旗，在国际上都享有非常良好的声誉。而海南自贸港在此次国际船舶登记制度的设计过程中也是主要对标新加坡和中国香港的相关规定，在诸多方面作出了重要调整与创新。

1. 放宽登记条件

（1）取消船舶登记主体外资股比限制

2018 年交通运输部提出，对注册在海南的国际船舶代理企业，取消外资股比不超过 50%的限制。[6]同年 10 月以及 2020 年 6 月的两个总体方案[7]（简称为“2018 年《总体方案》”和“2020 年《总体方案》”），也再一次强调了“取消船舶登记主体外资股比限制”的政策要求。

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1 《中国（海南）自由贸易港建设总体方案》，中共中央、国务院 2020 年 6 月 4 日发布。

2 王淑敏、杨欣、李瑞康：《上海自由贸易区实施“国际船舶登记制度”的法律问题研究》，载《中国海商法研究》2015 年第 26 卷第 2 期，第 103 页。

3 袁雪、王倩楠：《中资方便旗船回归的困境突破与对策》，载《知与行》 2015 年第 3 期，第 58 页。

4 United Nations Conference on Trade and Development,*Review of Maritime Transport* (2020), United Nations Publications (Dec. 20, 2020), https://unctad.org/publications.

5 United Nations Conference on Trade and Development，*Review of Maritime Transport*(2020), United Nations Publications(Dec. 20, 2020), https://unctad.org/publications.

6 《交通运输部贯彻落实<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>实施方案》，交通运输部 2018 年 7 月 25 日发布。

7 两个总体方案具体指：《中国(海南)自由贸易试验区总体方案（2018）》和《中国（海南）自由贸易港建设总体方案（2020）》

一直以来，我国都严格要求中方投资人在船舶登记主体间的出资比最少要达到 50%。[1]无论是 2011 年试点运行的“中国洋山港”保税船舶登记政策，还是 2013 年天津东疆保税区的国际船舶登记制度，都严格落实这一规定。[2]

虽然在之后 2014 年上海自贸区试点中允许外商投资比例可以高于 50%[3]，但始终没有放弃对外资的股比限制。而海南自贸港此次直接取消船舶登记主体的外资股比限制，无疑是对以往严格规定的一次重要突破。这一举措，不仅有利于中资方便旗回归，还有利于吸引主要由外国投资者投资的船舶前来海南洋浦港登记。

（2）放宽船级社限制

根据我国 2019 年《船舶和海上设施检验条例》（下文简称《检验条例》），来华登记的船舶若想从事国际航行，只能接受中国船级社的检验。[4]反观新加坡、中国香港则是完全不一样的态度。新加坡除本国船级社外，还另外认可 7 家国外船级社进行船舶入级检验[5]，香港则是 9 家。[6]相比之下，巴拿马和利比里亚认可的船级社更多，分别为 29 家和 10 家。[7]事实上，国内对检验机构资质的严格限制，一定程度上会降低船舶登记的效率，从而削弱船舶来华登记的意愿。

因此，为吸收国际有益经验，2018 年交通运输部就鼓励放宽船级社限制。[8] 2020 年 6 月 28 日，国务院则正式承认外国船舶检验机构的地位，允许在中国（海南）自由贸易试验区登记的中国籍国际航行船舶，由外国船舶检验机构进行船舶入级检验[9]，而不必遵守《检验条例》中关于中国籍船舶必须向中国船级社申请入级检验的规定。

2. 减免税费征收

一直以来，过多的税种与过高的税率是中资船舶外移的关键原因（见表 3）。而且对比国内外自贸港的财税制度，基本呈现以下三个特点：一是税种少;二是税率优惠; 三是税收优惠方式多样。[10]此次海南自贸港在财税制度方面也是出台各种利好政策，将“零关税、低税率、简税制”贯彻到底。

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1 国务院《中华人民共和国船舶登记条例》（2014 年）第 2 条第 2 款规定，“依据中华人民共和国法律设立的主要营业所在中华人民共和国境内的企业法人的船舶。但是，在该法人的注册资本中有外商出资的，中方投资人的出资额不得低于百分之五十”。

2 《天津东疆保税港区国际船舶登记制度创新试点方案》（交通运输部水运局〔2011〕）明确要求，“依据中华人民共和国法律在天津东疆保税港区设立的企业法人的船舶。在该法人的注册资本中有外商出资的，中方投资人的出资额不得低于 50%(国有资产监督管理部门认定的境外中资企业回国投资，其出资可作为中方出资额)。”

3 《中国（上海）自由贸易试验区国际船舶登记制度试点方案》(交通运输部〔2014〕)明确要求，“依据中华人民共和国法律上海自由贸易区设立的企业法人的船舶。在该法人的注册资本中有外商出资的，外商投资比例可以高于 50%。”

4 国务院《中华人民共和国船舶和海上设施检验条例》(2019 年)第 13 条第 1 款规定，“下列中国籍船舶，必须向中国船级社申请入级检验：（一）从事国际航行的船舶；……。”

5 冯俊新：《船舶登记制度比较研究》.中国海洋大学 2009 年硕士学位论文，第 32 页。

6 中国香港只承认国际船级社联合会 10 个成员中的 9 个：美国验船协会(ABS)；法国国际验船协会(BV)；中国船级社(CCS)；挪威船级社(DNV)；德意志劳埃德船级社(GL)；韩国船级社(KR)；英国劳氏船级社(LR)；日本海事协会(NK)；意大利船级社(RINA)，至今尚未承认俄罗斯船级社。

7 Tobin& Harry, *The Flag of Convenience*, Publish America press, 2007, p.34.

8 《交通运输部贯彻落实〈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〉实施方案》(交通运输部〔2018〕)明确要求，“基于对等原则，逐步放开对海南自由贸易试验区登记的中国籍国际航行船舶 的检验业务”。

9 《国务院关于在中国(海南)自由贸易试验区暂时调整实施有关行政法规规定的通知》，国函〔2020〕88 号，2020 年 6 月 18 日发布。

10 李恒：《构建海南自贸港财税政策新体系的研究动态》，载《中国商论》 2020 年第 22 期，第 18-21、35 页。

中国香港	新加坡	中国大陆
船舶年吨位税	船舶年吨位税	船舶吨税
企业所得税（16.5%）	企业所得税（17%）	企业所得税（25%）
		进出口关税、进口环节增值税
		车船税
		增值税
		印花税

表 3 中国香港、新加坡、中国大陆财税制度对比[1]

（1）原辅料零关税

按我国一般规定，造船企业船舶进口所需缴纳的税费合计为船价的 27.53%（包括进口关税 9%和增值税 17%）。[2]而新加坡、中国香港则直接免除这部分税额的缴纳。为减轻中国籍船舶的税负，吸引中资方便旗回归，2007 年我国实行特案免税制，在符合条件的情况下免征中资船舶回国登记的关税和进口环节增值税。[3]海南自贸港不仅延续了该项税收优惠，还于 2020 年 12 月 25 日发布有关“游艇零关税”政策的通知[4]，同年 12 月 30 日发布《管理办法（试行）》[5]，全岛封关运作前，赋予在海南自贸港登记并从事交通运输、旅游业的企业，进口用于交通运输、旅游业的船舶时，可享受免征进口关税、进口环节增值税和消费税的优惠[6]；封关之后，实施“零关税”的货物还可免于海关常规监管。但是，由于船舶是境外建造，造船所需的物料、设备等均需进口，这些物料和备件在进口时仍要缴纳 27.53%的税负[7]，因此即使交通运输部在 2009 年和 2011 年先后两次延长特案免税制的实施期限，最终召回的中资方便旗数量仍然十分有限。

海南自贸港意识到以往税负依旧较重的实际情况，2020 年海南省财政厅等三部门联合发布

1 数据来源：参见周玉会：《中国及新加坡航运企业船舶登记注册和经营税费比较》，载《水运管理》2017 年第 39 卷第 3 期，第 17-20、28 页。

2 《让中资“方便旗”船更乐意回家》，载《中国交通报》 2017 年 3 月 22 日，第 7 页。

3 享受特案免税政策的船舶应符合的三个条件：一、必须是中资国际航运船舶。《中华人民共和国船舶登记条例》规定，在登记的船舶中方出资比例不低于 50%。二、船龄需满足一定要求。具体是：（一）在 2005 年 12 月 31 日以前已经在境外登记；（二）船龄范围（以 2007 年 7 月 1 日作为船龄计算的截止日期）：船龄在 4—12 年的油船（包括沥青船）、散装化学品船等；船龄在 6—18 年的散货船、矿砂船等；船龄在 9—20 年的集装箱船、杂货船、多用途船、散装水泥船等。三、特案免税船舶需符合《中华人民共和国船舶和海上设施检验条例》的有关规定，取得法定检验证书，向中国船级社办理入级手续，并符合安全航行的条件。

4 《关于海南自贸港交通工具及游艇“零关税”政策的通知》，财关税〔2020〕54 号，2020 年 12 月 25 日发布。

5 《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）》，财政部、海关总署、税务总局 2020 年 12 月 30 日发布。

6 《关于海南自贸港交通工具及游艇“零关税”政策的通知》（财关税〔2020〕54 号）明确要求，“一、全岛封关运作前，对海南自由贸易港注册登记并具有独立法人资格，从事交通运输、旅游业的企业(航空企业须以海南自由贸易港为主营运基地)，进口用于交通运输、旅游业的船舶、航空器、车辆等营运用交通工具及游艇，免征进口关税、进口环节增值税和消费税。符合享受政策条件的企业名单，由海南省交通运输、文化旅游、市场监管、海事及民航中南地区管理局等主管部会同海南省财政厅、海口海关、国家税务总局海南省税务局参照海南自由贸易港鼓励类产业目录中交通运输、旅游业相关产业条目确定，动态调整”。

7 张元波、张程：《改革并完善中国船舶吨税制度的若干思考》，载《哈尔滨工业大学学报(社会科学版)》2015 年第 17 卷第 2 期，第 130-134 页。

“原辅料零关税”的通知[1]，宣布将在海南自贸港推行原辅料“零关税”政策，并实行正面清单管理，清单内容由财政部会同有关部门根据海南实际情况进行动态调整。这意味着国际船舶在中国登记后，不仅船舶本身可以免税，就连造船的零部件也能享受相应税收优惠。同时，原辅料零关税政策还规定，用于维修在海南注册登记具有独立法人资格的航运公司所运营的以海南省内港口为船籍港的船舶（含相关零部件）也能享受零关税的优惠。

（2）企业所得税的减免

海南自贸港 2020 年 6 月 30 日发布企业所得税优惠政策，对注册在海南自贸港并实质性运营[2]的鼓励类产业企业[3]减按 15%的税率征收企业所得税。从事国际运输的航运公司是否能够享受此项优惠？笔者认为，答案是可以的。海南自由贸易港鼓励类产业目录包括《产业结构调整指导目录(2019 年本)》、《鼓励外商投资产业目录(2019 年版)》和《海南自由贸易港新增鼓励类产业目录》。[4]其中，《产业结构调整指导目录》将船舶独立类别纳入鼓励类产业的范畴。[5]《海南自由贸易港新增鼓励类产业目录》虽然还未正式出台，但发改委今年 9 月 1 日发布的征求意见稿新增了 100 多项产业，将船舶配套设施及服务也纳入创新类产业当中，如从事船舶登记、管理、维修、保养、保税油加注服务的企业，均可享受 15%的企业所得税税率。[6]

据有关数据统计显示，中国内地目前的企业所得税按 25%计算，中国香港和新加坡则分别按 16.5%、17%计算。虽然内地也有部分企业按 15%缴纳所得税，但是海南企业所得税政策适用范围更广，并可享受直接免税。[7] 因此，若此项政策能最终落地，不仅来华登记的航运企业可以享受税费减免，周边配套设施及服务也能获得最大程度的税收优惠，有利于进一步降低中资方便旗回国后的经营成本，提高海南洋浦港船舶登记的吸引力和竞争力。

（3）个人所得税的减免

一直以来，船员都是一个高风险职业，也正因如此，其薪金待遇比较高。为了保障船员权益，很多国家选择免征或减征船员的个人所得税。比如新加坡、瑞典等国直接免征船员所得税；日本仅征船员陆地收入的个人所得税，海上发放的补贴一律不予征税[8]；英国对一年之内在国外航行超过 183 天的海员免征个人所得税；荷兰对境内有常设机构的船公司的所属船员，减免应征税额的 38%。[9]但是中国对海员没有特殊的优惠政策，导致许多中资船舶往往会因此选择方便旗国来降低税额的缴纳。2020 年海南出台中央文件，决定对在海南自由贸易港工作的高端和紧缺人才，免征个人所得税实际税负超过 15%的部分。[10]而船员资格人员（含船员、渔业船员）、船舶管理人才、

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1 《关于海南自由贸易港原辅料“零关税”政策的通知》，财关税〔2020〕42 号，2020 年 11 月 12 日发布。

2 《关于海南自由贸易港企业所得税优惠政策的通知》（财税〔2020〕31 号）明确规定，“实质性运营，是指企业的实际管理机构设在海南自由贸易港，并对企业生产经营、人员、账务、财产等实施实质性全面管理和控制”。

3 《关于海南自由贸易港企业所得税优惠政策的通知》（财税〔2020〕31 号）明确规定，“所称鼓励类产业企业，是指以海南自由贸易港鼓励类产业目录中规定的产业项目为主营业务，且其主营业务收入占企业收入总额 60% 以上的企业”。

4 周梅锋：《海南自由贸易港企业所得税政策解析》，载《中国税务》,2020 年第 8 期，第 34-35 页。

5 《产业结构调整指导目录（2019 年本）》，发改委令〔2019〕29 号，2019 年 10 月 30 日发布。

6 《海南自由贸易港鼓励类产业目录（2020 年本，征求意见稿）》，中华人民共和国国家发展和改革委员 2020 年 9 月 1 日发布。

7 姜跃生：《海南自贸港之国际税收政策思考》，载经济观察网 2020 年 8 月 15 日，http://www.eeo.com.cn/2020/0815/399830.shtml。

8 赵书博：《借鉴国际经验完善我国远洋运输业税收制度》，载《税务研究》2012 年第 4 期，第 81 页。

9 高彦明：《关于免征国际海员个人所得税的建议》,载国际船舶网 2016 年 3 月 4 日，http://www.eworldship.com/html/2016/person_character_0304/112599.html。

10 《中国（海南）自由贸易港建设总体方案》，中共中央、国务院 2020 年 6 月 4 日发布。

船舶服务人才等都被认定为海南的行业紧缺人才。[1]因此，只要在海南进行船舶登记，其海上的船员也能相应地获得个人所得税的减免。

（4）船舶退税

2020 年《总体方案》针对境内建造船舶还有特殊的退税政策。[2]享受退税待遇的船舶，必须同时满足以下三个要件：①境内建造；②在“中国洋浦港”登记；③从事国际运输。[3]这一举措，可以降低境内造船业的成本，激发国内造船业的活力。

（5）保税油

保税油是一种由国家为国际航行船舶专门提供的免税油品。获批准经营保税油的企业在无需占用国内燃油进口配额的情况下，可直接独立进口国际燃油，同时还可免征进口环节的关税、消费税等税费。[4]中国港口的供油价格普遍高于新加坡，一般每吨高出 10-15 美元。[5]为了进一步提高洋浦港航运产业的发展，海南自贸港决定为国际航运船舶供应保税油，实行出口退税政策。[6] 不仅如此，海南自贸港对于保税油的供应模式也进行了技术创新，从以前的“一船一供”[7] 改进为了“一船多供”[8]。

从今年 2 月完成首单 97 吨保税燃料油加注开始，洋浦保税燃料油加注业务量不断增长。截至目前，在洋浦加注保税油的国际船舶达 174 艘次，加注量超 9.3 万吨，为洋浦自贸港先行区建设注入强劲的动力。[9]

3. 优化融资条件

航运业资金需求量大，国内银行能直接提供给航运业的融资产品却不多，结果就导致贷款成了购置或建造船舶的主要资金来源。[10] 其实，我国原来是有针对航运企业造船贷款的优惠政策的，但自 1995 年起被取消，贷款利率从 3.6%上调至 8%－15%（约比国外高 4%），还款期限也缩短至 5－10 年且为税后还款。一旦船公司延迟付款，还需多承担 20%的罚息。[11] 对比国外，其金融产品众多、服务好、模式也很灵活，贷款期限一般为 10 年，贷款利率仅为 3.23%－3.75%。2018 年中国造船完工量占全球比重的 43%，而船舶融资却不足全球的 10%，新建国际船舶普遍选择境外融资。[12]

为改善中国籍船舶的融资环境，海南 2020 年《总体方案》中提出取消船舶的境外融资限制，尝试以保险代替保证金，鼓励金融机构开展各种融资业务。而具体政策落实，还有待海南进一步

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1 《海南自由贸易港行业紧缺人才需求目录（2020 年）》，琼府〔2020〕41 号，2020 年 8 月 28 日发布。

2 《中国（海南）自由贸易港建设总体方案（2020 年）》明确规定，“在确保有效监管和风险可控的前提下, 境内建造的船舶在“中国洋浦港”登记并从事国际运输的, 视同出口并给予出口退税”。

3 《中国（海南）自由贸易港建设总体方案》，中共中央、国务院 2020 年 6 月 4 日发布。

4 朱世强、李军、张颌：《探索群岛新区国际船舶服务基地建设——关于在舟山群岛新区建立国际船舶服务基地的若干思考》，载《浙江经济》2013 年第 16 期，第 48-49 页。

5 庄韶辉、陈晟：《制度新供给下的产业发展策略选择——以舟山国际船舶保税油供应产业为例》，载《中国市场》2020 年第 29 期，第 58-59 页。

6 《中国（海南）自由贸易港建设总体方案（2020 年）》明确规定，“以“中国洋浦港”为中转港从事内外贸同船运输的境内船舶，允许其加注本航次所需的保税油；对其加注本航次所需的本地生产燃料油，实行出口退税政策”。

7 一艘供油船在一个作业航次内，只能给一艘国际航行船舶加油。

8 一艘供油船在一个作业航次内，可以给多艘国际航行船舶加油。

9 符智、陈开任、李峥：《人民网.新引擎！洋浦保税油加注中心规模初现》，载人民网 2020 年 12 月 4 日，http://hi.people.com.cn/n2/2020/1204/c231190-34455709.html。

10 韩京伟、任晶惠、姜秋华：《中资外籍船回归路上的那些坎》，载《中国交通报》 2015 年第 7 期，第 1 页。

11 陈继红、真虹、宗蓓华：《中国船籍外移的主要原因及警示》，载《航海技术》 2008 年第 5 期，第 72 页。

12 金校宇、何志成、潘彤彤：《海南港航业精准定位大有可为》，载《中国交通报》2020 年 6 月 9 日，第 3 页。

出台工作细则。

4. 简化登记程序

以往我国的登记程序十分繁琐。在特案免税制施行期间，船舶需办理的手续多达 11 项，涉及交通运输部、申请方所在船舶登记机关、中国船级社等多个部门。[1]不仅如此，由于有关部门未明确办结时限，即使申请过程比较顺利，全部办妥仍需 6 到 9 个月。附随而来的问题就是，船东将为停航时间过长而承担巨大的损失。

因此，为减少繁琐的登记程序带来的不利影响，2020 年 11 月 10 日，海南自贸港出台了《海南自由贸易港国际船舶登记程序规定》（下文简称《程序规定》），在审批流程、办结时限、船舶转籍等方面做出了改进。

（1）优化审批流程

《程序规定》明确国际船舶登记可以选择网上受理，全岛通办。[2]同时将涉及海事管理机构签发、签注的其他船舶证书、文书等，全部交由船舶登记机关统一办理，实施二级审批制度[3]，减少了船舶登记办理环节。同时，船检、海事、交通三部门还将推行船舶证书信息共享，大大提高审批的效率。

（2）压缩办结时限

在船舶登记提交材料时，中国的习惯做法是一开始就让登记人提供各种文件原件，审查出现问题时再一一退回，无形之中延长的办结时限。而香港出于登记人便利性的考虑，一开始仅要求其先提供电子扫描件，只有符合要求后再一次性收取并审核原件。[4]海南自由贸易港此次出台的《程序规定》吸取了香港这一有益经验，针对能够通过政务服务平台核验的各类证照原件以及海事机构签发的文书，登记时可免于提交，大幅减少了申请材料，压缩了审查时间。同时，《程序规定》还明确了船舶登记的办结时限。船舶登记机关在签发受理通知书后，单个事项一日办结；多个事项，最多可延长一日。[5]与以前七个工作日办结相比，审批时间压缩了近 86%。[6]

（3）便利船舶转籍

考虑到中资方便旗转籍过程中会出现停航损失，《程序规定》第十六条规定，对转到“中国洋浦港”登记的国内船舶，申请人可在上一港办理注销手续的同时，持相关材料和有效证书至洋浦港申请办理国际船舶所有权登记和国籍登记，解决船舶转籍不停航问题[7]，大大降低时间和金钱成本。

5. 放宽经营限制

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1 徐敏霞:《“特案免税登记”政策优化建议》，载《水运管理》 2010 年第 32 卷第 9 期，第 13-16、2 页。

2 海南海事局《海南自由贸易港国际船舶登记程序规定》（2020 年）第十条规定：“申请人可以通过海事信息系统网上申请办理船舶登记，也可以前往船舶登记机关现场申请。”

3 海南海事局《海南自由贸易港国际船舶登记程序规定》（2020 年）第十一条规定：“申请人通过海事信息系统申请办理船舶登记的，船舶登记机关可以根据电子材料先行办理船舶登记手续。申请人在领取登记证书时应当提交符合第八条要求的申请材料。”

4 张丽英:《中资船舶注册香港船旗的相关法律问题》，载《国际经济合作》2011 年第 5 期，第 91-94 页。

5 海南海事局《海南自由贸易港国际船舶登记程序规定》（2020 年）第十二条规定：“船舶登记机关应在签发受理通知书后一个工作日内办结船舶登记手续。申请多个事项并联办理的，办结时限可适当延长，延长时限不超过一个工作日。”

6 萧潇:《解锁国际范儿，“动”起来的海南你知道吗？》，载微信公众号“海南自由贸易港”，2020 年 11 月 30 日。

7 海南海事局:《海南自由贸易港国际船舶登记程序规定》（2020 年）第十六条规定：“对因船舶所有权转移等原因转到“中国洋浦港”登记的国内船舶，允许申请人在上一港注销的同时，持相关证明材料和有效的原船舶技术证书申请办理国际船舶所有权登记和国籍登记。”

在航运业务经营方面，外资邮轮并不能与中资邮轮享受同等待遇。而海南自贸港资为了吸引中资方便旗回归，在沿海捎带业务以及沿海邮轮运输方面为中资非五星红旗打开缺口，相关部门已经开始研制中资方便旗邮轮公海游试点政策。[1]

而且，此次海南自贸港还为中资方便旗回归提出一条新思路，就是鼓励中资邮轮回国登记时，除了可以选择悬挂五星红旗，还可以选择悬挂香港旗，并允许从事以三亚为始发港口的沿海邮轮运输。这不仅为船东在登记时提供更多的选择空间，同时还有利于我国船队规模的壮大。

三、海南自贸港吸引中资方便旗船回国登记的前景分析

（一）海南自贸港吸引中资方便旗船回国登记所取得的成果

事实上，自 2018 年《总体方案》出台以来，洋浦港的船舶登记成效就非常可观（见表 4）。虽然洋浦局的船舶登记数量远不及三亚局，但其船舶登记总吨数却以 78,435 吨在海南各登记机关中排名第一。由此可见，前来洋浦局登记的都是大吨位的优质船舶，这恰好是中国船队目前所需要的。

表 4 2019 年海南各登记机关船舶登记艘次、登记总吨位及其占比[2]

单　位	艘　次	占　比	总　吨	占　比
局政务中心	0	0	0	0
海口局	48	16.49%	21989	17.09%
清澜局	2	0.69%	14	0.01%
三亚局	202	69.42%	7278	5.66%
八所局	1	0.34%	366	0.28%
洋浦局	31	10.65%	78435	60.96%
三沙局	4	1.37%	20585	16.00%

而随着 2020 年《总体方案》以及一系列配套的海关、税收、行政等措施的出台，以“中国洋浦港”为船籍港的国际航行船舶又显著增加。据有关统计，截至 11 月 25 日，海南新增航运公司 5 家，新登记或转籍海南自由贸易港注册的船舶 200 艘，与去年同期相比增加 57%，新增船舶运力 364.12 万，同比增加 28.7 倍；其中新增国际船舶 21 艘，新增国际船舶运力 324.67 万吨，同比增长 87%；以“中国洋浦港”为船籍港的国际航行船舶增加 19 艘，运力增加 317.26 万吨，单船载重量从 6 万吨到 15 万吨再到 30 万吨，实现了半年三级跳。[3]

由此可见，海南自贸港国际船舶制度在吸引中资方便旗回归方面，确实取得了一定成效。但由于该项政策的推行不到一年，相关配套措施建设还未完全成熟，部分问题在实践中随之暴露。

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1 《贯彻落实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实施方案》，交通运输部 2018 年 7 月 25 日发布。

2 参见《2019 年海南海事局辖区登记注册船舶数据及分析》，载中华人民共和国海南海事局网站，https://www.hn.msa.gov.cn/data/37841.jhtml，2020 年 12 月 23 日访问。

3 《海南省委书记沈晓明一行到洋浦海事局调研指导工作》，载中华人民共和国海南海事局网 2020 年 12 月 4 日，https://www.hn.msa.gov.cn/hszc_10_1/38894.jhtml。

（二）海南自贸港国际船舶登记制度实施过程中存在的问题

1. 国际船舶登记利好政策落地困难

虽然 2020 年《总体方案》推出的政策释放诸多利好信号，但实际落实过程中却存在诸多困难。比如，今年 6 月在“中国洋浦港”进行登记的“中远海运兴旺”轮，既从事国际运输，又为境内建造船舶，完全满足 2020 年《总体方案》中出口退税政策的要求。但其在建造期间已缴纳的零部件进口关税，到退税阶段却出现退税困难。[1]而且，近期拟到洋浦港登记的大部分新建船舶早在一两年前就已开工建造，进口的零部件较多。若零部件退税问题不能解决，将极大打击船舶至海南注册的积极性。

再比如，根据《程序规定》，办理国际船舶登记的期限一般为 1 日。[2]但是作为首艘登记船舶的“中远海运兴旺”轮，花费了 3 天时间才完成了所有登记手续。[3]相比之下，广州南沙自贸区和香港分别只用了 1 天和 2 小时就完成了所有程序。[4]加上海南洋浦港国际船舶登记中心刚刚建成，还未配足专业的外语类业务人才，无法实现全天 24 小时办理全球船舶业务咨询与登记注册。

2. 各项税收优惠容易引发税基侵蚀风险

根据海南 2020 年《总体方案》，在满足相关条件下，海南最终将实现零关税，这低于当前中国总体 7.5%关税总水平；企业所得税税率从 25%降至 15%，个人所得税从 45%降至 15%；增值税、消费税、车辆购置税等税费将简并为销售税。[5]大力度的减税政策确实能有效地提高海南洋浦港作为国际船舶登记港的竞争力度，但与此同时又容易引发税基侵蚀的风险。尤其是对于从事国际运输的跨国企业，要提防其在海南设立空壳公司，滥用税收优惠从而侵蚀内地税收利益，扰乱我国正常税收秩序。[6]

虽然海南自贸港在税制规划时就借鉴了一些国际标准，如实质性活动、实际管理机构等，在所得税减免中明确要求企业的“实质性运营[7]”和个人“在海南自由贸易港工作”[8]。但实践过程中具体的判断要素还有待进一步明确。“在海南自由贸易港工作”判断起来还比较简单，可通过海南自贸港居留的天数、户籍、劳动合同等进行判断；但企业的“实质性运营”是一个抽象概念[9]，如何准确理解并制定“实质性运营”规则，是需要重点考虑的问题。

3. 部分制度设计存在保守观念

虽然航运企业普遍呼吁“放宽船龄限制”，但交通运输部考虑到船龄与船舶环保、安全技术水平息息相关，仍不愿放开杂货船 34 年、散货船 33 年的船龄限制。[10]香港对此问题的处理更为

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1 黄海令、陈菁华:《省委政研室.关于海南自贸港国际船舶登记制度集成创新的挑战和建议》，载微信公众号“今日海南”， 2020 年第 7 期，第 33-35 页。

2 海南海事局《海南自由贸易港国际船舶登记程序规定》（2020 年）第十二条规定：“船舶登记机关应在签发受理通知书后一个工作日内办结船舶登记手续。申请多个事项并联办理的，办结时限可适当延长，延长时限不超过一个工作日。”

3 《“中国洋浦港”首船兴旺扬帆自贸港速度三天办结所有海事证书》，载中国交通新闻网 2020 年 6 月 5 日，http://www.mot.gov.cn/jiaotongyaowen/202006/t20200605_3323121.html。

4 张锡桓:《香港船舶注册登记制度及成功经验》，载《科学发展》2009 年第 1 期，第 62 页。

5 《中国（海南）自由贸易港建设总体方案》，中共中央、国务院 2020 年 6 月 4 日发布。

6 陈益刊:《海南自贸港重构税收制度:减税负不当“避税天堂”》，载《中新网》 2020 年 6 月 3 日，http://www.hi.chinanews.com/hnnew/2020-06-03/528782.html。

7 《关于海南自由贸易港企业所得税优惠政策的通知》，财税〔2020〕31 号，2020 年 6 月 30 日发布。

8 《关于海南自由贸易港国际运输船舶有关增值税政策的通知》，财政部, 税务总局 2020 年 9 月 21 日发布。

9 刘磊:《海南自由贸易港税收制度改革创新的思考》，载《国际税收》 2020 年第 11 期，第 3-8 页。

10 《交通运输部国家发展改革委财政部关于修订发布<关于实施运输船舶强制报废制度的意见>的通知》，交水发〔2016〕

灵活和变通，不对船龄作出强制性规定，只要船况符合检验要求就可以继续营运。[1]这有利于促进一些船龄虽然达到报废年限、但船况依然良好的船舶继续营运，推动资源的有效利用。

4. 缺乏监管的配套措施

就目前海南自贸港出台的各项政策和规定来看，都是在向船东释放各种利好信息来吸引其船舶来华登记。可是不容忽视的是，香港和新加坡之所以能够兼顾本国籍船舶的数量和质量，还在于其实施严格实施注册地监管。以香港为例，香港海事处若发现前来登记的船舶有不良记录，不仅登记前要对其进行“船旗国”品质管理检查，登记后还要即刻追踪该船动态，并提出船舶设备、人员管理等方面发现的安全问题和相应的建议。其中关于检查的内容、结果和管理方面的建议能从检查官出具的检查报告中找到。除此之外，香港海事处还会通过定期访问来确保船舶的安全运行。[2]

所以，海南自贸港在给予优惠的政策同时，也不要忘记在本国籍船舶的质量、技术、船员等方面严格把关。而如何科学设计与落实船舶监管措施，则是海南自贸港船舶登记制度需要解决的另一大问题。

四、完善海南自贸港国际船舶登记制度的建议

（一）明确各部门责任推动相关利好政策真实落地

国际船舶登记制度作为一项综合性制度，不仅需要修订多部海事法规，还需要多个中央部门相互协调合作（见表 5）。若改革仅仅依靠海事局的力量，各项利好政策恐怕只能沦为“空头支票”，难以真正落到实处，最终不利于中资方便旗的回归。

230 号，2017 年 1 月 6 日发布。

1 Liying, *A Comparative Study of 'Hong Kong Flag' Ship Registration*, Asia Pacific Law Review, Vol. 18:2, p. 202(2010).

2 张丽英：《中资船舶注册香港船旗的相关法律问题》，载《国际经济合作》2011 年第 5 期，第 91-94 页。

序 号	内 容	涉及单位部门
1	《海南自由贸易港国际船舶管理条例》涉及的上位法（法律、行政法规）的暂停使用；在《海南自由贸易港法》中对海南自贸港国际船舶登记管理事项进行立法授权。	省人大
2	牵头起草《海南自由贸易港国际船舶管理条例》将各项集成创新制度以法条的形式落地；海南自由贸易港国际船舶注册登记制度、海员管理制度、航运企业安全管理制度等的创新构建；船舶联合登临检查等监管方式创新。	海南海事局
3	注册的航运企业及其相关服务企业（如融资租赁、修理、保险、法律服务）等税费减免；海南自贸港国际航行船舶的税费减免；上述企业高级管理人员、船员的个人所得税减免；实行税收优惠的适用标准制定；取消向境外支付外汇的税务备案要求。	省财政厅 省税务局
4	对海南自贸港国际船舶的身份定位；关税、进口环节增值税等税收减免制度；监管、检查制度的简化等。	海口海关
5	船舶商事纠纷选择临时仲裁、提交域外仲裁、允许外国仲裁机构在自贸港开展仲裁活动的可行性；船舶登记强制性公证项目、公证机构的主体开放、融资租赁出租人的优先受偿权等。	省高院 省司法厅
6	开放船舶境外融资限制；简化融资手续；简化外汇管理手续。	中国人民银行海口中心支行（国家外汇管理局海南省分局）
7	雇佣境外船员的就业许可；境外船员的社会保险；海事劳工条件现场检 查的统一实施；境外企业在海南自贸港开办船员培训机构的许可。	省人社厅
8	外国籍船员及其随行家属免签政策、停留期限等。	省公安厅
9	简化对海南自贸港国际船舶、航运企业、水路运输辅助业的行业管理。	省交通厅
10	取消船舶进口的重点旧机电产品进口许可证；推动单一窗口更高水平建设。	省商务厅
11	航运业相互保险组织和自保公司设立；丰富航运业保险产品等。	海南银保监局

表 5 海南自贸港国际船舶登记制度有关单位/部门的工作内[1]

因此，笔者建议先由省级领导牵头，推动各部门完成工作部署，按照制度建设的难易程度合理安排时间表、确定好各方责任，出台更多具体的配套措施和实施细则，不让各项利好政策最后沦为“空头支票”，建立更有执行力的国际船舶登记制。

针对退税难问题，海南税务机关应进一步明确退税流程，同时完善相关配套服务。比如，可

1 黄海令、陈菁华:《省委政研室.关于海南自贸港国际船舶登记制度集成创新的挑战和建议》，载微信公众号“今日海南”，2020 年第 7 期，第 33-35 页。

学习香港将申请表格、有关通知以及法律规定等统一放置于洋浦港办事处的网站上以供下载，通过线上退税申报、审批来提高退税效率。针对登记效率低下问题，可以学习香港经验，加强对审批工作人员的培训。同时，为了避免登记因国际时差而间断可在全球的主要大城市广设办事处，为船东办理船舶登记提供便利。

（二）落实实质性运营规则防治税基侵蚀

对于实质性经营规则的运营，要把握以下两点：

第一，处理好国内外一般规则与海南自贸港特殊规则之间的关系。

BEPS 第 5 项行动计划[1]最终报告中提出，实质性活动(substantial activity)是判定有害税收实践的两大考虑因素之一，其目的在于防范某些国家(地区)为吸引企业进驻而滥用税收优惠政策。[2]《OECD 税收协定范本及注释》对实际管理机构所在地列举了董事会或类似机构通常举行会议的地点等考虑因素。[3] 我国国内法也规定了实际管理机构的概念及解释。[4] 而“实质性运营”则是此次海南自贸港建设提出新概念，其主要目的在于防止海南自贸港成为新的避税天堂。其创新性举措就是将“实质性运营”与实际存在的管理机构联系在一起。从适用环境和应用目的来讲，这一条件基本与 OECD 税收协定范本的实际管理机构标准、避税地的经济实质法案标准相当。

第二，厘清核心要素和辅助要素的界限。判定海南自贸港注册的企业是否存在“实质性运营”时，要抓住核心要素。判断是否存在“实质性运营”的核心就在于设在海南自贸港的机构能否对企业实施全面的管理与控制。[5] 由于管理和控制实际由“人”操作，因此海南相关税收制度应要求该机构在海南自贸港工作或居住的高管、实际控制人员必须达到一定比例，以此作为“实质性运营”判断的核心要素之一。而诸如财产、会计账簿、办公场所等其他条件则可作为判断“实质性运营”的辅助要素。

（三）进一步放开对船龄的限制

香港、美国和希腊等大多数国家和地区，皆未对登记船舶设限，而是把重点置于船舶检验和船舶公司管理的加强上。因为对于航运企业来说，其持续发展最根本保证就是安全运营，船龄本就不是决定航行安全的绝对因素。大多数航运企业为了降低风险，往往选择尽可能遵守国际公约和国家海事局的各项规定，许多 34 年以上的老龄船仍然可以继续使用。[6]

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1 BEPS 行动计划：是由二十国集团（G20）领导人背书并委托经济合作与发展组织（OECD）推进的国际税改项目。OECD 于 2015 年 10 月 5 日发布 BEPS 行动计划的最终报告，其中包括 15 项行动计划报告和一份解释性声明。BEPS 的每一项行动计划都是针对现行规则或法规中的薄弱环节，就国际规则和各国国内立法的调整提出建议，以便各国协调一致地全面应对税基侵蚀和利润转移问题。其中，第 5 项行动计划是结合考虑透明度和实质要求，打击有害税收实践。

2 经济合作与发展组织：《OECD/G20 税基侵蚀和利润转移(BEPS)项目 2015 年成果最终报告:考虑透明度和实质性因素，更有效打击有害税收实践:第 5 项行动计划》，国家税务总局国际税务司译，中国税务出版社 2016 年版，第 367-409 页。

3 经济合作与发展组织：《OECD 税收协定范本及注释》，国家税务总局国际税务司译，中国税务出版社 2017 年版，第 182 页。

4 《中华人民共和国企业所得税法》（2018 年）第二条第二款规定：“本法所称居民企业，是指依法在中国境内成立，或者依照外国(地区)法律成立但实际管理机构在中国境内的企业”；《中华人民共和国企业所得税法实施条例》第四条规定：“企业所得税法第二条所称实际管理机构，是指对企业的生产经营、人员、财务、财产等实施实质性全面管理和控制的机构。”

5 《关于海南自由贸易港企业所得税优惠政策的通知》（财税〔2020〕31 号）明确规定，“实质性运营，是指企业的实际管理机构设在海南自由贸易港，并对企业生产经营、人员、账务、财产等实施实质性全面管理和控制”。

6 郭伟娜：《关于我国限制船舶登记船龄的探讨》，载《交通科技》 2007 年第 5 期，第 114 页。

而且，过早报废船舶对于无论对于中国还是企业来说，都不是一个最优策略。目前，新船建造 80%的资金都源于贷款，利息比国际市场高出 5 个百分点，加上中国融资成本高、没有造船补贴，船公司船舶营运的大部分利润都将用于还贷。[1] 这对于资金密集型的航运业来说无疑是雪上加霜。因此，海南自贸港在之后的政策中可考虑对船龄采取更加开放的态度，将更多的监管重心放在船舶的检验和船公司的管理上。

（四）建立完备的国际船舶监管体系

严格注册地监管义务，是一项体系性工程。首先，就监管对象而言，除船舶本身以外，船舶所属的企业以及船舶上的人员也应当纳入监管的范畴。其次，就监管阶段而言，还应当将其分为登记时、登记后两个阶段，有针对性地实施监管。

在此，笔者提出如下建议。在登记时，船舶方面可学习香港采用《船旗国品质管理》（FSQC）系统对船舶质量进行初步评估，同时严格执行《中华人民共和国船舶安全监督规则》，要求船舶在申请登记前，应取得授权的船舶检验机构签发的船舶检验证书；船员方面则应要求其提交《STCW 规则》[2] 缔约国签发的适任证书。在登记后，海南海事管理机构可考虑设置船舶质量以及企业管理评估指标，定期对已登记的船舶开展船舶质量评价。对于评估分值较低或者有不良记录的船舶或企业，有重点地予以特别安全审查。船员方面，则可以建立相应的黑名单制度，针对列入黑名单且再次发生的类似错误，不允许其在国际船舶上任职。

五、结论

目前，海南自贸港的国际船舶制度，较我国以往吸引中资方便旗回归政策已有很大的突破，不仅大幅度放松登记条件、税费征收，还通过各种方式为船舶营造良好的融资环境及便捷的登记程序。但由于该制度实施仍处于摸索阶段，实践过程中出现利好政策落空、登记服务低效运转、部分政策仍趋保守以及监管体系缺乏等一列问题。日后，海南各部门应当进一步明确责任，完善好相关配套设施及法律规定，推动利好政策的真正落地。同时，还应当进一步开放对船龄的限制，将监管的重心放到船舶的检验和管理上来。通过建立完备的船员、船舶、船舶企业质量评估体系及黑名单制度，针对性地实施监管，既保证中资方便旗回归的数量，又保证登记船舶的质量，推动我国从航运大国向航运强国转变！

责任编辑：罗月琪

1 郭伟娜:《关于我国限制船舶登记船龄的探讨》，载《交通科技》 2007 年第 5 期，第 113 页。

2 《1978 年船员培训、发证和值班标准公约》（International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, STCW 规则）：是指 1978 年 6 月 14 日至 7 月 7 日政府间海事协商组织为规定在海上商船工作海员的培训、签发职务证书和船上值班国际标准的国际公约。有 17 条和 1 个附则。1991 年通过了一个修正案，主要是增加了对全球海上遇险安全系统无线电人员的发证等方面的法定最低要求。1995 年又通过了一个修正案(STCW95)，强化了港口国监控的作用，增加了预防船员值班事故与使用模拟器培训船员等内容。公约于 1984 年 4 月 28 日起生效。1991、1995 两个修正案分别于 1992 年 12 月 1 日、2002 年 2 月 1 日起生效。中国于 1981 年 6 月 28 日加入此公约，公约及两个修正案均已对中国生效。

Analysis of Issues Related to the International Ship Registration System in the Hainan Free Trade Port

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Abstract: In recent years, the problem of Chinese-funded ships' emigration has not been effectively solved, which has caused some negative impacts, such as hurting China's fiscal revenue, diminishing China's influence as a major shipping country and being detrimental to national security. Although since 2007, China has begun to explore the countermeasures for the return of Chinese-funded ships under Flags of Convenience, and has successively carried out a series of attempts, such as "Tax Exemption Registration System of Special Cases" (encouraging those vessels registered abroad and hanging "flags of convenience" to re-register in China and hang the flag of the PRC), "Yangshan Port of China " Bonded Ship Registry, Tianjin East Port Free Trade Zone and International Ships Registry in China (Shanghai) Pilot Free Trade Zone, but the number of vessels recalled is still very limited. While with the promulgation of the Overall Plan for the Construction of Hainan Free Trade Port in 2020, Hainan provincial authorities decided to leverage the opportunity to deepen opening up. Against this backdrop, the international ship registration system was introduced, which was devised by referring to both the experience and lessons of China Mainland, and those of China Hong Kong and Singapore. A series of institutional reforms and innovations have been carried out in relaxing registration conditions, deducting and exempting taxes and fees, optimizing financing requirements and streamlining registration procedures. Additionally, a batch of initiatives exclusive to Hainan Free Trade Port have been launched, such as the Regulations on the International Ship Registration Procedures for the Hainan Free Trade Port[1] the Circular on Preferential Corporate Income Tax Policy for the Hainan Free Trade Port[2], the Circular on Preferential Individual Income Tax Policy for High-level and Urgently-needed Talent[3] and "Zero Tariff" on Imported Vehicles and Yachts Management Measures (Trial).[4]At present, the International Ship Registration System in the Hainan Free Trade Port has successfully attracted many Chinese-funded ships under Flags of Convenience to return back for registration. However, due to the immature development of the system, many problems have gradually been exposed in practice, such as the practical implementation of favorable policies, tax base erosion and the supervision of ships. All these need to be further solved and optimized by continuously improving the relevant supporting facilities and legal system in the future.

Keywords: Chinese-funded ships under Flags of Convenience; the Hainan Free Trade Port; international ship registration

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1 *The Regulations on the International Ship Registration Procedures for Hainan FTP*, issued by Hainan Maritime Safety Administration of PRC on Nov. 3, 2020.

2 *The Circular on Preferential Corporate Income Tax Policy for Hainan FTP* (No.31, [2020]) jointly released by Department of Finance of Hainan Province and the State Taxation Administration on June 30, 2020.

3 *The Circular on Preferential Individual Income Tax Policy for High-level and Urgently-needed Talent* (No.32, 2020) jointly released by the Department of Finance of Hainan Province and the State Taxation Administration on June 23, 2020.

4 *"Zero Tariff" on Imported Vehicles and Yachts Management Measures (Trial)*, jointly issued by Department of Finance of Hainan Province, the General Administration of Customs and the State Taxation Administration on Dec. 30, 2020.

I. The Imperative of Attracting Chinese-funded Ships under Flags of Convenienceto Register in the Hainan Free Trade Port

i. Lacking Supervision of Ships under Flags of Convenience May Easily Lead to Safety Hazards

Currently, 35 countries are recognized as Flag of Convenience (hereinafter referred to as FOC) countries by the International Transport Workers Federation (hereinafter referred to as ITF),[1] and most of them are developing countries[2]. Countries that have adopted open registries mostly use loose ship supervision, preferential tax policies, fewer registration restrictions, and low labor costs to attract foreign ships to register there. The data in 2020 from the UNCTAD[3] shows that if the registered tonnage and fleet value are used as the standard, Panama, Liberia, and the Marshall Islands are the top three countries in the world for ship registration. As of January 1, 2020, the ship tonnage of the above three countries is nearly half of the global ship tonnage, which is as high as 42%, and they are all FOC countries identified by the ITF (see Table 1).[4]

1 International Transport Workers Federation, which was established in 1896 and is headquartered in London, England. It has resisted flag ships of convenience for many years since its establishment. The main measures are as follows: 1. Forcing the owner of the flag of convenience ship to sign an agreement with the organization to improve the wages and benefits of the crew of the ship; 2. Boycotting the owners of flag of convenience ships that have not signed an alliance to prevent them from loading and unloading goods in ports with branches of the organization.

2 International Transport Workers' Federation, *Flags of Convenience* (Nov. 06, 2018), https://www.itfglobal.org/en/sector/seafarers/flags-of-convenience.

3 UNCTAD, its full name is United Nations Conference on Trade and Development, it is the only intergovernmental body in the United Nations system that deals comprehensively with issues related to development and trade, capital, technology, investment and sustainable development. Every year, it publishes the Review of Maritime Transport according to the global maritime transport situation in that year.

4 United Nations Conference on Trade and Development, *Review of Maritime Transport*(2020), United Nations Publications(Dec, 20, 2020), https://unctad.org/publications.

• Antigua and Barbuda 安提瓜和巴布达（北美洲国家）	• Jamaica 牙买加（北美洲岛国）
• Bahamas 巴哈马群岛（拉丁美洲国家）	• Lebanon 黎巴嫩（亚洲国家）
• Barbados 巴巴多斯（拉丁美洲国家）	• Liberia 利比里亚（非洲国家）
• Belize 伯利兹城（拉丁美洲国家）	• Malta 马耳他（南欧岛国）
• Bermuda (UK) 百慕大群岛（北大西洋西部群岛）	• Madeira 马德拉群岛（大西洋的群岛）
• Bolivia 玻利维亚（南美洲西部国家）	• Marshall Islands (USA) 马绍尔群岛（美国）
• Cambodia 柬埔寨（亚洲国家）	• Mauritius 毛里求斯（非洲国家）
• Cayman Islands 开曼群岛（位于拉丁美洲）	• Moldova 摩尔多瓦（东欧内陆国家）
• Comoros 科摩罗群岛（非洲国家）	• Mongolia 蒙古
• Cyprus 塞浦路斯（亚洲国家）	• Myanmar 缅甸
• Equatorial Guinea 赤道几内亚（非洲国家）	• Netherlands Antilles 荷属安的列斯群岛（拉丁美洲群岛）
• Faroe Islands (FAS) 法罗群岛（欧洲国家）	• North Korea 朝鲜
• French International Ship Register (FIS) 法国国际船舶登记处	• Panama 巴拿马（中美洲国家）
• German International Ship Register (GIS) 德国国际船舶登记处	• Sao Tome and Príncipe 圣多美和普林西比岛（非洲国家）
• Georgia 乔治亚州（美国）	• St Vincent 圣文森特岛（北美洲国家）
• Gibraltar (UK) 直布罗陀	• Sri Lanka 斯里兰卡（亚洲国家）
• Honduras 洪都拉斯（北美洲国家）	• Tonga 汤加（南太平洋岛国）
	• Vanuatu 瓦努阿图（西南太平洋岛国）

Table 1 The 35 FOC countries and regions recognized by the ITF in 2018[1]

Moreover, according to the statistics of the IMO, nearly 70% of the fleet in the world fly FOC[2],

1 See International Transport Workers' Federation (ITF) official website, https://www.itfglobal.org/en/sector/seafarers/flags-of-convention.

2 International Maritime Organization: *The Structure and Operations of the Liberian Registry*，Liberian Registry (March 5, 2020), https://wwwcdn.imo.org/localresources/en/OurWork/Legal/Documents/IMLIWMUSYMPOSIUM/9%20Panel%203_Ladas.pdf.

which is a staggering number. However, as the number of FOC continues to increase, the problems caused by the lack of supervision of the registration country have also been exposed. In terms of navigation safety, the FOC states have set low ship registration thresholds and low safety technical requirements, attracting many ships with poor ship conditions to register for naturalization. Such practice pose a potential safety hazard for international navigation[1]. With regard to the safety of transactions, FOC ships conceal the identity of the real owner of the ship, which is not conducive to the effective supervision of the FOC states, and then in practice there are often cases of maritime fraud and unsuccessful claims for personal injury in traffic accidents. In the aspect of maritime security, [2]FOC ships often become tools for illegal activities such as arms smuggling, concealing money, trafficking in goods and people, and becomes a hotbed of terrorism. In respect of environmental protection[3], FOC countries generally lack environmental and ecological protection legislation, and marine pollution and illegal fishing incidents related to FOC ships occur from time to time.[4]

ii. Overseas Registration of Chinese-funded Ships and its Negative Impact

According to the data of the UNCTAD in 2020, the Chinese fleet ranks third in the world with approximately 22.84 million deadweight tons (228,371,455DWT), with a total of 6,125 ships. Among them, the number of Chinese ships (4,569) far exceeds the number of foreign ships (2,300), but in terms of deadweight tonnage, Chinese ships account for only 43.56%, and more than half are foreign ships. This makes the average tonnage of a Chinese ship about 21,000 tons, while the average tonnage of foreign ships owned by China is as high as 56,000 tons, more than twice the tonnage of Chinese vessels[5]. These figures show that ships under Chinese flag, despite their large number, are small in tonnage; although the number of ships flying foreign FOC is small, their tonnage is rather large relatively. Moreover, according to the registration and dead-weight of Chinese ships from 2008 to 2020 (see Table 2), it can be clearly seen that although the proportion of foreign ships has declined, it still remains at more than half, and even has an upward trend since 2015.

Year	Number of vessels	Number of ships flying foreign flag	Dead-weight tonnage of ships flying foreign flag	Dead-weight tonnage of ships flying foreign flag as a percentage of total
2008	3,303	1,403	50,530,684	59.53
2009	3,499	1,555	55,594,490	59.91
2010	3,633	1,609	63,426,314	61.00
2011	3,629	1,569	72,285,422	58.29
2012	3,651	1,607	61,762,042	57.20
2013	5,313	2,648	123,142,883	64.79
2014	5,406	--	126,928,000	63.00
2015	4,966	1,996	83,746,441	53.15
2016	4,960	1,915	84,778,140	53.36
2017	5,206	--	89,282,495	53.97
2018	5,512	1,956	99,455,000	54.30
2019	6,125	2,138	115,307,656	55.92
2020	6,869	2,300	128,892,849	56.44

1 YUAN Xue& WANG Qiannan, *Breakthroughs and Countermeasures for the Return of Chinese-funded Flag-of-convenience Ships*, *Cognition and Practice,* Issue 3, 2015, p. 56.

2 Hamad, *Flag of Convenience Practice，A Threat to Maritime Safety and Security*, IJRDO-Journal of Social Science and Humanities Research, Vol.1:1, p. 207-230 (2016).

3 Yale University, *Crimes Under Flag of Convenience*, Yale Global Online (Dec. 22, 2020), https://yaleglobal.yale.edu/content/crimes-under-flags-convenience.

4 Dempsey, P. S.&Helling L. L., Oil pollution by ocean vessels - an environmental tragedy, *the legal regime of flags of convenience, multilateral conventions, and coastal states*, Denver J. Int. Law Policy, Vol: 10:1, p. 3-4 (2016).

5 United Nations Conference on Trade and Development，Review of Maritime Transport(2020), United Nations Publications(Dec. 20, 2020), https://unctad.org/publications.

Table 2 Ship Registration and Dead-weight in China from 2008 to 2020[1]

The problem of numerous Chinese-funded ships switching to open registries, if not addressed effectively, would ultimately exert adverse effects on China's finance, shipping, national defense and national image.

1. Leading to a Partial Loss of Our Fiscal Revenue

A large number of Chinese-funded ships registered in foreign countries are not under the direct control of our government as they are not registered in China, resulting in the loss of taxes and fees that should be paid to our country. Subsequently, in April 2017, [2]China ceased to levy ship registration fees, so that the registration fee lost due to the transfer of ship registration before 2017 will no longer be regarded as part of the loss of our country's fiscal revenue. However, although the ship registration fees have been canceled, ship tonnage tax, vehicle and vessel tax, stamp duty, etc. are still taxes and fees that must be paid after ship registration. In 2020, the average tonnage of Chinese vessels registered as foreign nationality was about 56,000 tons[3]. According to China's vehicle and vessel tax levy standards[4], for every additional Chinese ship registered in a foreign country, China's fiscal revenue will lose nearly 168,000-336,000 yuan.

2. Weakening the Status and Image of China as a Major Shipping Country

The tonnage of a country's merchant fleet flying its national flag is a key factor in measuring a country's shipping status[5]. However, many high-quality national vessels with large tonnage and small age are registered overseas, which has accelerated the aging of our fleet. Moreover, the decline of the gross tonnage of the Chinese shipping fleet will hinder the continuous expansion of the scale of naturalization of the China Classification Society, which is not conducive to the promotion of the status of the China Classification Society. All the above problems will become obstacles to the transformation of China into a shipping power and weaken the status.

3. Not Conducive to China's National Security

According to Table 2, it can be seen that nearly 1/3 of Chinese ships engaged in international navigation in 2020 have been registered as foreign nationality. The tonnage of the remaining 2/3 ships flying the the flag of the PRC is less than 1/2 of the gross deadweight tonnage of Chinese ships. The current international situation is in a state of tension. In the event of war or local disputes, a large number of Chinese ships moving overseas will not be used by the Chinese government. As far as the current situation is concerned, China's demand for ships sailing internationally is on the rise. Whether our army participates in international peacekeeping activities, or the construction of overseas logistics support bases or ocean support transportation, a large number of international ships are needed. However, it is difficult for national defense mobilization departments at all levels to grasp the actual situation of flag of convenience ships, which makes it difficult to quickly dispatch Chinese-funded FOC ships in wartime or emergency situations. [6]

iii. China's Previous Attempts to Attract Chinese-funded FOC Ships to Return to China for

1 Data source: 13 copies of Review of Maritime Transport published by UNCTAD from 2008 to 2020.

2 Notice on the Policy on Cleaning and Regulating a Batch of Administrative Fees and Charges (No. 20 [2017]): Starting from zero o' clock on April 1, 2017, 41 administrative fees set up at the central level will be canceled or suspended, including:... ship registration fees, inspection fees for ships and marine products and facilities...

3 United Nations Conference on Trade and Development，Review of Maritime Transport（2020），United Nations Publications(Dec, 20, 2020), https://unctad.org/publications.

4 Travel Tax Law of the People's Republic of China (No.191 [2019]) : The specific applicable tax amount for ships shall be determined by the State Council within the tax amount range specified in Travel Tax Items and TaxAmount Table attached to this Law. ..... The net tonnage of motor ships is taxed per ton from 3 yuan to 6 yuan.

5 YE Yanglian, Research on the Legal System of Ship Registration, Ph.D. Thesis of East China University of Political Science and Law in 2013, p. 35-37.

6 LIU Baoxin& LIU Jiasheng, A Study on National Defense Mobilization of Chinese-funded Flags of Convenience Ships, Journal of Military Communications College, Vol. 20, No. 1, p. 15-18,41 (2018).

Registration Have not Achieved Good Results

In June 2007, the Ministry of Transport issued an Announcement:[1] from July 1, 2007 to June 30, 2009, the Tax Exemption Registration System of Special Cases will be implemented. According to the Regulations on the Tax Exemption Registration System of Special Cases, if a Chinese-funded ship acquires nationality abroad and meets the conditions such as ship age before the end of 2005, it will be able to enjoy the policy.[2] During this period, four batches of 55 Chinese-funded FOC ships registered in China. In order to attract more Chinese-funded FOC ships,[3] the Ministry of Transport extended the implementation period of this policy in 2009 and 2011 respectively, and finally the Tax Exemption Registration System of Special Cases was extended to December 31, 2015. [4]However, only 16 Chinese-funded FOC ships returned during the extended period, the policy has far less effect than expected.[5]

In 2016[6], the Ministry of Transport issued an announcement that would extend the policy of exempting Chinese-funded FOC ships from customs duties and import value-added tax until September 1, 2019. Compared with the previous policies, the adjusted and improved preferential tax policies no longer require all kinds of imported ships to comply with the relevant and previous regulations on the import of ships. From 2016 to 2019, a total of 80 Chinese-funded FOC ships returned to China for registration. [7]

In order to further attract the return of Chinese-funded FOC ships, China began to explore international ship registration systems. The Registration Policy of Bonded Ships in the Pilot Project of "Yangshan Port of China" was carried out in 2011; Tianjin East Port Free Trade Zone took the lead in implementing the International Ship Registration System nationwide in 2013; The Ministry of Transport approved Shanghai's Pilot Program for the International Ship Registration System in 2014[8], relaxing restrictions on ship registration, foreign crew allocation, etc., allowing registered entities to have a foreign investment ratio of more than 50%, but the effect was still poor. Tianjin East Port Free Trade Zone has attracted only 12 Chinese-funded FOC ships to return to China for registration since 2013. [9] The failure is principally attributable to China's strict registration conditions and high tax rates; at the same time, the relatively weak financing environment and cumbersome registration procedures are also important reasons.

Therefore, in order to reduce the potential safety hazards brought by FOC ships and alleviate the adverse effects of overseas migration of Chinese-funded ships on China, the Hainan Free Trade Port

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1 Announcement on the Implementation of Tax Exemption Registration Policy for Special Cases of Chinesefunded International Shipping Vessels, (No.18, [2007]) issued by the Ministry of Communications Water Transport Bureau on June 13, 2007.

2 The Announcement on the Implementation of Tax Exemption Registration Policy for Special Cases of Chinese-funded International Shipping Vessels, No.18, [2007], clearly requires that Chinese-funded ships declared for import and registered during the period from July 1, 2007 to June 30, 2009 shall be exempted from customs duties and import value-added tax if they meet the following conditions: (1) They have been registered overseas before December 31, 2005;(2)Range of ship age: 1. Oil tankers (including asphalt tankers) and bulk chemical tankers with a ship age of 4-12 years; 2. Bulk carriers and ore carriers with a ship age of 6-18 years; (3) Container ships, general cargo ships, multi-purpose ships, bulk cement ships, etc. with a ship age of 9-20 years.

3 See the website of the Ministry of Transport of the People's Republic of China, http://www.mot.gov.cn/fenxigongbao/, visited on Dec. 23, 2020.

4 YUAN Xue& WANG Qiannan, The Dilemma Breakthrough and Countermeasures for the Return of Chinese-funded FOC Ships. Cognition and Practice, No. 3, 2015, p. 58.

5 See the website of the Ministry of Transport of the People's Republic of China, http://www.mot.gov.cn/fenxigongbao/, visited on Dec. 23, 2020.

6 Announcement on Implementing the Import Tax Policy for Registration of Chinese-funded Flag of Convenience Ships Returning to China, No. 42, [2016] jointly issued by the Ministry of Finance of the PRC, the General Administration of Customs of the PRC and the State Taxation Administration of the PRC on 31 August 2016.

7 See the website of the Ministry of Transport of the Peoples Republic of China, http://www.mot.gov.cn/fenxigongbao/, visited on December 23, 2020.

8 Pilot Program for International Ship Registration System in China (Shanghai) Pilot Free Trade Zone, which was released by Shanghai Maritime Safety Administration on January 21, 2014.

9 See the website of the Ministry of Transport of the People's Republic of China, http://www.mot.gov.cn/fenxigongbao/, visited on December 23, 2020.

(hereinafter referred to as Hainan FTP) decided to establish the registry port of "Yangpu Port of China" and carry out international ship registration business[1]. By drawing lessons from the past and learning from the experience of well-known ports at home and abroad, Hainan FTP has carried out a series of institutional improvements and innovations in its international ship registration system (hereinafter referred to as the Registration System), hoping to have better results in attracting the return of Chinese-funded FOC ships.

II. Relevant Policies and Legal Provisions on the Registration System in Hainan FTP

i. Definition of Registration System international ship registration system

At present, the ship registration systems of all countries in the world can be divided into three types: strict ship registration system, open ship registration system and international ship registration system. Among them, neither will the international ship registration system imposes strict restrictions on the nationality of ship owners, crew allocation, capital contribution ratio, technical safety, etc. like[2] the strict ship registration system, nor will it be like the open ship registration system, relax the registration and supervision of ships too easily, in other words, the international ship registration system is a kind of new registration system between the two.[3]

In the past, China implemented a strict ship registration system. It was not until the establishment of Tianjin East Port Free Trade Zone in 2013 and Shanghai Pilot Free Trade Zone in 2014 that it began to try the international ship registration system regionally, so that ships coming to register could enjoy a series of preferential treatment on taxation and registration. While this time, Hainan FTP took over the baton of the construction of international ship system in Tianjin East Port Free Trade Zone and Shanghai Pilot Free Trade Zone, and carried out a new round of exploration and pilot on the implementation of this system.

ii. Analysis of the Registration System in Hainan FTP

As of January 1, 2020, the five economies with the largest number of ships are Greece, Japan, China, Singapore and Hong Kong China, accounting for more than 50% of the world's gross tonnage. [4]Among them, more than 70% of the fleets (by tonnage) are registered as foreign nationality, and only Singapore and Hong Kong China keep the proportion of foreign nationality of ships less than 50%, which are 41.32% and 26.31% respectively. [5]A comparison of those figures reveals that Singapore and Hong Kong China are quite effective in controlling the emigration of ship nationality. The key reason lies in the international ship system of combining leniency with strictness, which can not only ensure the number of registered ships through a series of preferential policies, but also guarantee the quality of registered ships by the strict supervision imposed. Therefore, both the Hong Kong China flag and the Singapore flag enjoy a very good reputation in the world. In the design process of the international ship registration system, Hainan FTP also mainly benchmarked the relevant regulations of Singapore and Hong Kong China and made important adjustments and innovations in many aspects.

1. Relaxation of Registration Conditions

(1) Abolishing the Restriction on Foreign Shareholding Ratio of Ship Registration Entities

In 2018, the Ministry of Transport proposed to cancel the restriction that the ratio of foreign shares

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1 The Overall Plan for the Construction of China (Hainan) Free Trade Port, issued by the Central Committee of the Communist Party of China and the State Council on June 4, 2020.

2 WANG Shumin& YANG Xin& LI Ruikang, Research on Legal Issues of "Implementing International Ship Registry" in Shanghai Pilot Free Trade Zone, Research on China's Maritime Law, Volume 26, No. 2, 2015, p. 103.

3 YUAN Xue& WANG Qiannan, The dilemma breakthrough and countermeasures for the return of Chinese-funded FOC ships, Cognition and Practice, No. 3, 2015, p. 58.

4 United Nations Conference on Trade and Development，Review of Maritime Transport（2020），United Nations Publications(Dec, 20, 2020), https://unctad.org/publications.

5 United Nations Conference on Trade and Development，Review of Maritime Transport（2020），United Nations Publications (Dec, 20, 2020), https://unctad.org/publications.

should not exceed 50% for international shipping agencies registered in Hainan. [1]Two overall plans in October of the same year and June 2020 respectively also reiterated the policy requirement of "canceling the restriction on the ratio of foreign shares of ship registration entities". [2]

For a long time, China has strictly required Chinese investors to contribute at least 50% [3]of their capital among ship registration entities. Whether it is the bonded ship registration policy of "Yangshan Port of China" piloted in 2011, or the international ship registration system of Tianjin East Port Free Trade Zone in 2013[4], all strictly implement this regulation. Although Shanghai Pilot Free Trade Zone allowed the proportion of foreign investment to be higher than 50%,[5] it has never given up the restriction on the share ratio of foreign capital. However, Hainan FTP directly canceled the restriction on the ratio of foreign shares of ship registration subjects, which is undoubtedly an important breakthrough against the previous strict regulations. This measure is not only conducive to the return of Chinese-funded FOC ships, but also conducive to attracting ships mainly invested by foreign investors to register in Yangpu Port, Hainan.

(2) Relaxation of Restrictions on Classification Societies

According to China's Regulations on Inspection of Ships and Offshore Facilities in 2019 (hereinafter referred to as the Inspection Regulations), ships registered in China can only be inspected by China Classification Society if they want to engage in international navigation[6], which is substantially different from Singapore and Hong Kong China. In addition to Singapore's own classification society, Singapore also recognizes 7 foreign classification societies to carry out ship classification inspection[7], Hong Kong China has 9 foreign ones[8]. In contrast, Panama and Liberia have recognized more classification societies, with 29 and 10 respectively[9]. In fact, the strict restrictions on the qualification of inspection agencies in China will reduce the efficiency of ship registration to a certain extent, and further undermine the shipowners' intention to register their ships in China.

Therefore, in order to absorb useful international experience, in 2018, the Ministry of Transport

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1 Implementation Plan of the Ministry of Transport for Implementing the Guiding Opinions of the CPC Central Committee and the State Council on Supporting Hainan to Comprehensively Deepen Reform and Opening up, issued by the Ministry of Transport on July 25, 2018.

2 The two overall plans specifically refer to: China (Hainan) Pilot Free Trade Zone Overall Plan (2018) and the Overall Plan of Construction for China (Hainan) Free Trade Port (2020).

3 Article 2, paragraph 2, of the State Council' s the Ship Registration Regulations of the People's Republic of China (2014) stipulates: Ships of enterprise legal persons established in accordance with the laws of the People's Republic of China whose main business offices are within the territory of the People' s Republic of China. However, if foreign investors contribute to the registered capital of the legal person, the amount of Chinese investors' contribution shall not be less than 50%.

4 The Pilot Scheme for Innovation of International Ship Registration System in Tianjin East Port Free Trade Zone (Water Transport Bureau of the Ministry of Transport [2011]) clearly requires: ships of enterprise legal persons established in Tianjin East Port Free Trade Zone according to the laws of the People's Republic of China. If foreign investors contribute to the registered capital of the legal person, the amount of Chinese investors' contribution shall not be less than 50% (if overseas Chinese-funded enterprises recognized by the state-owned assets supervision and administration department return to invest, their contribution may be taken as the amount of Chinese contribution).

5 The Pilot Scheme for International Ship Registration System in China (Shanghai) Pilot Free Trade Zone (Ministry of Transport [2014]) explicitly requires: ships of enterprise legal persons established in Shanghai Pilot Free Trade Zone according to the laws of the People's Republic of China. If there is foreign investment in the registered capital of the legal person, the proportion of foreign investment may be higher than 50%.

6 Article 13, paragraph 1, of the State Council's Regulations on the Inspection of Ships and Offshore Installations of the People's Republic of China (2019) stipulates that the following Chinese ships must apply to China Classification Society for classification inspection: (1) Ships engaged in international navigation; ...

7 FENG Junxin, Comparative Study on Ship Registration System, Master's Thesis, Ocean University of China, 2009, p. 32.

8 Hong Kong, China only recognizes 9 of the 10 members of the International Federation of Classification Societies: American Bureau of Shipping (ABS); Bureau Veritas (BV); China Classification Society (CCS); Det Norske Veritas (DNV); Germanischer Lloyd (GL); Korea Classification Society (KR); Lloyd's Register of Shipping (LR); Japan Classification Society (NK); RegistroItalianoNavale (RINA) , and the Russian Classification Society has not yet been recognized.

9 Tobin & Harry, The Flag of Convenience, Publish America press, 2007, p. 34.

explicitly encouraged the relaxation of classification society restrictions[1]. On June 28, 2020, the State Council formally recognized the status of a foreign ship inspection agency, allowing ships with Chinese nationality registered in the China (Hainan) Pilot Free Trade Zone to conduct ship classification inspections by foreign ship inspection agencies instead of complying with the regulations in the Inspection Regulations that Chinese ships must apply to the China Classification Society for classification inspection.[2]

2. Tax Reduction and Exemption

For a long time, too many taxes and too high tax rates have been the key reasons for the overseas migration of Chinese ships (see Table 3). Moreover, compared with the fiscal and taxation systems of free trade ports at home and abroad, it basically presents the following three characteristics: First, there are few taxes; Second, preferential tax rates; Third, there are various ways of tax incentives[3]. Hainan FTP has also introduced various favorable policies in terms of fiscal and taxation system, and implemented "zero tariff, low tax rate and simple tax system" to the end.

Hong Kong, China	Singapore	China Mainland
Annual tonnage tax on ships	Annual tonnage tax on ships	Tonnage tax on ships
Corporate income tax (16.5%)	Corporate income tax (17%)	Corporate income tax (25%)
		Import and export tariff Added-value tax on import
		Vehicle and vessel tax
		Added-value tax
		Stamp tax

Table 3 Comparison of Fiscal and Tax Systems in Hong Kong China, Singapore and China Mainland[4]

(1) Zero Tariff on Raw and Auxiliary Materials

According to the general regulations of our country, the total taxes and charges paid by shipbuilding enterprises on ship imports are 27.53% [5]of the ship price (including 9% import tariff and 17% value-added tax). In contrast, Singapore and Hong Kong China are directly exempt from this tax. In order to reduce the tax burden on Chinese ships and attract the return of Chinese-funded FOC ships, China implemented the Tax Exemption Registration System of Special Cases in 2007, exempting

1 The Implementation Plan of the Ministry of Transport for Implementing the Guiding Opinions of the CPC Central Committee and the State Council on Supporting Hainan to Deepen Reform and Opening up in an All-Round Way ([2018]): Based on the principle of reciprocity, the inspection business of Chinese international sailing ships registered in Hainan Pilot Free Trade Zone will be gradually liberalized.

2 Notice of the State Council on Temporary Adjustment and Implementation of Relevant Administrative Regulations in China (Hainan) Pilot Free Trade Zone, No.88, [2020] issued on June 18, 2020.

3 LI Heng, Research Trends on Building a New Fiscal and Tax Policy System in Hainan FTP, in China Business Theory, No. 22, 2020, p. 18-21 and 35.

4 Data Source: See Yuhui Zhou, Comparison of Ship Registration and Operating Taxes of Shipping Enterprises in China and Singapore, Water Transport Management, Volume 39, No. 3, 2017: p. 17-20 and 28.

5 Making Chinese-funded Flag of Convenience Ships More Pleasant to Go Home, China Communications News, March 22, 2017, p. 7.

Chinese ships from customs duties and import value-added tax if they meet the conditions. [1] Hainan FTP not only continued this tax preference, but also issued a Notice on the "Zero Tariff Policy for Yachts" on December 25, 2020, [2]and the Administrative Measures (Trial) [3]on December 30 in the same year. Before the whole island of Hainan becomes a bonded area, enterprises registered in Hainan FTP and engaged in transportation and tourism, when importing ships used for transportation and tourism, can enjoy the preferential treatment of exemption from import duties, import value-added tax and consumption tax[4]. After the customs is sealed, goods subject to "zero tariff" can also be exempted from routine customs supervision. However, because the ship is built overseas, the materials and equipment needed for shipbuilding have to be imported, and these materials and spare parts are still subject to pay 27.53% tax at the time of import[5]. Therefore even though the Ministry of Transport extended the implementation period of the Tax Exemption Registration System of Special Cases in 2009 and 2011 respectively, the number of Chinese FOC finally re-registered in China is still very limited.

Aware of the reality that the tax burden remained heavy in the past, the Department of Finance of Hainan Province and two other departments jointly issued [6]the Notice on "Zero Tariff" on Raw and Auxiliary Materials in 2020, announced that it will implement the "zero tariff" policy in Hainan FTP, and implement positive list management. The contents of the list will be dynamically adjusted by the Ministry of Finance in conjunction with relevant departments according to the actual situation in Hainan. This means that after international ships are registered in China, not only can the ships themselves be exempted from tax, but also can shipbuilding parts enjoy corresponding tax incentives. At the same time, the zero tariff policy for raw and auxiliary materials also stipulates that ships (including related parts) operated by shipping companies registered in Hainan with independent legal personality and with ports in Hainan Province as their ports of registry can also enjoy the zero tariff policy.

(2) Reduction and Exemption of Corporate Income Tax

Hainan FTP issued preferential policies for corporate income tax on June 30, 2020[7]: for

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1 Ships enjoying the Tax Exemption Registration Policy for Special Cases of Chinese-funded International Shipping should meet three conditions: First, they must be Chinese-funded international shipping ships. The Ship Registration Regulations of the People's Republic of China stipulates that the proportion of Chinese capital contribution in registered ships shall not be less than 50%. Second, the age of the ship must meet certain requirements. Specifically: (1) It has been registered overseas before December 31, 2005; (2) Range of ship age (taking July 1, 2007 as the deadline for calculating ship age): oil tankers (including asphalt tankers) and bulk chemical tankers with a ship age of 4-12 years; Bulk carriers and ore carriers with a ship age of 6-18 years; Container ships, general cargo ships, multi-purpose ships, bulk cement ships, etc. with a ship age of 9-20 years. Three, special tax-free ships must comply with the relevant provisions of the Regulations of the People's Republic of China on the Inspection of Ships and Offshore Facilities, obtain a statutory inspection certificate, go through the classification procedures with China Classification Society, and meet the conditions for safe navigation.

2 Notice on the "Zero Tariff Policy" for Transportation and Yachts in Hainan FTP, No. 54, [2020] issued on December 25, 2020.

3 Administrative Measures for "Zero Tariff" on Imported Vehicles and Yachts in Hainan FTP (Trial), issued by the Ministry of Finance, the General Administration of Customs and the State Taxation Administration on December 30, 2020.

4 Notice on the "Zero Tariff" Policy for Transportation and Yachts in Hainan FTP (No. 54 [2020]) clearly requires: First, before the whole island is closed, enterprises registered in Hainan FTP with independent legal person status and engaged in transportation and tourism (aviation enterprises must take Hainan FTP as the main operating base) are exempted from import duties, import value-added tax and consumption tax for ships, aircraft, vehicles and other operational vehicles and yachts used for transportation and tourism. The list of enterprises that meet the conditions for enjoying the policy shall be jointly determined and dynamically adjusted by The competent departments of transportation, cultural tourism, market supervision, maritime and civil aviation administration of Hainan Province, together with Hainan Provincial Department of Finance, Haikou Customs and Hainan Provincial Taxation Bureau of the State Administration of Taxation with reference to the items of transportation and tourism-related industries in the Catalogue of Encouraged Industries of Hainan FTP.

5 ZHANG Yuanbo& ZHANG Cheng, Some Thoughts on Reforming and Perfecting China's Ship Tonnage Tax System, Journal of Harbin Institute of Technology (Social Science Edition), Vol. 17, No. 2, 2015, p. 130-134.

6 Notice on the Policy of "Zero Tariff" on Raw and Auxiliary Materials in Hainan FTP, No. 42, [2020] issued on November 12, 2020.

7 The Circular on Preferential Corporate Income Tax Policy for Hainan FTP clarifies: The term "practical operation" means the management body of an enterprise set up in Hainan FTP that actually performs management functions and carries out substantial and comprehensive management and control over production and operation, personnel, accounting and property

encouraged industries, enterprises that are registered in Hainan FTP and have a practical operational record are entitled to a reduced corporate tax rate of 15%[1]. Are shipping companies engaged in international transportation able to enjoy this concession? The answer, the authors believe, is positive. The Catalogue of Encouraged Industries in Hainan FTP includes the Catalogue for the Guidance of Industrial Structure Adjustment (2019 Edition), the Catalogue of Industries Encouraging Foreign Investment (2019 Edition) and the Catalogue of Newly Encouraged Industries in Hainan FTP[2]. Among them, the Catalogue for the Guidance of Industrial Structure Adjustment has the independent category of ships included in the category of encouraged industries[3]. Although the Catalogue of Newly Encouraged Industries in Hainan FTP. has not been officially released, the draft for soliciting opinions issued by the National Development and Reform Commission on September 1 this year has added more than 100 new industries, including ship supporting facilities and services among the innovative industries, such as enterprises engaged in ship registration, management, repair, maintenance and bonded oil refilling services, all of which can enjoy a 15% corporate income tax rate.[4]

According to relevant statistics, the current corporate income tax in China Mainland is calculated at 25%, while that in Hong Kong China and Singapore is calculated at 16.5% and 17% respectively. Although some enterprises in the Mainland also pay income tax at 15%, Hainan's corporate income tax policy has a wider scope of application and can enjoy direct tax exemption[5]. Therefore, if this policy can be finally implemented, not only can shipping enterprises registered in China enjoy tax reduction and exemption, but also can surrounding supporting facilities and services obtain maximum tax concessions, which is conducive to further reducing the operating costs of Chinese-funded FOC ships after returning home and improving the attractiveness and competitiveness of ship registration in Yangpu Port, Hainan.

(3) Individual Income Tax Deductions and Exemptions

Vessels' crew has always been a high-risk profession, for which the salaries are relatively high. To protect the right of vessels' crew, many countries will deduct or exempt their individual income tax. For example, in Singapore and Sweden, the income tax of vessels' crew gets totally exempted; in Japan, the income tax will be only levied on their income from activities on land. As for the subsidies provided during the sail, the tax will be exempted[6]; in the UK, the individual income tax will be exempted for those vessels' crew who sail abroad for over 183 days in a year; in Netherlands, 38% of the individual income tax will be deducted for vessels' crew from the shipping companies with permanent organizations in Netherlands.[7] However, in China, there is no such preferential policies for vessels' crew, which leads that many Chinese-funded vessels will choose to register in the FOC countries to relieve their tax burden. In 2020, Hainan government released official documents of central government, which said that high-end talents and highly-demanded talents employed in Hainan FTP are entitled to the individual income tax rate of 15%.[8] And qualified crew members (including vessels' crew and fishing vessels' crew), vessel management talents, vessel service talents are all qualified as

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affairs.

1 The Circular on Preferential Corporate Income Tax Policy for Hainan FTP clarifies: The term "enterprises in encouraged industries" refers to enterprises whose main business are described and included in the catalogue of encouraged industry for Hainan FTP, and major business income accounts for more than 60% of the total income.

2 ZHOU Meifeng, Analysis of Enterprise Income Tax Policy in Hainan FTP, China Taxation, No. 8, 2020, p. 34-35.

3 The Catalogue for the Guidance of Industrial Structure Adjustment (2019 Edition), No.29 [2019] of the National Development and Reform Commission, issued on October 30, 2019.

4 The Catalogue of Encouraged Industries in Hainan FTP (2020 Edition, Draft for Soliciting Opinions), released by the National Development and Reform Commission of the People's Republic of China on September 1, 2020.

5 JIANG Yuesheng, Thoughts on International Tax Policy of Hainan FTP, published in Economic Observation Network, August 15, 2020, http://www.eeo.com.cn/2020/0815/399830. shtml.

6 ZHAO Shubo, Completing the Taxation System of Ocean Transportation Industry in China with the Reference of International Practice, Taxation Research, Vol. 4, 2012, p. 81. (in Chinese)

7 GAO Yanming, the Advice on exempting the Individual Income Tax of International Vessels' Crew, http://www.eworldship.com/html/2016/person_character_0304/112599.htm, March 4, 2016. (in Chinese)

8 The Central Committee of the Communist Party of China, the State Council, Overall Plan for the Construction of Hainan Free Trade Port, June 4, 2020.

highly-demanded talents in Hainan[1]. So as long as the vessel is registered in Hainan, the vessels' crew will get individual income tax deduction and exemption accordingly.

(4) Tax Rebate of Vessels

In the Overall Plan for the Construction of Hainan Free Trade Port (hereinafter referred to as the Overall Plan) issued in 2020, there are special tax rebate policies for the domestically built vessels[2], which should meet all the following three requirements:

① vessels should be built domestically;

② vessels should be registered at Yangpu Port of China;

③ vessels should be engaged in international shipping.[3] Such policy will reduce the cost and trigger the vigor of domestic shipbuilding industry.

(5) Bonded Oil

Bonded oil is a kind of duty-free oil specifically for the international sailing vessels offered by one country. Those authorized bonded oil companies can import international fuel oil directly and independently, and avoid the import tax like tariff and consumption tax, while the import quota of domestic fuel oil of those companies can still be retained.[4] Compared with the oil price in Singapore, the oil price at ports in China is $10-$15 higher per ton[5]. For further developing the shipping industry of Yangpu Port, Hainan FTP determines to provide bonded oil for the international shipping vessels and carry out export tax rebate policy[6]. Furthermore, technological innovation has been made to the mode of bonded oil refueling, from "one fuel ship for one shipping vessel[7]" to "one fuel ship for more shipping vessels[8]".

Yangpu bonded fuel business started from a 97-ton fueling in February 2020. Since then, the business has seen a continuous growth. Up to now, there have been 174 international vessels fueled more than 93 thousand tons bonded oil at Yangpu Port, which strongly stimulates the construction of Yangpu Free Trade Port Zone.[9]

3. Optimizing Financing Conditions

Shipping industry has a big demand for capital, which cannot be satisfied by the limited financing products directly offered by domestic banks. In that case, the industry practitioners have to mainly resort to loans to cover the payment for the purchase or building of ships.[10] In fact, China once had

1 The People's Government of Hainan Province: The List of Highly-demanded Talents in Hainan Free Trade Port, August 28, 2020.

2 Overall Plan for the Construction of Hainan Free Trade Port: Under the premise of effective supervision and risk control, domestically built ships registered at Yangpu Port of China and engaged in international shipping are entitled to export tax rebate as in the situation of export.

3 The Central Committee of the Communist Party of China, the State Council, Overall Plan for the Construction of Hainan Free Trade Port, June 4, 2020.

4 ZHU Shiqiang, LI Jun & ZHANG He, Exploring the Construction of International Vessels service Base in Archipelago New Area: Thoughts on Building International Vessels Service Base in Zhoushan Archipelago New Area, Zhejiang Economy, Vol. 16, 2013, p. 48-49. (in Chinese)

5 ZHUANG Shaohui& CHEN Sheng, Strategies of Industry Development under New Systematically Supply: Take the International Vessels Bonded Oil Supply Industry in Zhoushan as Example, Chinese Market, Vol. 29, 2020, p. 58-59. (in Chinese)

6 Overall Plan for the Construction of Hainan Free Trade Port: Domestic ships with both domestic and foreign trade goods on board which transit at Yangpu Port of China are allowed to refuel with bonded fuel required for the voyage, or tax rebate could be claimed if the ships refuel with locally produced fuel oil for the voyage.

7 During one voyage, one fuel ship can fuel up just one international shipping vessel.

8 During one voyage, one fuel ship can fuel up more than one international shipping vessel.

9 FU Zhi, CHEN Kairen& LI Zheng, New Engine: Yangpu Bonded Oil Fueling Center Has a Steady Start, http://hi.people.com.cn/n2/2020/1204/c231190-34455709.html, December 4, 2020.

10 HAN Jingwei, REN Jinghui & JIANG Qiuhua, The Barriers that Prevent Chinese-funded Vessels with Foreign Nationality from Returning to China, China Transportation News, Vol. 7, 2015, p. 1. (in Chinese)

preferential policies for shipbuilding loan of shipping companies. However, such policies were abolished after 1995. Since then, the loan interest rate was raised to 8%-15% from 3.6%, which was about 4% higher than that in other countries. The repayment period was also narrowed to 5-10 years and the loan should be repaid after tax. Once delayed repayment happened, the ship companies should pay another 20% penalty interest.[1] While in abroad, there are more financing products, better service and more flexible modes. In most occasions, their loan term is generally 10 years with a lower interest rate of 3.23%-3.75%. In 2018, the volume of constructed vessels in China accounted for 43% of that in the whole world, while the vessel financing was lower than 10%. Newly-built international vessels generally choose overseas financing.[2]

To ameliorate the financing environment of vessels with Chinese nationality, the Overall Plan proposes to cancel the restriction on overseas financing of vessels and replace deposit with insurance. It also encourages financing institutions to put forward various financing business. The implementation of specific policies still needs to be further issued by Hainan.

4. Streamlining Registration Procedure

In the past, China was notorious for its cumbersome registration procedures. During the implementation of the Policy of "Tax Exemption Registration System of Special Cases", to complete the whole procedure, vessels should get 11 related documents and materials, which needed many departments to approve like Ministry of Transport, the registration authority of applying vessels, China Classification Society.[3] What's more, because the time limit for approval were not specified, it still needed 6-9 months to complete re-registration, even if the applying procedure was smooth, which may cause huge loss to the vessel owners due to a long port time.

So in order to mitigate negative effects caused by complex registration procedure, on November 10, 2020, Hainan FTP issued the Stipulation of International Ship Registration Procedure in the Hainan Free Trade Port (hereinafter referred to as the Stipulation), in which approval process, time limit of approval, nationality changing of vessels and other aspects all get improved.

(1) Optimizing Approval Process

The Stipulation clarifies that the international ship registration can be completed online and by all registration institutions in Hainan[4]. Vessels' certificates and other documents issued or endorsed by maritime administrations will be all approved by ship registration institutions. Registration can be approved with electronic version of related certificates and documents[5], which streamlining the vessel registration procedure. What's more, the information of vessels' certificates will be shared among ZC, Maritime Safety Administration and Ministry of Transport, which will make approval more efficient.

(2) Shortening Time Limit

When the applicants submit materials during ship registration, the officials in Chinese mainland will make applicants submit all originals of needed materials that may be rejected once there appears any problems, which may extend the time limit of approval. However, in order to offer convenience to applicants, the officials in Hong Kong China will ask them to submit scanned copies of materials at the beginning. Only when the scanned copies all meet the requirement, they will collect and verify originals

1 CHEN Jihong, ZHEN Hong & ZONG Beihua, The Main Reasons Why Chinese Vessels Change Their Nationalities and Warnings, Sailing Technology. Vol. 5, 2008. p. 72. (in Chinese)

2 JIN Xiaoyu, HE Zhicheng& PAN Tongtong, The Future Will Be Bright if the Shipping Industry of Hainan Get Precisely Self-position, China Transportation News. June 9, 2020, p. 3. (in Chinese)

3 XU Minxia, The Advice on Optimizing the Policy of "Tax Exemption Registration System of Special Cases". Water Transportation Management. 32(9), 2010, p. 13-16, 26. (in Chinese)

4 Article 10 in the Stipulation: The applicants can apply the vessel registration through Maritime Safety Administration information system online, or apply at the registration institution.

5 Article 11 in the Stipulation: For the applicants registering through the information system, the registration institution can register the vessel according to the electronic materials. When applicants get the registration certificates, they should submit applying materials stipulated in the article 8.

of materials[1]. The Stipulation issued by Hainan FTP also takes this practice. Applicants are not mandated to present the original certificates which can be verified on the e-government platform, nor the documents issued by maritime authorities, which reduces the applying materials and shortens the approving time. Also, the Stipulation clarifies the time limit for vessel registration. Once the vessel registration institution sends Notification of Acceptance, single item should be completed within one workday; if there are more than two items, one more day is permitted[2]. Compared with the previous 7-day time limit, the approval time get shortened by nearly 86%.[3]

(3) Making Nationality Changing of Vessels More Easily

Considering that Chinese-funded FOC ships will suffer losses due to long port time when changing nationality, according to the article 16 in the Stipulation, for all the domestic vessels re-registering at "Yangpu Port of China", when the applicants make cancelation registration at the previous port, they can make registration of international vessels ownership and nationality with relevant materials and certificates at Yangpu Port at the same time, thus solving the problem of non-suspension of ship transfer and greatly reducing the cost of time and money[4].

5. Relaxing the Limitation on Business

For the shipping business, foreign-funded cruises cannot enjoy the same treatment as Chinese-funded cruises. To attract those Chinese-funded FOC ships, Hainan FTP will permit those Chinese-funded FOC ships to take part in coastal container transportation among ports in China and coastal cruise transportation. What's more, the policy of international sea cruising for Chinese-funded FOC ships has already been in discussion.[5]

In a bid to attract Chinese-funded FOC ships to reregister in China, Hainan FTP also makes some innovation for the nationality changing of Chinese-funded FOC ships. When the Chinese-funded cruises re-register in China, they can choose to hang the flag of the PRC, or the flag of Hong Kong China, and they are permitted to take part in the coastal cruise transportation with Sanya as their departure port. This policy can not only provide vessels' owners with more choices when registering, but benefit the expansion of Chinese fleet scale.

III. Prospect Analysis of Hainan FTP Attracting Chinese-funded FOC Ships to Register in China

i .The Achievements of Hainan FTP in Attracting Chinese-funded FOC Ships to Register in China

Since Notice by the State Council of Issuing the Framework Plan for China (Hainan) Pilot Free Trade Zone was issued in 2018, the vessel registration business at Yangpu Port has seen a huge progress (table 4). Although the number of vessels registered at Yangpu Maritime Safety Administration is far less than that of Sanya Maritime Safety Administration, the total load capacity of registered vessels, 78435 tons, ranks the first place among other registration administration in Hainan. From this point, it shows that the vessels registered at Yangpu Maritime Safety Administration are all high quality vessels with big load capacity, which just meets the demand of Chinese fleet.

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1 ZHANG Liying, the Law-related Problems When Chinese-funded Vessels Register in Hong Kong China and Apply for the Flag of Hong Kong China, International Economic Cooperation. Vol. 5, 2011. p. 91-94. (in Chinese)

2 Article 12 in the Stipulation: The vessel registration institutions should complete the registration within one workday once they send notification of acceptance. If more than 2 items are applied to be handled together, one more workday is permitted.

3 XIAO Xiao, Benchmarking with international practice, Hainan gets some changes. Subscription in Wechat "Hainan Free Trade Port". November 30, 2020.

4 Article 16 in the Stipulation: For the domestic vessels registering at "Yangpu Port of China" for the transiting ownership and other reasons, the applicants are permitted to make cancelation registration at the former port, and make registration of international vessels ownership and nationality with relevant materials and certificates at Yangpu Port at the same time

5 The Implementation Plan for Conducting Guiding Opinions of the CPC Central Committee and the State Council on Supporting Hainan in Comprehensively Deepening Reform and Opening Up, Ministry of Transport of the People's Republic of China, July 25, 2018.

Institution	Number	%	Total load capacity	%
Administrative center of Hainan Maritime Safety	0	0	0	0
Haikou Maritime Safety Administration	48	16.49%	21989	17.09%
Qinglan Maritime Safety Administration	2	0.69%	14	0.01%
Sanya Maritime Safety Administration	202	69.42%	7278	5.66%
Basuo Maritime Safety Administration	1	0.34%	366	0.28%
Yangpu Maritime Safety Administration	31	10.65%	78435	60.96%
Sansha Maritime Safety Administration	4	1.37%	20585	16.00%

Table 4: the number, total load capacity and proportion of registered vessels at different registration institutions in Hainan Province in 2019[1]

As the Overall Plan was issued in 2020 and other supporting measures on customs, taxation and administration were also put forward, the number of international vessels with "Yangpu Port of China" as the port of registry has realized an obvious increase. According to the relevant statistics, as of November 25, 2020, there are 5 newly founded shipping companies in Hainan; and 200 more vessels registered or re-registered at Hainan FTP, which is 57% higher than that of last year during the same period; the international vessels' load capacity increase by 3.2467 million tons, which is 87% higher than that of last year; there are another 19 international vessels registered at "Yangpu Port of China", which increases by 3.1726 million tons load capacity. The load capacity per vessel increases from 60 thousand tons to 150 thousand tons, then to 300 thousand tons, which has seen twice huge growths in a half year.[2]

So for attracting Chinese-funded FOC ships, Hainan FTP international ship system has gained some progress. However, because this policy is newly issued and the supporting measures are still being constructed, there are also some problems appearing.

ii. Problems in Carrying out the Registration System

1. The Preferential Policy for the International Ship Registration are Difficult to be Put into Practice

Although some policies in the Overall Plan release many beneficial signs, those policies are hard to be put into practice. For example, in June, 2020, a vessel called "COSCO Shipping Xing Wang" (Shipping Xing Wang from China Ocean Shipping (Group) Company) got registered at "Yangpu Port of China". This vessel is domestically-built and engaged in international shipping, which meets all requirements stipulated in the export tax rebate policy in the Overall Plan. But the import tariff the vessel's owner had paid for the accessories of the vessel during construction were hard to be refund[3].

1 The Statistics and analysis of vessels registered in administrative areas of Hainan Maritime Safety Administration in 2019. https://www.hn.msa.gov.cn/data/37841.jhtml, visited on December 23, 2020.

2 SHEN Xiaoming, the secretary of provincial party committee, investigated and survey at Yangpu Maritime Safety Administration. https://www.hn.msa.gov.cn/hszc_10_1/38894.jhtml, December 4, 2020.

3 HUANG Hailing & CHEN Jinghua, Policy Research Center of Provincial Party Committee: the Challenges of and Advices to the Integrated Innovation of Hainan Free Trade Port International Vessel Registration System, subscription in Wechat "Hainan Today". Vol. 7, 2020. p. 33-35.

What's more, those newly-built vessels that are going to register at Yangpu Port recently were all built one or two years ago, whose accessories are mostly imported. If it's hard to make tax rebate for the imported accessories, the positivity of vessels registering in Hainan will be greatly affected.

According to the Stipulation, the time limit for making international vessel registration is one workday[1]. But "COSCO shipping Xing Wang", as the first vessel registered at "Yangpu Port of China", spent 3 days completing the registration.[2] In contrast, in Guangzhou Nansha free trade zone and Hong Kong China, the whole procedure just cost 1 day and 2 hours respectively[3]. Besides, because Hainan Yangppu international vessel registration center was just constructed, there are not enough talents who have good command of foreign language to handle the global vessels consultation and registration all around clock.

2. Various Tax Incentives are Prone to Cause the Risk of Tax Base Erosion

According to the Overall Plan, under certain conditions, Hainan will realize zero-tariff in the future, which is lower than the tariff rate of 7.5% China has now. Corporate income tax rate will decrease to 15% from 25%; individual income tax rate will be reduced from 45% to 15%; VAT, consumption tax, vehicle purchase tax and other taxes will be all concluded into sales tax[4]. There is no doubt that strong taxation preferential policies can improve the competitiveness of Yangpu Port as the international ship registration port, but such policies may also cause tax base erosion. Especially to those multinational corporates doing international transporting business, we should prevent them from setting shell companies in Hainan that abuse tax preferential policies to harm mainland taxation and disturbing the normal order of Chinese taxation.[5]

Hainan FTP has taken some international standards for reference when planning taxation system, like some stipulations on substantial activities and the actual offices of management. And in the policy of deducting and exempting income tax, it is clearly stipulated that corporates must "practically operate"[6] and persons must "work in Hainan FTP"[7]. But when it comes to practice, the detailed judging elements are still to be further clarified. "Working in Hainan FTP" is generally easy to be judged, which can rely on elements like days staying in Hainan FTP, household registration and labor contract; but "practical operation" of corporates is more abstract[8], it still needs to be discussed that how to understand and set the rules of "practical operation".

3. Some System Are Still Conservative

Considering the correlation between the age of a ship and its performance in environment protection and safety technology, the Ministry of Transport of China remains reluctant to lift the 34-year limit for general cargo ships and 33-year limit for bulk carriers, despite the shipping companies' strong call for relaxing the limit.[9] However, the policies in Hong Kong China are more flexible. There is no

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1 Article 12 in the Stipulation: The vessel registration institutions should complete the registration within one workday once they send notification of acceptance. If more than 2 items are applied to be handled together, one more workday is permitted.

2 The first vessel "Prosperity" gets registered at "Yangpu Port of China", all the maritime certificates are approved in 3 workdays, China Transportation News, http://www.mot.gov.cn/jiaotongyaowen/202006/t20200605_3323121.html, June 5, 2020.

3 ZHANG Xiheng, The Hong Kong China Vessel Registration System and the experience, Scientific development, Vol. 1, 2009, p. 62.

4 The Central Committee of the Communist Party of China, the State Council, Overall Plan for the Construction of Hainan Free Trade Port, June 4, 2020.

5 CHEN Yikan, Hainan Free Trade Port Reconstructs Taxation System, Relieving Tax Burden instead of Being Tax Heaven, http://www.hi.chinanews.com/hnnew/2020-06-03/528782.html, June 3, 2020.

6 Notice by the Ministry of Finance and the State Taxation Administration of Preferential Income Tax Policies for Enterprises in Hainan Free Trade Port, June 30, 2020.

7 Notice by the Ministry of Finance and the State Taxation Administration of Preferential Value-added Tax Policies for International Shipping Vessels in Hainan Free Trade Port, September 21, 2020.

8 LIU Lei, Thoughts on the Innovation of Taxation System Reform in Hainan Free Trade Port, International Taxation, Vol. 11, 2020, p. 3-8.

9 Notice of the Ministry of Transport, National Development and Reform Commission and the Ministry of Finance on Revising and Issuing Opinions on Implementing Mandatory Scraping System of Shipping Vessels, January 6, 2017.

mandatory stipulation for the vessel age, as long as the vessel condition can meet the testing requirements, the vessel can be used for shipping business[1], which is beneficial to the effective use of resources.

4. Lacking Supporting Measures of Supervision

All policies and stipulations issued by Hainan FTP are releasing preferential information to attract vessels to register in China. However, the reason why some countries and regions like Singapore and Hong Kong China can ensure both the quality and quantity of vessels registered is that they carry out strict supervision on the vessels' original registration place. For example, if the Marine Department of Hong Kong China finds out bad records of vessels that come for registration, they will not only conduct pre-registration flag State quality control audits, but also monitor the vessel's movements immediately after registration. Besides, they will inform the vessel's owner of the problems existing in vessels' equipment and stuff management and relevant advices. The inspecting content, result and advice on management can be all found in the inspection report issued by the inspector. And the Marine Department of Hong Kong China will visit regularly to secure the safe operation of vessels.[2]

So apart from giving preferential policies, Hainan FTP should also conduct strict inspection on the quality, technique, ship crew and other aspects of vessels with Chinese nationality. For Hainan FTP ship registration system, it still needs to think about how to scientifically plan and conduct supervision measures of vessels.

IV. Advice on Optimizing the Registration System

i. Clarifying the Responsibility of Relevant Departments to Promote the Conduction of Preferential Policies

As a comprehensive system, international ship registration system doesn't only need to revise relevant marine regulations, but the cooperation of relevant central departments (table 5). If this reform only relies on the efforts of Maritime Safety Administration, all the preferential policies may be hard to put into practice, which may hinder the return of Chinese-funded FOC ships.

No.	Contents	Related department
1	Suspending the implementation of the superior law (including laws and administrative rules) of Hainan Free Trade Port International Vessel Management Regulation; authorizing the legislation about Hainan Free Trade Port international vessel registration management in Hainan Free Trade Port Law.	Hainan Provincial People's Congress
2	Leading the drafting of Hainan free trade port international vessel management regulation; put all integrated innovation regimes into stipulations of law; innovating the systems of Hainan free trade port international vessel registration, ship crew management and shipping company safety management; innovating to conduct joint onboard ship inspection and other supervisory methods	Maritime Safety Administration of Hainan Province
3	Tax deduction and exemption for the registered shipping companies and relevant service companies (financing, leasing, fixing, insurance, law service); tax deduction and exemption for the Hainan free trade port international vessels; personal income tax deduction and exemption for the senior management personnel in the companies above and ship crew; set standard of application for tax incentives; cancel the tax filing requirement of outbound foreign exchange payment	Department of Finance of Hainan Province; Hainan Provincial Tax Service
4	Classifying Hainan free trade port international vessels; tax deduction and exemption for tariff, import VAT; simplifying the supervising and detecting systems	Haikou Customs

1 Liying, A Comparative Study of 'Hong Kong Flag' Ship Registration, Asia Pacific Law Review, Vol.18:2, p. 202(2010).

2 ZHANG Liying, The Law-related Problems When Chinese Vessels Register in Hong Kong (SAR) and Apply for the Flag of Hong Kong (SAR), International Economic Cooperation, Vol. 5, 2011, p. 91-94. (in Chinese)

5	The feasibility of ad hoc arbitration and arbitration abroad for commercial dispute of vessels; the feasibility of permitting foreign arbitral institution to conduct arbitration in Hainan free trade port; compulsory notarization project for vessels registration; opening up for notarization institution; priority of compensation of financing and leasing leasers	Provincial High Court; Department of Justice of Hainan Province
6	Relaxing the limit on financing abroad of vessels; simplifying the financing procedure and foreign exchange management procedure.	People's Bank of China Haikou Branch Office (State Administration of Foreign Exchange Hainan Branch)
7	Permission to hire overseas ship's crew; social insurance of overseas ship crew; unified conducting of detecting maritime labor condition; permission for enterprises abroad to establish ship crew training institution in Hainan free trade port.	Department of Human Resources and Social Security of Hainan Province
8	Visa free policy and duration of stay of ships' crew with foreign nationality and their accompanying families.	Department of Public Security of Hainan Province
9	Simplifying the industry management for Hainan free trade port international vessels, shipping companies and waterway transportation ancillary industries	Department of Transport of Hainan Province
10	Canceling the import permission of used mechanical and electrical products for vessels; promoting the high-level construction of single window	Department of Commerce Of Hainan Province
11	Setting mutual insurance organization and captive insurance companies of shipping industry; increasing insurance products for shipping industry.	Hainan Banking and Insurance Regulatory Commission

Table 5: the relevant departments and their working contents in Hainan free trade port international vessel registration system[1]

So here comes some advice. The provincial leaders should take the leading role, promote the subordinate departments to draw out the working plan, and arrange reasonable timetable according to the complexity of system construction, clarify the responsibilities of each party, put forward more detailed supporting measures and implementing rules and establish practice-oriented international ship registration system, without making the preferential policies castles in the air.

To make it not hard to refund tax anymore, Hainan taxation authorities should further clarify the procedure of tax rebate and complete relevant supporting services. For example, the authorities can learn from the practice of Hong Kong China, putting applying charts, relevant notices and laws and regulations on the website of Yangpu Port office for download, and improve the efficiency of tax rebate through applying and approving tax rebate online. To solve the problem of low registration efficiency, the institution can also learn from Hong Kong China, strengthening the training of approving personnel. At the same time, to avoid registration being affected by jet lag, the institution can set offices in global major cities, to make it easier for vessels' owners to register.

ii. Putting the Rules of Practical Operation into Practice to Avoid Tax Base Erosion

The conducting of rules of practical operation should pay attention to the following two points:

Firstly, we should balance the general rules at home and abroad and the special rules in Hainan FTP.

In Action 5 - 2015 Final Report[2], it is mentioned that "substantial activity" is one of two factors judging harmful tax practice, which is to prevent some countries or regions from abusing tax

1 HUANG Hailing & CHEN Jinghua, Policy Research Center of Provincial Party Committee: the Challenges of and Advices to the Integrated Innovation of Hainan Free Trade Port International Vessel Registration System, Subscription in Wechat "Hainan Today". Vol. 7, 2020, p. 33-35.

2 BEPS Actions are developed in the context of the OECD/G20 BEPS Project, the 15 actions set out below equip governments with domestic and international rules and instruments to address tax avoidance, ensuring that profits are taxed where economic activities generating the profits are performed and where value is created. Among the Actions, the fifth action is to counter harmful tax practice with a focus on improving transparency.

preferential policies to attract corporates[1]. In Commentaries on the Articles of the Model Tax Convention, the meeting places of the board of directors and alike institution have been listed as a factor of places where actual offices of management locate[2]. The domestic law in China has also stipulated the conception and its notification of actual office of management[3]. While "practical operation" is a new conception raised by Hainan FTP, which is to avoid Hainan FTP being a new tax haven. The innovation of this conception is to combine "practical operation" with actual offices of management. From the aspect of applied environment and purpose, this measure is basically the same as substantive standard to govern and substantial economic law of tax haven in the OECD Model Tax Convention.

Secondly, we should clarify the core factors and auxiliary factors. Core factors is essential to judge whether the corporates registered in Hainan FTP conduct "substantial operation". The key to judge whether there existing "substantial operation" is that whether the institutions set in Hainan FTP can conduct comprehensive management and control to corporates[4]. Because management and control rely on relevant personnel, Hainan relevant taxation system should stipulated certain portion for the senior executives and personnel conducting actual control who work or live in Hainan FTP. And such portion can be regarded as one of the core factors judging "substantial operation". While other factors like capitals, account books and working places can be regarded as auxiliary factors.

iii. Further Relaxing the Limit on Vessel Age

In most countries and regions like America, Greece and Hong Kong China, there is no limit on vessel age for registered vessels. Instead, they will strengthen the vessel inspecting and shipping company management. Because for shipping companies, the fundamental guarantee of their sustainable development is safe operation. The vessel age is not everything that determines navigation safety. To lower risks, most shipping companies will choose to obey the international convention or the stipulations of national maritime safety administration as much as possible. Many vessels whose age has been over 34 years are still usable for transport.[5]

What's more, premature scrapping of ships is not a best strategy no matter for China or for corporates. At present, the 80% of the capital used to construct new vessels is from loan[6], whose interest is 5% higher than that of international market. For those shipping companies, because of the high cost of financing and lack of shipbuilding allowance, most of the profit earned will be used to repay the loan. For the capital-intensive shipping industry, this can only make things worse. So Hainan FTP can try to relax the limit on the vessel age, paying more attention to the vessel testing and shipping company management.

iv. Establishing Complete International Ship Supervision System

It is a systematic project to strengthen the supervision duty of registration place. First of all, the companies owning vessels and the personnel on the vessel should be also regarded as the targets of

1 OECD: Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, Action 5 - 2015 Final Report (translated by International Taxation Office of State Taxation Administration), 2016, Beijing: China Taxation Publishing House, p. 367-409.

2 OECD: Commentaries on the Articles of the Model Tax Convention (translated by International Taxation Office of State Taxation Administration), 2017, Beijing: China Taxation Publishing House, p. 182.

3 Article 2 in Enterprise Income Tax Law of the People's Republic of China (2018 Amendment): The term "resident enterprise" as mentioned in this Law refers to an enterprise that is established inside China, or which is established under the law of a foreign country (region) but whose actual office of management is inside China.
Article 4 in Regulation on the Implementation of the Enterprise Income Tax Law of the People's Republic of China (2019 Revision) : The term "actual office of management" as described in Article 2 of the EIT Law refers to the institutions conducting comprehensive management and control practically to the operation, personnel, capital, accounts and other elements of enterprises.

4 Notice by the Ministry of Finance and the State Taxation Administration of Preferential Income Tax Policies for Enterprises in Hainan Free Trade Port: Substantial operation refers to the actual office of management of enterprises are set in Hainan FTP and conduct comprehensive management and control practically to the operation, personnel, capital, accounts and other elements of enterprises.

5 GUO Weina, the Discussion about Limit on Vessel Age in China, Transportation Technology, Vol. 5, 2007, p. 114.

6 GUO Weina, the Discussion about Limit on Vessel Age in China, Transportation Technology, Vol. 5, 2007, p. 113.

supervision, as well as the vessels. Then the supervising stages should be divided into on-registration and post-registration, which can make supervision more pertinent.

In the course of registering, authorities may, referring to Hong Kong's experience, adopt FSQC system to make a primary assessment to the quality of vessels. Besides, we should strictly conduct the Rules of the People's Republic of China on the Safety Supervision of Ships, requiring vessels to get vessel inspection certificate issued by authorized institution before applying for registration. For ship crew, they should submit the certificates issued by engaged countries of STCW rules.[1] After registration, the maritime safety administration institution can set assessing index for vessel quality and company management, assessing the vessel quality of registered vessels regularly. To those vessels and companies with low marks or bad records, the institution will conduct the special safety detection specifically. For ship crew, blacklist system can be applied. Those crew who have been in the blacklist and make the same mistake again will be forbidden to work on the international vessels.

V. Conclusion

Now, compared with the former policies China adopted to attract Chinese-funded FOC ships, the international ship system in Hainan FTP has made a huge breakthrough, which relaxes registration conditions and taxation greatly, and creates good financing environment and convenient registration procedure for vessels through various methods. However, this system is still in its primary stage, many problems have appeared in the practice, like frustrated preferential policies, inefficient registration, conservative policies and lack of supervision system. In the future, all the related departments in Hainan province should further clarify their responsibilities, perfect relevant supporting measures and laws, promote the conduction of preferential policies. At the same time, they should further relax the limit on the vessel age, remove the center of supervision to the testing and management of vessels, conduct supervision pertinently through complete quality assessing system of vessels' crew, vessels and ship companies and blacklist system. These measures can guarantee the coming back quantity of Chinese vessels hanging "flags of convenience" and the quality of registered vessels, promote the transition of China from a shipping giant to a shipping power.

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1 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers: it was adopted by the International Conference on Training and Certification of Seafarers on 7 July 1978, and entered into force on 28 April 1984. The 1991 amendments, relating to the global maritime distress and safety system (GMDSS) and conduct of trials, were adopted by resolution MSC.21(59) and entered into force on 1 December 1992; The 1995 amendments were adopted by resolution 1 of a Conference of Parties to the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, which entered into force on 1 February, 2002. China was engaged into this convention on 28 June, 1981. Now the Convention and its amendments are all effective to China.

论 IMO 强制审核机制－主要文件的法律解析与中国应对挑战

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摘要：“IMO 强制审核机制”是为解决成员国履约能力不佳所引进的外部审核机制。《IMO 文件履行章程》及《IMO 成员国审核机制框架和程序》是强制审核机制框架下的 2 份主要文件，IMO 将《IMO 文件履行章程》以修正案模式并入原先已生效的“主要海事公约”，藉此赋予 2 份主要文件法律拘束力及“主要海事公约”缔约国强制性被审核义务。我国作为 IMO 成员国在迎接强制审核及完善自我履约义务的同时，也可关注《IMO 文件履行章程》此强制性适用规定内国法化问题；国内海事立法与国际海事公约间的落差问题；“被认可组织”管理问题；我国长期的海事履约战略欠缺问题。

关键词：国际海事组织；自愿性审核机制；强制审核机制；IMO 成员国审核机制框架和程序；IMO 文件履行章程

一、引言

根据《国际海事组织公约》(International Maritime Organization Convention)第 1 条规定，国际海事组织（International Maritime Organization, IMO）（以下简称 IMO）成立的主要宗旨限缩在船舶从事有关“海上贸易”、“海上安全”、“航行效率”和“防止及控制船只对海上污染”的四大领域上。在上述宗旨下促进各国政府合作、信息交换、消除歧视和不必要的法规限制，并藉由 IMO 所出台的文件来建议(recommend)各国普遍采用最高可行的标准。[1]IMO 成立 40 多年来，积极投入船舶航运安全及海洋污染防治的规则制定，也让其扮演角色从原先一个咨询及建议机关逐渐转变为规则制定机关。探究 IMO 角色转变的根本原因，除 IMO 为了实践《国际海事组织公约》本身的宗旨目标(mandate)及职能(functions)外，IMO 作为与联合国发生关系的“专门机关”(specialized agency)系根据《联合国宪章》第 57 条的规定而来，也因此 1982《联合国海洋法公约》在第 41、53、60 等超过 20 条涉及海事安全的条文中皆以“主管国际组织”(competent international organization)间接性的授权指派 IMO 承担更多国际责任，而这些国际责任的行使所涉及的规则制定权限，都是促成近年来 IMO 功能转变及扩大规则制定趋势的主要原因。[2]

IMO 在具有法律拘束力的规则制定上，通过大会决议得以起草公约(Convention)，这些公约的通过、修改、退出程序皆依照国际公约缔结程序，由各成员国径自签署及通过。因此 IMO 所

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1 IMO Convention, Art. 1(a), (b) and Art. 15(j).

2 Allen, C. H., Revisiting the Thames Formula: The Evolving Role of the International Maritime Organization and Its Member States in Implementing the 1982 Law of the Sea Convention, San Diego International Law Journal, Vol. 10, p. 271-272, 284 (2009).

出台的这些公约，对缔约国来说具有法律拘束力效果。然而在公约执行过程中往往需要细节性的补充规范来落实公约，此时 IMO 会出台“指导方针”或“准则”等补充性文件。基于这些文件源自落实公约的补充性质而非独立存在，因此这些补充文件也应视同公约般具有法律拘束力效果。本文研究强制审核机制框架下的 2 份主要文件，就是具备这类补充性质的文件，其作为落实公约的一部分，对主要海事公约缔约国来说即有法律拘束力效果。

本文问题意识在于梳理“IMO 强制审核机制”发展及内容外，更通过法律解释途径厘清强制审核机制主要文件的立法及效力，并提出我国应对审核挑战的相关建议，这对我国身为“IMO 强制审核机制”被审国及海事大国而言，具有一定的现实意义。

二、IMO 强制审核机制的发展

（一）IMO 成员国履约能力不佳

自 1959 年 IMO 成立以来，截至 2020 年，IMO 已是一个具有高达 174 个成员国及 3 个副成员的全球性国际组织。[1]同时更通过了维护海上保安、安全、防治海上污染及管理等相关事项的 53 个公约和议定书，以及高达 800 多个规则和建议书，部分重要公约所涵盖全球商船吨位百分比更高达 99%以上。[2]也由于条约较多，各成员国国情及海事发展程度不一，导致成员国履约情况不甚理想，进而影响 IMO 在维持海上航行、安全及环保工作推动之成效。诚如 IMO 前秘书长所言：“今日问题的存在不在于法规体系的不足，而在于各成员国履约能力上。”[3]有鉴于此，IMO 曾采取一系列措施试图来加强监督成员国履约情形，如“港口国管制”（Port State Control, PSC）、《海员训练、发证及值班标准国际公约》（International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, STCW）、《国际安全管理规则》（International Safety Management Code, ISM）、“船籍国表现自评”(Self-Assessment of Flag State Performance)……等。

尽管 IMO 做了上述各种努力，但根据过去实践经验也发现如下缺失：如“港口国管制”措施中的“港口国管制执行官”（Port State Control Officer, PSCO）存在缺乏一定的训练、一致性的操作程序，导致港口国检查欠缺统一标准。《海员训练、发证及值班标准国际公约》的履约过程中也发现，IMO 只针对成员国所递交航海人员的证书进行书面审核，未能进行实质审核的结果导致，伪造证书，以及由不适任训练机构所发出的证书等不适格情形。至于《国际安全管理规则》在执行过程中，主要是以文件纪录作为稽核方式，此文书作业除加重船员文书处理量外，航运公司也仅满足于证书的取得，因而造成普遍性的形式主义。“船籍国表现自评”希望藉由船籍国内部自我审核报告来强化履约能力。[4]但“船籍国表现自评”完全仰赖船籍国内部的自我审查，导致自评报告的成果缺乏可信度，而这类不具外控机制的缺点很快就被发现[5]。

（二）自愿性审核机制

基于上述措施所存在的缺失，导致 IMO 成员国履约效率不高，进而衍生全球“不合格船舶”（sub-standard ships）长期存在的问题。因此 2002 年 6 月，IMO 第 88 届理事会审议通过英、美、

1 Member States, IGOs and NGOs, IMO, http://www.imo.org/en/About/Membership/Pages/Default.aspx.
2 相关公约及议定书名称可参阅：IMO, Status of IMO Treaties (July 3, 2020), http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202020%20June.pdf.
3 Mansell, J. N.K., Flag State Responsibility-Historical Development and Contemporary Issues, Germany: Springer-Verlag Berlin Heidelberg press, 2009, p. 143.
4 IMO Resolution A.912 (22), Self-Assessment of Flag State Performance, 29 November 2001.
5 何肇庭、张朝阳：《论国际海事组织自愿性审核机制》，载《船舶与海运通讯》2010 年 6 月第 78 期，第 21 页。

挪威等19国所提交在自愿性基础上所建立的一套“IMO成员国示范审核机制”（IMO Model Audit Scheme），而这套机制即是参考“国际民航组织全球安全监督查核计划”（ICAO Universal Safety Oversight Audit Programme, ICAO USOAP）而来。[1]在IMO及成员国努力下，很快的2003年11月IMO第二十三届大会以决议A.23/Res. 946文件的形式，[2]通过将原提案名为“IMO成员国示范审核机制”改为“IMO成员国自愿审核机制”（Voluntary IMO Member State Audit Scheme, VMAS）。而A.23/Res. 946决议内容除确认自愿性审核机制外，也表明下述两项重点：第一，为保证IMO“主要海事公约”得到切实履约，文件内容刻意使用“成员国”（the States）而非船旗国（flag states），藉此希望审核机制的范围包括船旗国、沿岸国及港口国等相关层面；第二，同意将来不排除强制实施该审核机制的可能性，[3]此也替未来强制审核机制的设立先预设标竿。

IMO正式采用质量管理系统，并以稽核方式引进一套从外部对其成员国进行履约审核机制。[4] 回顾这套审核机制的发展历史，2005年在IMO第24届大会上通过“IMO自愿审核机制”，[5] 2006年至2013年为推行“IMO自愿审核机制”期。“IMO自愿审核机制”可视作“船籍国表现自评”的改良版本，但自2006年全面启动后，其“自愿性”的本质缺乏“强制力”造成自愿申请国的数量有限且以发达国家为多，复以缺乏惩罚效果终究沦为纸上审核作业，以及自愿审核机制由于其自愿的性质，不能对所有成员国产生平等的压力等缺失，导致“IMO自愿审核机制”的实施成效，最终仅能仰赖成员国自身道德层面的遵循。[6]

（三）强制性审核机制

为解决“自愿性”所带来的缺失，2013年在IMO第28届大会上通过A.28/Res. 1068决议文──《IMO成员国从自愿性审核机制过渡至强制性审核机制》（Transition from the Voluntary IMO Member State Audit Scheme to the IMO Member State Audit Scheme）表明2013年至2015年间为朝向强制性“IMO审核机制”过渡期（IMSAS Transition），同时鼓励成员国在过渡期间，持续在自愿性基础上申请审核。[7]

2013年在IMO第28届大会上同时也通过建构强制审核机制框架的2份主要文件。分别为A.28/Res.1067决议文──《IMO成员国审核机制框架和程序》（Framework and Procedures for the IMO Member State Audit Scheme）与A.28/Res. 1070决议文──《IMO文件履行章程》（IMO Instruments Implementation Code）（以下简称III Code）作为审核规范及标准，并依据审核周期计

1 Lawrence D. Barchue, Sr., The Voluntary IMO Member State Audit Scheme: An Accountability Regime for States on Maritime Affairs, WMU Journal of Maritime Affairs, Vol. 8:1, p. 61, 64 (2009).
2 IMO Resolution A.946 (23), Voluntary IMO Member State Audit Scheme, http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Assembly/Documents/A.946(23).pdf.
3 原文为: The development of a Voluntary IMO Member State Audit Scheme in such a manner as not to exclude the possibility in the future of it becoming mandatory.
4 Molenaar, E. J., Options for Regional Regulation of Merchant Shipping Outside IMO, with Particular Reference to the Arctic Region, Ocean Development and International Law, Vol. 45, p. 282 (2014).
5 IMO Resolution A.974 (24), Framework and Procedure for the Voluntary IMO Member State Audit Scheme, http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Assembly/Documents/A.974(24).pdf.
6 Lawrence D. Barchue, Sr., Making a Case for the Voluntary IMO Member State Audit Scheme, p. 5, Paper delivered at a seminar on: Auditing Flag States: New Directions for Smaller Maritime States, Malmo, World Maritime University (October 17-19, 2005).
7 IMO Resolution A.1068 (28), Transition from the Voluntary IMO Member State Audit Scheme to the IMO Member State Audit Scheme, http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Assembly/Documents/A.1068(28).pdf.

划（audit cycle and schedule），所有 IMO 成员国自 2016 年起，将会在 7 年内完成强制性审核。[1]

三、强制审核机制范畴及主要文件内容

（一）强制审核机制审核范畴

“强制审核机制”的具体审核范围限定在六个“主要海事公约”及其修正案共计 10 个强制性文件（以下统称 “主要海事公约”）。对具体的被审国而言，仅限于审核该国所加入的公约。下表 1 即《IMO 成员国强制审核机制公约范围一览表》。

表 1：IMO 成员国强制审核机制公约范围一览表

英文	中文	缔约方	全球商船吨位百分比
《1974 年海上人命安全国际公约》部分			
International Convention for the Safety of Life at Sea, 1974, as amended (SOLAS 1974)	经修正的《1974 年海上人命安全国际公约》	166	99.98%
Protocol of 1978 relating to the International Convention for the Safety of Life at Sea, 1974, as amended (SOLAS PROT 1978)	关于《1974 年海上人命安全国际公约》1978 年议定书修正案	121	97.85%
Protocol of 1988 relating to the International Convention for the Safety of Life at Sea, 1974, as amended (SOLAS PROT 1988)	关于《1974 年海上人命安全国际公约》1988 年议定书修正案	122	97.95%
《1973 年防止船舶污染国际公约》部分			
International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto, as amended (MARPOL 73/78)	关于《1973 年防止船舶污染国际公约》1978 年议定书修正案	159	99.95%

1 IMO Resolution A. 1067 (28), Framework and Procedures for the IMO Member State Audit Scheme, 5 December 2013, p. 12,http://www.imo.org/en/OurWork/TechnicalCooperation/Documents/A%2028-Res%201067.pdf .

Protocol of 1997 to amend the International Convention for the Prevention of Pollution from Ships, as modified by the Protocol of 1978 relating thereto (MARPOL PROT 1997)	关于《1973 年防止船舶污染国际公约》1997 年议定书修正案	96	96.72%
《1978 年海员培训、发证及值班标准国际公约》部分			
International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as amended (STCW 1978)	经修正的《1978 年海员培训、发证及值班标准国际公约》	165	99.03%
《1966 年船舶载重线国际公约》部分			
International Convention on Load Lines, 1966 (LL 66)	《1966 年船舶载重线国际公约》	163	99.03%
Protocol of 1988 relating to the International Convention on Load Lines, 1966 (LL PROT 1988)	关于《1966 年船舶载重线国际公约》1988 年议定书	118	98.00%
《1969 年船舶吨位丈量国际公约》部分			
International Convention on Tonnage Measurement of Ships, 1969 (Tonnage 1969)	《1969 年船舶吨位丈量国际公约》	158	98.94%
《1972 年海上避碰规则国际公约》部分			
Convention on the International Regulations for Preventing Collisions at Sea, 1972, as amended (COLREG 1972)	《1972 年海上避碰规则国际公约》	160	99.03%

资料来源：作者整理自 IMO Resolution A.973(24), *Code for the Implementation of Mandatory IMO Instruments*, p. 4; IMO, *Status of IMO Treaties* (July 3, 2020), IMO website, http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202020%20June.pdf.

（二）III Code 主要内容

根据 III Code 内容，其提供三种途径来让成员国完成履约目标。第一，成员国应制定“行动策略”来履行 IMO 所出台的所有文件；第二，成员国应有效的监控与评估 III Code 的内容有无被

落实；第三，持续性审查“行动策略”与 IMO 出台文件的目标是否相符。[1]除了成员国主动性达成履约目标外，III Code 依旧引入外部审核机制，通过审核官员就下列表 2 的 9 项标准进行 IMO 被审查国的审核评估。

对 IMO 成员国来说，由于 III Code 的内容是要帮助成员国有效达成 IMO 所有出台文件的履约目标，因此对于有签署“主要海事公约”的缔约国来说，III Code 有其法律拘束力和遵循义务。但对未签署“主要海事公约”的 IMO 成员国来说，III Code 内容中所规范的不论是履行文件的三种建议途径，或是 IMO 审核官员针对被审查国的审核标准也都只是一种建议性质。

表 2：IMO 成员国履约审核评估一览表

审核标准	审核重点
管辖权执行	成员国国内海事管辖权现况
主管机关	海事主管机关、部门设置情况
立法与规则制定	成员国国内有关 IMO 强制性文件内国法化，以及相关海事安全立法情况
IMO 文件广宣	是否有针对 IMO 大会决议的文件在国内进行海事安全宣传
协议事项的执行	成员国与 IMO 协议事项的落实情况
海事管理能力建设情况	成员国于海事管理、测量、检查、审核、认证、许可、检定功能的能力建设情况
被认可组织及海事调查员适格性	成员国对于其国内海事调查员的提名流程、征选、认可、授权、控管等过程的适当性
海事人员调查报告回报机制	是否要求海事人员调查结果必须有效回报主管机关（包括 IMO）
海事会报后续处置	相关海事情况于成员国主管机关、单位内的回报及后续处理情况

资料来源：作者整理自：IMO Resolution A. 1070 (28), *IMO Instruments Implementation Code (III Code)*, 4 December 2013, p. 5.

（三）《IMO 成员国审核机制框架和程序》主要内容

1、前置作业

《IMO 成员国审核机制框架和程序》规定了审核前置工作、审核实施流程、反馈机制等相关细节。[2]依据审核周期计划（audit cycle and schedule），所有 IMO 成员国自 2016 年起，将会在 7 年内完成强制性审核，并依照下列三原则完成审核工作：第一，由 IMO 采随机挑选尚未申请自愿性审核的成员国先进行审核，完成后再针对 2016 年以前已申请过自愿性审核的成员国进行审核；第二，IMO 秘书长将提前 18 个月前将审核计划与被审查国沟通；第三，被审查成员国如有

1 IMO Resolution A. 1070 (28), IMO Instruments Implementation Code (III Code), 4 December 2013, p. 4, http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Assembly/Documents/A.1070(28).pdf.

2 IMO Resolution A. 1067 (28), Framework and Procedures for the IMO Member State Audit Scheme, 4 December 2013, p. 11.

暂缓审核需求，至迟要在审核日 6 个月前以书面方式提出，并由 IMO 理事会决定接受与否。[1]根据目前 174 个成员国及 3 个副成员来计算，7 年的审核周期内，每年至少需要审核 25 个成员国家方能完成。依据 IMO 理事会于 2016 年 5 月所召开第 116 届理事会的文件 C. 116/6 显示，2016 年计有 19 个、2017 年 23 个、2018 年 22 个、2019 年 22 个成员国安排接受 IMO 强制性审核期程，中国及香港地区则安排在 2021 年进行审核。[2]此外，被审查国在接受审核前都须与 IMO 秘书长签订合作备忘录以厘清双边责任以及受审核强制性公约的范围。[3]

2、审查官员遴选标准

根据《IMO 成员国审核机制框架和程序》于审查官员遴选标准上，与自愿性审核机制较大不同的是，审核官员资格获得扩大。首先审核官员只要通过“管理系统审核员培训课程”（management system auditor training course）、“《国际安全管理规则》审核员培训课程”（ISM Code auditor training course）、“IMO 成员国审核官员培训课程”（IMO Member State auditor training course）三个标准中的其中一项即可获 IMO 成员国推荐，后再由 IMO 秘书长根据候选人本质能力，IMO 官方语言及其他语言能力，还有各地域代表性等考虑因素，审批核定最终的 IMO 审核官员名单。[4]

3、审核实施标准及流程

在公约审核的“主要海事公约”范围上， IMO 审核官员评断标准在于缔约国针对上述强制性公约，在缔约国政府内的行政、立法及司法发展过程中是否达标。审核官员具体审核评量方式有三：第一，访谈被审查国相关海事人员；第二，审核被审查国提供的履约成果文件；第三，参与被审查国相关海事机关及活动。[5]

针对履约能力不佳的被审查国，在“结束会议”(closing meeting)环节前，IMO 会根据审核事实向被审查国进行先期通报。同时 IMO 审查官可以利用“结束会议”提出改善行动计划建议。[6]最终阶段则是 IMO 审查官会针对审核结果及被审查国反馈情况（包括改善行动计划）撰写审核报告。[7]

四、强制审核机制主要文件的立法及效力

（一）IMO 强制审核机制立法模式

2013 年至 2015 年间为 IMO “自愿性审核机制”朝向“强制性审核机制”过渡期，期间重要工作即在 2016 年 1 月 1 日强制审核机制全面启动前，完备“强制审核机制”修正案(amendment)立法程序。

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1 IMO Resolution A. 1067 (28), Framework and Procedures for the IMO Member State Audit Scheme, 4 December 2013, p. 12.

2 IMO C 116/6, IMO Member State Audit Scheme: Progress Report on the Implementation of the Audit Scheme, 9 May 2016, Annex, p. 4, 6.

3 IMO Resolution A. 1067 (28), Framework and Procedures for the IMO Member State Audit Scheme, 4 December 2013, part II, para. 4.2.1 & 4.2.2.

4 IMO Resolution A. 1067 (28), Framework and Procedures for the IMO Member State Audit Scheme, 4 December 2013, p. 12-13.

5 IMO Resolution A. 1067 (28), Framework and Procedures for the IMO Member State Audit Scheme, 4 December 2013, part II, para. 6.4.2.

6 IMO Resolution A. 1067 (28), Framework and Procedures for the IMO Member State Audit Scheme, 4 December 2013, part II, para. 6.5.3.

7 IMO Resolution A. 1067 (28), Framework and Procedures for the IMO Member State Audit Scheme, 4 December 2013, part II, para. 7&8.

在立法模式上IMO将大会或下属委员会有关III Code此一强制性适用规定的出台决议案以修正案模式呈现，分别并入原先已生效的“主要海事公约”。[1] 藉此让“强制审核机制”直接适用在所要审查的“主要海事公约”的所有缔约国。例如 IMO 所制定“主要海事公约”之一的《1973 年防止船舶污染国际公约》International Convention for the Prevention of Pollution from Ships, 1973, MARPOL 73)，其作为一个已生效具法律拘束力的国际公约已含盖 159 个缔约方及全球商船吨位 99.95％以上。IMO 将其辖下“海洋环境保护委员会”有关 III Code 强制性适用(III Code mandatory)规定的决议案作为修正案直接并入《1973 年防止船舶污染国际公约》中，只要不超《1973 年防止船舶污染国际公约》三分之一缔约国或全球商船吨位 50%以上的反对，III Code 适用的修正案即可直接拘束缔约国来接受强制审核的义务，同时也拘束了 99.95％以上的全球商船吨位。[2]当然，《1973 年防止船舶污染国际公约》个别缔约国当然有权针对修正案提出反对意见而不遵循。

事实上，在立法过程中 IMO 将 III Code 强制性适用规定作为修正案直接并入“主要海事公约”时，各缔约国有权针对直接损及成员国主权的强制性问题提出反对意见，期间仅有芬兰、美国以国内立法程序不及将损及该国主权而提出反对，但完成国内立法程序后即收回反对意见。[3]最终并无缔约国提出反对意见而让修正案于 2016 年生效。

（二）强制审核机制主要文件的法律地位

IMO 分别在“主要海事公约”中制定强制性适用 III Code 修正案模式来赋予成员国接受“强制审核机制”义务。由于修正案内容仅是大会或委员会采用“强制审核机制”的决议，因此在具体操作面上有赖 III Code 与《IMO 成员国审核机制框架和程序》作为审核规范及标准方能予以操作。

III Code 与《IMO 成员国审核机制框架和程序》这两份主要文件的法律地位要从两方面分析。首先，对“主要海事公约”缔约国来说，这两份主要文件存在目的是为履约执行“主要海事公约”及其相关的修正案。因此缔约国在遵循“主要海事公约”及其相关修正案义务的同时，也必然要遵循这两份主要文件，这样的关联性也就赋予这两份主要文件对上述缔约国的法律拘束力。

其次，对仅为 IMO 成员国但非“主要海事公约”的缔约国来说。理论上 III Code 与《IMO 成员国审核机制框架和程序》这两份主要文件本身对 IMO 成员国来说并非组织宪章，所以仅有建议性的软法性质而不具法律拘束力。例如甲国作为 IMO 成员国，但却不是《1974 海上人命安全国际公约》的缔约国。此时《1974 海上人命安全国际公约》及其相关修正案对甲国没有法律拘束力的同时，III Code 与《IMO 成员国审核机制框架和程序》这两份主要文件当然对甲国在落实《1974 海上人命安全国际公约》一事上也不具法律拘束力。严格来说，甲国作为 IMO 成员国对于遵约来说仍具有一定的现实意义，遵循国际软法有助赢得国家声誉，该国家声誉有助甲国与其他国际主体发生正面法律及合作关系，这样的压力是促使甲国仅为 IMO 成员国但非“主要海事

1 有将 III Code 强制适用规则修正案并入的“主要海事公约”有：《1974 年海上人命安全国际公约》、《1973 年防止船舶污染国际公约》、关于《1973 年防止船舶污染国际公约》1997 年议定书修正案、《1972 年海上避碰规则国际公约》、《1966 年船舶载重线国际公约》、关于《1966 年船舶载重线国际公约》1988 年议定书、《1978 年海员培训、发证及值班标准国际公约》。IMO, Status of IMO Treaties (July 3, 2020), p. 62, 106, 165, 179, 219, 226, 418, http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202020%20June.pdf.

2 此修正案即是 2014 年 III Code 强制适用修正案 MEPC.246(66)，该修正案已于 2016 年 1 月 1 日生效。IMO, Status of IMO Treaties, 3 July 2020, p. 165, http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202020%20June.pdf .

3 IMO, Status of IMO Treaties, 3 July 2020, p. 62, 106, 165, 179, 219, 226, 418, http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202020%20June.pdf.

公约”的缔约国时，仍然推动甲国自愿性遵循软法的主要原因。[1]

最后，整体观察 III Code 与《IMO 成员国审核机制框架和程序》这两份主要文件的目标都是为了强化全球海事安全以及海洋环境保护。[2]但两份主要文件的内容比较起来有类似普通法与特别法的区别。III Code 的内容类似普通法性质，内容是要帮助成员国有效达成 IMO 所有出台文件的履约目标，其内容非针对 IMO“强制审核机制”，而是更大范围的提供 IMO 成员国作为船旗国、港口国及沿岸国等不同角色，该如何正确且有效执行 IMO 出台所有文件的一般性遵约原则（包含有法律拘束力及不具法律拘束力的文件）。[3]《IMO 成员国审核机制框架和程序》则类似特别法性质，其内容专门规范 IMO“强制审核机制”有关的审核前置工作、审核实施流程、反馈机制等相关细节。[4]

（三）强制审核机制未达标的可能影响

“强制审核机制”中被审核国的最终报告验证与纪录都会在 IMO 成员国间被公开。因此对成员国来说，是否通过审核除涉及有关国家履约信誉外，对于不符审核标准的国家，其作为船旗国极有可能因“强制审核机制”不达标，衍生遭受港口国管制措施制裁而蒙受经济损失的结果。

在未达标的制裁机制上，IMO 作为建议及协商机关的本质，无权干涉各国主权行使权力，更无从对于履约程度不佳的缔约国给予制裁。如此一来，对于“强制审核机制”被审核国的不达标制裁，在实践上仅能藉由沿岸港口国自发性的管制来实施。一般来说港口国可制定国内法拒绝不符 IMO“主要海事公约”标准的外国船舶进入其港口，[5]甚至联合其他沿岸国缔结备忘录以区域合作形式来禁止黑名单船舶进入其港口。[6]当遇有不合格船舶进入港口国后，港口国得以扣留该船并令其改善，待符合港口国国内海事机关及 IMO 标准后才准放行。这类禁止不合格船舶进入、调查、扣留、命其改善等作法对“主要海事公约”的缔约国来说也有法源依据，例如《1973 年防止船舶污染国际公约》第 4 条有关“违章”规定，明确赋予沿岸国海事主管机关对于不合格船舶的行政及司法管辖权。《1966 年船舶载重线国际公约》第 21 条关于港口国监督上，赋予港口国政府应保证此项监督的执行尽可能地合理和切实可行。且必须保证船舶出海而不危及旅客或船员安全以前不得出航。事实上，一些欧洲沿岸国已经采取 IMO 公约中的“无优惠待遇”（no more favourable treatment, NMFT）原则的单边行动，禁止黑名单船舶进入其港口，单方面排除履约水平差的船旗国船舶入港。[7]可以研判，发达国家这类自发性港口国管制措施，将有效迫使“强制审核机制”被审核国重视并提高履约水平，但万一审核不达标，也恐怕面临一系列单边或区域性联合港口国管制的制裁措施，造成主权国家利益损失。

五、中国履约审核的挑战

1 Guzman, A. T., A Compliance- Based Theory of International Law, California Law Review, Vol. 90, p. 1849 (2002).
2 IMO Resolution A. 1070 (28), IMO Instruments Implementation Code (III Code), 4 December 2013, p. 4.
3 IMO Resolution A. 1070 (28), IMO Instruments Implementation Code (III Code), 4 December 2013, p. 4-6.
4 IMO Resolution A. 1067 (28), Framework and Procedures for the IMO Member State Audit Scheme, 4 December 2013, p. 11.
5 Mansell, J. N.K., Flag State Responsibility-Historical Development and Contemporary Issues, Germany: Springer-Verlag Berlin Heidelberg press, 2009, p. 231.
6 Takei, Y., Institutional Reactions to the Flag State that Has Failed to Discharge Flag State Responsibilities, Netherlands International Law Review, Vol. 59, p. 84 (2012).
7 李桢、裘建伟：《IMO 成员国自愿审核机制的现况、趋势和挑战》，载《世界海运》2007 年 2 月第 30 卷 1 期，第 41 页。

（一）III Code 强制性适用规定内国法化问题

中国作为 IMO 成员国暨 A 类理事国，[1]又是“主要海事公约”缔约国。根据国际法“条约必须遵守”原则（*pacta sunt servanda*）以及《维也纳条约法公约》第 26 条：“凡有效之条约对其各当事国有拘束力，必须由各该国善意履行”的规定来看，条约的遵守义务完全是主权国家主权行使的范围。因此，强制审核机制中的 III Code 与《IMO 成员国审核机制框架和程序》这两份主要文件对我国来说理应具有拘束力。

但可能存在的问题是，当我国接受“强制审核机制”一事时，国内立法程序完备问题。对于“主要海事公约”并入 III Code 强制性适用规定修正案，我国主管机关是否逐一完备内国法化程序？不论是采取海事主管机关出台有关通知或公告的直接适用模式，或是采取转化立法模式。须知，倘若国内立法程序不完备，等同 IMO“强制审核机制”的强制性行为直接损害我国主权行为。这也是为何芬兰及美国当初坚持完备国内立法程序后，才收回“主要海事公约”关于 III Code 强制性适用修正案反对意见的主要原因。

（二）系统化梳理海事法律文件

III Code 规范成员国对 IMO“主要海事公约”履约适用及内国法化是强制性审核关注重点之一。[2]事实上，被审核国普遍性存在国内海事立法的落差问题，而中国因海事履约形式不一、立法主体多样，导致立法冲突与法律效力不一的情况严重，已明显造成海事立法混乱的困境。而这样的问题在 2009 年我国参加“自愿审核机制”时，也曾被 IMO 审核组的报告中被提出要求改进。可预见相关海事法律文件的系统化梳理，将是我国接受强制审核机制时，IMO 审查官的审核重点。

若依照海事履约立法态样区分，主要可分为法律（如《海上交通安全法》）、行政法规（如《防治船舶污染海洋环境管理条例》）、部门规章（如《船舶及其有关作业活动污染海洋环境防治管理规定》）、普遍适用的规范性文件、主管部门发布通知或者公告、技术标准和船检规范等六种立法态样。目前法律、行政法规、部门规章争议不大，主要问题在于作为海事立法补充的大量规范性文件、主管部门发布通知或者公告、技术标准和船检规范。其中单是交通运输部所制定的规范性文件就高达 800 余件。而这类部颁规范性文件的法律定位又相对模糊，既不是技术标准，也不是部令，其在法律中没有明确效力定位，但在相关部门、相关行业履行公约义务的实践中，却又具有强制约束力。此外在立法程序上，部颁规范性文件的制定程序并不受《中华人民共和国立法法》规范，因此在制定程序简便的情况下，已达到“量多不精”缺乏体系化统整的地步。也因量多，在立法过程或直接纳入适用时不够严谨而造成法律依据上的模糊，甚至于法无据的困境，因而增加上级行政机关或上位阶法律的限制干涉，进而影响地方海事主管机关履约执法的权威性。[3]

因此在海事法律文件梳理问题上，建议有关机关与部门透过梳理中国国内相关规范性法律文件，从全国人大及其常委会制定的法律，到国务院的行政规章和部门规章，包括交通运输部及其辖下海事局制定的规范性法律文件，在国际海事公约履约的基础上解决下列三项主要问题。第一，解决因国际海事公约直接适用所造成与国内法规竞合的问题；第二，透过规范性文件清理，逐步

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1 IMO 大会是该组织最高权力机构，每两年召开一次，其主要议题之一是选举理事会成员。理事会是大会的执行机构，在大会闭会期间行使大会各项职能，理事会成员分为 A 类、B 类和 C 类，A 类为 10 个在国际航运服务方面有最大利益的国家，B 类为 10 个在国际海上贸易方面有最大利益的国家，C 类是 20 个代表了世界主要地域并在海运方面有特殊利益的国家。

2 IMO Resolution A. 1070 (28), IMO Instruments Implementation Code (III Code), 4 December 2013, p. 4-5.

3 曲亚囡:《IMO 审核机制下国际海事公约在中国立法转化研究》，大连海事大学 2014 年博士学位论文，第 38-39 页。

废止违反国际海事公约行为的强制性措施；第三，体系化统整部颁规范性文件，避免海事执法混乱，优化基层海事主管机关法律环境。

（三）加强对“被认可组织”的监督管理

被认可组织(recognized organization)的授权与监管属于强制审核范围之一。[1]中国船级社（Chinese Classification Society, CCS）自 1956 年成立以来，[2]最重要的工作就是依据本身的经验及技术储备制定入级规范，为入级船舶提供维持安全所必须的最低标准。这些标准绝大多数是技术标准，然自 20 世纪 90 年代以来这些标准就由技术范畴逐步扩充到管理领域。[3]但是法律并没有赋予船级社立法的权力，作为专业机构，其仅仅是接受中国海事局委托起草《船舶检验规范》草案。至于其自定义的《材料与焊接规范》和《钢质海船入级规范》等规范指南都属不具法律拘束力的文件。[4]

在权责问题上，对于这类“被认可组织”的权责在中国国内常被混淆，因此建议中国海事局应建立一套完整的法定文件和指令，使“被认可组织”权责相符，建立责任制、督察制和配套的责任追究机制。

在授权行为上，中国海事局及相关主管机关应确认“被认可组织”的管理程序及相关授权行为。尤其针对悬挂我国国旗的船舶，建议可主动提供“主要海事公约”及国内法规针对入级船舶的不同标准比较表，在履行船旗国义务的同时也让各国入级船舶能依法有据来符合我国相关海事规范。[5]

在监督问题上，对质量不符的“被认可组织”人员（如验船师资历）或被认可证书、文件、项目工程等，主管海事机关应善尽职责，制定相应调查、监督以及教育训练计划，逐步规范好“被认可组织”行为。[6]

（四）履约战略

毋庸置疑的，根据 III Code 要求，以我国作为船旗国、港口国及沿岸国不同身份，建立一套履约战略来协助审核目标的达成是必须的，也是被审核重点。[7]所谓履约战略就是为了有效实施“主要海事公约”履约，各级海事管理机关必须为此进行目标达成的设计与规划，同时各级海事管理机关制定的海事履约管理战略也应系统体现全国性的履约战略及国家海洋政策。[8]目前中国还没有形成系统完整的一套长期的海事履约战略，因此笔者建议，由交通运输部层级领头制定一套完整的履约战略，其内容设计除包括该机关及各级海事单位所涉海事履约的目标、任务、愿景、规划、重大举措外，[9]更可反馈前述有关“系统化梳理海事法律文件”及对“被认可组织”监督管

1 IMO Resolution A. 1067 (28), Framework and Procedures for the IMO Member State Audit Scheme, 4 December 2013, p. 3, 6, 30.

2 中国船级社成立于 1956 年，总部设在北京，是国际船级社会的正式成员。经船旗国或地区政府主管机关授权，中国船级社开展法定检验和有关主管机关核准的其他业务，目前已接受了包括中国政府在内的 40 个国际上主要航运国家或地区的政府授权，为悬挂这些国家或地区旗帜的船舶及海上设施代行法定检验。

3 陈映秋：《中国船级社的规范体系与相关科研发展方向》，载《中国船检》2000 年 4 月第 2 期，第 5 页。

4 曲亚囡：《IMO 审核机制下国际海事公约在中国立法转化研究》，大连海事大学 2014 年博士学位论文，第 39-40 页。

5 IMO Resolution A. 1070 (28), IMO Instruments Implementation Code (III Code), 4 December 2013, p. 8.

6 凌黎华：《我国应对 IMO 审核机制强制化转变的新策略》，载《中国海事》2016 年 2 月第 2 期，第 33 页；IMO Resolution A. 1070 (28), IMO Instruments Implementation Code (III Code), 4 December 2013, p. 9.

7 IMO Resolution A. 1070 (28), IMO Instruments Implementation Code (III Code), 4 December 2013, p. 4.

8 IMO Resolution A. 1067 (28), Framework and Procedures for the IMO Member State Audit Scheme, 4 December 2013, p. 29.

9 周羽、沙正荣：《关于 IMO 审核与海事履约管理体系建设的思考》，载《中国水运》2011 年 7 月第 7 期，第

理相关问题的一并解决计划。通过有系统的目标管理履约战略，来提高中国作为船旗国、港口国及沿岸国的国际义务与表现能力。

六、结论

IMO 出台的文件有三类。第一，涉内部事项的决议：IMO 通过大会决议(resolution)所出台涉及 IMO 内部组织事项活动的规范，仅对 IMO 内部及相关附属机构具法律拘束力效果。[1]第二，涉成员国的决议：IMO 通过大会决议所出台涉及成员国事项的规范，普遍不具法律拘束力效果。这些规范有以“指南”(guideline)、“规则”(code)…等为名。原则上这些规范对成员国不具法律拘束力，但作为 IMO 重要文件其之所以出台，就是反映出各成员国间高度共识下所通过的规范，也因此这些文件也都被各成员国所高度重视与遵行。[2]第三，公约：即 IMO 通过大会决议得以起草，对缔约国来说具有法律拘束力效果的国际海事公约。

根据上述分类，本文所述“主要海事公约”即是上述 IMO 出台第三类具法律拘束力的公约。至于落实“强制审核机制”的 2 份主要文件：《IMO 成员国审核机制框架和程序》与 III Code，就是 IMO 出台第二类涉成员国决议的文件。理论上《IMO 成员国审核机制框架和程序》与 III Code 属于软法，对于 IMO 成员国来说不具拘束力效果。但 IMO 为解决成员国长期履约不利问题，将审核机制赋予强制性义务，因此在立法模式上，技术性的“绕道”将 III Code 以修正案模式并入原先已生效的“主要海事公约”，藉此赋予“主要海事公约”缔约国强制性被审核义务。换言之，IMO 就是把第二类涉成员国决议的文件，以“主要海事公约”修正案模式并入公约中。

我国身为 IMO 成员国及“主要海事公约”缔约国理应履行强制审核义务，在面对即将到来的审核挑战，本文建议：第一，在法律程序上梳理 III Code 强制性适用规定内国法化问题，避免当我国接受 IMO 审查官的外部审核时，国内缺乏法源或主管机关公告，造成我国海事机关及人员“依法无据”来接受审核，因而造成 IMO 审核机制的强制性义务直接侵害我国国家主权行为。第二，系统化梳理国内海事法律文件，解决我国普遍性存在的国内海事立法与国际海事公约间的落差问题，这是一项大工程，可视作我国长期履约目标。第三，解决对“被认可组织”在权责不清、授权模糊及监督管理质量不到位等长期性问题。第四，建议由交通运输部层级制定我国长期的海事履约战略，除提高我国作为船旗国、港口国及沿岸国的履约能力外，更可在海事履约战略中，同步规划前述“系统化梳理国内海事法律文件”及对“被认可组织”监督管理问题的解决方案。

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1 Anianova, E., The International Maritime Organization-Tanker or Speedboat? in Ehlers, P. &Lagoni, R. eds., International Maritime Organizations and their Contribution toward a Sustainable Marine Development, Germany: Lit Verlag Hamburg press, 2006, p. 83.

2 Kirgis, F. L., Shipping, in Schachter, O. & Joyner, C.O. eds., United Nations Legal Order, The American Society of International Law, University Press Cambridge, Vol. 2, p. 727 (1998).

The Mandatory IMO Member State Audit Scheme-A Legal Analysis of Main Instruments Related and China's Response to the Challenges

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Abstract: The IMO Mandatory Member State Audit Scheme is an external audit mechanism introduced with the purpose of enhancing the individual Member State's insufficient capabilities and poor performance in meeting its obligations and responsibilities contained in IMO instruments to which they are parties. The IMO Instruments Implementation Code (III Code) as well as the Framework and Procedure for the IMO Member State Audit Scheme are two major related instruments under the mandatory audit scheme. IMO incorporates the III Code, as an amendment, into the main maritime convention in effect, so as to give these two instruments a legally binding force and impose compulsory audited obligations to the parties of the main maritime conventions. China, as an IMO Member State, could increase its focus on the issue of domestication of IMO mandatory audits while meeting the mandatory audit and improve the performance of its obligations. This paper also discusses the difference between the domestic maritime legislation and international maritime conventions, the issue of regulation of recognized organizations as well as China's chronic lack of strategy in fulfilling its maritime obligations.

Keywords: International Maritime Organization; voluntary audit scheme; mandatory audit scheme; Framework and Procedure for the IMO Member State Audit Scheme; IMO Member State Audit Scheme

1. Introduction

According to Article 1 of the Convention on the International Maritime Organization, the main purposes of establishing the International Maritime Organization (hereafter referred to as IMO) are limited to mainly, four subject matter areas concerning shipping: maritime trade, maritime safety, efficiency of navigation and the prevention and control of marine pollution from ships. For the above purposes, IMO tries to promote the co-operation and the exchange of information among Governments to remove discriminatory action and unnecessary restrictions by Governments as well as recommend the general adoption of the highest practicable standards set out in IMO documents.[1] Over the past 40 years since its establishment, IMO has actively taken part in setting the rules concerning shipping safety and marine pollution prevention, as well as shifting its role gradually, from an advisory and consultancy agency to a rule-making one. The root cause of IMO's role shift could be attributed to several aspects, including, fulfilling the mandate and functions of the Convention on the International Maritime Organization. In addition to this, the IMO's role as a specialized agency of the United Nations is granted under Article 57 of the UN Charter, and like, the 1982 Law of the Sea Convention, has through more than 20 articles such as Article 41, 53 and 60, indirectly been designated to assume more international responsibilities in the role of a competent international organization. And it is the rulemaking authority involved in exercising these international responsibilities that facilitates the IMO's functional change and brings up a trend of expanding the scope of rulemaking which has been critical in recent years.[2]

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1 IMO Convention, Art. 1(a), (b) and Art. 15(j).

2 Allen, C. H., Revisiting the Thames Formula: The Evolving Role of the International Maritime Organization and Its Member States in Implementing the 1982 Law of the Sea Convention, San Diego International Law Journal, Vol. 10,

In terms of the formulation of legally binding rules, IMO can normally draft a Convention through the Resolutions of the Assembly. The adoption, amendment and withdrawal procedures of these conventions are totally in accordance with the procedures that are followed to conclude international treaties, meaning the conventions are signed and ratified by the individual Member State itself. For this reason, conventions published by the IMO are legally binding on all Contracting States. However, detailed supplementary specifications are often needed to carry out the convention during its implementation process. Usually, IMO will issue supplementary specifications in the name of Guidelines or Code to deal with this situation. On account of such supplementary specifications, which are complementary in nature and are derived from the original conventions and do not exist independently, such supplementary specifications should also be deemed to have the same binding effects as the convention. The two instruments under the framework of IMO mandatory audit explored in this paper are those of a supplementary nature. As part of IMO Conventions, they have the same legally binding force on parties to the main maritime conventions.

This paper is aimed to analyze the development and contents of IMO mandatory audit scheme, clarify the legislation and legal effect of main documents relating to mandatory audit scheme through legal methods and put forward suggestions for China to cope with the challenges occurring during the audit. As an audited state of IMO mandatory audit scheme and a big maritime power, this is of great practical importance for China.

2. The Development of IMO Mandatory Audit Scheme

2.1 IMO Member States' Poor Performance in Implementing the Conventions

Since its establishment in 1959 and as of 2020, IMO has grown into a global international organization which has 174 Member States and three Associate Members.[1] It has adopted 53 conventions and protocols concerning matters such as maritime safety and security and the protection and governance of the marine environment and up to more than 800 rules and proposals. Some of the significant conventions IMO has published cover more than 99% of the world's merchant tonnage.[2] While due to the large number of conventions and different levels of development and national conditions of each Member State, the implementation of IMO conventions is not as ideal as expected, which has further impacted the effectiveness of IMO's efforts on promoting the maintenance of sea voyage, maritime safety and environment protection. Just as indicated by the Former Secretary General of the IMO, the problems perceived today do not lie basically with shipping's regulatory framework or with the mechanism by which that framework is constructed, but with its implementation.[3] In view of this, a series of measures, such as Port State Control (PSC), International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW), International Safety Management Code (ISM) and Self-Assessment of Flag State Performance, have been adopted by the IMO to strengthen supervision over the Member States' implementation.

Despite the efforts made by IMO and based on past practical experience, there were still many deficiencies that could be found in those measures. For instance, the Port State Control Officer (PSCO) listed in PSC had not received fair training and there were no consistent operational procedures for them to follow, in the end leading to the lack of uniform standards for port state inspection. And during the implementation of STCW, it had also been found that IMO only conducted a desk review, rather than a substantial one, of the Seafarer's Certification submitted by the Member States, which had resulted in several inappropriate situations like fabricating the certificates and issuing of such certificates by unqualified training organizations. As to the ISM, the main problem occurring during its implementation was that documentation had been used as the very method to conduct an audit. But the shipping

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p. 271-272, 284 (2009).

1 Member States, IGOs and NGOs, IMO, http://www.imo.org/en/About/Membership/Pages/Default.aspx.

2 For more information about the Conventions and Protocols, please refer to: IMO, Status of IMO Treaties (July 3, 2020), IMO, http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202020%20June.pdf.

3 Mansell, J. N.K., Flag State Responsibility-Historical Development and Contemporary Issues, Germany: Springer-Verlag Berlin Heidelberg press, 2009, p. 143.

companies were only satisfied with obtaining the certificates and cared about nothing else, hence resulting in general formalism. Not to mention the documentation would have increased the workload of the ship's crew. It should be admitted that the mechanism of Self-Assessment of Flag State Performance had urged the Flag States to strengthen their performance by means of internal self-assessment reports.[1] However, Self-Assessment of Flag State Performance relied entirely on the internal self-assessment conducted by the Flag State, which could cause credibility concerns towards those reports. The disadvantages of such mechanisms with no external control could be detected very soon.[2]

2.2 Voluntary Audit Scheme

The deficiencies mentioned above have caused IMO Member States' inefficiency in meeting their obligations and responsibilities, which in turn has brought up the long existing global problem of sub-standard ships. The IMO Council, at its eighty-eighth session in June 2002, considered and approved, in principle, a proposal by nineteen Member States, including the United Kingdom, the United States and Norway, for the development of an IMO Model Audit Scheme, which drew on the model of the ICAO Universal Safety Oversight Audit Programme.[3] With the joint efforts of IMO and its Member States, in November 2003, the Assembly at its twenty-third session endorsed the decisions of the Council and adopted Resolution A.946(23) entitled "Voluntary IMO Member State Audit Scheme" (VIMSAS)[4], which originally was IMO Model Audit Scheme. In addition to confirming the voluntary audit scheme, Resolution A.946(23) has also illustrated the following two points. First, in order to guarantee the effective implementation of IMO's main maritime conventions, the Resolution particularly used the term "the States" in place of "Flag States". By doing so, it intended to expand the audit scope to include flag, coastal and port states. Second, the Resolution made it clear that the development of a Voluntary IMO Member State Audit Scheme in such a manner did not exclude the possibility in the future of it becoming mandatory.[5] This would also preset a benchmark for the establishment a mandatory audit scheme.

IMO has officially adopted a quality management system and introduced an external performance audit mechanism for its member states in the form of an audit.[6] Looking back to the development history of IMO Member State Audit Scheme, we can see that the Voluntary IMO Audit Scheme was adopted by the Assembly at its twenty-fourth session in 2005[7] and conducted from 2006 to 2013. The Voluntary IMO Audit Scheme could be regarded as an improved version of Self-Assessment of Flag State Performance. However, since it was fully launched in 2006, the amount of member states that voluntarily applied for the audit scheme was very limited and most of them were developed countries. This could be due to its voluntary nature, which apparently lacked coercive force. Moreover, such a voluntary scheme had no appropriate punishment, which was replaced by a paper review, thus did not create equal overwhelming force on each member state. As a consequence, its implementation and enforcement could only rely on the moral compliance of the member states.[8]

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1 IMO Resolution A.912 (22), Self-Assessment of Flag State Performance, 29 November 2001.

2 HE Zhaoting& ZHANG Chaoyang, An Analysis on Voluntary IMO Member State Audit Scheme, Ship & Shipping Newsletter, June 2010, Issue NO. 78, p.21.

3 Lawrence D. Barchue, Sr., The Voluntary IMO Member State Audit Scheme: An Accountability Regime for States onMaritime Affairs, WMU Journal of Maritime Affairs, Vol. 8:1, p. 61, 64 (2009).

4 IMO Resolution A.946 (23), Voluntary IMO Member State Audit Scheme, http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Assembly/Documents/A.946(23).pdf.

5 The original statement in the Resolution A.946(23) comes as follow: The development of a Voluntary IMO Member State Audit Scheme in such a manner as not to exclude the possibility in the future of it becoming mandatory.

6 Molenaar, E. J., Options for Regional Regulation of Merchant Shipping Outside IMO, with Particular Reference to the Arctic Region, Ocean Development and International Law, Vol. 45, p. 282 (2014).

7 IMO Resolution A.974 (24), Framework and Procedure for the Voluntary IMO Member State Audit Scheme, http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Assembly/Documents/A.974(24).pdf.

8 Lawrence D. Barchue, Sr., Making a Case for the Voluntary IMO Member State Audit Scheme, p. 5, Paper delivered at a seminar on: Auditing Flag States: New Directions for Smaller Maritime States, Malmo, World Maritime University (October 17-19, 2005).

2.3 Mandatory Audit Scheme

For the purpose of dealing with the scheme's delinquencies brought by its voluntary nature, the IMO Assembly adopted Resolution A.28(1068) "Transition from the Voluntary IMO Member State Audit Scheme to the IMO Member State Audit Scheme" at its twenty-eighth session. The document indicated that the period from 2013 to 2015 was the IMSAS Transition and IMO Member States were greatly encouraged to continue applying for the audit on a voluntary basis.[1] In addition, two main instruments were endorsed at the IMO Assembly's 28th session. They were Resolution A.28(1067) "Framework and Procedures for the IMO Member State Audit Scheme" and Resolution A.28(1070) "IMO Instruments Implementation Code (III Code)" respectively, both of which were considered as the audit norms and standards. According to the audit cycle and schedule, all Member States shall conduct mandatory audit scheme at periodic intervals not exceeding seven years, from 2016.[2]

3. The Scope of Mandatory Audit Scheme and the Content of Two Main Documents

3.1 The Scope of Mandatory Audit Scheme

The specific scope of mandatory audit scheme is limited to ten mandatory documents, including six main maritime conventions and its annexes (hereafter referred to as main maritime conventions). For particular audited states, the conventions applicable are restricted to the one(s) to which they are party to. Table 1 is the List of the Scope of Conventions on IMO Mandatory Member States Audit Scheme.

Table 1 List of the Scope of Conventions on IMO Mandatory Member States Audit Scheme

English	Chinese	Contracting Party	Percentage of Global Merchant Tonnage
International Convention for the Safety of Life at Sea, 1974			
International Convention for the Safety of Life at Sea, 1974, as amended (SOLAS 1974)	经修正的《1974 年海上人命安全国际公约》	166	99.98%
Protocol of 1978 relating to the International Convention for the Safety of Life at Sea, 1974, as amended (SOLAS PROT 1978)	关于《1974 年海上人命安全国际公约》1978 年议定书修正案	121	97.85%
Protocol of 1988 relating to the International Convention for the Safety of Life at Sea, 1974, as amended (SOLAS PROT 1988)	关于《1974 年海上人命安全国际公约》1988 年议定书修正案	122	97.95%
International Convention for the Prevention of Pollution from Ships, 1973			
International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto, as amended (MARPOL 73/78)	关于《1973 年防止船舶污染国际公约》1978 年议定书修正案	159	99.95%

1 IMO Resolution A.1068 (28), Transition from the Voluntary IMO Member State Audit Scheme to the IMO Member State Audit Scheme, http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Assembly/Documents/A.1068(28).pdf.

2 IMO Resolution A. 1067 (28), Framework and Procedures for the IMO Member State Audit Scheme, 5 December 2013, p. 12, http://www.imo.org/en/OurWork/TechnicalCooperation/Documents/A%2028-Res%201067.pdf.

Protocol of 1997 to amend the International Convention for the Prevention of Pollution from Ships, as modified by the Protocol of 1978 relating thereto (MARPOL PROT 1997)	关于《1973 年防止船舶污染国际公约》1997 年议定书修正案	96	96.72%
International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978			
International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as amended (STCW 1978)	经修正的《1978 年海员培训、发证及值班标准国际公约》	165	99.03%
International Convention on Load Lines, 1966			
International Convention on Load Lines, 1966 (LL 66)	《1966 年船舶载重线国际公约》	163	99.03%
Protocol of 1988 relating to the International Convention on Load Lines, 1966 (LL PROT 1988)	关于《1966 年船舶载重线国际公约》1988 年议定书	118	98.00%
International Convention on Tonnage Measurement of Ships, 1969			
International Convention on Tonnage Measurement of Ships, 1969 (Tonnage 1969)	《1969 年船舶吨位丈量国际公约》	158	98.94%
Convention on the International Regulations for Preventing Collisions at Sea, 1972			
Convention on the International Regulations for Preventing Collisions at Sea, 1972, as amended (COLREG 1972)	《1972 年海上避碰规则国际公约》	160	99.03%

Source of date: organized by the author based on IMO Resolution A.973(24), Code for the Implementation of Mandatory IMO Instruments, p. 4; IMO, Status of IMO Treaties (July 3, 2020), IMO website, http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202020%20June.pdf.

3.2 The Content of III Code

Three strategies are recommended in III Code for the Member States' consideration to fulfil the performance. Specifically speaking, a State should develop an overall strategy to ensure all IMO documents are implemented, should establish a methodology to monitor and assess whether the content of III Code have been put into effect and should continuously review whether the strategy has achieved the goal set in IMO documents.[1] Despite requesting the Member States to take the initiative to fulfil the performance, III Code additionally introduced an external audit mechanism to conduct the audits of IMO audited states by auditors in accordance with nine standards, listed in the following Table 2.

For IMO Member States, since the content of III Code is meant to help facilitate the

1 IMO Resolution A. 1070 (28), IMO Instruments Implementation Code (III Code), 4 December 2013, p. 4, http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Assembly/Documents/A.1070(28).pdf.

implementation and enforcement of the Member States' obligations and responsibilities set out by IMO documents, the Contracting Parties who have signed the main maritime conventions are legally bounded and obliged to follow III Code. While for the IMO Member States that have not yet endorsed the main maritime conventions, both the three methods specified in III Code with regard to implementation the IMO and the audit standards applied by IMO auditors towards audited states are only suggestions for them.

Table 2 List of Audit Standards for IMO Member States

Audit Standards	Audit Priority
Jurisdiction	The status of domestic maritime jurisdiction of IMO Member States
Competent Authority	The establishment of maritime organization and authority
Legislation, Rules and Regulations	The domesticaliztion of IMO mandatory documents and the legislation on maritime safety
Promulgation of IMO Documents	Whether there is any promulgation on maritime safety specified in IMO Assembly Resolution
Enforcement of Arrangements	The implementation of agreements between IMO and its Member States
Capacity Construction on Maritime Control	IMO Member States' capacity construction on maritime control, survey, inspection, audit, verification, approval and certification functions
Appropriacy of Recognized Organizations and Nominated Surveyors	The appropriacy of IMO Member States' selection, recognition, authorization, empowerment and monitoring of recognized organizations and nominated surveyors
Reporting Mechanism of the Investigation on Maritime Personnel	Whether the investigations are required to be reported to the competent organization (including IMO)
The Follow-up of Maritime Reports	The reports and follow-up on maritime situation to IMO Member States' competent authorities and organizations

Source of date: organized by the author based on IMO Resolution A. 1070 (28), IMO Instruments Implementation Code (III Code), 4 December 2013, p. 5.

3.3 The Content of Framework and Procedures for the IMO Member State Audit Scheme

3.3.1 Preparation

The Framework and Procedures for the IMO Member State Audit Scheme has specified the preparation, conduct of the audit and the reporting requirements.[1] According to the audit cycle and schedule, all IMO Member States shall adopt mandatory audit scheme at periodic intervals not exceeding seven years from 2016 and shall conduct the audit in accordance with the following three principles. The first principle is that, IMO will randomly select one from the Member States who have not completed an audit under the voluntary Scheme to conduct mandatory audit, which will be followed by the audit conducted by the Member States who have completed a voluntary audit. The second one is that, the Secretary-General will notify the audited Member States about the audit schedule in advance - not less than 18 months. The last one is that, the request to postpone an audit by the audited Member States should be submitted in writing at least six months prior to the audit date and should be considered and determined by the Council.[2] If calculating, based on the current number of the Member States,

1 IMO Resolution A. 1067 (28), Framework and Procedures for the IMO Member State Audit Scheme, 4 December 2013, p. 11.

2 IMO Resolution A. 1067 (28), Framework and Procedures for the IMO Member State Audit Scheme, 4 December 2013, p. 12.

namely 174 Member States and three Associate Members, at least 25 states need to be audited each year during the seven-year audit cycle. Document C. 116/6 of the 116th Session of IMO Council held in May 2016 showed that there were 19 States in 2016, 23 States in 2017, 22 States in 2018 and 22 States in 2019, scheduled to accept the mandatory audit cycle, while China and Hong Kong were scheduled to conduct audit in 2021.[1] Furthermore, in order to clarify the responsibilities and the scope of audited conventions, the audited member States should include a Memorandum of Cooperation with the Sectary-General before proceeding to audit.[2]

3.3.2 The Selection Criteria of Auditors

The selection criteria of auditors set in the Framework and Procedures for the IMO Member State Audit Scheme has been expanded, which is quite different from the one stipulated in Voluntary Audit Scheme. Auditors can be nominated by IMO Member States as long as they have passed one of the following three courses: management system auditor training course, ISM Code auditor training course and IMO Member State auditor training course. Then IMO Sectary-General will determine the final list of IMO auditors in line with factors including nominees' essential capabilities, language capabilities (IMO official languages and others) and representation from different geographical regions and nationalities.[3]

3.3.3 The Standard and Procedure of Conducting an Audit

As to the scope of main maritime conventions audited as required by the IMO Convention, the standard applied by IMO auditors lies in whether the Contracting Party has met IMO's criteria in the course of administrative, legislative and judicial development with respect to the above mandatory conventions. There are three specific auditing ways for the auditors' reference: the first is interviewing relevant maritime staff of audited states; the second is reviewing documents of performance results provided by audited states; the last is participating in relevant activities of audited states' maritime authorities.[4]

For the audited states with poor performance, IMO will make an early briefing to the audited states based on the findings relating to the audit in advance of the closing meeting. At the same time, IMO auditors will put forward suggestions regarding a corrective action plan at the audit closing meeting.[5] At the final stage of the audit, IMO auditors will prepare audit reports with respect to the audit findings and observations as well as the feedback, including the corrective action plan, from the Member State.[6]

4. The Legislation and Legal Effects of the Main Instruments Related to IMO Mandatory Audit Scheme

4.1 The Legislative Model of IMO Mandatory Audit Scheme

The time from the year 2013 to 2015 was a transition period for the IMO's Audit Scheme shifting from voluntary to mandatory, during which the priority work of the IMO was to complete the legislative procedures of the amendment to the mandatory audit scheme before the mandatory scheme was fully adopted on 1 January 2016.

In terms of the legislative model, IMO presents the resolutions of the Assembly and the sub-committee on the mandatory application of the III Code in the form of amendments and

1 IMO C 116/6, IMO Member State Audit Scheme: Progress Report on the Implementation of the Audit Scheme, 9 May 2016, Annex, p. 4, 6.

2 IMO Resolution A. 1067 (28), Framework and Procedures for the IMO Member State Audit Scheme, 4 December 2013, part II, para. 4.2.1 & 4.2.2.

3 IMO Resolution A. 1067 (28), Framework and Procedures for the IMO Member State Audit Scheme, 4 December 2013, p. 12-13.

4 IMO Resolution A. 1067 (28), Framework and Procedures for the IMO Member State Audit Scheme, 4 December 2013, part II, para. 6.4.2.

5 IMO Resolution A. 1067 (28), Framework and Procedures for the IMO Member State Audit Scheme, 4 December 2013, part II, para. 6.5.3.

6 IMO Resolution A. 1067 (28), Framework and Procedures for the IMO Member State Audit Scheme, 4 December 2013, part II, para. 7&8.

respectively incorporates them into the main maritime conventions that have already been in effect.[1] By doing so, the Mandatory Audit Scheme is directly applicable to all contracting parties to the main maritime conventions to be reviewed. For example, the International Convention for the Prevention of Pollution from Ships, 1973 (hereafter referred to as MARPOL 73), one of the main maritime conventions formulated by IMO, which, as a legally binding international convention covers 159 contracting parties and more than 99.95% of the global merchant tonnage measurement of ships. IMO has directly incorporated the resolution of Marine Environment Protection Committee on IMO Instruments Implementation Code (III Code) mandatory, in MARPOL 73 as an amendment. As long as no more than a third of the contracting parties of MARPOL 73 or no more than 50% of the global tonnage measurement of merchant ships raise objections, the amendments to III Code are applicable to all contracting parties (which means they are obliged to be audited) and more than 99.95％ of the global tonnage of merchant ships.[2] And absolutely, some individual contracting parties to MARPOL 73 have the right to contest against the amendments and not to comply with them.

In fact, during the legislation process when IMO planned to take III Code mandatory as amendments into the main maritime conventions, each contracting party was entitled to voice out against the compulsory issues that would immediately undermine the sovereignty of the member states. However, during that period, only Finland and the United States had made sounds by reason that the imperfection of their own national procedural requirements would prejudice state sovereignty but then announced withdrawing the objections after the required domestic legislative process was complete.[3]

4.2 The Legal Status of the Main Instruments of Mandatory Audit Scheme

IMO has developed a model of mandatory application of the III Code amendments in the main maritime conventions in order to impose on the member states the obligation of accepting the mandatory audit scheme. Since the contents of the amendments are only resolutions of the IMO Assembly or its council to adopt the mandatory audit scheme, the specific operation would depend on the III Code and the Framework and Procedures for the IMO Member State Audit Scheme. In this case, both of these two instruments will play the role of audit specifications and standards.

The legal status of these two main instruments, that is to say the III Code and the Framework and Procedures for the IMO Member State Audit Scheme, shall be analyzed from two aspects. Firstly, for the contracting parties to the main maritime conventions, the purpose of these two main documents is to implement the main maritime conventions and their related amendments. Therefore, while complying with the obligations of the main maritime conventions and its relevant amendments, the contracting parties shall also need to follow these two main instruments as well. In other words, such relevance between the contracting parties and the above two instruments has endowed the latter with the legally binding force on the former.

Secondly, for States that are members of IMO but not parties to major maritime conventions, the two main instruments, in theory, are not a form of organizational charter for IMO member states but only soft laws that are of a suggestive nature rather than a legally binding one. For example, Party A was an IMO member state but not a contracting party to the International Convention for the Safety of Life at Sea, 1974. In this situation, the 1974 Convention and its relevant amendments have no legally binding force on Party A and the two above-mentioned main instruments certainly have no legally

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1 The main maritime conventions that have incorporated the amendments of the III Code include The International Convention for the Safety of Life at Sea, 1974, International Convention for the Prevention of Pollution From Ships, 1973, Amendments to the Annex of the Protocol of 1997 to Amend the International Convention for the Prevention of Pollution from Ships,1973, International Regulations for Preventing Collisions at Sea, 1972, The International Convention on Load Lines, 1966, Protocol of 1988 relating to the International Convention on Load Lines, 1966 and The International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978.

2 This amendment refers to Resolution MEPC.246(66) adopted in 2014 and has entered into force on January 1, 2016. See IMO, Status of IMO Treaties (July 3, 2020), p. 165, http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202020%20June.pdf.

3 See IMO, Status of IMO Treaties (July 3, 2020), p. 62, 106, 165, 179, 219, 226, 418, http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202020%20June.pdf.

binding force on Party A's implementation of the 1974 Convention neither. Strictly speaking, as a member state of IMO, Party A's compliance with the conventions has certain practical significance. Compliance with international soft law can help to win a country the reputation, which contributes to the establishment of positive legal and cooperative relationship between Party A and other international subjects. Such kind of pressure is the main reason that prompts Party A to follow the soft law voluntarily when it is only a member state of IMO but not a party to the main maritime conventions.[1]

Lastly, viewing from an overall perspective, we can see that the objectives of III Code and the Framework and Procedures for the IMO Member State Audit Scheme are both to enhance global maritime safety and protection of the marine environment.[2] However, the contents of these two main documents are comparable to those of common law and special law. The content of III Code is similar to that of common law and it is intended to help the IMO member states effectively achieve the implementation objectives of all the instruments issued by IMO. However, its content is not targeted at the IMO mandatory audit scheme, but provides the IMO member states the opportunities to have a greater role as a coastal State or a port State than as a flag State and illustrates how to correctly and effectively implement the general compliance principles (including legally binding and non-legally binding documents) of all documents issued by IMO.[3] The content of the Framework and Procedures for the IMO Member State Audit Scheme is similar to that of special law, which specifically regulates the audit preparation, conduct of the audit, reporting requirements and other relevant details related to the IMO mandatory audit scheme.[4]

4.3 The Possible Impacts of Non-compliance with IMO Mandatory Audit Scheme

In the mandatory audit scheme, the verification and record of the audited member state's final report should be available only to the audited Member State. So, for the member states, whether they have passed the audit or not is of great significance. Apart from the impact on a country's reputation for conforming to international commitments, for flag states that have not met the audit standards, their failure to live up to the requirements of mandatory audit scheme might result in suffering economic loss deriving from sanctions imposed by Port States' control measures. As for the sanction mechanism of non-compliance with the instruments, IMO, as an advisory and consultative organization, has no right to interfere in the exercise of sovereign power of a state, let alone impose sanctions on states that have poor performance. In this way, the sanctions for the audited states' non-compliance with the mandatory audit scheme could only be taken, in practice, through the voluntary controls by Coastal States. In general, the Port States would enact domestic laws to deny access to their ports for ships flying the flag of States that do not meet the standards required by IMO mandatory instruments,[5] or even team up with other Coastal States to sign a memorandum of understanding in the form of regional co-operation to ban blacklisted ships from entering into their ports.[6] In case of any unqualified ship entering into the port state, the port state may detain the ship and order for its improvement as advised. The ship should not be released until it meets the standards required by the port state's domestic maritime authorities and IMO. From the contracting parties to the main maritime conventions, there is a legal basis for such practices of prohibiting the entry, investigating, detaining and ordering for improvement of unqualified ships. For example, in Article 4 of MARPOL 73, providing remedy for violation of the requirements of the said convention, has clearly entrusted the competent authorities of Coastal States with administrative and judicial jurisdiction over unqualified ships. And Article 21 of the International Convention on Load Lines, 1966, concerning the port state control, provides that the Port State Government shall ensure such

1 Guzman, A. T., A Compliance- Based Theory of International Law, California Law Review, Vol. 90, p. 1849 (2002).
2 IMO Resolution A. 1070 (28), IMO Instruments Implementation Code (III Code), 4 December 2013, p. 4.
3 IMO Resolution A. 1070 (28), IMO Instruments Implementation Code (III Code), 4 December 2013, p. 4-6.
4 IMO Resolution A. 1067 (28), Framework and Procedures for the IMO Member State Audit Scheme, 4 December 2013, p. 11.
5 Mansell, J. N.K., Flag State Responsibility-Historical Development and Contemporary Issues, Germany: Springer-Verlag Berlin Heidelberg press, 2009, p. 231.
6 Takei, Y., Institutional Reactions to the Flag State that Has Failed to Discharge Flag State Responsibilities, Netherlands International Law Review, Vol. 59, p. 84 (2012).

control is exercised as far as is reasonable and practicable and as well ensure that the ship shall not sail until it can proceed to sea without danger to the passengers or the crew. As a matter of fact, several European coastal states have applied the principle of no more favorable treatment (NMFT) enshrined in IMO instruments, prohibiting the blacklisted ships and unilaterally excluding ships flying the flag of states that have poor performance from entering into their ports.[1] It can be concluded that such voluntary port state control measures taken by developed countries will effectively necessitate the audited states attaching great importance to the mandatory audit scheme and improving the level of compliance. However, on the other side, if the audit results fail to reach the standards, it is likely that the above-mentioned countries would face a series of unilateral or regional joint port state control sanctions, which will bring about the loss of interests of sovereign countries.

5. The Challenges for China's Performance in the Audit

5.1 The Domestication of III Code Mandatory Application

As an IMO member state, China is a Category A Member of the Council[2] and the contracting party of main maritime conventions. According to the principle of pacta sunt servanda and Article 26 of Vienna Convention on the Law of Treaties, which states that every treaty in force is binding upon the parties to it and must be performed by them in good faith, to comply with their obligations under the treaties is entirely within the scope of the sovereignty of a sovereign state. For this reason, the two instruments pertaining to mandatory audit scheme, namely III Code and the Framework and Procedures for the IMO Member State Audit Scheme, should be binding on China.

But one possible problem is that at the time China applied for the Mandatory Audit Scheme, was the domestic legislation procedure complete? As for the main maritime conventions' incorporation of the amendments to III Code, it is also to be known whether the competent authorities of China have completed the domestic legalization procedures detail by detail? Whether adopting the direct mode of issuing relevant notices or announcements, or following the indirect one of transforming legislation, it should be noted that if the domestic legislative procedure was inadequate, the mandatory application of IMO Mandatory Audit Scheme would directly undermine the sovereign rights of China. This is also the main reason why Finland and the United States did not withdraw their objections against taking III Code mandatory as amendments into the main maritime conventions until the completion of their own domestic legislative procedures.

5.2 Systematization of Maritime Legal Documents

III Code's regulation on the IMO member states' observance of main maritime conventions and the legal transformation of relevant aspects are one of the focuses of mandatory audit.[3] Actually, domestic maritime legislative gaps are common in audited states. Due to the different forms of implementing the maritime treaties and the diversity of legislative bodies, there appears to be serious conflicts of legislation and inconsistency of legal effects in China, which have evidently caused the dilemma of maritime legislative confusion. Such kind of issues have been raised for improvement in the reports of IMO audit teams when China participated in the Voluntary Audit Scheme in 2009. It is foreseeable that the systematization of maritime legal documents would be the key aspects reviewed by IMO auditors once China embraces the mandatory audit scheme.

If distinguished from the perspective of legislative patterns, the regulations on maritime legislation

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1 LI Zhen & QIU Jianwei, Status, Trends and Challenges of Voluntary Audit Mechanism in IMO Member States(《IMO 成员国自愿审核机制的现况、趋势和挑战》), World Shipping, Vol. 30, No. 1, p. 41, Feb 2007.

2 The Assembly, one of whose main issues is to elect its council Members, is IMO's highest governing body and meets once every two years. The council is the executive body of the Assembly and would perform tasks on behalf of the Assembly during the intersessional period. The council members are classified into Categories A, B and C. Category A refers to 10 States with the largest interest in providing international shipping services; Category B refers to 10 States with the largest interest in international seaborne trade; and Category C refers to 20 States not elected under (a) or (b) above, which have special interests in maritime transport or navigation and whose election to the Council will ensure the representation of all major geographic areas of the world.

3 IMO Resolution A. 1070 (28), IMO Instruments Implementation Code (III Code), 4 December 2013, p. 4-5.

performance can be divided into six categories: laws (e.g. Maritime Traffic Safety Law of the People's Republic of China), administrative regulations (e.g. Regulation on the Prevention and Control of Vessel-induced Pollution to the Marine Environment), departmental rules and regulations (e.g. Regulation on the Prevention and Control of Pollution Introduced by Vessel and Related Operations to the Marine Environment), generally applicable normative documents, notices or announcements issued by competent departments and technical standards and ship inspection specifications. At present, there is little dispute on laws, administrative regulations and departmental rules and regulations. The main problem lies in the normative documents, notices or announcements issued by competent departments and technical standards and ship inspection specifications, all of which appear in large quantities and play as the supplements to maritime legislation. Taking the normative documents issued by the Ministry of Transport as an example, its total amount is as high as 800. But the legal status of such kind of normative documents issued by the Ministry of Department is relatively vague, which are neither technical standards nor ministerial decrees. Specifically speaking, they have no clear legal position in the law; but in the practice of relevant departments and industries to fulfill their obligations of conventions, they have legally binding force. In addition, in terms of legislative procedure, the formulation procedure of normative documents issued by the Ministry or Department is not regulated by the Legislation Law of the People's Republic of China. Therefore, in the case that the procedure of making regulations has been simplified, the overall status of normative documents appears to be abounded in quantity but lack of accuracy and systematic integration. Besides, due to the large amount, lacking rigor during the legislative process or the course of being directly incorporated as application leads to the ambiguity in legal basis even the plight of no legal basis, which results in increased restrictions and interference by higher administrative authorities and the upper laws, as well as further affecting the authority of local maritime authorities in enforcing the conventions.[1]

Consequently, on the issue of sorting out maritime legal documents, it is kindly suggested that relevant authorities and departments should solve the following three main problems by reviewing relevant domestic normative legal documents in China, which range from the laws formulated by the National People's Congress and its Standing Committee to the administrative and departmental rules and regulations of the State Council, including the normative legal documents formulated by the Ministry of Transport and its Maritime Affairs Bureaus. The first problem needed to be solved is the concurrence between domestic regulations and international maritime conventions triggered by the direct application of the latter. The second is to gradually abolish the mandatory measures in violation with international maritime conventions by cleaning out the normative documents. The third is to systematically integrate normative documents issued by the Ministry or Department with the purpose of avoiding chaos in maritime law enforcement and optimizing the legal environment around the local maritime administrations.

5.3 Strengthen the Monitoring and Management of the Recognized Organizations

The authorization and monitoring of recognized organizations is one of the areas covered by the mandatory audit.[2] Founded in 1956, [3]China Classification Society's (CCS) most important task is to formulate classification regulations based on its own experience and technical reserves, so as to provide classified ships with the minimum standards necessary for maintaining safety. Most of the standards are technical ones, but they have been gradually expanded from technical scope to management field since

1 QU Yanan, Research on the Legislative Transformation of International Maritime Conventions in China under the IMO Audit Scheme (《IMO 审核机制下国际海事公约在中国立法转化研究》), Doctoral dissertation of Dalian Maritime University, p. 38-39 (2014).

2 IMO Resolution A. 1067 (28), Framework and Procedures for the IMO Member State Audit Scheme, 4 December 2013, p. 3, 6, 30.

3 Founded in 1956 and headquartered in Beijing, CCS is a full member of the International Association of Classification Societies. Authorized by the competent authorities of the flag states or regions, CCS has the right to carry out statutory surveys and provide other services approved by relevant competent authorities.Up to now, CCS has been authorized by the administrations of 40 major international shipping countries or regions to perform statutory surveys for the ships flying their flags.

the 1990s.[1] However, the law hasn't entitled CCS the power to legislate. As a professional organization, CCS was only commissioned by the Maritime Safety Administration of China (MSA) to draft the draft of the code for ships' surveys. As for the Specification for Materials and Welding and the Classification Rules of Steel Sea-going Vessel defined by CCS itself, both regulations are not legally binding.[2]

On the issue of authority and responsibilities, the ones of the recognized organizations are often being confused. For this reason, it is suggested that MSA should establish a complete set of legal documents and directives so as to make the authority and the responsibilities of recognized organizations commensurate with each other and establish the responsibility system, the supervision system and supporting accountability mechanism.

On the issue of act of authorization, MSA and relevant competent authorities should acknowledge the management procedures and relevant authorization acts conducted by recognized organizations. Especially for the ships flying the flag of China, it is proposed that China could provide classified ships with a comparative table of different standards under major maritime conventions and domestic laws on a voluntary basis, so that the classified ships from various countries can comply with China's maritime regulations while fulfilling the obligations of the flag states.[3]

To tackle the issues of unqualified personnel and certificates not meeting standard requirements being approved, the relevant maritime authorities should develop educational programs to regulate the performance of recognized organizations.[4]

5.4 Strategies to Implement the Applicable IMO Instruments

Undoubtedly, in accordance with the requirements of III Code, it is necessary for China, who has assumed a great role as a coastal State or a port State than as a flag State, to establish a set of implementation strategies to help achieve the objectives of IMO audits, which is also the key point of IMO audit.[5] The so-called implementation strategies refer to the design and planning, that maritime administrative organizations at all levels shall take to accomplish the aim of effectively implementing the main maritime conventions. And the maritime implementation management strategy formulated by the maritime administrative organizations at all levels should systematically reflect the national implementation strategies and marine policies.[6] At present, China has not yet developed a long-term systematically complete maritime implementation strategy. Based on this, it is suggested in this paper that the Ministry of Transport (MOT) should take the lead in formulating a complete set of performance strategies, whose contents not only include the goal, mission, vision, plan and significant measures of MOT and maritime-related organizations at all levels,[7] but also embody a joint resolution to the above-mentioned issues of systematization of maritime legal documents and the monitoring and management of the recognized organizations. In short, this is to enhance China's international obligations and performance capacity as a flag state, a port state and a coastal state through systematic implementation strategies with targets managements.

6. Conclusion

1 CHEN Yingqiu, The Standard System of China Classification Society and the Development Direction of Related Scientific Research（《中国船级社的规范体系与相关科研发展方向》）, China Ship Survey, Vol. 2, p. 5, April 2000.

2 QU Yanan, Research on the Legislative Transformation of International Maritime Conventions in China under the IMO Audit Scheme（《IMO 审核机制下国际海事公约在中国立法转化研究》）, Doctoral dissertation of Dalian Maritime University, p.39-40 (2014).

3 IMO Resolution A. 1070 (28), IMO Instruments Implementation Code (III Code), 4 December 2013, p. 8.

4 Lihua Ling, China's New Strategy to Cope with the Mandatory Transformation of IMO Audit Scheme（《我国应对 IMO 审核机制强制化转变的新策略》）, China Maritime Safety, Vol. 2, p. 33, Feb 2016; IMO Resolution A. 1070 (28), IMO Instruments Implementation Code (III Code), 4 December 2013, p. 9.

5 IMO Resolution A. 1070 (28), IMO Instruments Implementation Code (III Code), 4 December 2013, p. 4.

6 IMO Resolution A. 1067 (28), Framework and Procedures for the IMO Member State Audit Scheme, 4 December 2013, p. 29.

7 ZHOU Yu & SHA Zhengrong, Considerations on IMO Audit and the Construction of the Management System of Maritime Performance（《关于 IMO 审核与海事履约管理体系建设的思考》）, China Water Transport, Vol. 7, July 2011, p. 15.

The instruments adopted by IMO can be classified into three categories. The first is resolutions on internal matters, which refer to the regulations concerning activities related to IMO internal organizational matters issued by the IMO Assembly through Resolutions which are legally binding with IMO and its affiliate bodies.[1] The second is resolutions concerning IMO member states, which refer to the rules concerning the member states issued by IMO Assembly through Resolution and often presented in the name of a Guideline or Code and have no legally binding force in general. In principle, these rules are not legally binding on IMO member states, but as vital documents approved by IMO, which has reflected high degree consensus among the member states, they are highly valued and followed by all Member States.[2] The third is conventions and refer to the international maritime conventions that are legally binding on the contracting parties and decided to be drafted by IMO through the Assembly's resolution.

According to the above classification, the main maritime conventions mentioned herein are the third category of legally binding conventions adopted by IMO, while the two main instruments concerning the implementation of the mandatory audit scheme, Framework and Procedures for the IMO Member State Audit Scheme and III Code, belong to the second category documents involving the member states. In theory, these two main instruments are soft laws, which have no binding effect on IMO member states. However, in order to tackle the long-term issue of member states' poor performance in complying with IMO instruments, IMO granted compulsory obligations on the audit scheme. Therefore, on the legislative mode, IMO has modified the legislative technique slightly, incorporating amendments to III Code into the main maritime conventions that have been in effect and imposing the mandatory audited obligations on the contracting parties of main maritime conventions. In other words, IMO has incorporated the second category of resolution documents related to the member states into the conventions in the form of amendments to the main maritime documents.

China, as an IMO member state and a contracting party to main maritime documents, should fulfill the mandatory audit obligation. In the face of such challenges on the audit, this paper puts forward the following suggestions. Firstly, to analyze the domestication of the application of III Code, mandatory in China, so as to avoid the lack of legal source or the announcements of competent authorities when China accepts the external audit from IMO auditors. Lacking legal source and announcements aforesaid will lead to the situation that there is no legal basis for China's maritime authorities and personnel to go through the audit, which will cause the sovereign acts of China to be infringed upon, directly by the compulsory obligations of IMO mandatory audit scheme. Secondly, to systematically sort out the domestic maritime legal documents and narrow the gap between domestic maritime legislation and international maritime conventions. It is a great project and should be deemed as the long-term objectives of complying with IMO instruments. Thirdly, to solve the long-term issues such as ill-defined rights and responsibilities, obscure authorization and inadequate monitoring and management of the recognized organizations. Fourthly, it is suggested that the Ministry of Transport (MOT) should take the lead in formulating a complete set of performance strategies, with the purposes of not only enhancing China's international obligations and performance capacity as a flag state, a port state and a coastal state, but also simultaneously planning solutions to the issues of systematization of maritime legal documents and the monitoring and management of the recognized organizations.

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1 Anianova, E., The International Maritime Organization-Tanker or Speedboat? in Ehlers, P. &Lagoni, R. eds., International Maritime Organizations and their Contribution toward a Sustainable Marine Development, Germany: Lit Verlag Hamburg press, 2006, p. 83.

2 Kirgis, F. L., Shipping, in Schachter, O. & Joyner, C.O. eds., United Nations Legal Order, The American Society of International Law, University Press Cambridge, Vol. 2, p. 727 (1998).

我国海洋环境保护法的完善
——以与有关国际公约的衔接为视角

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摘要：面临保护海洋环境的严峻形势，我国加入了大量海洋环境保护国际公约，内容涉及海洋污染防治、资源保护和生态保护等多方面。由于我国在《宪法》中未对国际公约的适用方式作出规定，所以我国海洋环境保护法在实施过程中与部分国际公约的衔接存在着漏洞。恰逢《海洋环境保护法》修改之际，为了进一步完善我国海洋环境保护法，本文从与有关国际公约的衔接为视角，梳理了我国缔结和加入的海洋环境保护公约，通过探究了其在我国的适用方式，指出了两者在衔接过程中出现的漏洞，并提出了完善我国海洋环境保护法与有关国际公约有效衔接的建议和措施。

关键词：海洋环境保护法；国际公约；完善；衔接

一、导论

海洋是全球最大的环境净化器，其广阔性和流动性可以净化污染，从而维持生态平衡。我国是海洋大国，随着陆地资源的短缺，人们将视角进一步向海洋延伸，海洋的经济地位迅速提升。自 20 世纪 90 年代以来，我国海洋经济以两位数的增长率迅速发展，海洋产业也对国民经济的发展做出了突出贡献，包括海洋渔业、海洋船舶工业、海洋运输业等。但是人类的经济利益与海洋生态利益之间的矛盾在任何社会形态中都是固有存在的，随着人们对海洋开发利用程度的加深，人们不断从海洋环境中获取资源的数量超过了自然资源的再生能力，向海洋中排放污染物的数量超过了海洋环境的自净能力，最终导致海洋环境遭到破坏，资源严重短缺。为了应对海洋环境污染、生态破坏和海洋资源短缺等问题，我国已经制订了以《海洋环境保护法》为基础的法律法规和部门规章，也加入了大量的国际海洋环境保护公约。但是法律自制定实施后就不可避免地存在滞后性，所以我国海洋环境保护法与国际公约在衔接过程中也出现了隔阂。根据 2019 年 3 月 14 日通过的《关于第十三届全国人民代表大会第二次会议代表提出议案处理意见的报告》，指出为推进生态文明建设和绿色发展，同意代表提出的修改固体废物污染环境防治法、海洋环境保护法等法律的议案，[1]所以目前我国正在对《海洋环境保护法》进行修改，需要借此机会来使其与国际海洋环境保护公约的内容充分衔接，弥补之前在衔接过程中出现的漏洞。

二、国际法和国内法的关系

国际法与国内法的关系问题一直是国际法学者研究的重点领域，这个问题的解决对国际公约、

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1 《关于第十三届全国人民代表大会第二次会议代表提出议案处理意见的报告》，2019 年 3 月 14 日第十三届全国人民代表大会第二次会议主席团第三次会议通过。
http://epaper.gmw.cn/gmrb/html/2019-03/15/nw.D110000gmrb_20190315_1-03.htm.

国际惯例等能否在国内适用、适用的方式以及良好国际秩序的建立至关重要。国际法是一种软法，是国际社会主体通过协商而达成的权利义务一致的协议，但是在国际社会中不存在一个凌驾于所有主权国家之上的法律实施机构，所以国际法能否在国内有效实施的关键就在于对国际法和国内法关系的判断。以我国缔结和加入的国际海洋环境保护公约为例，我国虽然也制定了大量关于海洋环境保护的法律法规、规章等，如《海洋环境保护法》、《渔业法》、《防止船舶污染海洋环境管理条例》等，但若有关国际公约的重要内容无法与我国海洋环境保护法律体系中的内容相对应，那么在实践中出现了我国法律没有规定，但在国际公约中有明确规定的事项时，能否越过国内法而直接适用该国际公约来调整法律关系呢？还是只要是国内法没有规定的内容即使相关国际公约有相应的规定也不能适用？抑或是需要经过国内立法程序将该漏洞加以补充，从而进行转化直接依据国内法的相关内容作出裁定呢？对这个问题的回答就代表了广大国际法学者对国际法和国内法关系判断的两派观点，即一元论和二元论，但是这两种理论都存在各自的缺陷，都无法完全单一地促进国际法和国内法的衔接，所以又出现了一种新的理论——联系论，目前我国多数学者赞同联系论，认为国际法与国内法相互联系，密不可分。

（一）一元论

赞同一元论的学者认为国际法和国内法同属于一个法律体系当中，均涵盖在自然法的范围之内，认为两者没有什么本质区别，只是时间先后的问题。[1]在认同一元论的基础之上，由于国际法与国内法所归属的法律体系相同，因此产生了两者适用的优先性问题，即国际法优先说和国内法优先说两种主张。

1.国际法优先说。该学说最早出现在一战后，但直到二战以后这种学说才变得普及起来。该学说认为国际法优于其国内法，国内法之所以具有法律效力是由国际法所决定的，只有得到国际法的支持，国内法才能够发挥效力和作用。[2]当国际法和国内法发生冲突时，优先适用国际法的相关规定。针对某一事项若国际法有规定，而国内法存在漏洞的情况下，国际法可以在国内法院中直接适用，无需经有关部门许可，也无需转化为国内法。但国际法优先说在一定程度上否认了国家主权，否认了国家可以不受干涉自主制定和实施法律的权力。由于国际法的目的是为了维护国际秩序的和平稳定，所以国际法优先说不仅与该目的背道而驰而且也不符合国际法中国家主权不受侵犯，国家内政不容干涉等基本原则。

2.国内法优于国际法。有国际法优先说势必会存在国内法优先说，在承认国际法与国内法同属于一个法律体系的前提下，该学说认为国内法优于国际法，国际法之所以能够发挥法律效力取决于国内法的授权，如果没有国内法的支持，国际法就无法发挥法律效力。有学者甚至主张国际法是国内法的一个分支，并以国家的“对外公法”为名。但是国内法优先说否认了国际法在维护和建立国际秩序方面的作用，极易成为霸权主义和强权政治的工具，使国际法变得如同虚设。国内法优先说完全否认了国际法的价值，使国际法沦为国内法的附庸，逐渐被现代社会所摒弃。

（二）二元论

与一元论相对，二元论认为国际法和国内法是两个彼此独立，完全不同的法律体系，两者之间没有附属关系，处于平等的法律地位之下。国际法是调整国家之间社会关系的法律规范的总和，而国内法调整的是国内自然人、法人以及其他组织之间的法律关系，因此二者之间毫无联系，呈

1 徐端鸿、杜东泽：《浅析国际法与国内法的关系》，载《农家参谋（社会视野）》2018 年第 6 期。
2 黄军英：《国际法与国内法关系的思考》，载《法学研究》2019 年。

现出平行的特征。国内任何法院都不得直接适用国际公约或者国际惯例作为判定案件事实的依据，只有当国际公约的内容经由国内立法机关的立法程序转化为国内法之后，或者该国际惯例被本国普遍认可和接受，国内法院才可适用国际法的相关内容，其本质上适用的仍然是国内法而非国际法。二元论在一定程度上得到了许多国家的支持，因为它可以有效地维护国家主权和防止内政的侵犯，摆脱强国的控制。但是二元论过分强调了国际法与国内法之间的对立，割裂了两者之间存在的联系，使国际法和国内法的矛盾更加突出。

（三）联系论

由于一元论和二元论都存在自身的缺陷和不足，都无法充分有效地促进国际法与国内法进行衔接，从而促进国际秩序的良好发展。事实上，国际法和国内法并不是完全独立处于平行状态的，两者都是法律，他们的制定主体都是国家，所以两者存在着紧密的联系。

首先，从国内法的角度看。第一，国际社会是一个整体，国内法的制定需要关注国际法对于该问题所做出的规定，如果两者规定的内容大相径庭，那么在涉外案件中势必会存在着与国际法冲突的问题，不仅会产生大量的矛盾也会浪费司法资源，降低诉讼效率。第二，国际法在国内是具有法律效力的，当国际公约或国际惯例中的某些内容被我国所普遍采纳，那么国家为了在国内实施国际法的规则和制度，国际法可以通过立法程序转化为国内法。其次，从国际法的角度看。第一，国际法的制定不得干涉其他国家制定国内法的权力，但与此同时也要与其他国家国内法规定的通行做法和原则精神相一致，否则该国际法将会成为一个空壳，不被国际社会主体所遵守。第二，倘若国际法针对某个问题仅作了原则性的规则，则需要国内法作出相应具体的规定。[1]以我国加入的国际海洋保护公约为例，我国在 1999 年加入了《国际油污损害民事责任公约》，该公约解决的是邮轮船舶所有人因海上事故所引起的油污损害责任的问题，我国《海洋环境保护法》第 66 条与该公约紧密衔接，规定了承担责任的具体原则和方法，这说明国际法和国内法之间是密不可分，相互联系的，不存在何者优先的问题，也不存在两者彼此割裂的问题。再如，管辖权是主权国家的一项基本权利，根据保护管辖原则，当在国家管辖海域之外造成国家管辖海域污染的，受损害国家当然具有管辖权，这一国际惯例和原则被大多数主权国家认可和接受，所以《国际干预公海油污事故公约》和《干预公海非油类物质污染议定书》也对此作出了规定，这就表明国际法也会与国内法紧密结合，实现国际法的最大遵守和执行程度来实现国际法维护国际秩序的目标。

三、海洋环境保护公约在我国的实施情况

（一）我国缔结或加入的海洋环境保护公约

面对海洋环境的严峻形势，为了防止海洋环境进一步恶化，我国逐步加入各类有利于海洋环境保护的国际公约，还制定了大量关于海洋环境保护的法律法规。我国目前已经加入了 38 个海洋环境保护国际公约，大致可以分为综合保障类、污染防治类、生态保护类、资源保护类四大类。其中基础保障类共计 9 个，污染防治类 12 个，生态保护类 2 个，资源保护类 15 个。我国在注重对海洋环境基础保障的同时，重点防治海洋环境污染和保护现有的海洋生物资源，以实现海洋资源的永续利用和海洋环境的可持续发展。关于上述国际公约的具体内容、我国的加入情况、与国内法的衔接情况以及是否需要完善等内容会在下文详细分析。

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1 王铁崖主编:《国际法》，法律出版社 1995 年出版。

（二）海洋环境保护公约在我国的适用方式

由于我国在宪法中未对国际公约如何在国内适用及其效力作出规定，所以其在国内的实施过程中经常会出现混乱。关于国际法如何在国内适用的问题，通过上述对一元论和二元论的阐述，一元论认为国际法不需要转化为国内法并经立法机关或执法机关的批准直接适用，即套入式。而二元论认为国际法只有经国内立法程序转化后才能在国内法院适用，即转化式。但该划分仅仅是一种理论上的分类，为具体的海洋环境保护公约在国内的具体适用提供了理论基础和解决策略，所以我们要兼采一元论和二元论的优势，包容并蓄，使国际公约在本国适用时能够淋漓尽致地发挥作用。[1]

因此，就条约的适用问题，笔者认为应将该两种方式各取所长，采用转化式的间接适用和有条件套入式的直接适用。其中直接适用的条件包括第一、公约规定的内容足够详实完备；第二、经过我国有权机关对其适用性进行确认，即已被我国接纳，对象以国际惯例为主。笔者对两种方式各取所长的原因在于：首先，国际法大多都是通过国际法主体之间的协商而达成的权利义务一致的协议，国际法不同于国内法，它不具有强制执行力，所以对于国际惯例，只有者经有权机关批准或者在我国普遍实践后才可以将其落到实处；对于部分国际公约，要通过国内立法程序将其转化为国内法。其次，部分国际公约仅包含原则性的规定和制度，其具体的实施方法和要求还需要通过国内法作出详细的规定。最后，如果国际公约就某一问题规定的内容已经足够详实和完备，我国在缔结或加入时也根据我国实际情况作出了保留，尤其是在需要及时推行并高效实施的领域，如《联合国气候变化框架公约》，那么该国际公约经过有权机关的批准就可以直接适用来解决我国涉外问题了。因此，海洋环境保护公约要么有权机关批准或者被实践普遍采纳来确保其在国内得到遵守和执行。要么将公约转化为国内法，通过国内法体系的适用和执行来达到实施该国际公约的效果。例如我国《野生动物保护法》就将《濒危野生动植物物种国际贸易公约》和《保护迁徙野生动物物种公约》中的内容转化为国内法加以实施。《野生动物保护法》第三十五条就规定了我国缔结或者加入的国际公约禁止或者限制贸易的野生动物或者其制品名录，由国家濒危物种进出口管理机构制定、调整并公布。该规定进一步将国际公约的内容在国内进一步落实。我国《领海及毗连区法》和《专属经济区与大陆架法》就是结合《联合国海洋法公约》和我国现实国情加以制定的。

（三）公约在国内法中的具体表现以及我国海洋环境保护法是否有必要对此进行修改和补充

就国际法和国内法的关系而言，我国大多数学者赞同联系论的观点，认为两者既不属于同一个法律体系也不互相排斥，彼此独立。所以我国对于国际海洋环境保护公约在国内的适用方式应当兼采转化式和套入式。只有经过国内立法机关的立法程序，将我国缔结或加入的国际海洋环境保护公约中的内容结合我国的具体实际情况落实到国内法或者在某些法律中对部分国际条约或国际惯例的直接适用作出规定，国际法的具体原则、规则和制度才能够在我国法域内得以落实。

1 罗曼：《条约在我国适用的相关问题研究》，沈阳工业大学 2018 年硕士学位论文。

类别	公约名称	主要内容	在国内法中的具体表现	以《海洋环境保护法》为主体的国内法是否需要修改
基础保障类	联合国海洋法公约	该公约对内水、领海、临接海域、大陆架、专属经济区、公海、岛屿等重要概念做了界定。对当前全球各处的领海主权争端、海上天然资源管理、污染处理等具有重要的指导和裁决作用。	我国于1996年5月15日批准该公约。《领海及毗连 区法》、《专属经济区与大陆架法》作出了规定。	不需要，但是有关外大陆架、专属经济区的剩余权利、海域的历史性权利等问题在《领海及毗连区法》、《专属经济区与大陆架法》中可以进一步规定。有关岛屿的定义，我国可以根据我国的具体情况修改《海岛保护法》中的定义，给予人工岛岛屿法律地位。
	1969年国际干预公海油污事故公约	该公约用于应对公海上发生的油污事故。	我国于1990年正式加入该公约，该公约自1990年5月24日起对我国生效。《海洋环境保护法》第2条适用范围包括公约的范围。	衔接很好，不需要修改。
	1973年干预公海非油类物质污染议定书	该公约主要用于应对公海上发生的非油类污染事故的处理工作。	我国于1990年1月9日加入。《海洋环境保护法》第2条适用范围包括公约的范围。	衔接很好，不需要修改
	1990年国际油污防备、反应和合作公约	该公约的目的是促进各国加强油污防治工作，强调有效应急防备的重要性，在发生重大油污事故时加强区域性或国际性合作，采取快速有效的行动，减少油污造成的损害。	我国于1998年3月20日交存加入书，1998年6月30日对我国生效。《海洋环境保护法》第17、18、50、52条以及第八章“防治船舶及有关作业活动”对海洋环境的污染损害作出了衔接。	需要修改，《海洋环境保护法》针对船舶油污应对方面衔接较好，但是有关其他海洋灾害，如风暴潮、赤潮、海冰、海水侵蚀等也应当有相应的应对措施。

	修正1971 年设立国际油污损害赔偿基金国际公约的 1992 年议定书	为使《1971 年设立国际油污损害赔偿基金公约 1984 年议定书》规定的赔偿限额尽快生效而签订的议定书。	我国于 1999 年 1 月 5 日交存加入书，但该议定书目前只适用于香港地区。	不需要修改，我国有自己的基金，《海洋环境保护法》也规定了油污损害赔偿基金制度。国务院还印发来《船舶油污损害赔偿基金征收使用管理办法》。
	核事故或辐射紧急事故援助公约	该公约是为了加强安全发展和利用核能方面的国际合作，建立一个将有利于在发生核事故或辐射紧急情况时迅速提供援助，以尽量减少其后果的国际援助体制。	公约于 1987 年 10 月 14 日对我国生效。《海洋环境保护法》第 33 条、《核安全法》、《国务院关于核事故损害赔偿责任问题的批复》进行了衔接	衔接很好，不需要修改和补充。
	1965 年国际便利海上运输公约	该公约主要为国际海上运输提供便利。	我国于 1994 年 12 月 29 日决定加入，1995 年 3 月 16 日对中国生效。《中国海事局关于印发 2012 年船员管理工作要点的通知》等 4 篇部门规章作出规定。	不需要，虽然《海洋环境保护法》并没有对国际便利海上运输作出规定，但是国际海上运输不是该法所规制的对象，我国其他法律对此作出了规定。而且各国为国际海上运输提供便利已经为国际惯例。
	北太平洋海洋科学组织公约	该公约意图在互利的基础上通过国际科学合作能更好地科学地了解北太平洋海域，希望建立一个适当的政府间组织以促进和便利科学合作。	我国于 1991 年 10 月 22 日签署本公约，于 1992 年 3 月 24 日对我国生效。《国家“十一五”海洋科学和技术发展规划纲要》作出衔接	需要修改，《海洋环境保护法》并没有对海洋科学组织以及合作问题作出规定。
	核安全公约	该公约为使各核能利用国家采取加强核安全的措施，	我国 1996 年 4 月 9 日批准该公约。《核安全法》、《中华人民共和国	衔接很好，不需要修改。

		并通过国际合作在世界范围内实现和维持高水平的核安全，使人类社会在发展的同时保护自己的生存环境。	民用核设施安全监督管理条例》等法律法规和部门规章作出具体规定。	
污染防治类	国际油污损害民事责任公约	该公约主要解决邮轮船舶所有人因海上事故所引起的油污损害责任。	我国于1999年1月5日加入，2000年1月5日生效。我国《海洋环境保护法》第66条有相应衔接。	衔接很好，不需要修改。
	关于持久性有机污染物的斯德哥尔摩公约	该公约主要为保护人类健康和环境而采取的包括旨在减少和消除持久性有机污染物排放和释放的措施在内的国际行动。	2004年11月11日对我国正式生效。《海洋环境保护法》第二章、第四章对污染物的监督管理和有效防治作了规定，以及《生态环境部、外交部、国家发展和改革委员会等关于禁止生产、流通、使用和进出口林丹等持久性有机污染物的公告》等规定衔接较好。	衔接很好，不需要修改。
	防止倾倒废物以及其他物质污染海洋的公约	该公约的目的是防止向海洋倾倒的废物及其他物质对海洋造成污染。	1985年12月15日对中国生效。我国《海洋环境保护法》第七章“防治倾倒废弃物”、《海洋倾废管理条例》进行了衔接。	需要修改，《海洋环境保护法》56条规定的可以向海洋倾倒的废弃物名录与该公约不符。根据96议定书，只有在可倾倒的废物名录中的物质才能倾倒。
	1973年国际防止船舶造成污染公约1978年议定书	用于国际防止船舶对海洋环境造成污染和对污染的及时处理。	我国于2006年3月15日加入，2006年8月23日正式生效。我国《海洋环境保护法》第八章“防治船舶及其有关作业活动对海洋环境的污染损害” 作出具体规	需要修改，该公约中的新船强制性的能效设计指数(EEDI)和船舶能效管理计划(SEEMP)在我国海洋环境保护法中未作规定。

			定。	
	修正1969年国际油污损害民事责任公约1992年议定书	该公约将国际油污损害民事责任落到实处。	我国于1999年1月5日加入该议定书，2000年1月5日生效。我国《海洋环境保护法》第66条。	衔接很好，不需要修改。
	控制危险废料越境转移及其处置巴塞尔公约	用于控制危险废料越境转移并规定了处置方法。	中国于1990年3月22日在该公约上签字，1991年9月4日批准该公约。我国《海洋环境保护法》第七章“防治倾倒废弃物对海洋环境的污染损害”、《海洋倾废管理条例》、 《船舶载运危险货物安全监督管理规定》作出了具体规定。	衔接很好，不需要修改。
	2001年国际燃油污染损害民事责任公约	为解决燃油污染事件中确定责任问题和提供适当赔偿的统一国际规则和程序。	我国于2008年11月17日批准加入该公约。我国《海洋环境保护法》第66条作出了具体规定。	衔接很好，不需要修改。
	2007年内罗毕国际船舶残骸清除公约	为解决清除国际船舶残骸的问题而签订的国际公约	2016年7月12日国务院决定加入。我国《海洋环境保护法》第八章“防治船舶及有关作业活动对海洋环境的污染损害”对没有对国际船舶残骸的清除作出规定。	需要修改，参照公约在《海洋环境保护法》中进行修改和补充。
	禁止在海床、洋底及其底土安置核武器和其他大规模毁灭性武器条约	该公约规定各缔约国承诺不在12海里以外的海床、洋底及其底土安装或设置任何核武器或任何其他类型的大规模毁灭性武器。	我国于1991年2月28日加入。我国《核安全法》衔接较好、《海洋环境保护法》在总则部分对保障海洋安全作了规定。	衔接很好，不需要修改。
	国际控制	公约呼吁各国	公约将于2011年6	需要修改，在《海

	船舶有害防污底系统公约	采取措施减少由于防污底系统中使用有机锡化合物所造成的污染。	月 7 日对我生效，适用于澳门特区，但不适用于香港特区。我国《海洋环境保护法》第八章“防治船舶及其有关作业活动对海洋环境的污染损害”没有控制船舶防污地污染海洋环境等船舶建造的内容。	洋环境保护法》第八章防治船舶污染海洋环境的规定中增加有关船舶建造的内容。
	关于汞的水俣公约	公约主要是为了在全球范围内禁止生产、进口和出口加汞产品，保障各国公民的健康。	我国于 2013 年 10 月 11 日签署，2016 年 4 月 30 日批准该公约。我国《海洋环境保护法》第四章“防治陆源污染物对海洋环境的污染损害”作出具体规定	衔接很好，不需要修改。
	船舶压载水和沉积物控制和管理公约	公约用于控制管理船舶压载水和沉积物以防止、减少和消除有害水生物和病原体转移规则。	2018 年 10 月 22 日加入，2019 年 1 月 22 日正式对我国生效。《水污染防治法》第五节“船舶水污染防治”、《防治船舶污染海洋环境管理条例》第三章“船舶污染物的排放和接收”作出了规定。	衔接很好，不需要修改。
生态保护类	关于环境保护的南极条约议定书	对保护南极环境做出了细致规定。	我国于 1991 年 10 月 4 日签署该议定书。《南极活动环境保护管理规定》进行了衔接。	衔接很好，不需要修改。
	《联合国气候变化框架公约》京都议定书	主要目的是将大气中的温室气体含量稳定在一个适当的水平，进而防止剧烈的气候改变对人类造成伤害。	我国于 1998 年 5 月 29 日签署该议定书。《全国人民代表大会常务委员会关于积极应对气候变化的决议》以及多项行政法规和部门规章都作出了具体的规定。	需要修改，海洋对全球气候有重要影响，但在《海洋环境保护法》中并没有应对气候变化的规定。
资源保	生物多样性公约	是一项保护地球生物资源的国际性公约。	我国于 1992 年 6 月 11 日签署该公约，1992 年 11 月 7 日批准。生态	需要修改，对于其 2004 年《生物多样性公约秘书处的报

护类			环境部发布的19篇部门规章作出了规定。《环境保护法》、《野生动物保护法》、《野生植物保护条例》、《自然保护区条例》等一系列法律法规中均有生物多样性保护的规定。	告》中关于海水养殖、超出国家管辖权范围以外的深海海底遗传资源，以及超出国家管辖范围外的海域的生物多样性的养护与利用并未在我国《海洋环境保护法》中提及。
	濒危野生动植物物种国际贸易公约	该公约主要用于管制而非完全禁止野生物种的国际贸易，以达成野生物种市场的可持续利用性。	我国于1980年12月25日加入该公约，并于1981年4月8日正式生效。我国《野生动物保护法》有所衔接。	我国法律衔接很好，不需要修改。
	关于特别是作为水禽栖息地的国际重要湿地公约	该公约为湿地资源保护和利用的国家措施及国际合作构建框架。	中国于1992年3月1日加入。农业部公告第2619号-国家重点保护水生野生动物重要栖息地名录（第一批）、国际湿地公约履约办公室关于印发《国际湿地城市认证提名指标》的通知中有衔接。	需要修改，根据《国际湿地城市认证提名指标》通知中的精神，可以在《海洋环境保护法》目的中加入“建设环境美好滨海城乡”。
	亚洲-太平洋水产养殖中心网协议	该协议对亚洲-太平洋水产养殖中心网的宗旨、作用、成员的权利和义务、管理体系、财政等事项做了具体规定。	于1990年1月11日对中国生效。《中华人民共和国渔业法》、《水产苗种管理办法》以及当地的相关规定，农业部、生态环境部制定的30篇部门规章衔接较好。	衔接很好，不需要修改。
	中白令海狭鳕资源养护与管理公约	主要为养护和管理中白令海狭鳕资源合作采取措施。	我国于1995年9月批准该公约。《海洋环境保护法》第三章海洋生态保护，政府白皮书《中国海洋事业的发展》作出了解释。	衔接很好，不需要修改。

	执行1982年12月10日《联合国海洋法公约》有关养护和管理跨界鱼类种群和高度洄游鱼类种群的规定的协定	确保跨界鱼类种群和高度洄游鱼类种群的长期养护和可持续利用。	中国政府于1996年11月6日签署本协定。《海洋环境保护法》第三章海洋生态保护，政府白皮书《中国海洋事业的发展》作出了解释。	衔接很好，不需要修改。
	建立印度洋金枪鱼委员会协定	该协定确保印度洋金枪鱼和类金枪鱼的养护、促进对其进行最佳利用和这一渔业的可持续发展进行合作。	我国于1998年8月2日声明接受。《农业部办公厅关于规范金枪鱼渔业渔捞日志的通知》、《中国金枪鱼渔业渔捞日志》有衔接。	衔接很好，不需要修改。
	生物多样性公约卡塔赫纳生物安全议定书	该协定协助确保在安全转移、处理和使用凭借现代生物技术获得的、可能对生物多样性的保护和可持续使用产生不利影响的改性活生物体领域内采取充分的保护措施，同时顾及对人类健康所构成的风险并特别侧重越境转移问题。	我国于2005年4月27日加入，同年9月6日生效。生态环境部发布的19篇部门规章作出了规定、《疫苗管理法》也对生物安全作出了规定。	衔接很好，不需要修改。
	预防中北冰洋不受管制公海渔业协定（尚未生效）	该协定由北冰洋沿海国和非沿海国与欧盟一起平等磋商、最终形成的针对北极特定海域的治理规则，丰富了北极国际治理的内容。	我国于2018年10月03日签署，但尚未生效。《中华人民共和国农业农村部公告第108号——渔船和捕捞许可管理证书证件样式修订说明》、《渔业捕捞许可管理规定》、《渔业法》第三章“捕捞业”对公海渔业管制作出了规	需要修改，关于公海渔业资源捕捞和管制的规定可以在《海洋环境保护法》中提及。

			定。	
	国际捕鲸管制公约	公约防止对所有种类鲸鱼的过度捕猎。建立国际捕鲸管制制度，以确保鲸鱼族类的适当养护和发展。	中国从1980年9月24日起成为本公约当事国。我国虽然没有针对鲸鱼族类的规定，但是《渔业法》对鱼类的整体性规定在一定程度上可以与该公约相衔接。	不需要修改。
	养护大西洋金枪鱼国际公约	是一项养护及管理大西洋金枪鱼和类金枪鱼资源的公约。	我国于1996年加入该公约。农业部发布4篇部门规章以及政府白皮书《中国海洋事业的发展》对养护大西洋金枪鱼资源作出规定。	不需要修改。
	保护世界文化与自然遗产公约	公约主要规定了文化遗产和自然遗产的定义，文化和自然遗产的国家保护和国际保护措施等条款。	我国早于1985年就成为该公约缔约国之一。有2篇行政法规，31篇部门规章根据公约对我国具体文化和遗产作出规定。	不需要修改。
	保护迁徙野生动物物种公约	公约保护陆地、海洋和空中的迁徙物种的活动空间范围，保护通过国家管辖边界以外野生动物中的迁徙物种。	1979年6月23日在德国波恩通过，1983年12月1日对我国生效。《中华人民共和国野生动物保护法》进行了衔接，但没有涉及迁徙的海洋生物。	需要修改，我国海洋环境保护法中并没有对迁徙的海洋生物的保护作出规定。
	负责任渔业行为守则	要求各国从事捕捞、养殖、加工、运销、国际贸易和渔业科学研究等活动，应承担其责任的准则要求。	联合国粮农组织于1995年10月通过并在我国生效。《渔业法》以及《国务院关于海洋渔业持续健康发展的若干意见》等行政法规33篇作出了规定。	不需要修改。
	将保护和可持续利用生物多样性以增进福祉纳入主流的坎昆宣言	将生物多样性纳入主流以增进福祉，促进保护和可持续利用生物多样性。	2016年12月制定。生态环境部、农业农村部、水利部关于印发《重点流域水生生物多样性保护方案》的通知、国	不需要修改。

			家发展改革委、国家海洋局关于印发“一带一路”建设海上合作设想的通知等部门规章作出规定。	

四、海洋环境保护法与有关国际公约衔接过程中出现的问题

为了有效地保护海洋环境，防止海洋环境污染和海洋资源匮乏，我国在海洋环境保护方面已经做了充分的立法工作，制订了大量有利于海洋环境保护的法律法规。如果按照环境要素或领域作为划分我国环境法律体系的依据，那么《海洋环境保护法》是针对海洋环境的特殊性而作出的规定，成为其最为重要的组成部分之一。虽然我国正在开展《海洋基本法》的立法工作，但该部法律是面对海洋综合管理的法律，不仅包括海洋环境保护，还包括海洋经济发展、海洋科技创新、海洋国际合作等政治经济方面。因此，在海洋环境保护领域的基础就是《海洋环境保护法》，不仅其他与海洋环境有关的法律要与《海洋环境保护法》相互衔接，如《渔业法》、《防治海岸工程建设项目污染海洋环境管理条例》等，而且在其中也要体现出有关国际公约的内容，对套入式和转化式的适用方式要取其所长，才能促进两者之间有效衔接。当存在涉外因素时，我国《海洋环境保护法》96 条已对条约的适用性作出了规定，即除了我国作出保留的规定以外，采取国际法优于国内法的原则，优先适用国际公约。但当不含涉外因素时，一般需要转化为国内法才能实施。恰逢《海洋环境保护法》修改之际，借此机会来使其与有关国际公约的内容做到更充分的衔接，弥补之前在衔接过程中出现的漏洞。虽然我国海洋环境保护法中的内容已经较为完备，但随着我国加入的海洋环境保护公约日益增多，因此在与海洋环境保护公约的衔接过程中仍然存在一些不足之处。需要立法机关及时调整和更新海洋环境保护法，使国际条约的内容加以落实。

（一）《海洋环境保护法》的立法目的过于狭窄，统领性不足。

每部法律的立法目的都体现着立法者的价值追求和指导思想，每一法律条文都是该立法目的的具体体现，所以立法目的具有统领整部法律的作用。我国《海洋环境保护法》立法目的应当是统领整个海洋环境保护领域的，不仅涵盖国内海洋环境保护法的核心理念，也能涵盖有关海洋保护公约的中心主旨。但是随着我国加入的海洋环境保护公约日益增多，《海洋环境保护法》的立法目的已经无法涵盖我国缔结和加入的某些国际条约的核心思想，所以其立法目的失去了统领性，需要与时俱进地加以修改和补充。例如，《海洋环境保护法》未将“应对气候变化，防止全球变暖”作为其立法目的，但是我国于 1998 年 5 月签署的《联合国气候变化框架公约》京都议定书，以及我国《大气污染防治法》和国务院印发的《全国海洋主体功能区规划》都具有积极应对气候变化，防止全球变暖的作用，所以《海洋环境保护法》的立法目的已经无法有效地起到统领作用了。

（二）海洋环境保护法无法根据公约及时调整，缺乏实时性

法律自制定实施后，不可避免地存在滞后性的缺陷，为弥补该缺陷，保持与时俱进，使我国缔结或加入的海洋环境保护公约可以在海洋环境保护法中得以体现，需要对以《海洋环境保护法》为主的法律适时修改或者通过司法解释进行补充。当前我国海洋环境保护法已无法与我国缔结或

加入的国际海洋环境保护公约保持实时性。例如，我国加入的《湿地公约》、《生物多样性公约》等都不断出台新的规则，联合国也将未来的十年定位为生态修复的十年，国际上也正在开展极地环境保护、防治海洋微塑料污染等立法，但这些规则与理念目前未纳入我国的相关立法中。

（三）海洋环境保护法对部分国际公约的核心措施尚未作出规定

我国缔结或加入的国际海洋环境保护公约涉及范围较广，包括防治污染、资源保护、国际合作、环境责任等方面，但是我国有关海洋环境保护的立法不仅较为分散，并非所有的措施都统一规定在《海洋环境保护法》中，而且在某些领域还存在法律漏洞。比如在生物多样性保护方面，我国尚未制定一部《生物多样性保护法》，但是我国于 1992 年 6 月加入了《生物多样性公约》，而《海洋环境保护法》对于生物多样性和海洋生物资源的保护仅作了总体性、概括性的规定，但关于海水养殖、超出国家管辖权范围以外的深海海底遗传资源，以及超出国家管辖范围外的海域的生物多样性的养护与利用并未作出具体规定，所以有关保护地球海洋生物资源的规定应当通过修改《海洋环境保护法》得以落实。再如，根据 73/78 防止船舶污染海域国际公约（MARPOL）规定的新船强制性的能效设计指数（EEDI）和船舶能效管理计划（SEEMP），我国《海洋环境保护法》第八章虽然对防治船舶及其有关作业活动对海洋环境的污染损害作出了规定，但是并没有将公约中防止船舶污染海域的两项重要核心措施落到实处。此外，我国加入的《控制船舶有害防污底系统国际公约》、《船舶压载水和沉积物控制和管理公约》以及我国尚未加入但具有借鉴意义的《香港拆船公约》都对船舶的建造都有环境保护技术性的要求，但是我国《海洋环境保护法》并未对防污底系统、沉积物和压舱水系统、造船、拆船等的海洋环境科学研究和监测作出规定。由此可见，我国《海洋环境保护法》与国际海洋环境保护公约的衔接度较低，核心措施未作出具体的规定。

五、完善我国海洋环境保护法与有关国际公约有效衔接的建议和措施

（一）充实《海洋环境保护法》的立法目的

1.在《海洋环境保护法》的目的中加入“建设环境美好滨海城乡”

我国于 1992 年 3 月 1 日加入了《关于特别是作为水禽栖息地的国际重要湿地公约》，该公约为湿地资源保护和利用的国家措施及国际合作构建了框架。为更好地履行该公约，贯彻落实国务院办公厅印发的《湿地保护修复制度方案》，国家林业局办公室印发了《国际湿地城市认证提名暂行办法》，国际湿地公约履约办公室印发了《国际湿地城市认证提名指标》的通知，为了更好地与该公约相衔接，根据这两个法律文件的精神，可以在《海洋环境保护法》的目的中加入建设环境美好滨海城乡。

2.在《海洋环境保护法》的目的中加入“应对气候变化导致的海洋问题”

随着对矿产资源勘探开发力度的增强，化石燃料燃烧所排放的温室气体已经远远超过了大气环境承载力和自净能力，导致全球变暖，气温升高。剧烈的气候改变不仅对人类造成伤害，也会对海洋生物造成不可逆的损害。气候变化导致全球变暖，进而造成冰川融化海平面上升，海洋生物资源锐减，海洋环境的生态稳定性遭到破坏。所以为应对气候变化，我国不仅于 1998 年签署了《联合国气候变化框架公约》京都议定书，也在多次国民经济和社会发展规划中指出要积极应对气候变化，切实履行节能减排的职责。因为气候变化问题与海洋环境保护密切相关，应对气候

变化的法律法规也正在积极制定和实施，所以为了更好地实现《海洋环境保护法》立法目的的统领性，可以将“应对气候变化导致的海洋问题”纳入到立法目的中去。

（二）适时修改，增强《海洋环境保护法》实时性

1.在《海洋环境保护法》第一章总则中加入“国际合作原则”

由于海洋环境有着不同于陆地的特殊性，海洋环境问题已经危及整个人类社会的生存和发展。同时加强一带一路建设对国际合作保护海洋环境有迫切性的要求，以及国家履行国际海洋环境保护公约并参与区域和全球海洋环境治理的责任等都需要密切的国际合作才能完成。此外，对海洋环境保护的国际合作原则已经在我国缔结或加入的海洋环境保护公约中有所体现。《联合国海洋环境保护公约》专门对国际合作作出了详细而又具体的规定；《控制危险废物越境转移及其处置巴塞尔公约》中规定各缔约国应互相合作，以便改善和实现危险废物和其他废物的环境无害管理。[1]《生物多样性公约》中也规定了就有关保护和持久使用生物多样性的科学方案以及研究和开发方面的国际合作提供咨询意见。[2]除了上述国际文件，《1990 年国际油污防备、反应和合作公约》、《核安全公约》、《捕鱼及养护公海生物资源公约》、《内罗毕宣言》等文件也重点强调了开展国际及区域协调与合作共同应对海洋环境问题的基本理念，所以我们应当在《海洋环境保护法》中加入国际合作原则。

2.修改其他与海洋环境保护有关的法律，使《海洋环境保护法》有效实施

《联合国海洋法公约》对内水、领海、临接海域、大陆架、专属经济区、公海、岛屿等重要概念做了界定，我国《领海及毗连区法》、《专属经济区与大陆架法》就是将该公约的规定在国内实行的具体表现。但是各国对进一步开发海洋资源的欲望日益扩张，上述两部法律对有关外大陆架、专属经济区的剩余权利、海域的历史性权利等问题没有作出规定，所以可以通过修改《领海及毗连区法》、《专属经济区与大陆架法》将上述权利问题得以解决。

随着科学技术的发展和进步，各国开发和利用海洋的野心逐渐扩大，人工岛屿的数量也不断增加。但是《公约》并未对人工岛屿的法律地位进行界定，也没有对人工岛屿的海洋权利作出规定。由于各种海洋结构物经过人为建造组合在一起之后，就无法区分自然部分和人工部分了，所以对人工岛屿法律地位的界定在学界存在争议。目前学界主要存在“建造基础说”、“建造用途说”、“建造方式说”等主张。[3]但是海岛保护以及周围海域资源的开发利用在我国《海洋环境保护法》中也相应的原则性规定，所以我国可以根据具体情况修改《海岛保护法》，对人工岛屿的法律地位进行界定，这样才能与《海洋环境保护法》充分衔接，使其得到充分实施。

3.有关超出国家管辖权范围之外的海洋生物资源的养护和利用在《海洋环境保护法》中作出规定

生物多样性的锐减已经成为人类无节制地向自然索取导致的恶果。《生物多样性》公约是一项保护地球生物资源的国际性公约，我国于 1992 年签署并批准了该公约。为了切实履行该公约保护生物多样性的国际义务，我国已经制定了大量的法律法规来保护生物多样性，比如《野生动物保护法》、《海洋环境保护法》第三章海洋生态保护以及多年的国民经济和社会发展规划中都着重强调了对生物资源的保护，在生物多样性保护方面，我国《海洋环境保护法》衔接较好。但是由于各国在公海上享有捕鱼自由，所以产生了对超出国家管辖权范围之外的海洋生物资源的利用

1 《控制危险废物越境转移及其处置巴塞尔公约》第 10 条。
2 《生物多样性保护公约》第 25 条。
3 孙超、马明飞：《论人工岛屿的法律地位》，载《河北法学》2019 年第 4 期。

问题，2004 年《生物多样性公约秘书处的报告》中对海水养殖、超出国家管辖权范围以外的深海海底遗传资源，以及超出国家管辖范围外的海域的生物多样性的养护与利用等方面作出了规定，这些规定也应当在我国《海洋环境保护法》中提及。

4.增加应对除油污外的其他海洋灾害的相关规定

虽然海洋自身具有强大的净化能力，但是石油泄漏对海洋环境造成的污染是巨大的，海洋需要经过上百年甚至更久的时间才可以恢复甚至根本无法恢复，各国也都在有效地加强油污防治工作，强调有效应急防备的重要性，因此我国于 1998 年加入了《1990 年国际油污防备、反映和合作公约》，在《海洋环境保护法》中也对应对油污问题作了规定。但是随着如今人类对海洋环境的开发利用，不仅油污会造成海洋环境的破坏，其他海洋灾害如风暴潮、赤潮、海冰、海水侵蚀等也会对海洋环境造成损害，所以应该在《海洋环境保护法》中增加应对其他海洋灾害的内容。

5.增加对北极公海渔业资源开发、利用和保护的规定

在全球气候日益变暖的背景下，北冰洋海冰的融化使得对北冰洋渔业资源的开发利用成为了可能，所以在北冰洋沿岸五国管辖海域之外的海域，各国都有航行自由和捕鱼自由。为了保护对北极渔业资源无管制的攫取，北冰洋沿岸五国和中国在内的其他国家在 2018 年 10 月签署了《预防中北冰洋不受管制公海渔业协定》，从而有效防止各国不受管制地对北极公海海域的渔业资源的开发。因此，为了增强我国《海洋环境保护法》的实时性，应当增加在其中增加对北极公海渔业资源开发、利用和保护的规定，然后通过《渔业法》作出具体规定。

6.在《海洋环境保护法》第三章中加入“保护迁徙的海洋生物”

由联合国环境规划署起草的《保护迁徙野生动物物种公约》，我国作为联合国常任理事国之一应当遵守该公约，并将保护迁徙陆地、海洋和空中的野生动物物种的国际义务在国内法中加以落实，我国《海洋环境保护法》第三章并没有对迁徙的海洋生物的保护作出规定，在未来修改该法时，应当在第三章中加入“保护迁徙的海洋生物”的相关规定。

（三）落实有关国际公约的核心措施，促进《海洋环境保护法》的有效衔接

1.删去《海洋环境保护法》56 条第三款，并规定只有在可倾倒的废物名录中的物质才能倾倒

《防止倾倒废物及其他物质污染海洋的公约》于 1985 年 12 月对我国生效，2006 年，我国批准适用其 1996 年议定书。但是现行《海洋环境保护法》第 56 条第 3 款规定“可以向海洋倾倒的废弃物名录，由国家海洋行政主管部门拟定，经国务院环境保护行政主管部门提出审核意见后，报国务院批准。”该款将可以向海洋倾倒的废物名录的制定权交由国家海洋行政主管部门，并没有采用该公约及其议定书中规定的可倾倒的废物名录，该公约无法发挥其应有的作用，所以应当修改《海洋环境保护法》56 条第 3 款，规定只有列为议定书可倾倒废物名录中的物质才能倾倒，这样可以更好地将该公约中的核心措施落到实处，使国内法与国际公约更好地衔接。

2.在《海洋环境保护法》第八章中增加新船强制性的能效设计指数（EEDI）和船舶能效管理计划（SEEMP），以防治船舶污染，减少国际航运产生的温室气体排放

船舶污染是海洋环境污染的主要元凶，除了船舶装载的物品会对海洋环境造成损害，船舶航行消耗的能源所产生的二氧化碳等温室气体的排放也是一个极大的威胁。所以为了防止船舶污染，国际组织在伦敦签订了《1973 年国际防止船舶造成污染公约 1978 年议定书》，我国于 2006 年加入，但是对该公约的核心措施并没有于我国《海洋环境保护法》相衔接，所以在对其进行修改时，将提高船舶效能指数作为防治船舶污染的一个重要方面，应当将公约的 EEDI 和 SEEMP 纳入其中，以减少国际航运产生的温室气体排放。

3.我国《海洋环境保护法》应当增加造船、防底污系统、压舱水系统等的科学研究和监测的规定

我国加入的《控制船舶有害防污底系统国际公约》、《船舶压载水和沉积物控制和管理公约》以及尚未加入但是作为国际海事组织公约对我国海洋环境立法有重要借鉴意义的《香港拆船公约》对船舶的建造都有环境保护技术性的要求，但是我国《海洋环境保护法》第八章防治船舶及有关作业活动对海洋环境的污染损害缺乏对防污底系统、船舶压载水系统、造船以及船舶残骸的清除作出科学研究和监测的规定，所以在修改《海洋环境保护法》时，应当根据条约增加相应的科学研究和监测要求的规定，提高与国家条约的衔接度。

六、结语

中国缔结或加入的保护海洋环境的国际公约是我国在国际上作出保护海洋环境的承诺，体现了我国的政治立场，而体现一个国家负责任和有担当的则是将该承诺与国内法有效衔接，将保护海洋环境的承诺切实履行。由于我国在宪法中对国际法在国内的适用方式和原则并未作出规定，所以对国际法和国内法关系研究为两者的充分衔接以及国际法在国内的有效履行奠定了理论基础，我们应该采用套入式的直接适用和有条件转化式的间接适用来促进国际法在国内的有效实施。目前我国《海洋环境保护法》在与有关国际公约衔接的过程中存在一些漏洞，体现在立法目的不具有统领性，实时性不强，对加入的国际公约中的核心措施未作出具体规定等方面。面对我国当前正在修改《海洋环境保护法》的契机，弥补与国际法衔接过程中出现的漏洞，需要进一步充实《海洋环境保护法》的立法目的，加入有关建设美丽滨海城乡和应对气候变化等内容，还需要适时修改增强《海洋环境保护法》实时性，并落实国际海洋环境保护公约的具体核心措施，增强《海洋环境保护法》的衔接性。加入国际海洋环境保护公约的背后是决心和勇气，只有将其变成切实的行动，才能更有效地应对海洋环境挑战。期待各国携起手来，推动这些承诺真正落地，从而助力海洋生态环境改善。

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Improvement of China's Marine Environment Protection Law
——From the Perspective of Connection with Relevant International Conventions

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Abstract: Faced with the difficulties in protecting the marine environment, China has acceded to a large number of international conventions on marine environment protection, covering marine pollution prevention and control, resource protection and ecological protection. Since the *Constitution of China* does not stipulate the mode of application of international conventions, there are implementation gaps between China's Marine Environment Protection Law and international conventions. Coinciding with the revision of the *Marine Environment Protection Law*, this paper proposes further improvements in the said law, by connecting it with relevant international conventions. It sorts out the marine environment protection conventions that China has concluded and acceded to, and points out the loopholes in their implementation and application in China. Suggestions and measures to improve the effective connection between China's Marine Environment Protection Law and relevant international conventions are put forward.

Keywords: marine environment protection law; international conventions; improvement; connection

1. Introduction

The ocean is the world's largest environmental purifier, and its vastness and fluidity can clean up pollution and thus maintain ecological balance. China is a large maritime country. With the shortage of land resources, people have further extended their activities to the ocean, and the economic value of the ocean has rapidly increased. Since the 1990s, China's marine economy has developed rapidly at a double-digit growth rate. The maritime industry has also made outstanding contributions to the development of the national economy, including marine fisheries, marine shipbuilding, and marine transportation. However, the conflict between human economic interests and marine ecological interests is inherent in any society. With the increase in people's exploitation and utilization of the ocean, the amount of resources continuously obtained from the marine environment exceeds the regeneration capacity of natural resources, and the amount of pollutants discharged into the ocean exceeds the self-purification ability of the marine environment. Thus, the marine environment is destroyed and resources are seriously short. In order to deal with the problems of marine environment pollution, ecological damage and shortage of marine resources, China has formulated laws, regulations and departmental regulations based on *the Marine Environment Protection Law*, and has acceded to a large number of international conventions on marine environment protection. However, the law has inevitably lagged in implementation since its enactment**.** Therefore, there has also been a gap between the connection of China's Marine Environment Protection Law and international conventions. According to the *Report on the Handling of Proposals by Deputies at the Second Session of the Thirteenth National People's Congress*, it was pointed out that, in order to promote the ecological civilization construction and green development, it agrees to the proposals proposed by deputies on revising the Law on the

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Prevention and Control of Environment Pollution by Solid Waste and Marine Environment Protection Law.[1]Therefore, China is currently revising the *Marine Environment Protection Law* so as to take this opportunity to fully integrate it with the contents of the international marine environment protection conventions and make up for the loopholes that appeared in the process of application and implementation.

2.The Relationship between International Law and Domestic Law

The relationship between international and domestic laws has always been the focus of international law scholars. The solution to this problem is of great importance to whether international conventions and international practices can be applied in China and how to apply them, as well as to the establishment of good international order. International law is a kind of soft law, which is a compilation of agreements made by the international community through consultation concerning rights and obligations on various matters. However, in the international community, there is no law enforcement institution that is above all sovereign states. Therefore, the key to the effective implementation of international law in China lies in the nature of the relationship between international law and domestic law. Taking the international marine environment protection conventions that China has concluded and acceded to as an example, China has formulated a large number of laws and regulations on marine environment protection, such as *Marine Environment Protection Law, Fisheries Law, and Regulations on the Prevention of Vessel-induced Sea Pollution.* However, if the important provisions of the relevant international conventions do not correspond to the provisions of the China's Marine Environment Protection Law, especiallys those cases where an issue or a matter is not stipulated in Chinese laws but is clearly stipulated in the international conventions, can we directly apply the international conventions to comply with the legal obligations by bypassing the domestic laws? Or is it necessary to supplement the gap through the domestic legislative process, so as to take an action based directly on the relevant provisions of the domestic law? The answer to this question illustrates the two views of international law scholars on the relationship between international law and domestic law, namely monism and dualism. However, both of these theories have their own defects, and neither of them satisfactorily connects the international law and domestic law. Therefore, a new theory - Linkage Theory has emerged. At present, most scholars in China agree with Linkage Theory, believing that international law and domestic law are interrelated and inseparable.

2.1 Monism

Scholars who support monism believe that international law and domestic law belong to the same legal system, both of which are covered by natural law, consider that there is no essential difference between the two, but just a matter of time sequence.[2]The issue that arises with monism is that, since international law and domestic law belong to the same legal system, which one should have the priority in application, namely, international law or domestic law.

2.2 Primacy of international law

The doctrine of primacy of international law first appeared after World War I, but it did not become popular until after World War II. This doctrine holds that international law is superior to domestic law. The legal effect of domestic law is determined by international law. Only with the support of international law can domestic law exert its effectiveness.[3]When there is a conflict between international law and domestic law, the relevant provisions of international law shall prevail. If there are provisions in international law for a certain matter and there are loopholes in domestic law, international law can be

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1 *Report on the Handling of Proposals by Deputies at the Second Session of the Thirteenth National People's Congress*, the Third Meeting of the Presidium of the Second Session of the Thirteenth National People's Congress(2019). http://epaper.gmw.cn/gmrb/html/2019-03/15/nw.D110000gmrb_20190315_1-03.htm.

2 XU Duanhong&DUDongze, *Analysis of the relationship between international law and domestic law*, Sociological Perspectives(2019).

3 HUANG Junying, *Thoughts on the relationship between international law and domestic law*, Chinese Journal of Law(2019).

directly applied in the domestic courts, without the permission of the relevant department, and there is no need to transform it into domestic law. However, to some extent, this doctrine denies state sovereignty and the right of states to make and implement laws independently without interference. Since the purpose of international law is to maintain peace and stability of international order, the doctrine of priority of international law not only runs counter to that purpose, but also goes against the basic principles of inviolability of state sovereignty and non-interference in internal affairs of states.

2.3 Primacy of domestic law over international law

The doctrine of primacy of domestic law is bound to exist. On the premise that international law and domestic law belong to the same legal system, this doctrine holds that domestic law is superior to international law, and the legal effect of international law depends on the authorization from domestic law, and that without the support of domestic law, international law can not have a legal effect. Some scholars even argue that international law is a branch of domestic law and call it "Public Foreign Law of the State". However, the doctrine of primacy of domestic law denies the role of international law in maintaining and establishing international order, and it is easy to become a tool of hegemonism and power politics, which makes international law seem meaningless. This doctrine completely denies the value of international law and makes international law become the vassal of domestic law, which is gradually abandoned by modern society.

2.4 Dualism

In contrast to monism, dualism holds that international law and domestic law are two independent and completely different legal systems, which have no subsidiary relationship and are in an equal legal position. International law is the sum of legal norms that regulate relations among countries, while domestic law regulates the legal relations among domestic natural persons, legal persons, and other organizations. Therefore, there is no connection between the two, showing parallel characteristics. No domestic court may directly apply international conventions or international practices as the basis for determining the facts of the case. Only after the content of an international convention is transformed into domestic law through the legislative process of the domestic legislature, or the international practice is generally recognized and accepted by the country, the relevant content of international law can be applied by the domestic court, which is still essentially applicable to domestic law rather than international law. To some extent, dualism has been supported by many countries, because it can effectively safeguard national sovereignty, prevent the infringement of internal affairs, and get rid of the control of powerful countries. However, dualism overemphasizes the opposition between international law and domestic law, which cuts off the connection between them and makes the contradiction between international law and domestic law more prominent.

2.5 Linkage Theory

Both monism and dualism have their own shortcomings and deficiencies, and neither can fully and effectively connect international law and domestic law, thereby promoting the sound development of the international order. In fact, international law and domestic law are not completely independent and parallel. Both are laws, and the enacting entities are states, so there is a close relationship between the two.

To begin with the perspective of domestic law. First, the international community is a whole, and the formulation of domestic law needs to pay attention to the provisions of international law on this issue. If the contents of the two laws are very different, inevitably there will be conflicts with international law in the related cases. This will not only cause a large number of contradictions, but also waste judicial resources and reduce the efficiency of litigation. Second, international law has a legal effect at home. When some provisions of international conventions or international practices are generally adopted by China, then in order to implement the rules and institutions of international law at home, international law can be adopted into domestic law through legislative procedures. Next, from the perspective of international law. First, the formulation of international law should not interfere with the right of other countries to formulate their domestic laws, and at the same time, it should be consistent

with the prevailing practices and principles stipulated in the domestic laws of other countries. Otherwise, international law will become an empty shell, which will not be observed in the international community. Second, if international law only stipulates guiding principles on a certain issue, domestic law needs to make corresponding specific provisions.[1] Take for example, the international conventions on marine conservation to which China has acceded, China acceded to*International Convention on Civil Liability for Oil Pollution Damage* in 1999, which addresses the liability of cruise ship owners for oil pollution damage arising from accidents at sea. Article 66 of China's *Marine Environment Protection Law* is closely linked to *this Convention*, stipulating specific principles and methods for assuming responsibility. This shows that international law and domestic law are inseparable and interrelated. There is no issue of priority, nor there is any issue of separating the then from each other. An another example, jurisdiction is the primary right of a sovereign state. According to the principle of primary jurisdiction, when the pollution of the sea area under national jurisdiction is caused by the sea area outside the national jurisdiction, the state facing the damage has the jurisdiction of course. This international practice and principle have been recognized and accepted by most sovereign states. The *International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties* and *Protocol Relating to Intervention on the High Seas in Cases of Marine Pollution by Substances Other Than Oil* also stipulate this, which is indicative of the intention that international law will be in conjunction with the domestic law to achieve the maximum degree of compliance and enforcement of international law, so as to realize the objective of international law to maintain international order.

3.Implementation of Marine Environment Protection Convention in China

3.1 Marine Environment Protection Convention concluded or acceded to by China

In order to prevent the further deterioration of the marine environment, China has gradually acceded to various international conventions conducive to the protection of the marine environment, and has formulated a large number of laws and regulations on the protection of the marine environment. China has so far acceded to 38 international conventions on marine environment protection, which can be roughly divided into four categories: comprehensive protection, pollution prevention and control, ecological protection and resource protection. Among them, there are 9 categories of basic protection, 12 categories of pollution prevention and control, 2 categories of ecological protection and 15 categories of resource protection. In order to realize the sustainable utilization of marine resources and the sustainable development of the marine environment, China focuses on the prevention and control of marine environment pollution and the protection of existing marine living resources and at the same time pays attention to the basic protection of the marine environment. The specific content of the above-mentioned international conventions, the accession of China, the connection with domestic law and the need for improvement will be analyzed in detail below.

3.2 Application of Marine Environment Protection Convention in China

China does not make the stipulation in the *Constitution* on how to apply the international conventions in China and their effect, so the implementation process in China often appears confusing. As to the issue of how international law can be applied in China, it is worthy to have a relook at the above explanation of monism and dualism. The monists postulate that international law does not need to be converted into domestic law and supported by the legislature or law enforcement agencies, meaning thereby, it can be directly applied, while the dualists postulate that international law can only be applied in domestic courts after being transformed by domestic legislative procedures, that is, it can be applied only by the transformation. However, this classification is only a theoretical classification, which provides a theoretical basis and a solution strategy for the specific application of marine environment protection conventions in China. Therefore, we should take into considerations of the advantages of both monism and dualism, so that international conventions can play a full role in their application in China.[2]

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1 WANG Tieya, *International Law,* Beijing: Law Press·China,1995.

2 LUO Man, *Research on the Issues Related to the Application of the Treaty in China,* Shenyang: Shenyang University

Therefore, with regard to the application of the treaties on marine environment protection, the author believes that the we should take the advantage of both the methods, and combine the indirect application through transformation and the direct application of conditional nesting should both be adopted. The conditions for direct application include: first, to check whether the contents of the convention are sufficiently detailed and complete; second, whether China has authorized its applicability, which means that it has been accepted by China, the object will be mainly international custom. The reason why the author argues for taking the advantage of each of the two methods is that: first of all, international law is mostly comprises of agreement on rights and obligations reached through the negotiation between the main bodies of international law. International law, unlike domestic law, is not enforceable, and international practices can only be implemented with the approval of the competent authority or after the general practice in China; some international conventions must be transformed into domestic laws through domestic legislative procedures. Secondly, some international conventions only contain principled provisions and systems, and their specific implementation methods and requirements need to be specified in detail through domestic laws. Finally, if the content of an international convention on a certain issue is sufficiently detailed and complete, and taking into account the reservations that China may have made while accepting, especially in areas that require timely implementation and efficient implementation, such as United Nations Framework Convention on Climate Change, then the international convention can be directly applied to solve China's foreign-related issues after it has been approved by the competent authority. Therefore, the marine environment protection convention is either approved by the competent authority or generally adopted in practice to ensure its compliance and enforcement in China, or the convention is transformed into domestic law and the effect of implementing the international convention is achieved through the application and implementation of the domestic law system. For example, *Law of the People's Republic of China on the Protection of Wildlif*e has applied the contents of C*onvention on International Trade in Endangered Species of Wild Fauna and Flora* and *Convention on Migratory Species* into domestic laws for implementation. Article 35 of *Law of the People's Republic of China on the Protection of Wildlif*e stipulates that the list of wildlife or their products prohibited or restricted by international conventions which China has signed or ratified, shall be formulated, adjusted accordingly and published by the Nationally Endangered Species Import and Export Management Agency. This regulation further implements the content of international conventions. China's *Convention on the Territorial Sea and the Contiguous Zone* and *Exclusive Economic Zone and Continental Shelf Act* was formulated in combination with the *United Nations Convention on the Law of the Sea* and China's actual conditions.

3.3 Examining the Replication of the Provisions of the Convention in the Domestic Law and the Necessity to Modify THE Marine Environment Protection Law

As far as the relationship between international law and domestic law is concerned, most scholars in China agree with the view of Linkage Theory, believing that the two neither belong to the same legal system nor are they mutually exclusive and independent. Therefore, the application of the international marine environment protection convention in China should adopt both the transformational and the nested methods. Only through the legislative process the contents of the international marine environment protection conventions signed and ratified to by China can implemented into the domestic law in combination with the actual situation of China, or if it is provided in certain laws the direct application of some international treaties or international practices, can the specific principles, rules and systems of international law be implemented in the legal domain of China.

Categ ory	Name	Main contents	Specific manifestations in domestic law	Whether the domestic law with *Marine Environment Protection Law* as the main body needs to

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				be revised
Basic guarantee	United Nations Convention on the Law of the Sea	The Convention defines important concepts such as internal waters, territorial sea, adjacent sea, continental shelf, exclusive economic zone, high seas and islands. It plays an important role in guiding and adjudicating the sovereignty disputes of territorial sea, the management of natural resources at sea, the treatment of pollution and so on.	China ratified the Convention on May 15, 1996. Provisions are made in *Convention on the Territorial Sea and the Contiguous Zone* and *Exclusive Economic Zone* and *Continental Shelf Act.*	No. But the issues relating to the outer mainland shelf, the remaining rights of the exclusive economic zone and the historical rights of the sea area can be further regulated in *Convention on the Territorial Sea and the Contiguous Zone* and *Exclusive Economic Zone* and *Continental Shelf Act.* Regarding the definition of islands, China can modify the definition in the *Island Protection Law* according to China's specific conditions and grant artificial islands legal status.
	International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1996	The Convention is used to deal with cases of oil pollution casualties on the high seas.	China formally acceded to the Convention in 1990, and the Convention entered into force for China on May 24, 1990. Article 2 of the *Marine Environment Protection Law* covers the scope of the Convention.	No. Because the connection is very good.
	Protocol Relating to Intervention on the High Seas in Cases of Marine Pollution by Substances Other Than Oil, 1973	The Convention is mainly used to deal with marine pollution by substances other than oil that occurred on the high seas.	China acceded to the Convention in 1990, and the Convention entered into force for China on January 9, 1990. Article 2 of the *Marine Environment Protection Law* covers the scope of	No. Because the connection is very good.

			the Convention.	
	International Convention on Oil Pollution Preparedness, Response and Cooperation, 1990	The purpose of the Convention is to promote countries to strengthen oil pollution prevention and control work, emphasize the importance of effective emergency preparedness, strengthen regional or international cooperation in the event of major oil pollution accidents, and take quick and effective actions to reduce the damage caused by oil pollution.	China deposited the instrument of accession on March 20, 1998, and the Convention entered into force for China on June 30, 1998. Articles 17, 18, 50 and 52 of the *Marine Environment Protection Law* and Chapter 8 "Prevention and Control of Pollution Damage to the Marine Environment by Ships and Related Operation Activities" make the connection.	Yes. The *Marine Environment Protection Law* has a good connection in dealing with oil pollution from ships, but there should also be corresponding measures to deal with other marine disasters, such as storm surge, red tide, sea ice and sea erosion.
	The 1984 Protocol to the 1971 Convention Establishing an International Oil Pollution Compensation Fund	It was signed to enable *The 1984 Protocol to the 1971 Convention Establishing an International Oil Pollution Compensation Fund* to take effect as soon as possible.	China deposited the instrument of accession on January 5, 1999, but the protocol currently only applies to Hong Kong.	No. China has its own fund, and the *Marine Environment Protection Law* also stipulates the oil pollution damage compensation fund system. The State Council also issued the *Administrative Measures for the Collection and Use of Compensation Funds for Vessel-Induced Oil Pollution Damage*.
	Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency	The purpose of the Convention is to strengthen international cooperation in the safe development and use of nuclear energy, and to establish an international assistance system	The Convention entered into force for China on October 14, 1987. Article 33 of the *Marine Environment Protection Law*, the *Nuclear Safety Law,* and the *State*	No. Because the connection is very good.

		that will facilitate the rapid provision of assistance in the event of a nuclear accident or radiation emergency in order to minimize its consequences.	*Council's Reply on the Issue of Liability for Compensation for Damage in Nuclear Accidents* make the connection.	
	Convention on facilitation of International Maritime Traffic, 1965	The Convention mainly provides convenience for international maritime transportation.	China decided to accede to it on December 29, 1994, and it became effective for China on March 16, 1995. *Notice of the China Maritime Safety Administration on the Issuance of the Key Work Points of Crew Management in 2012* and other three departmental regulations make provisions.	No. Although the *Marine Environment Protection Law* does not stipulate the international convenience of maritime transportation, international maritime transportation is not regulated by the law, and other laws in China have made provisions on it. Moreover, it has been an international practice for countries to provide convenience for international maritime transportation.
	North Pacific Ocean Science Organization Convention	The Convention intends to better scientifically understand the North Pacific waters through international scientific cooperation on the basis of mutual benefit, and hopes to establish an appropriate intergovernmental organization to promote and facilitate scientific cooperation.	China signed this Convention on October 22, 1991, and it entered into force for my country on March 24, 1992. *Outline of the National Eleventh Five-Year Plan for Marine Science and Technology Development* makes the connection.	Yes. The *Marine Environment Protection Law* does not stipulate the marine scientific organizations and cooperation issues.
	Convention on Nuclear Safety	The Convention is to enable countries that use nuclear energy to	China ratified the Convention on April 9, 1996. The	No. Because the connection is very good.

		take measures to strengthen nuclear safety, and to achieve and maintain a high level of nuclear safety worldwide through international cooperation, so that human society can protect its own living environment while developing.	*Nuclear Safety Law*, the *Regulations of the People's Republic of China on the Administration of Supervision over Safety of Nuclear Facilities for Civilian Use* and other laws and regulations as well as departmental rules provide for specific provisions.	
Pollution prevention and control	International Convention on Civil Liability for Oil Pollution Damage	The Convention mainly deals with the liability of cruise ship owners for oil pollution damage caused by maritime accidents.	China acceded to it on January 5, 1999, and it entered into force on January 5, 2000. Article 66 of China's *Marine Environment Protection Law* makes a corresponding connection.	No. Because the connection is very good.
	Stockholm Convention on Persistent Organic Pollutants	The Convention mainly takes international actions to protect human health and the environment, including measures aimed at reducing and eliminating the discharge and release of persistent organic pollutants.	It officially entered into force for China on November 11, 2004. Chapter 2 and Chapter 4 of the *Marine Environment Protection Law* make provisions for the supervision, management and effective prevention and control of pollutants.	No. Because the connection is very good.
	Convention on the Prevention of Marine Pollution by Dumping of Wastes and	The purpose of the Convention is to prevent the pollution of marine by dumping of wastes and other matter.	It entered into force for China on December 15, 1985. Chapter 7 "Prevention and	Yes. The list of wastes that can be dumped into the ocean stipulated in Article 56 of the *Marine Environment*

	Other Matter		Control of Dumping of Wastes" of China's *Marine Environment Protection Law* and *Regulations on Control over Dumping of Wastes* make the connection.	*Protection Law* is inconsistent with the Convention. According to the 96 Protocol, only matters in the dumpable waste list can be dumped.
	MARPOL	It is used internationally to prevent ships from causing pollution to the marine environment and deal with the pollution in a timely manner.	China acceded to it on March 15, 2006, and it officially took effect on August 23, 2006. Chapter 8 "Prevention and Control of Pollution Damage to the Marine Environment from Ships and Related Operations" of China's *Marine Environment Protection Law* provides specific provisions.	Yes. The mandatory energy efficiency design index (EEDI) and ship energy efficiency management plan (SEEMP) for new ships in this convention are not stipulated in China's *Marine Environment Protection Law.*
	The 1992 Protocol to amend the 1969 International Convention on Civil Liability for Oil Pollution Damage	The Convention puts international civil liability for oil pollution damage into practice.	China acceded to it on January 5, 1999 and it entered into force on January 5, 2000. Article 66 of China's *Marine Environment Protection Law.*	No. Because the connection is very good.
	Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal	It is used to control the transboundary movement of hazardous wastes and it stipulates the disposal method.	China signed the Convention on March 22, 1990 and ratified it on September 4, 1991. Chapter 7 "Prevention and Control of Pollution Damage to the Marine	No. Because the connection is very good.

			Environment from Ships and Related Operations" of China's *Marine Environment Protection Law, Regulations on Control over Dumping of Wasters,* and *Provisions on Safety Supervision and Administration of the Carriage of Dangerous Goods by Vessels* provide specific provisions.	
	International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001	It uniforms international rules and procedures for determining liability and providing appropriate compensation in the event of oil pollution.	China ratified and acceded to it on November 17, 2008. Article 66 of China's *Marine Environment Protection Law* provides specific provisions.	No. Because the connection is very good.
	International Conference on the Removal of Wrecks, 2007	An international convention was signed to solve the problem of removing the wreckage of international ships.	The State Council decided to accede to it on July 12, 2016. Chapter 8 "Prevention and Control of Pollution Damage to the Marine Environment from Ships and Related Operations" of China's *Marine Environment Protection Law* provides no specific provisions for the removal of international shipwrecks.	Yes. It needs to make amendments and supplements in the *Marine Environment Protection Law* with reference to the Convention.
	Treaty Prohibiting the Placement of	The convention stipulates that the contracting parties	China acceded to it on February 28,	No. Because the connection is very good.

	Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed, Ocean Floor and Its Subsoil	undertake not to install or install any nuclear weapons or any other types of weapons of mass destruction on the seabed, ocean floor and its subsoil beyond 12 nautical miles.	1991. China's *Nuclear Safety Law* is well connected, and *the Marine Environment Protection Law* provides provisions for the protection of marine safety in the general provisions.	
	International Convention on Control of Harmful Anti-fouling Systems on Ships	The Convention calls on all countries to take measures to reduce pollution caused by the use of organotin compounds in anti-fouling systems.	The Convention entered into force for China on June 7, 2011, and it applies to the Macau Special Administrative Region, but not to the Hong Kong Special Administrative Region. Chapter 8 "Prevention and Control of Pollution Damage to the Marine Environment from Ships and Related Operations" of China's *Marine Environment Protection Law* does not contain the contents of ship construction such as the pollution of marine environment by ship anti-fouling site.	Yes. The contents concerning the ship construction should be added to Chapter 8 "Prevention and Control of Pollution of the Marine Environment by Ships" of the *Marine Environment Protection Law*.
	Minamata Convention on Mercury	The main purpose of the Convention is to ban the production, import and export of mercury-added products on a global scale to protect the	China signed the Convention on October 11, 2013 and ratified it on April 30, 2016. Chapter 4	No. Because the connection is very good.

		health of citizens of all countries.	"Prevention and Control of Pollution Damage to Marine Environment by Land-based Pollutants" in China's *Marine Environment Protection Law* makes specific provisions.	
	Convention for the Control and Management of Ships' Ballast Water and Sediments	The Convention is used to control and manage ships' ballast water and sediments to prevent, reduce and eliminate harmful aquatic organisms and pathogen transfer rules.	China acceded to it on October 22, 2018, and it officially entered into force for China on January 22, 2019. Section 5 of "Prevention and Control of Water Pollution by Ships" of *Law on Prevention and Control of Water Pollution*and Chapter 3 "Discharge and Receiving of Marine Contaminants" of *Management Regulations on the Prevention and Control of Marine Environment Pollution by Ships* make the provisions	No. Because the connection is very good.
Ecological protection	Protocol to the Antarctic Treaty on Environment Protection	Detailed regulations have been made to protect the Antarctic environment.	China signed the Protocol on October 4, 1991. *Regulations on Environment Protection for Antarctic Activities* make the connection.	No. Because the connection is very good.

	Kyoto Protocol to the United Nations Framework Convention on Climate Change	The main goal is to stabilize the amount of greenhouse gases in the atmosphere at a level that would prevent dramatic climate change from harming humans.	China signed it on May 29, 1998. *Resolution of the Standing Committee of the National People's Congress on Actively Addressing Climate Change* and a number of administrative regulations and departmental rules make specific provisions.	Yes. The ocean has an important impact on the global climate, but there are no provisions for addressing climate change in the *Marine Environment Protection Law*.
Resource protection	Convention on Biological Diversity	It is an international convention to protect the earth's biological resources.	China signed the convention on June 11, 1992 and ratified it on November 7, 1992. The 19 departmental regulations issued by the Ministry of Ecology and Environment make provisions. *Environment Protection Law, Wild Animal Conservation Law, Wild Plant Protection Regulations, Nature Reserve Regulations* and a series of laws and regulations all have provisions for biodiversity protection.	Yes. The conservation and utilization of mariculture, deep seabed genetic resources beyond the scope of national jurisdiction, and biodiversity in sea areas beyond the scope of national jurisdiction, as mentioned in the 2004 *Convention on Biological Diversity Secretariat Report*, are not mentioned in China's *Marine Environment Protection Law*.
	Convention on International Trade in Endangered Species of Wild Fauna and Flora	The Convention is mainly used to control rather than completely prohibit the international trade of wild species in order to achieve the sustainable use of the wild species	China acceded to the Convention on December 25, 1980, and it formally entered into force on April 8, 1981. China's *Wild Animal Conservation Law*	No. Because the connection is very good.

		market.	makes the connection.	
	Convention on Wetlands of International Importance, Especially as Waterfowl Habitat	The Convention constitutes a framework for national measures and international cooperation for the protection and utilization of wetland resources.	China acceded to it on March 1, 1992. The Ministry of Agriculture Announcement No. 2619-List of Important National Key Protected Aquatic Wildlife Habitats (First Batch), and the International Wetland Convention Implementation Office's notice on the issuance of *Nomination Indexes for International Wetland Cities Certification* make the connection.	Yes. According to the spirit of the *Nomination Indexes for International Wetland Cities Certification*, "Building a Beautiful Coastal City and Countryside Environment" can be added to the purpose of the *Marine Environment Protection Law*.
	Asia-Pacific Aquaculture Center Network Agreement	The Agreement specifies the purpose, role, rights and obligations of members, management systems, finance and other matters of the Asia-Pacific Network of Aquaculture Center.	It entered into force for China on January 11, 1990. The *Fisheries Law of the People's Republic of China*, the *Management Measures for Aquatic Seed Seeds* and the relevant local regulations, as well as the 30 departmental regulations formulated by the Ministry of Agriculture and the Ministry of Ecology and Environment make the connection.	No. Because the connection is very good.
	Convention on the Conservation and	Measures are mainly taken for the conservation and management of	China ratified the Convention in September 1995.	No. Because the connection is very good.

	Management of Pollock Resources in the Central Bering Sea	China's Bering Sea pollock resources.	Chapter 3 "Marine Ecological Protection" of the *Marine Environment Protection Law* provides an explanation in the government's white paper *The Development of China's Marine Undertaking*.	
	Agreement to implement the provisions of the United Nations Convention on the Law of the Sea of December 10, 1982 concerning the conservation and management of straddling fish stocks and highly migratory fish stocks	It aims to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks.	The Chinese government signed this Agreement on November 6, 1996. Chapter 3 "Marine Ecological Protection" of the *Marine Environment Protection Law* provides an explanation in the government's white paper *The Development of China's Marine Undertaking*.	No. Because the connection is very good.
	Agreement Establishing the Indian Ocean Tuna Commission	The Agreement ensures the conservation of Indian Ocean tuna and tuna-like species, promotes their optimal use and cooperation for the sustainable development of this fishery.	China declared its acceptance on August 2, 1998. *Notice of the General Office of the Ministry of Agriculture on Regulating Tuna Fishing Logs* and *China Tuna Fishing Logs* make the connection.	No. Because the connection is very good.
	Cartagena Protocol on Biosafety to the Convention on Biological	The Agreement assists in ensuring adequate conservation measures in the area of the safe transfer,	China acceded to it on April 27, 2005 and it entered into force on September 6 of the same year. It is	No. Because the connection is very good.

	Diversity	treatment and use of living modified organisms derived from modern biotechnology that may adversely affect the conservation and sustainable use of biological diversity, while taking into account the risks to human health, with a particular focus on transboundary movements.	stipulated in 19 departmental regulations issued by the *Ministry of Ecology and Environment,* as well as in the *Vaccine Management Law*.	
	Agreement on the Prevention of Unregulated High Seas Fisheries in the Central North Ice Ocean (not yet in force)	The Agreement, jointly negotiated by the coastal and non-coastal Arctic States and the EU on an equal footing, provides governance rules for specific Arctic waters and enriches the content of international governance of the Arctic.	China signed it on October 3, 2018, but it has not yet come into force. *Announcement No. 108 of the Ministry of Agriculture and Rural Affairs of the People's Republic of China-Revised Instructions for Fishing Vessels and Fishing License Management Certificates, Fisheries Fishing License Management Regulations*, and Chapter 3 "Fishing Industry" of the *Fishing Law* make specific provisions.	Yes. Regulations on the fishing and control of high seas fishery resources can be mentioned in the *Marine Environment Protection Law*.
	International Convention for the Regulation of Whaling	The Convention prevents over-hunting of all species of whales. It aims to establish an international whaling control system to ensure proper conservation and development of	China became a party to this Convention on September 24, 1980. Although China does not have regulations on whale species, the overall regulations on fish	No.

		whale species.	in the *Fisheries Law* can be connected with the convention to a certain extent.	
	International Convention for the Conservation of Atlantic Tunas	It is a convention for the conservation and management of Atlantic tuna and tuna-like resources.	China acceded to it in 1996. Four departmental regulations issued by the Ministry of Agriculture and the government's white paper *The Development of China's Marine Undertaking* make provisions	No.
	Convention Concerning the Protection of the World Cultural and Natural Heritage	The Convention mainly stipulates the definition of cultural heritage and natural heritage, national protection and international protection measures for cultural and natural heritage, etc.	China became one of the parties to the Convention as early as 1985. There are 2 administrative regulations and 31 departmental regulations that stipulate the specific culture and heritage of China in accordance with the Convention.	No.
	Convention on Migratory Species	The Convention protects the active spatial scope of migratory species on land, sea and air, and protects migratory species among wild animals that pass through the borders of national jurisdiction.	It was adopted in Bonn, Germany on June 23, 1979, and entered into force for China on December 1, 1983. *Wild Animal Conservation Law of the People's Republic of China*makes the connection, but it does not involve migrating marine life.	Yes. China's Marine Environment Protection Law does not stipulate the protection of migratory marine organisms.
	Code of Conduct for Responsible	It requires countries to undertake their responsibilities in	It was adopted by the Food and Agriculture	No.

	Fisheries	activities such as fishing, breeding, processing, transportation and marketing, international trade and scientific research in fisheries.	Organization of the United Nations and entered into force in China in October 1995. 33 administrative regulations such as the *Fisheries Law* and *Several Opinions of the State Council on the Sustainable and Healthy Development of Marine Fisheries* make provisions.	
	Cancun Declaration on Mainstreaming the Conservation and Sustainable Use of Biodiversity to Enhance Well-being	It mainstreams biodiversity to enhance well-being and promote the conservation and sustainable use of biodiversity.	It was formulated in December 2016. The notice on *Key River Basin Aquatic Biodiversity Conservation Plan* issued by the Ministry of Ecology and Environment, the Ministry of Agriculture and Rural Affairs, and the Ministry of Water Resources and the notice on the Belt and Road construction maritime cooperation, as well as other departmental rules and regulations make provisions.	No.

4.Problems in the Process of Connection of the Marine Environment Protection Law withRelevant International Conventions

In order to effectively protect the marine environment and prevent marine environment pollution and facing a decrease in marine resources, China has done sufficient legislative work in marine environment protection, and formulated a large number of laws and regulations conducive to marine environment protection. If different biospheres are used as the basis for dividing China's environment legal system, the *Marine Environment Protection Law* is a regulation aimed particularly at the marine environment and becomes one of its most important components. Although China is carrying out legislation on the *Ocean Basic Law*, that law is aimed at comprehensive marine management, covering not only marine environment protection, but also political and economic aspects such as marine

economic development, marine scientific and technological innovation, and international cooperation on the ocean. Therefore, the basis of marine environment protection remains in the *Marine Environment Protection Law*. Not only should other laws relating to the marine environment be connected to the *Marine Environment Protection Law*, such as the *Fisheries Law*, and the *Regulations on the Management of the Prevention and Control of Marine Environment Pollution by Coastal Engineering Construction Projects*, but they should also reflect the contents of the relevant international conventions. The application of methods of nesting and transformation should be based on their strengths in order to promote the effective connection between the two. When there are foreign-related factors, Article 96 of China's *Marine Environment Protection Law* has stipulated the applicability of treaties, that is, in addition to China's reservations, the principle that international law is superior to domestic law shall be applied in priority to international conventions. But when there are no foreign-related factors, it generally needs to be transformed into domestic law before it can be implemented. Coinciding with the revision of the *Marine Environment Protection Law,* we should take this opportunity to make it more fully coherent with the content of relevant international conventions so as to make up for the gaps in the previous legislation. Although the content of China's Marine Environment Protection Law is relatively complete, with the increasing number of marine environment protection conventions that China has acceded to, there are still some shortcomings in the process of connection with marine environment protection conventions. The legislature needs to adjust and update the Marine Environment Protection Law in a timely manner so that the content of the relevant international conventions can be implemented.

4.1Impact of the Narrow Scope of the Marine Environment Protection Law on its Effectiveness.

The legislative purpose of each law embodies the values its pursuits and guiding ideology of the legislator, and each legal clause is the concrete embodiment of the legislative purpose, thus the legislative purpose has the function of leading the entire law. The legislative purpose of China's *Marine Environment Protection Law* should be to cover the entire field of marine environment protection, covering not only the core concepts of the domestic marine environment protection law, but also the central theme of the relevant marine protection conventions. However, with the increasing number of marine environment protection conventions that China has acceded to, the legislative purpose of *Marine Environment Protection Law* has been unable to cover the core ideas of some international treaties concluded and acceded to by China. Therefore, the legislative purpose of *Marine Environment Protection Law* has lost its leading role and needs to be amended and supplemented with the times. For example, the *Marine Environment Protection Law* does not include "response to climate change and prevent global warming" as its legislative purpose. However, Kyoto *Protocol to the United Nations Framework Convention on Climate Change* signed by China in May 1998, China's *Air Pollution Prevention and Control Law*, and the *National Marine Functional Area Plan* issued by the State Council have all been able to actively respond to climate change and prevent global warming. Therefore, the legislative purpose of the *Marine Environment Protection Law* has been unable to effectively play a leading role.

4.2 *Marine Environment Protection Law*can not be adjusted in time according to the conventions, and lacks real-time performance.

Between formulation and implementation of the law, there is inevitably a time lag. In order to make up for this defect and keep pace with the times, the marine environment protection conventions that China has concluded or acceded to can be reflected in the Marine Environment Protection Law. It is necessary to timely modify the laws mainly based on the *Marine Environment Protection Law* or supplement them through judicial interpretations. At present, China's Marine Environment Protection Law cannot keep up with the international marine environment protection conventions that China has concluded or acceded to. For example, the *Convention on Wetlands* and the *Convention on Biological Diversity*, which China has acceded to, have continuously issued new rules. The United Nations has also positioned the next decade as a decade of ecological restoration. Internationally, conventions on polar environment protection and the prevention and control of marine microplastics pollution are also being

carried out, but the laws on these subjects are not currently included in China's relevant legislation.

4.3 *Marine Environment Protection Law* has not stipulated the core measures of some international conventions

International conventions on the subject of marine environment protection signed or ratified by China cover a wide range of areas, including pollution prevention, resource protection, international cooperation and environment responsibility, but China's legislations related to the protection of the marine environment are not only relatively scattered, there is no unified regulation in the *Marine Environment Protection Law*, but also there are loopholes in some areas. For example, for biodiversity conservation, China has not yet formulated the *Law on Biodiversity Conservation,* but in June 1992, China acceded to *Convention on Biological Diversity.* The *Marine Environment Protection Law* only makes general and general provisions on the protection of biological diversity and marine living resources, but it makes no specific provisions on the conservation and utilization of marine aquaculture, deep seabed genetic resources beyond the scope of national jurisdiction, and the biological diversity in sea areas beyond the scope of national jurisdiction. Therefore, the provisions concerning the protection of the marine living resources should be implemented through amendments to the *Marine Environment Protection Law.* For another example, according to the mandatory EEDI and SEEMP for new ships stipulated by the 73/78 of MARPOL, although Chapter 8 of China's *Marine Environment Protection Law* has made provisions on the prevention and control of pollution damage to marine environment caused by ships and their related operations, the two important core measures of preventing marine pollution by ships in the Convention have not been implemented. In addition, the *International Convention on Control of Harmful Anti-fouling Systems on Ships* and *Convention for the Control and Management of Ships' Ballast Water and Sediments* that China has acceded to as well as *Hong Kong Convention on Shipbreaking*, to which China has not yet acceded, all have technical requirements for environment protection relating to the construction of ships, but China's *Marine Environment Protection Law* does not make provisions for the scientific research and monitoring of marine environment such as anti-fouling systems, sediment and ballast water systems, shipbuilding, and shipbreaking. It can be seen that the degree of connection between China's *Marine Environment Protection Law* and international marine environment protection conventions is relatively low, and no specific provisions are made for core measures.

5.Suggestions and Measures to Improve the Effective Connection between China's Marine Environment Protection Law and Relevant International Conventions

5.1 Enrich the legislative purpose of the *Marine Environment Protection Law*

5.1.1 "Building a beautiful coastal city and countryside environment" is added to the purpose of the *Marine Environment Protection Law*

On March 1, 1992, China acceded to the *Convention on Wetlands of International Importance, Especially as Waterfowl Habitat*, which establishes a framework for national measures and international cooperation for the protection and utilization of wetland resources. In order to better implement the Convention and implement the *Wetland Protection and Restoration System Plan* issued by the General Office of the State Council, the Office of the State Forestry Administration has issued the *Interim Measures for the Nomination of International Wetland City Certification,* and the International Wetland Convention Implementation Office has issued a notice on the *Nomination Indexes for International Wetland Cities Certification.* According to the spirit of these two legal documents, "building a beautiful coastal city and countryside environment" is added to the purpose of the *Marine Environment Protection Law.*

5.1.2 "Response to ocean issues caused by climate change"should be added to the purpose of the *Marine Environment Protection Law*

With the increase in the exploration and development of mineral resources, the greenhouse gases emitted by the burning of fossil fuels have far exceeded the carrying capacity and self-purification capacity of the atmospheric environment, leading to global warming and rising temperatures. The

drastic climate change not only causes harm to humans, but also causes irreversible damage to marine life. Climate change leads to global warming, which in turn melts glaciers and raises sea levels, decreasing marine biological resources and the ecological stability of the marine environment. Therefore, in order to deal with climate change, China not only signed the *Kyoto Protocol to the United Nations Framework Convention on Climate Change* in 1998, but also pointed out in many national economic and social development plans that we should actively deal with climate change and earnestly fulfill the duty of energy conservation and emission reduction. Climate change is closely related to marine environment protection, and laws and regulations on climate change are being actively formulated and implemented. Therefore, in order to better achieve the leading role of the legislative purpose of the *Marine Environment Protection Law,* "response to ocean issues caused by climate change" can be added to the purpose of the *Marine Environment Protection Law.*

5.2 Proposal for Amendments to the Marine Environment Protection Law to Enhance its Current Performance.

5.2.1 Add "principles of international cooperation" to the General Provisions of Chapter 1 of the *Marine Environment Protection Law*

Due to the peculiarity of the marine environment which is different from that of the land, marine environment problems have endangered the survival and development of the entire human society. At the same time, strengthening the construction of the Belt and Road has urgent requirements for international cooperation to protect the marine environment. Responsibilities of States for fulfilling the international marine environment protection conventions and participating in regional and global marine environment governance require close international cooperation. In addition, the principles of international cooperation for marine environment protection have been embodied in the marine environment protection conventions that China has concluded or acceded to. The *United Nations Marine Environment Protection Convention* specifically makes detailed and specific provisions on international cooperation;*Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal* stipulates that all contracting parties shall cooperate with each other in order to improve and realize the environmentally sound management of hazardous wastes and other wastes.[1] The *Convention on Biological Diversity* also provides advice on scientific programs related to the conservation and sustainable use of biological diversity and international cooperation in research and development.[2]In addition to the above-mentioned international documents, the *International Convention on Oil Pollution Preparedness, Response and Cooperation, 1990*, *Convention on Nuclear Safety, Convention on Fishing and Conservation of Living Resources on the High Seas,* and *Nairobi Declaration* also emphasize the basic concept of international and regional coordination and cooperation to jointly address marine environmental issues. Therefore, "principles of international cooperation" should be added to the *Marine Environment Protection Law.*

5.2.2 Amend other laws related to marine environment protection to enable the effective implementation of the *Marine Environment Protection Law*

The *United Nations Convention on the Law of the Sea* defines important concepts such as internal waters, territorial waters, adjacent sea areas, continental shelf, exclusive economic zone, high seas, and islands. China's *Law on the Territorial Sea and the Contiguous Zone* and the *Law on the Exclusive Economic Zone and the Continental Shelf* are concrete manifestations of the implementation of the provisions of the Convention. However, the desire of various countries to further develop marine resources is expanding. These two laws do not make provisions for such issues as the outer continental shelf, residual rights in the exclusive economic zone, and historical rights in the sea areas. Therefore, these rights issues can be resolved by amending the *Law on the Territorial Sea and the Contiguous Zone* and the *Law on the Exclusive Economic Zone and the Continental Shelf.*

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1 Article 10 of the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.*

2 Article 25 of the *Convention on the Conservation of Biological Diversity.*

With the development and progress of science and technology, countries have gradually expanded their ambitions to develop and utilize the ocean, and the number of artificial islands have increased. However, the Convention does not define the legal status of artificial islands, nor does it stipulate the maritime rights of artificial islands. Since it is impossible to distinguish the natural part from the artificial part after all kinds of marine structures are assembled together by human construction, the definition of the legal status of artificial islands is controversial in academic circles. At present, there are some opinions in academic circles, such as "construction foundation theory", "construction purpose theory", and "construction method theory".[1] However, the island protection and the exploitation and utilization of the resources of the surrounding sea areas are also stipulated in principle in China's Marine Environment Protection Law, so China can amend the *Island Protection Law* according to the specific situation, and define the legal status of the artificial island, so as to fully connect with the *Marine Environment Protection Law* and implement it completely.

5.2.3 Stipulate the conservation and utilization of marine living resources beyond the scope of national jurisdiction in the *Marine Environment Protection Law*

The sharp decline in biodiversity is the result of mankind's unrestrained exploitation of nature. The *Convention on Biological Diversity* is an international convention for the protection of the living resources of the earth, which China signed and ratified in 1992. In order to fulfill the Convention's international obligations to protect biodiversity, China has formulated a large number of laws and regulations to protect biodiversity. For example, the *Wild Animal Conservation Law* and Chapter 3 "marine ecological protection and many years of national economic and social development plans" of the *Marine Environment Protection Law* have emphasized the protection of biological resources. In terms of biodiversity protection, China's *Marine Environment Protection Law* is well connected. However, because various countries enjoy the freedom of fishing on the high seas, the problem of using marine living resources beyond the scope of national jurisdiction has arisen. The conservation and utilization of mariculture, deep seabed genetic resources beyond the scope of national jurisdiction, and biodiversity in sea areas beyond the scope of national jurisdiction are stipulated in the *Convention on Biological Diversity Secretariat Report* in 2004, and these provisions should also be mentioned in China's *Marine Environment Protection Law.*

5.2.4Increase the relevant provisions for dealing with marine disasters other than oil pollution

Although the ocean itself has a strong purification capacity, the pollution caused by oil spills to the marine environment is huge, and it takes a hundred or more years for the ocean to recover or even fail to recover at all. All other countries are effectively strengthening oil pollution prevention and control, stressing the importance of effective emergency preparedness. Therefore, in 1998, China acceded to the *International Convention on Oil Pollution Preparedness, Response and Cooperation, 1990*, and the *Marine Environment Protection Law* also makes provisions for dealing with the problem of oil pollution. However, with the development and utilization of the marine environment, not only oil pollution will cause damage to the marine environment, but other marine disasters such as storm surge, red tide, sea ice and seawater erosion will also cause damage to the marine environment. Therefore, the content of dealing with other marine disasters should be added to the *Marine Environment Protection Law.*

5.2.5 Increase the regulations on the development, utilization and protection of the Arctic high seas fishery resources

In the context of global warming, the melting of Arctic Ocean sea ice has made it possible to develop and utilize the Arctic Ocean's fishery resources. Therefore, in the waters outside the jurisdiction of the five countries along the Arctic Ocean, all countries have freedom of navigation and fishing. In order to protect the unregulated capture of Arctic fishery resources, the five countries along the Arctic Ocean and other countries including China signed the *Agreement on the Prevention of Unregulated High Seas Fisheries in the Central North Ice Ocean* in October 2018, thereby effectively preventing

1 SUN Chao&MA Mingfei, *Legal status of artificial islands,* Hebei Law(2019).

various countries from unregulated exploitation of fishery resources in the Arctic high seas. Therefore, in order to enhance the present performance of China's *Marine Environment Protection Law,* the provisions on the exploitation, utilization and protection of fishery resources in the Arctic high seas should be increased, and then specific provisions should be made through the *Fishery Law*.

5.2.6 Add "protection of migratory marine life" to Chapter 3 of the *Marine Environment Protection Law*

The *Convention on Migratory Species* was drafted by the United Nations Environment Programme. As one of the permanent members of the United Nations, China should abide by the Convention and implement the international obligations of protecting migratory wild animal species on land, sea and air in domestic laws. Chapter 3 of the *Marine Environment Protection Law* does not stipulate the protection of migratory marine life. When the law is revised in the future, the relevant provisions of "protection of migratory marine life" should be added to this chapter.

5.3 Implement the core measures of relevant international conventions and promote the effective connection of the *Marine Environment Protection Law*

5.3.1Delete Article 56 (3) of the *Marine Environment Protection Law* and stipulate that only the items in the list of wastes that can be dumped

The *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter* entered into force for China on December 15, 1985. In 2006, China ratified the application of its 1996 Protocol. However, the current Article 56 (3) of the *Marine Environment Protection Law* stipulate that "The list of wastes that can be dumped into the ocean shall be drawn up by the national maritime administrative department, and submitted to the State Council for approval after the review and comments made by the environmental protection administrative department of the State Council." This Article entrusts the formulation of the list of wastes that can be dumped into the ocean to the national maritime administrative department, but does not adopt the list of wastes that can be dumped as is stipulated in the Convention and its Protocol. The Convention cannot play its due role, so Article 56 (3) of the *Marine Environment Protection Law* should be amended, stipulating that only matters listed in the Protocol's list of wastes that can be dumped, which can better implement the core measures of the Convention and connect better domestic laws with international conventions.

5.3.2 Add mandatory EEDI and SEEMP for new ships to Chapter 3 of the *Marine Environment Protection Law* to prevent ship pollution and reduce greenhouse gas emissions from international shipping

Ship pollution is the main culprit of marine environment pollution. In addition to the damage to the marine environment caused by the items carried by ships, the emission of carbon dioxide and other greenhouse gases generated by the energy consumed by ships is also a great threat. In order to prevent pollution from ships, international organizations signed the *MARPOL* in London. China acceded to it in 2006, but the core measures of the Convention are not connected with China's *Marine Environment Protection Law.* Therefore, the improvement of ship performance index should be taken as an important aspect in the prevention and control of ship pollution, and EEDI and SEEMP of the Convention should be included in the revision, so as to reduce greenhouse gas emissions generated by international shipping.

5.3.3 Add provisions for the scientific research and monitoring of shipbuilding, anti-fouling systems and ballast water systems in China's *Marine Environment Protection Law*

International Convention on Control of Harmful Anti-fouling Systems on Ships and *Convention for the Control and Management of Ships' Ballast Water and Sediments* that China has acceded to as well as *Hong Kong Convention on Shipbreaking*, which China has not yet acceded to but has important reference significance for China's marine environment legislation as an international maritime organization convention, all have technical requirements for environment protection for the construction of ships, but Chapter 8 "Prevention and Control of Pollution Damage to the Marine Environment from Ships and Related Operations" of China's *Marine Environment Protection Law* lacks provisions for the

scientific research and monitoring of anti-fouling systems, ship's ballast water systems, shipbuilding, and the removal of shipwrecks. Therefore, when the *Marine Environment Protection Law* is revised, the corresponding scientific research and monitoring requirements should be added in accordance with the treaty, and the degree of connection with the national treaty should be improved.

6. Conclusion

The international conventions on marine environment protection that China has concluded or acceded to represent China's international commitment to the protection of the marine environment, which reflects China's political position. What reflects a country's sense of responsibility is to effectively connect its international commitment with its domestic laws and fulfill this commitment to protect the marine environment. The *Constitution* does not stipulate the method of application of the principles of international law in China, so the study of the relationship between international law and domestic law has laid a theoretical foundation for the completing the connection between the two and the effective implementation of international law in China. We should adopt the indirect application of transformation and the direct application of conditional nesting to promote the effective implementation of international law at home. At present, China's *Marine Environment Protection Law* has some gaps in relation to the relevant international conventions, which is reflected in the fact that the legislative purpose can not play the leading role, that the real performance is not strong, and that no specific provisions have been made on the core measures in the international conventions to which China acceded. In the face of the opportunity that China is currently revising the *Marine Environment Protection Law*, in order to make up for the loopholes in the process of the connection with international law, it is necessary to further enrich the legislative purpose of the *Marine Environment Protection Law.* It can be proposed that additions be made to the contents on issues such as building beautiful coastal cities and towns and response to climate change, amend and enhance the real-time performance of the *Marine Environment Protection Law* in due course, implement the specific core measures of the international marine environment protection convention, and enhance the connection of the *Marine Environment Protection Law.* There is courage and determination behind joining the *International Convention* on marine environmental protection. Only by turning it into practical action can we more effectively deal with the marine environment challenges. It is hoped that all countries will join hands to promote the implementation of these commitments and help improve the marine ecological environment.

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基于渔民权益保障的法治渔村建设问题研究

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摘要：在新的历史条件下，我国法治乡村建设显现出良好的趋势。随着的城乡一体化的推进，乡村成员的流动性增强，乡村社会的封闭程度显著降低，社会秩序也逐渐法治化。然而，目前的法治乡村建设工作仍有不足之处，需要予以修正，尤其是渔村的法治建设。通过总结归纳，现阶段的主要问题包括基层执法不够规范、政务服务效能有待提升，以及渔民守法和法律监督意识不强。针对这三点现存问题，建议从行政执法、政务服务和普法宣传三个方面入手，在剖析产生原因的基础上，对行政机关提出了相应的法律意见。

关键词：法治乡村；渔业；私权保障；行政自制

一、基于渔民权益保障建设法治渔村的必要性

（一）法治渔村建设

乡村作为社会结构的基本单元，是我国的重要组成部分。[1] 尤其是在中国特色社会主义进入新时代的当下，在未来的几十年内仍将有大量的国民生活在乡村社会。因此，乡村治理是国家治理的基石，而法治是乡村治理的根本。[1]即使乡村具有内在的封闭性，也不能将其排除在法治建设之外。而且，乡村经济的发展需要法治护航。法治不仅能够营造良好的营商环境，还能规范乡村的社会秩序。因此，无论是从发展经济，还是从增进民生福祉的角度来看，法治乡村建设都是我国当前重要且必要的工作之一。

在众多乡村类型中，渔业与林业、畜牧业等传统农业的差异较大，不能等同视之。在建设法治渔村时，有必要着重考虑其特殊性。以从事捕捞的渔民为例，渔船对其而言是生产工具，又是航行交通工具，那么在捕捞生产时既涉及到渔业法律体系，包括渔业基本法、渔业水域环境保护相关法律、渔船管理相关法律等；同时，也涉及到海上交通安全等相关的法律法规。另外，渔船的经济价值普遍较高，是渔民的重要财产，那么在渔船的抵押或流转时，又涉及到更多的法律法规。种类繁多的法律规定对渔民的行为方式提出了较高的要求。然而，由于水上环境不同于陆地，销毁证据和躲避侦查的难度较低，不少渔民即使知晓法律规定，也会存在侥幸心理，以违法行为获取较高利益。这对于执法活动的进行尤为不利，为渔村的法治化进程带来不小的阻力。因此，对渔村的法治建设应当针对其自身规律和特征，探寻行之有效的法治建设途径。

（二）渔民权益保障

以渔民权益保障为直接目的，对于法治渔村建设的主要益处有二。第一，有助于行政机关理解法律和相关政策的内在含义，提升工作效率和执法效果。目前，我国渔村的法治现代化进程如同海洋的水体分层，在规范性文件的制定和相关政策的发布等方面，如同波涛的海浪般声势浩大，

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1 吴钰：《传统文化在乡村旅游中的价值研究“律令法体系向律例法体系的转换”》，载《人民论坛·学术前沿》2017年第17期。

但在渔村的基层组织，法治化进程却如同深海般趋于平静。在执法层面未充分考虑到渔民的权益保障问题，缺乏服务心态，未切合渔民实际的利益需求运行公权力，是产生该现象的根本原因之一。那么将渔民权益保障作为行政行为的直接目的和衡量标准，就能够在一定程度上缓解当前的困境。

第二，以渔民权益保障为直接目的，有助于引导渔民了解法律，信任法律，遵守法律，并最终维护法律。虽然我国的法治乡村建设已经取得了一定的成效，但目前来看，正式的具有普遍约束力的法律规范与乡村长期形成的，具有本地特色的村规民约、惯例等非正式制度机理之间，仍然存在着不一致甚至相背离的情况。那么，为了促使乡村中的成员遵守法律的规定，构建法治乡村，就有必要从权益保障的角度对其加以引导，培养其自觉遵守法律的观念和习惯。更何况，渔民是法治渔村建设的重要参与者，推动渔村的法治化进程还需依靠其配合和努力。只有将渔民的权益保障作为工作核心，坚持渔民的主体地位，才能真正成功地建设了法治渔村。

二、法治渔村建设中的问题

（一）基层执法不够规范

在价值取向上，传统人治主义与现代法治主义的一个重大差异，在于对社会主体权利的不同态度。在现代社会，执法活动是把法律规范的基本要求转化为人们的实际行为，转化为社会成员享受权利、履行义务的事实上的关系。[1] 那么，规范公权力的运行，就有助于保障渔民私权益的实现。

目前，渔业执法的主要问题之一，在于执法人员在作出行政处罚决定时，未结合案件进行综合考虑，即行政裁量权未得到规范使用。实践中，部分执法人员忽视案件事实，如违法行为的情节、社会危害程度等，对于非法捕捞行为一律处罚三万元。由于法律规定对于情节一般的非法捕捞行为可处五万元以下的罚款，选择三万元这一中间数作出居中处罚貌似“保险”，但体现出的是执法人员疏于作为，未能公正合理地作出裁量。而且经过一段时间，当地渔民逐渐默认了这一“潜规则”，将可能被罚缴的三万元算入违法成本，抱着侥幸心理大肆非法捕捞。一旦被处罚，既不申请复议也不提起诉讼，甚至不要求处罚决定书等相关文书。如此一来，行政处罚实质上等同于行政许可，不但未能起到保护渔业资源和生态环境的执法效果，还反倒是放纵和助长了非法捕捞行为，产生了负面的影响，不利于法治乡村的建设。然而，对此行政处罚“变质”的现象，外部监督体系很难充分发挥作用。在司法监督方面，行政相对人不愿提起诉讼，司法机关无从受理也就无法救济。在国家权力机关监督方面，部分权力机关倾向于在宏观上监督法律执行情况，不易发现具体行政行为存在的问题。在社会监督方面，公民、新闻媒体等大多针对个案进行监督，以至于监督范围较小，并且监督效率不高。由此，有必要依靠内部监督力量进行整治，通过加强行政自制，提升执法水平。

另外，渔业执法活动中还存在着程序违法的情况，尤其是在渔村的基层行政执法主体。部分行政执法人员对执法程序的重要性认识不够，实践上存在着行政执法人员随意简化或省略执法程序的现象，如对涉案证据进行先行登记保存，却不送达相关文书等。对于执法程序问题，如果行政执法人员仅违反法律的任意性规定，则只是程序瑕疵。但如果行政执法人员违反的是法律的强行性规定，则构成程序违法。[2] 程序违法一方面体现在行政执法人员没有依照法律，向相对人表

1 公丕祥：《中国特色社会主义法治理论的探索之路》，载《社会科学战线》2015 年第 6 期。
2 梁君瑜：《论行政程序瑕疵的法律后果》，载《华东政法大学学报》2019 年第 2 期。

明自己行政执法人员的身份，也没有表明自己的执法目的；另一方面体现在行政执法人员没有依照法律规定的步骤、方式、顺序以及时限开展执法活动，甚至违反了法律的强制性规定。[1] 作为在基层的公权力使用者，在法治乡村的建设过程中，执法人员更应当带头严格遵守法律规定，以起到良好的宣传普法作用。

（二）政务服务效能有待提升

行政机关不仅仅是作出行政处罚的主体，其同时负有作出行政许可、行政给付、行政确认、行政奖励、行政裁决等行政权力和部分公共服务事项的职责。[2] 那么对于和渔民权益息息相关的事项，例如渔船更新改造审批手续的时限和流程等方面，有必要遵循高效便民的原则。我国海洋捕捞渔船更新改造补贴的发放坚持先建后补原则，并且补助期限是 2015 年 10 月 1 日至 2019 年 12 月 31 日，因此无论是企业还是渔民，更新改造老旧渔船对船东而言都有流动资金方面的压力。并且，近年农业部对燃油补贴政策作出了调整，再加上近海渔业资源有逐渐减少的趋势，渔船贷款的风险不断增加，使得不少银行机构提高了对渔船发放贷款的门槛。在此背景下，行政机关进行审批的时限越长，船东的还款压力就越大。针对此情况，多地创新地推出了线上审批的服务，以提高政务服务效率。然而，即便推出了线上审批这一高效途径，部分行政机关仍然要求渔民另邮寄一份纸质材料，才能完成审批。重复提交审批材料的要求有违高效便民这一行政法的基本原则，应当予以取消。而对于该行政行为反映出的行政工作僵硬死板的问题，各地行政主体应当普遍予以重视并自查自纠。

（三）渔民守法和法律监督意识不强

考虑到渔民的权益保障问题，除了对行政机关提出一定的要求外，还需渔民自身了解法律，自觉履行法定义务。具体而言，以渔民常见的违法行为之一，即非法电鱼为例，该行为已经严重地损害了渔民整体的权益。据调查，220V 的电压会导致半径为 20 米的水体真空，鱼类即使没有被电死也容易窒息而死。而实务中，在近海渔业资源显著减少的背景下，不少渔民会使用几万瓦的逆变器，以近千伏的输出电压在水中电鱼，严重地破坏了渔业资源和水域环境，损害了渔民整体的权益。更严重的是，当人体在接触到仅 90-100mA 的电流时就会呼吸麻痹，持续 3 秒或更长时间后，会心脏麻痹或心房停止跳动。输出电压为 800-1200V 时，输出电流可达 5-10A。[3]部分渔民为了方便捕捞，将电鱼设备持续启动，那么一旦渔民误触了导电介质，就会有生命危险。因此，渔民应当遵守法律规定，既不损害公共资源，也不侵害自身权益。

法律既设定了义务，也给予了权利。在守法方面，渔民既要做到不违反法律规定，也要懂得运用法律所给予的权利。鉴于电鱼的危害后果极为严重，多地行政机关采取了多项行动进行查处和规制。对于非法电鱼行为，法律规定了不同情节的处罚种类和幅度，行政机关在执法时就应当严格依照法律，做到事实清楚、证据确凿、适用依据正确、定性准确、程序合法。然而，部分行政机关仅仅出于警示教育的目的，对电鱼行为一律视为情节严重的档次进行处罚。此外，部分渔政部门对已经流入市场的渔获物进行处理，超越了该部门的职责范围。对于以上行为，行政相对人可分别以行政处罚决定明显不当和超越职权为由申请复议或提起诉讼，维护自身权益。

三、现存问题的原因分析

1 江瑾，沈斌：《执法程序严重违法阻却妨害公务罪的构成》，载《人民法院报》2018 年 11 月 29 日。
2 周海源：《行政权力清单制度深化改革的方法论指引》，载《政治与法律》2019 年第 6 期。
3 周海源：《行政权力清单制度深化改革的方法论指引》，载《政治与法律》2019 年第 6 期。

（一）部分执法人员法治思维淡薄

渔业执法人员在行政裁量过程中未综合考虑必要的案件事实，或考虑了不相关因素，都违反了合理行政，甚至合法行政的要求。诚然，法律规定必然存在一定的概括性，这是法的本质所决定的。而且，作为法律的载体，语言的模糊性常常导致法律适用阶段存在着一定的不确定性。但是，这并不是执法人员能够裁量失当的理由。古语道：“吏不良，则有法而莫守；法不善，则有财而莫理。”法律的生命在于实施，法律的权威也在于实施。作为行政权力的行使者，行政机关应当理解并遵循立法目的的要求，在执行国家法律时实现个案公平。相应的，执法人员就应当具有符合法治精神、法治原则、法治标准的思维模式。

至于渔业执法人员程序意识不强的问题，在一定程度上是受到了我国传统的封建专制的影响，使得不少渔业执法人员自身有一种优越感。而且我国“重实体，轻程序”的观念较为普遍，许多渔业执法人员注重于打击违法行为，没有做到完整地履行法律在程序上的要求。在渔业执法人员普遍存在程序违法的环境下，极少有人因此而受到处罚，导致渔业执法人员的程序意识愈发淡薄。

（二）执法人员服务意识有待提升

关于政务服务效率的问题，主要原因之一就是执法人员的服务意识不强，执法为民的理念不够深入。部分行政机关为了避免多头执法、滥用职权等风险，形成了极为谨慎的工作态度，甚至存在“不作为”的现象。长此以往，这种工作作风会导致行政机关缺乏一定的执行力。执法，亦称法律执行，是指国家行政机关依照法定职权和法定程序，行使行政管理职权、履行职责、贯彻和实施法律的活动。[1]若执法人员懒政怠政，缺乏保障渔民权益的意识，那么就与滥用职权一般，同样会激发与人民群众的矛盾，不利于法律的实施和宣传。

（三）渔民对法律认知不够

渔民在守法和法律监督方面存在的问题，主要是源于法律认知不够。在传统的乡土社会秩序中，起主导作用的大多是风俗习惯、惯例、村规民约等，尤其是生产模式特殊的渔村。而法律是国家制定或认可并由国家强制力保证实施的，反映由特定物质生活条件所决定的统治阶级意志的规范体系。[2] 由其概念可知，国家制定法的适用对象是不特定的个人或组织，具有一定的概括性，那么法律在灵活程度、社会适应性等方面，与乡村的非正式制度就有一定的距离。长此以往，渔民普遍信任当地既已形成的秩序规则，对法律就会有一定的忽视甚至排斥，也就不了解法律规定，也不懂得适用法律。

四、对策建议

（一）加强行政自制

现代法治国家，就公民和国家权力之间的关系而言，国家权力是手段，公民权利是目的。国家权力的存在是为了服务于人民，让人民更好的享有权利。为了防止国家权力侵犯公民权利，尤其是在法治建设还不完善的基层，必须进一步重视对国家权力的规范力度，要求行政机关严格依法行政。对此，建议行政机关加强主动型的自我规制。依照传统的行政法理论，规范行政行为主要依靠立法机关和司法机关的监督，寄希望于行政机关进行自我规制是很难有作为的。然而，近些年行政机关的行政职能和行政任务不断强化，其事实上肩负着解读法律等重要职责，而法律概

1 周海源：《行政权力清单制度深化改革的方法论指引》，载《政治与法律》2019 年第 6 期。
2 周海源：《行政权力清单制度深化改革的方法论指引》，载《政治与法律》2019 年第 6 期。

念模糊和司法谦抑主义导致外部监督力量不够强劲，这对传统理论带来了一定的挑战。可实践中，行政机关并没有大肆滥用职权，而是积极地进行自我规制。这种现象在世界多国也曾发生，近年我国不少学者也加以分析研究，认为评议考核制和责任追究制是内在动力之一。有学者提出，责任追究制度对执法个人带来的影响大于行政诉讼，因为在个人风险增加时，执法人员能够更加谨慎地进行行政裁量，从而作出合理的行政处罚决定。为此，在大多执法人员尚未明晰立法目的的初级阶段，结合行政机关在内部展开的定期与不定期案卷评查活动，建议评查项目不仅限于主体、执法程序等形式要件，还要适当增加合目的性考察，重视处罚决定对立法目的的贯彻。

实务中，部分案卷评查活动已经涉及到了实质审查，重视对行政行为合目的性的考察。据农业农村部 2020 年度渔业行政执法案卷评查细化标准显示，自由裁量权的使用存在畸轻畸重的，应扣除一定的分数。由此，对于行政裁量中考虑不相关因素的案件，就能起到警示和规范作用。此外，评查活动中曾发现有执法人员未明晰立法目的，导致法律适用错误的情况，遂作出不及格处理。该处罚决定书显示，对于违法行为人非法电鱼的行为，考虑到渔获物中存在国家二级保护动物，执法人员将其认定为《渔业法》第三十八条中的情节严重。这属于严重的立法目的理解错误：《渔业法》的立法目的是保护渔业资源，而非珍稀动物。既然执法人员对立法目的不够明晰，那么对具体法条的价值内涵也会存在理解上的问题，有碍于合理合法的处罚决定的作出。因此，建议在案卷评查时，将合目的性作为单独的一类评查项目，并将法律适用、自由裁量的使用等项目置于该类之中，以达到有效规范行政行为，保障立法目的得以贯彻的效果。

（二）改进政务服务的提供方式

基于保障渔民权益的直接目的，行政机关在履行行政权力和部分公共服务事项时，除了要达到公平合法的基本要求外，建议改进政务服务的提供方式，在服务途径、服务场所、服务流程、服务时限等方面进行优化。以渔船的更新改造为例，国家基于保障渔业生产安全的考虑，出台淘汰老旧渔船的补贴政策。补贴政策采取先建后补原则，即先由船东自筹资金完成更新改造再发放补贴。然而，建造一艘标准化渔船所需资金较高，以至于多数船东选择贷款造船。根据《中华人民共和国渔业船舶检验条例》《海洋捕捞渔船更新改造项目实施管理细则》等法律法规的规定，船东要经历申请审核、资格公示、备案登记、现场勘验、上排拆解、拆解监督等环节，全流程较为繁琐，若不提升政务服务效率就容易增加船东的贷款成本。其中贷款成本不仅包括船东向银行机构借款所付出的成本，还包括利息和时间成本。针对此类现实问题，部分行政机关就对政务服务的提供方式进行了优化，实现了高效便民的要求。为了缩短更新建造的周期，打通政策落实的“最后一公里”，浙江的“渔小二”自助办证系统通过对接浙江政务服务网、中国渔政管理指挥系统、公安户籍系统、渔船交易管理系统、财政非税系统，进行数据共享、事项整合、流程再造，解决了材料提交重复、部门签字等问题。[1] 宁波提出的“一事联办”渔船拆解流转系统同样起到类似的积极作用，其主张船东只需将相关材料递交至渔业行政服务中心进行审核登记，后续各环节将以手机短信的形式发送至各个部门和勘验监督人员，各部门工作人员就会主动上门服务对接，最后再由县水利和渔业局联合所有部门和人员，约定时间统一进行现场会签，出具拆解证明。以上政务服务的创新之处值得各地学习借鉴，共同为法治渔村建设工作提供助力。

（三）增强渔民对法律的理解和适用

对于增强渔民法律认知的问题，途径之一就是通过行政指导深化普法宣传。受多种因素影响，

1 周海源：《行政权力清单制度深化改革的方法论指引》，载《政治与法律》2019 年第 6 期。

渔民对执法机关存在畏惧，抵触，甚至反感的情绪。在当今的法治社会，为了完成行政管理任务的同时又实现和谐行政，执法机关有必要重视行政指导的作用，以较为缓和又便于理解的方式进行普法宣传。行政指导属于柔性监管，是国家行政机关在职权范围内，为实现所期待的行政状态，以建议、劝告等非强制措施要求有关当事人作为或者不作为的活动。依然以渔船更新改造为例，行政指导在老旧渔船管理方面能够发挥重要的作用。各地渔政渔港监督部门通常利用渔船年度检验、柴油补贴发放、伏季休渔等有利时机，在渔港、渔村发放安全生产宣传资料、以社区普法的方式进行政策解读、定期举办公益培训，以此加强对渔业安全生产的宣传力度。除了上述对老旧渔船更新改造方面的宣传外，行政指导也能够在非法捕捞、非法造船等方面发挥重要作用，从源头预防和遏制违法思想，打造良好的法治环境。因此，建议执法机关通过示范、提示、约谈、回访等非强制方式，大范围深层次地推进行政指导，提升服务效能。其中示范包括描绘美好前景、树立行为典范、推荐展示等方式；提示是将渔民理应知晓但容易疏忽、出错的问题和事项善意地告知、提醒；约谈是对渔民集体或个别约见，进行交流沟通、交换意见，了解有关情况后提出整改要求。[1] 当然，行政指导不是行政强制，应当遵守自愿原则，渔民有权自主决定是否听从、配合行政指导。此外，部分渔民对渔船存在的安全隐患无心、无力整改，那么执法机关还可以通过制定引导性政策这一助成型行政指导方式，在行政管理政策、信息方面为其提供服务。

另外，鉴于提升渔民的法律意识是一项长远的工作，并非一朝一夕就能达到理想的效果，那么为了在一定程度上行之有效地保障渔民的合法权益，建议行政机关公示权力清单。如此，既有利于渔民知法守法，并进行法律监督，也有利于行政机关划定职责范围，防止争权诿责或超越职权的现象发生。权力清单是指对政府及政府部门行使的职能、权限，以清单方式进行列举。行政机关履行职能、行使权力，应当按照法律、法规确立的清单进行，不属于清单列举范围内的权能和权限，行政机关不得为之。[2] 公示权力清单，就是给予群众法律武器，鼓励群众监督渔业执法部门的作为，让群众面对渔业执法人员超越业务范围行使职权的时候能够有维权意识，并能够做到依法合理地陈述申辩或复议诉讼。如此有利于杜绝超越职权的现象，消除权力设租寻租空间。

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1 冯欢欢等：《河南明确八种食品药品行政指导方式》，载《中国医药报》2017 年 11 月 6 日。
2 董成惠：《“权力清单的”正本清源》，载《北方法学》2017 年第 2 期。

Research on the Construction of the Rule of Law in Fishing Villages Based on the Protection of Fishermen's Rights and Interests

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Abstract: Under the new historical conditions, the construction of the rule of law in rural China has shown a positive trend. With the advancement of urban-rural integration, the mobility of rural members is enhanced,the degree of seclusion of rural society has been significantly reduced, and the governing of rural society is gradually becoming law-based. However, there are still some deficiencies in the current construction of villages under the rule of law that call for amendment, especially in the construction of fishing villages. The main problems to solve at this stage can be roughly summarized in three categories: first is the insufficiency of standard law enforcement at the grass-roots level;second is the need to improve the efficiency of government services; and third is the lack of legislative awareness among the fishermen.To solve these problems, it is necessary to explore the potential issues from the perspectives of the administrative law enforcement, government services, and popularization of law.

Keywords: Rule of Law Village; Fisheries; Protection of Citizens' Rights and Interests; Self-restraint in Administration

1. The Necessity of Building Rule of Law in Fishing Villages on the Basis of Protection of Fishermen's Rights and Interests

1.1 The Construction of Rule of Law Fishing Villages

The rural area is an important part of our country, and it is regarded as the basic unit of our society.[1] Especially since socialism with Chinese characteristics has entered a new era, Chinese society will continue to include a large rural population over the next few decades. Therefore, rural governance is the cornerstone of national governance, and the rule of law is the foundation of rural governance.[2] In addition,the development of the economy in rural areas needs the protection of the rule of law. To conclude, whether the goal is economic development or the wellbeing of the people, establishment oftheruleoflawinthecountrysideisofgreatimportanceandnecessity.

Quite different from traditional agricultural villages, such as those based on forestry and livestock husbandry,fishing villages are especially unique. Therefore,in the process of enacting the rule of law for fishing villages, their unique characteristics should be taken into consideration. Consider the fishermen, for example, whose fishing boats are their tools of production and transportation. When fishing, they are obligated to obey the fishery legal system,including basic laws regarding fishery, relevant laws about environmental protection of fishery waters, laws relating to management of fishing vessels, etc. Maritime traffic safety laws, and other related laws and regulations, are also involved in the fishing process. In addition, the economic value of fishing boats is generally high, so they are among a

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1 WU Yu, 'A Study of the Value of Traditional Culture in Rural Tourism', RenmingLuntan·XueshuQianyan, No. 17, 2017.

2 GONG Pixiang, 'The Development of the Counties' Rule of Law in China for the New Era', Seeking Truth, No. 1, 2019.

fisherman's most valued property. Further legal regulations are in place regarding the mortgage or circulation of fishing boats, which requires more guidelines for the behavior of fishermen. However, because the environment in water areas is different from that on land, it is easier to destroy evidence of illegal activity and avoid detection. As a result, even if many fishermen know the legal provisions, they may take illegal risks to obtain higher profits. This is particularly detrimental to the enforcement of law and has a negative influence on the rule of law in fishing villages. Hence, the construction of the rule of law in fishing villages should be based on its own pattern and characteristics. Exploring effective solutions for these issues is of top priority.

1.2 The Protection of Fishermen's Rights and Interests

There are two main benefits to establishing the protection of fishermen's rights and interests as the primary purpose. First of all, it will help administrative organs to understand the inherent meaning of laws and relevant policies, thereby improving their working efficiency and the law enforcement effect. Currently, the modernization process of the rule of law in fishing villages in China is like the stratification of water bodies in the ocean. In terms of formulating normative documents and issuing relevant policies, it is as powerful as the waves; yet, in the grassroots organizations of fishing villages, the process of the rule of law tends to be calm, like the deep sea. One of the fundamental reasons for this phenomenon is that law enforcement fails to fully consider the protection of fishermen's rights and interests, lacks service mentality, and fails to wield public power according to the actual interests of fishermen. Therefore, accepting the protection of fishermen's rights and interests as the direct purpose of administrative acts – and the standards by which they are evaluated –can alleviate the current predicament.

Second, establishing the protection of fishermen's rights and interests as the primary purpose can help guide fishermen to understand, trust, abide by, and ultimately safeguard, the law. Although some progress has been made in the construction of law-based villages in China, there still exist inconsistencies or even deviations between formal legal norms, with universal binding force, and informal institutional mechanisms, such as village rules and conventions with local characteristics that have been formed in rural areas over a long period. Then, in order to encourage the villagers to obey the provisions of the law and construct rule of law villages, it is necessary to demonstrate to them how the laws protect their rights and interests, as well as to cultivate their awareness and habit of consciously obeying the law. Moreover, the cooperation and the efforts of fishermen are needed to promote the construction of law-based fishing villages, as they are an important part of this process. Only by designating the protection of fishermen's rights and interests as the core work and insisting on the principal position of fishermen, can the law-based fishing villages be built successfully.

2. Problems Appeared during the Construction of Rule of Law Fishing Villages

2.1 The Insufficiency of Standard Law Enforcement at the Grass-roots Level

In terms of value orientation, a major difference between traditional rule of man and modern rule of law lies in their different attitudes towards the rights of social subjects. In modern society, law enforcement activities are the activities that impress basic requirements of legal norms upon people's behaviors and establish a relationship where members of the society enjoy their rights and fulfill their obligations.[1] Then, the regulation of public power will help to guarantee the realization of fishermen's rights and interests.

At present, one of the main problems of fishery law enforcement is that the law enforcement personnel have not taken comprehensive consideration of the cases when deciding to administer punishment. In other words, the administrative discretion has not been used in properly. In practice, some law enforcement personnel have ignored the facts of the case – such as the circumstances of the illegal acts, the degree of social harm, and so on – and punished all illegal fishing activities with a fine of 30,000 yuan. Since the relevant law stipulates that illegal fishing, within general circumstances, warrants a fine of up to 50,000 yuan, the amount of 30,000 yuan seems like an appropriate penalty.

1 GONG Pixiang, 'The Road to Explore the Theory of Socialist Rule of Law with Chinese Characteristics' Social Science Front, No. 6, 2015.

However, such behavior reflects the in action of law enforcement officers, as well as their lack of fair and reasonable discretion. After a period of time, the local fishermen gradually acquiesce to this hidden rule, taking the 30,000 yuan into the cost of illegal fishing and accepting a risk-taking mindset. Once punished, they neither apply for reconsideration, nor file a lawsuit, nor even request relevant documents, such as a written decision of administrative penalty. In doing so, administrative punishment is essentially equivalent to administrative licensing, which not only fails to protect fishery resources and ecological environment, but also indulges and encourages illegal fishing, all of which result in a negative impact on the construction of law-based villages. The external supervision system can hardly function well in regards to the "deterioration" of administrative punishment. In the aspect of judicial supervision, the administrative counterpart is unwilling to file a lawsuit, so the judicial organ cannot accept it, let alone provide judicial remedy. In terms of supervision by state organs of power, some tend to supervise law enforcement at a macro level, indicating that it is difficult for them to find problems in specific administrative acts. When it comes to social supervision, citizens, news media, and others mostly supervise specific,individual cases, which means that the scope of supervision is small and the efficiency of supervision is low. Therefore, it is necessary to rely on the internal supervision force to clean up such phenomena by improving the level of law enforcement through the strengthening of self-restraint in administration.

Additionally, there are also illegal procedures in fishery law enforcement, especially in the administrative law enforcement bodies in basic fishing villages. Some administrative law enforcement personnel do not fully realize the importance of law enforcement procedures. In practice, some administrative law enforcement personnel simplify or omit law enforcement procedures at will. For example, they register and save the evidence involved in a case, as is expected, but then they neglect to serve relevant documents. As for the issue of law enforcement procedures, if administrative law enforcement personnel only violate the arbitrary provisions of the law, such acts are simply considered procedural defects; however, if they violate the mandatory provisions, it constitutes procedural illegality.[1] Procedural illegality is constituted in two kinds of situations. The first is when administrative law enforcement personnel fail to show their identity or to declare their purpose to the administrative counterpart in accordance with relevant laws. The second situation is when administrative law enforcement personnel fail to carry out law enforcement activities in accordance with the steps, methods, orders, and time limits stated in the laws, or when they even violate the mandatory provisions of the law.[2] As the operators of public power at the grass-roots level, law enforcement personnel should take the lead by strictly observing the legal provisions when constructing a law-based village, so as to play a positive role in publicizing the law.

2.2 The Need to Improve the Efficiency of Government Services

The administrative organ does not only determine administrative punishment; it also bears the burden of responsibility for utilizing administrative power, including administrative licensing, administrative payment, administrative affirmation, administrative reward, administrative adjudicating,and other relevant public services.[3] Therefore, it is necessary to follow the principle of efficiency and convenience for matters closely related to the rights and interests of fishermen, such as the time limit and process of the approval procedures for the update and alteration of fishing boats. The subsidy for the update and alteration of marine fishing vessels in China adheres to the principle of "construction before compensation", and the subsidy period is from October 1, 2015 to December 31, 2019. Therefore, regardless of whether the shipowners are enterprises or fishermen, they face pressure to maintain sufficient working capital while updating and altering their vessels. In addition, the Ministry of Agriculture has made adjustments to the fuel subsidy policy in recent years, and offshore fishery resources have gradually declined – both of which have increased the risks associated with fishing boat

1 LIANG Junyu, 'The Legal Consequences of Administrative Procedural Defect', ECUPL Journal, No. 2, 2019.
2 JIANG Jing, Shen Bin, 'The Failure to Constitute Crime of Hindering Public Affairs Due to the Violations of Law in Law Enforcement Procedures', People's Court Daily, November 29, 2018.
3 ZHOU Haiyuan, 'Methodological Guidance for Deepening Reform of the Administrative Power List System', Political Science and Law, No. 6, 2019.

loans and have caused many banking institutions to increase their threshold for such loans. In this context, the longer the time limit for administrative approval, the greater the pressure will be on shipowners to repay. In view of this situation, many places have responded innovatively by launching online examination and approval services to improve the efficiency of government services. However, despite the introduction of efficient, online approval processes, some administrative authorities still require fishermen to mail a separate paper document to complete the process. The requirement to repeatedly submit approval materials violates the basic principle of high efficiency and convenience for the people, and it should therefore be abolished. As for the problem reflected by this administrative act – which is that some administrative processes may be overly rigid – it stands to reason that administrative subjects everywhere should pay close attention, and they should check and correct themselves.

2.3 The Lack of Law-abiding and Legal Supervision Awareness of the Fishermen

In addition to establishing certain requirements for the administrative organs, fishermen's rights and interests would also benefit from fishermen themselves understanding the law and consciously upholding their legal obligations. As an example of a common activity that has seriously damaged the rights and interests of fishermen on the whole, consider the illegal practice of fishing by electrocution. According to one survey, a voltage of 220V can cause a vacuum in the water with a radius of 20m, and fish can easily die of suffocation, even if they are not electrocuted. In practice, against the background of significantly reduced offshore fishery resources, many fishermen use power inverters, which use tens of thousands of watts to produce an output of nearly a thousand volts, to electrocute fish in the water – a practice that results in serious damage to fishery resources and the water environment, as well as the overall rights and interests of fishermen. What is even more serious is that when the human body is exposed to a current of only 90 to 100mA, it will experience respiratory paralysis. If lasting for 3 seconds or longer, the heart will be paralyzed or the atria will stop beating. When the output voltage is 800-1200V, the output current can reach 5-10A.[1] In order to facilitate their fishing, some fishermen keep this equipment running continuously, and if a fisherman were to accidentally touch the conducting medium, his life would be in serious danger. Therefore, fishermen should abide by the provisions of the law to avoid harming the public resources as well as their own rights and interests.

The law determines rights as well as obligations. In terms of abiding by the law, fishermen are not only expected to avoid violating the legal provisions; they should also know how to exercise their lawful rights. In view of the serious consequences of fishing by electrocution, many local administrative authorities have taken action to investigate and regulate such behaviors. The laws stipulate the types and ranges of punishment for such behaviors in various circumstances. Therefore, when enforcing the law, the administrative organs should comply strictly with the law to ensure that the facts are clear, the evidence is conclusive, the application basis is correct, the determination of nature is accurate, and the procedure is legal. However, when punishing individuals for fishing by electrocution, some administrative organs treat all cases as serious circumstances for the purpose of setting an example for other fishermen. In addition, some fishery authorities have reached beyond the limits of their authority when dealing with catches that have already entered the market. As for the situations mentioned above, the administrative counterpart can apply for reconsideration or bring a lawsuit on the basis of obvious improper administrative penalty decision, and of exceeding authority respectively, to safeguard his own rights and interests.

3.Analysis on the Causes of the Current Problems

3.1 Part of Law Enforcement Personnel's Consciousness of Rule of Law is Weak

When fishery law enforcement personnel do not comprehensively consider the necessary facts of the case, or when they consider irrelevant factors in the process of administrative discretion, it is in violation of reasonable administration and even of the requirements of legal administration.Granted, there must be a certain generality in legal provisions, which is determined by the nature of law. As the

1 ZHAO Ying et al, 'Analysis of Electric Shock Protection Measures of Bathroom Based on Human Body Effect Under Humid Environment of IEC 60479', Electrotechnical Application, No. 12, 2019.

carrier of law, the vagueness of language often leads to uncertainty in the application of law, but that should not be an excuse for failure in discretion.As the old saying goes, "If an official is not good, then even if there are laws, he will not obey them. If the law is not good, the money will be hard to manage." The vitality of the law lies in its implementation, as does the authority of the law.As the executor of administrative power, the administrative organs should understand and follow the requirements of the legislative purpose, and they should strive for fairness when applying national laws to individual cases.Correspondingly, law enforcement personnel should adopt a mindset that conforms to the spirit, principle, and standard of the rule of law.

To some extent, the problem of fishery law enforcement personnel lacking procedural awareness can be attributed to China's tradition of feudal autocracy, which gives many fishery law enforcement personnel a sense of superiority.Moreover, the concept of "attaching importance to the substance,rather than the procedure" is more common in China. Many fishery law enforcement officers focus on cracking down on illegal acts but fail to completely fulfill legal requirements in the process.In an environment where fishery law enforcement personnel generally violate procedural laws, few people are punished for such acts,which leads to further weakening of fishery law enforcement personnel's procedural awareness.

3.2 The Service Awareness of Law Enforcement Personnel Needs Improving

As for the low efficiency of government service, one of the main reasons is that the law enforcement personnel's service consciousness is insufficient and the concept of law enforcement for the people is not deeply rooted in their minds. In order to avoid the risk of duplicate law enforcement and abuse of power, some administrative organs have adopted an extremely cautious attitude towards their work, which can even result in dereliction of duty. In the long run, this will result in a lack of executive force. Law enforcement refers to the activities where the state administrative organs exercise administrative powers, fulfill obligations, and implement and enforce laws in accordance with the statutory powers and procedures.[1] Just as the abuse of administrative powers can provoke conflict, the same result can occur if law enforcement officials are indolent, sloppy, or neglectful of their duties and lack awareness of the importance of protecting the rights and interests of fishermen, which is harmful to the implementation and publicity of the law.

3.3 The Fishermen Have Little Knowledge about Current Laws and Policies

Fishermen's issues related to legal supervision, as well as their difficulties abiding by relevant laws, are mainly caused by a lack of legal awareness. In regards to traditional rural social order, the dominant deciding factor is mostly customs, conventions, and village rules – especially in fishing villages with unique methods of production. However, law is a normative system that is created, approved, and enforced by the state, so it reflects the will of the ruling class as determined by the specific material living conditions.[2] It is evident from this concept that the applicable objects of enacted laws are indicated with a certain generality – they are non-specific individuals or organizations – which accounts for the disconnect between formal laws and the informal systems in rural areas in terms of flexibility and social adaptability. In the long run, fishermen generally trust the established local order and rules, so they will ignore or even reject the law to some extent. Consequently, they do not understand the legal provisions or the application of the law.

4.Countermeasures and Suggestions

4.1 Strengthen Self-restraint in Administration

In a modern country ruled by law, the relationship between state power and citizens is one of means and ends. The existence of state power is to serve the people so they can better enjoy their rights. In order to prevent state power from infringing upon citizens' rights – especially at the grass-roots level,

1 MO Yuchuan, 'Report on Government Legal System Construction in the Last Thirty Years', Review on Constitutionalism and Administrative Rule of Law, No. 1, 2019.

2 ZHOU Fengting, 'New Exploration of the Definition and Essence of Law', Hebei Law Science, No. 7, 2011.

where the construction of the rule of law is still imperfect – we must pay greater attention to the standardization of state power and require administrative organs to strictly exercise administrative power according to laws. In this regard, it is suggested that the administrative organs strengthen their self-restraint. According to the traditional theory of administrative law, the regulation of administrative acts depends primarily on the supervision of the legislative body and the judiciary authorities. Although the self-regulation of administrative organs is difficult to achieve, the functions and tasks of administrative organs have been continuously strengthened in recent years, indicating that they shoulder important responsibilities, such as the interpretation of laws. However, due to judicial modesty and ambiguity in the concept of law, the external supervision force is insufficient, which has brought some challenges to the traditional theory. In practice, the administrative organs do not abuse their power; rather, they actively regulate themselves, which has also happened in many countries around the world. Many Chinese scholars have analyzed and studied this phenomenon in recent years, holding the opinion that the review and verification system – as well as the accountability system – are one of the internal motivations. Some scholars propose that the impact of an accountability system on law enforcement individuals is greater than that of administrative litigation, because when personal risks increase, law enforcement officers can be more cautious in administrative discretion, so as to make a reasonable decision on administrative punishment. Therefore, in the primary stage, when most law enforcement personnel have not yet clearly understood the purpose of legislation, it is suggested that the items to review should not be limited to the formal elements, such as the subject and the enforcement procedure. Instead, they should be expanded to include investigation into the purpose of the punishment decision, and they should pay attention to the implementation of the purpose of legislation to some extent, combined with the regular and irregular file-review activities carried out internally.

In practice, some file-review activities have involved substantive review, attaching importance to the investigation into the purposiveness of administrative acts. According to the Ministry of Agriculture and Rural Affairs' detailed standards for evaluation of fishery administrative law enforcement files in 2020, some points should be deducted for misuse of discretionary power, which serves cautionary and normative purposes in cases where irrelevant factors are considered in administrative discretion. In addition, some law enforcement officers were found to have not recognized the purpose of the legislation and had applied the laws incorrectly. The law enforcement officials often classify fishing by electrocution as "serious circumstances" –as stipulated in Article 38 of the Fisheries Law –based on their consideration of the existence of second-class protected animals in the catch. This is a serious misunderstanding of the legislative purpose of the Fisheries Law, which is to protect fishery resources rather than rare animals. Since the law enforcement personnel do not understand the legislative purpose correctly, they will have difficulty understanding the value of specific laws, which will hinder their ability to make reasonable and lawful punishment decisions. Therefore, it is suggested that purposefulness should be regarded as a separate category for evaluation, and the application of law and the use of discretion should be included in this category, so as to effectively regulate administrative acts and ensure the implementation of legislative purposes.

4.2 Improve the Way Government Services Are Provided

Based on the direct purpose of protecting the rights and interests of fishermen, administrative organs are advised to improve methods for providing government services and optimize the ways, places, processes, and time limits of services to meet the basic requirements of fairness and legality when performing administrative powers. Taking the update and alteration of fishing boats as an example, the government has introduced subsidy policies to eliminate old fishing boats in the interest of the safety of fishery production. The subsidy policy adopts the principle of "construction before compensation" – that is, the shipowner shall first raise funds to complete the renovation and reconstruction before being issued the subsidy. However, the cost of building a standardized fishing vessel is so high that most owners apply for loans to build one. According to the provisions in 'Regulations of the People's Republic of China on Fishing Vessel Inspection', 'Rules for the Implementation of the Update and Alteration of Marine Fishing Vessels', and other laws and regulations, the shipowner has to undergo a process of application review,qualification publicity, registration and archival filing, scene investigation,

demolition,demolition supervision, and other steps in order to update or alter a fishing boat. The process is relatively cumbersome, so if the efficiency of government services is not improved, the shipowners' borrowing costs stand to increase easily. The loan costs include not only the cost paid by the shipowner to borrow money from the banking institution, but also interest payments and time spent. In view of such practical problems, some administrative organs have optimized the way of providing government services to achieve the requirements of high efficiency and convenience. Built in order to shorten the update cycle and implement the policies 'in the last mile', "Yu Xiao Er" self-help registration system in Zhejiang province solves problems such as repeated registration, obtaining signatures from certain departments, and more. By connecting it to Zhejiang Government' s Official Web Portal, China Fishery Administration Command System, Household Registration System, Fishing Vessel Trade Management System, and Non-tax Revenue Management System, the self-help registration system conducts tasks like information sharing, affairs integration, and process reengineering.[1] The Fishing Vessel Dismantling Circulation System in Ningbo city has a similarly positive effect. With this system, the shipowner has only to submit the relevant materials to the fishery administrative service center for review and registration, after which the departments and inspection personnel will receive a message. Next,the working staff of each department will initiate door-to-door service. Finally, the Water Resources and Fisheries Bureau will unite all departments and personnel, issue the demolition certificate, and appoint a time for all the documents to be signed at the same time. Each region in China should learn about the innovation in government services described above, so as to jointly support the construction of law-based fishing villages.

4.3 Promote the Fishermen's Legal Awareness

One way to enhance the legal cognition of fishermen is to deepen the publicity of law through administrative guidance. Affected by a diversity of factors, fishermen have emotions like fear, resistance, and even antipathy towards law enforcement agencies. In today's society ruled by law, in order to complete the task of administrative management while also achieving harmonious administration, it is necessary for law enforcement agencies to attach importance to the role of administrative guidance and to carry out law popularization in a relatively moderate and easily understood way. Administrative guidance belongs to flexible regulation. It is an activity where the state administrative organs require the relevant parties to act or not to act using non-compulsory measures, such as suggestions and advice, with the purpose of realizing the expected administrative state within the scope of their functions and powers. Taking the update and alteration of fishing boats as an example, administrative guidance can play an important role in the management of old fishing boats. To strengthen the propaganda of safety in fishery production, some local fishery administration and port supervision departments frequently distribute publicity materials on safety production in fishing ports and villages. They also interpret policies by means of community law popularization, and they hold public training sessions regularly during the annual inspection of fishing boats, the distribution of diesel subsidies, and the fishing ban in summer season. In addition to the propaganda about updating and altering old fishing boats, administrative guidance can also play an important role in stopping illegal fishing and shipbuilding by preventing and curbing illegal ideas before they are conceived, thus helping to cultivate a healthy legal environment. Therefore, it is suggested that law enforcement agencies strongly promote administrative guidance on a large scale to improve service efficiency through non-compulsory measures, such as demonstration, reminder, negotiation,and return visitation. Demonstration includes depicting a bright future, providing a model of good behavior, and other ways. Reminder means to inform and remind fishermen of the problems and matters they should be aware of that are easily ignored or misunderstood. Negotiation is to meet with fishermen collectively or individually to exchange views and then put forward rectification requirements after understanding the relevant situation.[2] Admittedly, administrative guidance is not administrative coercion and should be followed on a voluntary basis.

1 SHI Zhongying, 'Deepen Reforms to Streamline Administration, Delegate Powers, and Improve Regulation and Services to Resolve the Problems of Fishermen' China Fisheries News, September 16, 2019.

2 FENG Huanhuan et al, 'Henan Province Clearly Stated the Administrative Guidance Eight Kinds of Food and Drug', China Medical News, November 6, 2017.

Fishermen have the right to independently decide whether to follow and cooperate with administrative guidance. In addition, some fishermen have no intention of rectifying the hidden safety problems of their fishing boats, so law enforcement agencies can also provide services for them by providing informative guidance.

Moreover, considering that it is a long-term project to improve the legal awareness of fishermen, and that the ideal effect cannot be achieved overnight, it is suggested that administrative organs publish a power list in order to effectively protect the legitimate rights and interests of fishermen to a certain extent. It will not only help fishermen to know and abide by the law and conduct legal supervision, but it will also help administrative organs to define the scope of their duties and prevent the phenomena of power-exceeding and scapegoating. A power list is a list of the functions and powers exercised by the government and its departments. An administrative organ shall perform its functions and exercise its power in accordance with the list, as established by laws and regulations, and shall not perform any power or authority other than those listed in the list.[1] Publicizing the power list is to provide the public with the weapon of law, to encourage the public to supervise the actions of fishery law enforcement departments, to equip them to safeguard their rights when fishery law enforcement officers exercise functions and powers beyond their scope, and to enable them to make a reasonable statement or file a lawsuit for reconsideration in accordance with the law. All these measures could assist in preventing fraudulent practices by government employees such as exploiting their role in public office for their own financial gain.

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1 DONG Chenghui, ‘Clear Radically of Power List’, Northern Legal Science, No. 11, 2017.

德宝海运有限公司(TURBO MARITIME LIMITED）、美亚财产保险有限公司广东分公司、审被告美国总统轮船私人有限公司(APL CO.PTE LTD）、狮威集装箱航运公司(SCANWELLCONTAINER LINE LIMITED)海上货物运输合同纠纷案

案例摘要

一、案件信息

（一）基本信息

案由：	海上货物运输合同纠纷
案号：	（2011）粤高法民四终字第 116 号
上诉人（原审被告）：	德保海运有限公司（TURBO MARITIMELIMITED)
被上诉人（原审原告）：	美亚财产保险有限公司广东分公司
原审被告：	美国总统轮船私人有限公司（APL CO.PTE LTD)、狮威集装箱航运公司（SCANWELL CONTAINER LINELIMITED)
出判时间：	2011.12.12

案件事实（主要为台风因素）

本案货物损坏是因受“黑格比”台风和风暴潮的影响，造成江水上涨并倒灌进入莲花山港码头淹没货物所致，本案讨论此损失是否可以援用“不可抗力”进行减责或免责抗辩。

二、争议焦点

本案是否由不可抗力造成并免责。

三、法院观点

（一）案涉“威马逊”台风是否构成不可抗力。

法院认为“不可抗力”是指不能预见不能避免并不能克服的客观情况。

1. 不能预见

就本案而言，台风本身属于不可抗力的范畴，即使在气象部门对台风的登陆已作出提前预报的情况下，承运人德宝公司也不可能提前预知台风发生的实际强度和对涉案货物带来的实际影响，且现有证据材料证实“黑格比”台风的实际强度比预报的强度大，故德宝公司上诉认为“有预报不等于有预见”的抗辩意见有一定的道理。

2.不能避免和克服

本案事实表明，货损发生的原因并不是由台风直接造成的，而是由于受“黑格比”台风和风暴潮的影响，江水上涨并倒灌进入莲花山港码头，淹没堆放在码头底层的集装箱货物所致。

而在本案“黑格比”台风登陆前，气象部门发布了台风警报，海洋部门发布了海浪警报和风暴潮警报，对“黑格比”台风及风暴潮的强度和可能造成的危害程度进行预报，已预报广东省汕尾沿海至雷州半岛沿海将发生 80 至 200 厘米的风暴潮增水，其中珠江口至阳江沿岸为严重岸段，沿岸验潮站的最高水位将超过当地防潮警戒水位。

法院认为，作为专业的货运公司，在看到上述预报后，即使无法预见到台风实际发生的强度，也应当做好防御台风的准备，并时刻关注天气的变化，及时采取有效的防护措施避免损失的发生。然而，德宝公司提供的会议纪要却证实，其只在台风发生之前召开了一个防台会议，除此之外，再没有其他证据材料证其为避免损失采取了哪些措施。德宝公司称其未能采取有效的防护措施主要还是由于对台风的强度无法预见，且码头存放的货物数量巨大，无法在短时间内普遍采取搬运或垫高等抢险措施，表明德宝公司在台风发生之时怠于行使妥善保管货物的法定义务，主观上存在一定的过错，也说明本案的货损并不是不可避免和不可克服的。

因此，德宝公司关于本案货损是由不可抗力造成的上诉理由不能成立，不予支持。

综上，涉案“威马逊”台风不符合构成不可抗力的构成要件。

四、小结

本案中的争议焦点为本案是否由不可抗力造成并免责。

关于不可抗力最高院从“不能预见”和“不可避免和克服”两个方面论证。有关“不能预见”的论述中，最高院首先对台风认定为“不可抗力的范畴”；但是，法院认为货损发生的原因并不是由台风直接造成的，而是由于受“黑格比”台风和风暴潮的影响，江水上涨并倒灌进入莲花山港码头，淹没堆放在码头底层的集装箱货物所致，因此“威马逊”不构成不可抗力。

有关“不可避免和克服”的论述中，法院认为作为专业的货运公司，在看到天气预报后，即使无法预见到台风实际发生的强度，也应当做好防御台风的准备，并时刻关注天气的变化，及时采取有效的防护措施避免损失的发生，然而，德宝公司提供的会议纪要却证实，其只在台风发生之前召开了一个防台会议，除此之外，再没有其他证据材料证其为避免损失采取了哪些措施。德宝公司称其未能采取有效的防护措施主要还是由于对台风的强度无法预见，且码头存放的货物数量巨大，无法在短时间内普遍采取搬运或垫高等抢险措施，表明德宝公司在台风发生之时怠于行使妥善保管货物的法定义务，主观上存在一定的过错，也说明本案的货损并不是不可避免和不可克服的。

案例提供者：任雁冰
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责任编辑：杨伟

Case Summary Of Turbo Maritime Limited, AIGA Property & Casualty Insurance Company Limited, Guangdong Branch vs American President Lines Pte Ltd and Scanwell Container Line Limited, in the contract of carriage of goods by sea Dispute

I. Case Information

1. Background Information

Causes for action：	Dispute over contract of carriage of goods by sea
Case Number：	（2011）粤高法民四终字第 116 号
Defendants：	Turbo Maritime Limited
Plaintiff：	AIG China Guangdong Branch
Trial Defendants：	American President Lines Pte Ltd and Scanwell Container Line Limited
Time of First Trial：	December, 12. 2012

2. Case Facts (The Typhoon)

The damage to the goods was caused by the Typhoon Hagupit and storm surge, which resulted in the rise of water level, flowing into the Lianhuashan Passenger Terminal, to flood the goods. This case discusses whether this loss can be invoked as “force majeure” to reduce liability or defense.

I. Dispute Focus

Whether force majeure applies in this case and excludes liability.

III. Court’s View

1. Whether the case of Typhoon Rammasun constitutes force majeure.

The court held that “force majeure” refers to objective circumstances that cannot be foreseen, avoided or overcome.

a. Unforeseen

In this case, the typhoon itself belongs to the category of force majeure. Although the Meteorological Department forecasted its landing in advance, it was still impossible for the carrier Turbo Maritime Limited (Turbo) to foresee the intensity of the typhoon and the likely impact on the goods involved. Existing evidence confirms that the actual intensity of Typhoon Hagupi is greater than predicted, so the Turbo defense of “forecasting is not equal to foreseeing” has its reason.

b. Cannot be avoided and overcome

Facts of this case show that the damage was not directly caused by the typhoon, but due to the typhoon Hagupit and storm surge, which caused the rise in the river water flowing into Lianhuashan Port Terminal, resulting in the submergence of container goods stacked at the bottom of the terminal.

Before the typhoon Hagupit, the Meteorological Department issued a typhoon warning, and the Marine Department likewise issued a wave warning and a storm surge warning, forecasting the intensity and possible damage caused by the typhoon and storm surge. They forecasted a 80 to 200 cm storm surge water for Shanwei Coast to Leizhou, including the Pearl River mouth to Yangjiang coast.The highest water level of coastal tide stations would exceed the local tidal warning level.

The court held that, as a professional freight company, upon seeing the above forecast, even if it could not foresee the intensity of the actual occurrence of the typhoon, it should be prepared to defend against the typhoon and always pay attention to the changes of the weather to take effective protective measures so as to avoid losses in a timely manner. However, the minutes of the meeting provided by Turbo confirmed that it only held a meeting on typhoon prevention before the typhoon occurred; there

was no other evidence to prove what measures it took to avoid losses. Turbo claimed that its failure to take effective protective measures was its inability to foresee the strength of the typhoon and the huge amount of goods stored at the terminal, which made it impossible to take rescue measures such as handling or padding within a short period of time. Such a position is an indication that Turbo was negligent in exercising its legal obligation to properly store the goods at the time of the typhoon and was subjectively at fault, which also showed that the damage in this case was not inevitable and insurmountable. Hence, Turbo's claim that the goods damaged in this case is inevitable and insurmountable could not be legitimate. Consequently, the appeal reasoned that loss of goods was caused by force majeure is invalid and will not be supported.

In conclusion, the case of Typhoon Rammasun does not meet the elements of force majeure.

II. Summary

The controversy in this case is whether the case is caused by force majeure.As to the application of force majeure, the Supreme Court argued from two aspects: "unforeseeable" and "unavoidable and overcome". In the discussion of the former, the Supreme Court first identified the typhoon as "the category of force majeure". However, the Court held that the damage was not directly caused by the typhoon, but by the Hagupit and storm surge, which caused the river water to rise, flowing into the Lianhuashan Passenger Terminal which flooded the container cargo stacked at the bottom of the terminal. Therefore, "Typhoon Rammasun" did not constitute force majeure.

About the "unavoidable and overcome" in discussion, the court held that as a professional freight company, upon seeing the weather forecast, even if it cannot foresee the height of the typhoon, it should be prepared to defend against the typhoon., Again, it must always pay attention to changes in the weather, and timely take effective protective measures to avoid losses, but the minutes of the meeting provided by Turbo confirmed that it only held a meeting on typhoon prevention before it occurred. There was no other evidence to prove what measures it took to avoid losses. Turbo claimed that its failure to take effective protective measures was mainly due to its inability to foresee the height of the typhoon and the huge amount of goods stored at the terminal, which made it impossible to take emergency measures such as handling or padding within a short period of time. It indicated that Turbo was negligent in exercising its legal obligation to properly store the goods at the time of the typhoon and was subjectively at fault, which also showed that the damage in this case was not inevitable and insurmountable. It also shows that the cargo damage in this case was not inevitable and insurmountable.

Case-collectors: REN Yanbing
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广东红土地物流有限公司因、中国平安财产保险股份有限公司广东分公司、海口南青集装箱班轮有限公司湛江分公司、海口南青集装箱班轮有限公司多式联运合同纠纷案

案例摘要

一、案件信息

（一）基本信息

案由：	多式联运合同纠纷
案号：	（2016）粤民终 1527 号
上诉人（原审被告）：	广东红土地物流有限公司
被上诉人（原审原告）	中国平安财产保险股份有限公司广东分公司、海口南青集装箱班轮有限公司湛江分公司、海口南青集装箱班轮有限公司
出判时间：	2017.6.14

（二）案件事实（主要为台风因素）

2014 年 5 月 8 日，红土地公司与信威公司签订运输合同，运货船名“金轮 9 号”。

7 月 16 日，国家海洋环境预报中心网页登载的“威马逊”迅速逼近，南海中部将出现狂浪到狂涛区的报告称，国家海洋预报台 16 日上午 8 时发布海洋橙色警报；同日登载的“威马逊”进入南海，向海南沿海逼迫的报道称，国家海洋预报台 16 日 16 时发布海浪橙色警报:受台风“威马逊”影响，预计 7 月 16 日夜间到 17 日白天，南海中部将出现 7 到 10 米的狂浪到狂涛区，广东、海南东部沿岸海域将出现 2 到 3 米的中浪到大浪，注意防范风暴潮可能引发的次生灾害。

7 月 17 日，“雷神”发威，南海掀狂浪的报道称，国家海洋预报台 17 日上午继续发布海浪橙色预警，受“威马逊”影响，预计 7 月 17 日中午到 18 日中午，南海中北部将出现 7 到 11 米的狂浪到狂涛区，广东西部、海南东部沿岸海域将出现 3 至 5 米的大浪到巨浪。同时也针对广东珠江口以西至雷州半岛东岸及海南岛东北部沿海发布风暴潮蓝色预警。7 月 18 日国家海洋局网页上登载的国家海洋局部署“威马逊”风暴潮和海浪灾害防御工作的报道称，国家海洋预报台于 17 日 14 时将海浪预警级别提升为红色，同时还将风暴潮的警报级别提升为橙色。

7 月 15 日，海口南青湛江分公司将涉案两个集装箱运往海口港等待中转。

7 月 20 日，海口码头公司出具证明函给海口南青公司称该公司在港重箱处于底层有 243 自然箱（178 小柜、65 大柜），因特大台风影响，堆场地面有不同程度积水（雨水及海水倒灌），可能存在箱内货物损失。

在海口码头公司所附受影响集装箱列表中包括了涉案两个集装箱。

8 月 4 日，涉案两个集装箱运抵目的地上海嘉定，发现集装箱内货物水湿受损，信威公司随

即向平安保险公司报案。

二、争议焦点：

红土地公否应对涉案货物损失承担责任。

三、法院观点：

红土地公司主张水湿系因台风“威马逊”所致，属不可抗力。

承运人依据不可抗力主张免责，需证明货损系因不能预见、不能避免且不能克服的客观情况所致，其作为承运人已经合理、谨慎、勤勉地照顾货物仍不能避免损害的发生；在涉案货物已经交付给其他人实际承运或保管的情况下，承运人亦应证明其受托人已尽谨慎义务仍不能避免损害的发生，而不能以其本身无法作为作为抗辩。

气象部门已于 2014 年 7 月 14 日发布台风预报，作为承运人的红土地公司应对此有所预见，并积极采取措施，避免损害的发生，但没有证据显示红土地公司对台风天气的到来采取了相关的防御措施。本案中，红土地公司仅举证证明涉案货物运输过程中出现台风天气，但未提供证据证明其或其受托人已经积极管理货物而不能避免货损发生，故对其援引不可抗力免责的主张不予支持。

红土地公司另主张涉案货损是因托运人的过错造成，涉案货物在海口秀英港码头堆放时，红土地公司已经通知信威公司涉案货物可能受水浸，但信威公司未对涉案货柜开箱检验或采取施救措施，造成货物进一步扩大受损，信威公司存在过错。对此，本院认为，本案货损系因承运人未尽合理管货义务，货物遭受水湿所致，红土地公司作为承运人在接到货物可能受损的通知后，亦没有积极采取施救措施，要求信威公司配合开箱检验，现以此为由主张免责缺乏依据，不能成立。

四、小结：

本案有关台风的争议焦点仍为是否能够构成不可抗力从而使当事人主张免责。

法院主要论证了红土地公司作为承运人没有对台风天气的到来采取相关的防御措施，承运人应证明已尽谨慎义务但是却不能仍不能避免损害的发生，而不能以其本身无法作为提出抗辩条件。

红土地公司不能证明自身或者其受托人已经积极管理货物而不能避免货损发生，所以不能构成不可抗力中的“不能避免、不能克服”条件，也就不能因此免责。

案例提供者：任雁冰
符丽勤
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Guangdong Hongtudi Logistics Co., Ltd. v. Guangdong Branch of China Pingan Property Insurance Co., Ltd, Zhanjiang Branch of Haikou Nanqing Container Liner Co., Haikou Nanqing Container Liner Co.(jurisdictional objection in dispute over multimodal transport contract)

Case Brief

I. Case Summery

(I) Basic information

Case	Multimodal Transport Contract Dispute
Case No.	(2016) Yue MinZhong No. 1527
Appellant (original defendant)	Guangdong Hongtudi Logistics Co., Ltd.
Appellee (original plaintiff)	Guangdong Branch of China Pingan Property Insurance Co., Ltd, Zhanjiang Branch of Haikou Nanqing Container Lines Co., Haikou Nanqing Container Lines Co.
Date of Adjudication	June 14, 2017

(II) Facts (mainly because of typhoon)

On May 8, 2014, Guangdong Hongtudi Logistics Co., Ltd. signed a contract of carriage with Beijing Xinwei Telecom Technology Inc., with “Jinglun 9” as the named shipping vessel.

On July 16, the website of the National Marine Environmental Forecasting Center published a report titled *Typhoon Rammasunis rapidly approaching, the middle of the South China Sea will appear strong waves*. The report said the National Marine Environmental Forecasting Center issued an orange alert at 8:00 am on the 16th. On the same day, *Typhoon Rammasun entered the South China Sea and forced its way to the coast of Hainan* was published. According to the report, the National Marine Environmental Forecasting Center issued an orange wave alert at 16:00 on the 16th, stating that being affected by Rammasun, there will be 7 to 10 meters of rough waves in the middle of the South China Sea during the night of July 16 to the daytime of July 17. Coastal waters in Guangdong and Eastern Hainan would be affected by2 to 3 meters of moderate to huge waves. The report further alerted: Pay attention to prevent secondary disasters caused by storm surge.

On July 17, a report titled *Thunder god’s wrath caused raging waves in the South China Sea* said that the National Marine Environmental Forecasting Center continued to issue an orange sea wave warning on the morning of the 17th. Affected by Rammasun, 7 to 11 meters of rough waves would appear at the north-central South China Sea during July 17 noon to 18 noon. Big waves of 3 to 5 meters will appear in the coastal waters of western Guangdong and eastern Hainan. A blue alert was also issued for west of Pearl River Delta, Guangdong, as well as the eastern coast of Leizhou Peninsula and the northeastern coast of Hainan Island. On July 18, a report titled *State Oceanic Administration has deployed storm surge and wave disaster prevention work for Typhoon Rammasun*was posted on the State Oceanic Administration website, in which the National Marine Environmental Forecasting Center raised the wave warning level to red at 14:00 on the 17th, and also raised the storm surge warning level to orange.

On July 15, Zhanjiang Branch of Haikou Nanqing Container Lines Co. shipped the two containers in question to Haikou Port for transshipment.

On July 20, Haikou Port Container Terminal Co. Ltd issued a certificate letter to Zhanjiang Branch

of Haikou Nanqing Container Lines Co. stating that the company had 243 natural containers (178 small containers and 65 large containers) at the bottom of the port, and due to the impact of the mega typhoon, there were different degrees of water accumulation on the ground of the yard (rainwater and seawater), and there might be loss of goods in the containers.

The two containers in question were included in the list of affected containers attached by Haikou Port Container Terminal Co. Ltd.

On August 4, the two containers involved in the case arrived at their destination in Jiading District, Shanghai, where the contents were found to have been damaged by water. Beijing Xinwei Telecom Technology Inc. reported to China Pingan Property Insurance Co., Ltd immediately.

II. Issue

Should Guangdong Hongtudi Logistics Co., Ltd be responsible for the loss of the goods involved?

III. Rationale & Holding

Guangdong Hongtudi Logistics Co., Ltd claimed the water in the container was caused by Typhoon Rammasun and was force majeure.

When claiming exemption for force majeure, the carrier is required to prove that the damage was caused by objective circumstances that could not have been foreseen, avoided or overcome, that is, damage cannot be avoided even though the carrier has taken reasonable, prudent and diligent care of the goods. Where the goods in question have been delivered to another person for actual carriage or safekeeping, the carrier shall also prove that its trustee's duty of care cannot prevent the damage from occurring and cannot use its own inability to act as a defense.

Since the Meteorological Department has issued the typhoon forecast on July 14, 2014, the Guangdong Hongtudi Logistics Co., Ltd as the carrier should have anticipated the typhoon weather and taken active measures to avoid the damage. But there is no evidence that Guangdong Hongtudi Logistics Co., Ltd have taken any precautions in response to the typhoon. In this case, the Guangdong Hongtudi Logistics Co., Ltd only proved that typhoon weather occurred during the transportation of the goods involved, but did not provide evidence that it or its trustee had actively managed the goods but could not avoid the damage. The court therefore did not support its claim to invoke the force majeure.

The Guangdong Hongtudi Logistics Co., Ltd also claimed that the damage was caused by the shipper's fault. While the goods were being stored at the Xiuying Terminal in Haikou, the Guangdong Hongtudi Logistics Co., Ltd had informed Beijing Xinwei Telecom Technology Inc. of the possible flooding of the goods. But the company did not open the case of container inspection or take rescue measures, resulting in further damage to the goods, so the company is at fault. In response, the court held that the damage in this case was caused by the carrier's failure to exercise reasonable control over the goods and the fact that the goods were wet. The Guangdong Hongtudi Logistics Co., Ltd, as the carrier, did not take active measures to rescue the goods after receiving the notice of possible damage and requested a prestigious company to open the case for inspection. Therefore, this claim has no basis and cannot be established.

IV. Summary

At issue in this case is whether the typhoon could have constituted a force majeure, thereby exempting the parties from liability.

The court mainly argued that the Guangdong Hongtudi Logistics Co., Ltd as the carrier did not take relevant precautions against the arrival of the typhoon weather. The carrier should prove that the duty of care had been exercised but that harm could not be avoided, rather than relying on its own inability to raise defences.

The Guangdong Hongtudi Logistics Co., Ltd cannot prove that it or its trustee has actively

managed the goods, but still cannot avoid the damage, so it cannot constitute the "cannot avoid, cannot overcome" condition in the force majeure, and therefore cannot be exempted from liability.

Case-collectors: REN Yanbing
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中国人民财产保险股份有限公司北京市分公司与湛江港（集团）股份有限公司第一分公司、湛江港（集团）股份有限公司港口作业纠纷案

案例摘要

一、案件信息

（一）基本信息

案由：	港口作业合同纠纷
案号：	(2018)粤 72 民初 89 号
原告：	中国人民财产保险股份有限公司北京市分公司
被告：	湛江港（集团）股份有限公司第一分公司、湛江港（集团）股份有限公司
出判时间：	2018.07.11

（二）案件事实（主要为台风因素）

在“海鸥台风”的影响下，中粮公司与湛江港公司签订的货物港口作业合同发生了货物损失。中国人民财产保险股份有限公司北京市分公司作为本案海上货物运输的保险人，在货物发生保险事故后，基于已向被保险人中粮公司支付了货物损失的保险赔款而取得了代位求偿权，进而有权在保险赔偿范围内向造成货物损失的责任人请求赔偿损失。法院围绕就原告提出的货物港口作业协议书中免责条款是否有效进行讨论。

二、争议焦点

货物港口作业协议书中免责条款是否有效。

三、法院观点

据本案查明的事实，本案货物系由台风引起暴风雨，海水倒灌导致水湿损失。货物港口作业协议书约定如货物在湛江港港区内遇上台风、暴风雨所造成货物损失，湛江港公司可免责。对于恶意串通行为的认定，应当分析合同双方当事人是否具有主观恶意，并全面分析订立合同时的具体情况、合同约定内容以及合同的履行情况，在此基础上加以综合判定。根据保险单条款约定，在保险事故发生后原告对被保险人中粮公司应当承担保险赔偿责任，以保护中粮公司的正当利益。中粮公司与湛江港公司在货物水湿后订立台风免责条款，但双方并非为了获取非法利益，中粮公司的损失本应得到赔偿，并未损害原告利益。本案证据不足以证明中粮公司与湛江港公司主观上具有获取非法利益的目的。台风免责条款订立之后，原告才向中粮公司支付保险赔偿款，如果原告认为该台风免责条款损害其利益，原告本可拒付保险赔偿款。故原告主张中粮公司与两被告主观恶意串通，损害原告合法利益的依据不足，不予支持。原告还主张两被告对本案货物损失存在重大过失。对于中粮公司存放在湛江港一分公司仓库的货物，两被告负有妥善保管的责任。

湛江港一分公司在台风造成货损的两天之前，向中粮公司告知台风信息并已按既定程序启动

防台预案，防台工作完成情况记录和照片显示湛江港一分对 18 号仓大门进行封门、压包等防台加固。由此可见，湛江港一分公司并未对货物安全弃之不顾，在台风来临前为避免货损的发生对仓库采取了必要的、谨慎的防范措施。故原告主张两被告对于货物水湿损失的发生存在重大过失依据不足，不予支持。

四、小结

本案中，货物港口作业协议书中的免责条款并非是中粮公司与湛江港公司恶意串通签订并损害原告利益，两被告对本案货物损失不存在重大过失，免责条款有效，故湛江港公司对本案损失不承担赔偿责任。

由于本案现有证据不能证明货物港口作业协议书中的免责条款无效，湛江港公司对原告所称货损不应承担赔偿责任，原告请求两被告承担赔偿责任的诉讼请求亦不能得到支持，故法院对包括是否因不可抗力造成本案货物损失、本案货物损失金额的确定以及中粮公司减损是否适当等问题不再审查。

案例提供者：任雁冰
姚旭
责任编辑：杨伟

Beijing Branch of PICC Property and Casualty Company Limited v. First Branch of Zhanjiang Port (Group) Co., Limited, Zhanjiang Port (Group) Co., Limited (dispute over port operation)

Case Brief

I. Case Information

(I) Basic information

Case	Port operation contract dispute
Case No.	(2018) Yue 72 Min Chu No. 89
Plaintiff	Beijing Branch of PICC Property and Casualty Company Limited
Defendant	First Branch of Zhanjiang Port (Group) Co., Limited, , Zhanjiang Port (Group) Co., Limited
Date of Adjudication	July 11, 2018

(II) Facts (mainly because of typhoon)

Under the influence of Typhoon Kalmaegi, the cargo port operation contract signed by China Oil and Foodstuffs Corporation and Zhanjiang Port (Group) Co., Limited suffered cargo loss. Beijing Branch of PICC Property and Casualty Company Limited, as the insurer of the carriage of goods by sea in this case, has obtained the right of subrogation on the basis of the payment of the insurance indemnity for the loss of the goods made to the insured China Oil and Foodstuffs Corporation after the insurance accident of the goods occurred, in turn, it has the right to claim compensation from the person responsible for the loss of the goods within the scope of insurance compensation. The court debated the validity of the exemption clause in the Port Operation Agreement for the goods proposed by the plaintiff.

II. Issue

The validity of the exclusion clause in the cargo port operation agreement.

III. Rationale & Holding

According to the facts ascertained, the goods in this case were dampened by the typhoon. According to the cargo port operation agreement, if the cargo is damaged by typhoon or storm in Zhanjiang port area, A Zhanjiang port company can be exempted from liability. For the determination of malicious collusion, it is necessary to analyze whether the two parties of the contract have subjective malice, and analyze the specific circumstances of the conclusion of the contract, the content of the

contract and the performance of the contract, to make a comprehensive judgment. According to the provisions of the insurance policy, after the occurrence of the insured accident, the plaintiff shall bear the liability of insurance to the insured China Oil and Foodstuffs Corporation to protect the legitimate interests of China Oil and Foodstuffs Corporation. China Oil and Foodstuffs Corporation and Zhanjiang Port (Group) Co., Limited entered into typhoon exemption clauses after the cargo was wet, but neither party intended to obtain illegal benefits. China Oil and Foodstuffs Corporation's losses should have been compensated and did not harm the plaintiff's interests.

The evidence in this case is insufficient to prove that China Oil and Foodstuffs Corporation and Zhanjiang Port (Group) Co., Limited have the objective of obtaining illegal benefits subjectively. The plaintiff will not pay the insurance indemnity to China Oil and Foodstuffs Corporation until the typhoon exemption clause is concluded. The plaintiff could have refused to pay the insurance indemnity if he had considered the typhoon exemption clause to be detrimental to his interests. Therefore, the plaintiff's claim that China Oil and Foodstuffs Corporation and Zhanjiang Port (Group) Co., Limited intentionally colluded with each other to damage the plaintiff's legitimate interests is not supported by insufficient basis. The plaintiffs also claim that the two defendants were grossly negligent in the loss of the goods. For the goods stored by China Oil and Foodstuffs Corporation in the warehouse of a branch in Zhanjiang Port, the two defendants are responsible for proper safekeeping.

Zhanjiang Port (Group) Co., Limited informed China Oil and Foodstuffs Corporation of the typhoon information two days before the cargo damage caused by the typhoon and started the typhoon prevention plan according to the established procedures. The records and photos of the typhoon protection work show that Zhanjiang Port (Group) Co., Limited reinforced the gate of No. 18 warehouse by sealing the door and pilin sand bags. It can be seen that Zhanjiang Port (Group) Co., Limited did not abandon the safety of the goods, but took necessary and prudent precautionary measures for the warehouse before the typhoon to avoid the damage to goods. Therefore, the plaintiff's claim that the two defendants have acted in gross negligence leading to the loss of the goods, is not sufficiently supported and lacks basis.

IV. Summary

In this case, the disclaimer clause in the cargo port operation agreement does not mean that China Oil and Foodstuffs Corporation and Zhanjiang Port (Group) Co., Limited signed in malicious collusion to damage the plaintiff's interests. The two defendants have no gross negligence for the loss of goods in this case. The disclaimer clause is valid, so Zhanjiang Port (Group) Co., Limited shall not be liable for the loss.

Since the existing evidence in this case cannot prove that the disclaimer clause in the cargo port operation agreement is invalid, Zhanjiang Port (Group) Co., Limited shall not be liable for the damage of the goods claimed by the plaintiff. The plaintiff's claim for the two defendants to bear the liability for compensation could not be supported, so the court no longer examined the issues including whether the loss of the goods in this case was caused by force majeure, the determination of the amount of the loss of the goods, and whether the loss of China Oil and Foodstuffs Corporation was appropriate.

Case-collectors: REN Yanbing
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Translator: CHEN Ze
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阳江市镁某刀具实业有限公司诉上海忻某物流有限公司等海上货物运输合同纠纷案

案例摘要

一、案件信息

（一）基本信息

案由：	涉外海上货物运输合同纠纷
案号：	(2009)广海法初字第 537 号
原告：	阳江市镁某刀具实业有限公司
被告：	上海忻某物流有限公司、东某国际货运代理（深圳）有限公司广州分公司、广州保税区玮某国际贸易有限公司和广州玮某物流服务有限公司
出判时间：	2009.12.14

（二）案件事实（主要为台风因素）

在强台风“黑格比”以及因此引发的风暴潮的影响下，阳江市镁某刀具实业有限公司发生损失，本案讨论此损失是否可以援用“不可抗力”进行减责或免责抗辩。

二、争议焦点

案涉强台风“黑格比”以及因此导致的风暴潮是否构成不可抗力。

三、法院观点

法院认为，涉案货物受损是由于强台风“黑格比”导致的风暴潮进而引发洪水浸入玮某物流公司的仓库所致。由于涉案货损的发生具有可预见性和可避免性，忻某公司提供的证据不足以证明“黑格比”台风与涉案货损之间存在直接的因果关系，因此，涉案货损不是由于《海商法》第五十一条规定的承运人不负赔偿责任的原因所造成。忻某公司、玮某贸易公司和玮某物流公司主张涉案货损是由不可抗力所致没有事实依据，不予支持。

法院认为忻某公司和玮某物流公司应当有更高的预见能力。关于“黑格比”强台风对广州的影响，新闻媒体及气象部门在台风到来之前已经大量预报，对于该次台风可能造成的影响，作为专业的仓储公司和物流公司，忻某公司和玮某物流公司应当比一般市场主体具有更专业的预见能力，因此，忻某公司和玮某物流公司可以采取提前投保、转移物品等必要措施避免和减少损失发

生，但忻某公司没有履行《海商法》第四十八条关于“承运人应当妥善地、谨慎地装载、搬移、积载、运输、保管、照料和卸载所运货物”的义务。

四、小结

除了原告与各被告之间的法律关系的梳理，本案中的争议焦点集中于案涉强台风“黑格比”以及因此导致的风暴潮是否构成不可抗力。

由于涉案货损的发生具有可预见性和可避免性，被告可以采取必要措施避免和减少损失发生，但却没有履行相应义务进而导致了损害的发生。

案例提供者：任雁冰
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Maritime Cargo Contract Dispute Case Brief: Yangjiang Meimou Knife Industry Co. v. Shanghai Xinmou Logistics Co., Ltd.

I. Case Information

1. Background Information

Causes for action:	Disputes over contracts of carriage of goods by sea involving foreign parties
Case Number:	(2009)广海法初字第 537 号
Defendants:	Yangjiang Meimou Knife Industry Co.
Trial Defendants:	Shanghai Xinmou Logistics Co.，Dongmou International Freight Forwarding (Shenzhen) Co., Ltd. Guangzhou Branch, Guangzhou Free Trade Zone Wei Mou International Trade Co.
Time of First Trial:	December 12, 2009

2. Case Facts（The Typhoon）

Under the influence of typhoon Hagupit and storm surge, Yangjiang Magnesium Cutlery Industrial Co., Ltd. incurred losses. This case discusses whether this loss can invoke “force majeure” to reduce or exclude liability defense.

II. Dispute Focus

Whether force majeure applies in this case and excludes liability.

III. Court’s View

The court held that the damage to the goods was caused by the storm surge that resulted from the strong typhoon Hagupit, which led to flooding of the warehouse of Wei Mou Logistics Company. Since the occurrence of the damage was predictable and avoidable, the evidence provided by Xinmou was not sufficient to prove that there was a relationship between Typhoon Hagupit and the damage. Therefore, the damage could not belong to the items of Article 51 of *the Maritime Code of the People’s Republic of China*. Xinmou, WeiMou Trading Company and WeiMou Logistics Company claimed that the damage was caused by force majeure, which was not supported by the facts.

The court held that Xinmou and WeiMou logistics companies should have higher sense of foreseeability. About the impact of the Hagupit on Guangzhou, the news media and meteorological departments forecasted the impacts that the typhoon might cause to the companies. As professional storage and logistics companies, Xinmou and WeiMou should have more professional foresight and taken the appropriate measures. Accordingly, Xinmou did not fulfill the obligation under Article 48 of the *Maritime Code of the People’s Republic of China* that “The carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried”.

IV. Summary

In addition to the legal relationship between the plaintiff and the defendants, dispute in this case is whether the Hagupit and its storm surge constitute force majeure or not.

Since the damage was foreseeable and avoidable, the defendant could have taken the necessary measures to avoid and reduce them. But they failed to fulfill the corresponding obligations, which resulted in the damage.

Source Text	Target Text	Source
《中华人民共和国海商法》	Maritime Code of the People's Republic of China	http://blog.sina.com.cn/s/blog_60dd02210101q8tq.html

Case-collectors: REN Yanbing
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Translator: DENG Chifei
Editor (English): Evans Tetteh
Executive editor: YANG Wei

中国太平洋财产保险股份有限公司珠海中心支公司与海口港集装箱码头有限公司港口货物保管合同纠纷上诉案案例摘要

一、案件信息

（一）基本信息

案由：	港口货物保管合同纠纷
案号：	(2017)琼民终 142 号
原告：	中国太平洋财产保险股份有限公司珠海中心支公司
被告：	海口港集装箱码头有限公司
出判时间：	2017.05.19

（二）案件事实（主要为台风因素）

在“威马逊”台风的影响下，海马公司保管在海口港集装箱码头有限公司的货物发生损失。中国太平洋财产保险股份有限公司珠海中心支公司作为承保人与海马公司就此次货损签订了保险理赔协议并进行了赔付。

二、争议焦点

（一）海口集装箱公司主体资格是否适格；

（二）应否适用不可抗力作为海口集装箱公司的免责事由；

（三）海口集装箱公司是否存在过错。

三、法院观点

（一）关于海口集装箱公司主体资格是否适格问题。

法院认为，海马公司货物存放在海口集装箱公司港口堆场，海马公司与海口集装箱公司之间存在事实上的港口货物保管合同关系，涉案集装箱、货物在港口因台风发生损失后，太保珠海公司已依约向被保险人海马公司支付保险赔偿并取得相关权益，其有权就涉案损失向海口集装箱公司主张代位求偿权，故海口集装箱公司作为被告的主体适格。

（二）关于应否适用不可抗力作为海口集装箱公司的免责事由问题。

法院认为，首先，从台风实际登陆的情况来看，此次台风的强度远超过预报的强度，引起海水倒灌的因素之一正是来自大风带来的风暴潮。加之预报时间与台风登录的时间间距极为短暂，无论是“威马逊”台风的威力或在其风力影响下的潮高及海水倒灌的灾难性后果均不能预见。其次，海口集装箱公司的集装箱堆场排水设施符合国家建设标准，但“威马逊”台风引发的潮高已

实际超过该公司集装箱堆场码头前沿顶面标高，台风带来的密集降水导致堆场货物因水淹发生货损不可避免且不能克服。

（三）关于海口集装箱公司是否存在过错问题。

法院认为，本案海口集装箱公司作为专业的港口经营人，对于如何堆放集装箱及防台、防水浸均有一定经验。海口集装箱公司在台风登录前召开紧急会议进行防台部署，将堆场内的集装箱按重箱与空箱分类堆放绑扎，重箱平铺摆放，确保港区内排水通畅，系基于其专业判断进行的防台作业，尽到足够谨慎的货物保管义务，不存在保管不善及过错之情形。

四、小结

本案的争议焦点为海口集装箱公司主体资格是否适格，“不可抗力”能否作为海口集装箱公司的免责事由，海口集装箱公司是否存在过错。

关于海口集装箱公司主体资格是否适格问题，法院认为，中国太平洋财产保险股份有限公司珠海中心支公司有权就涉案损失向海口集装箱公司主张代位求偿权，因此，海口集装箱公司作为被告的主体适格。

关于“不可抗力”，法院从“不能预见”和“不可避免”两个方面论证。在有关“不能预见”的论述中，法院从“威马逊”台风实际登录的强度和预报时间与台风登录的时间的短暂间距，说明了“威马逊”台风对货物造成的巨大损失是不能预见的。在“不可避免且不可克服”的论述中，法院认为，“威马逊”台风引发的潮高已实际超过该公司集装箱堆场码头前沿顶面标高，台风带来的密集降水导致堆场货物因水淹发生货损不可避免且不能克服。

关于海口集装箱公司是否存在过错的问题，法院认为，海口集装箱公司已在台风登录前进行了相应防台措施，尽到足够谨慎的货物保管义务，因此，海口集装箱公司不存在保管不善及过错之情形。

案例提供者：任雁冰
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Contract Dispute Appeal: Case Summary

China Pacific Property & Casualty Insurance Company Limited Zhuhai Central Branch Company V. Haikou Port Container Terminal Company Limited Port Cargo Custody

I. Case Information

1. Background Information

Causes for action：	Port Cargo Custody Contract Dispute
Case Number：	(2017)琼民终 142 号
Defendants：	China Pacific Property and Casualty Insurance Company Limited Zhuhai Central Branch
Plaintiff：	Haikou Port Container Terminal Co.
Time of First Tri	May 19，2017

2. Case Facts（The Typhoon）

Under the influence of typhoon Rammasun, the cargo of Haima Company was lost in Haikou Port Container Terminal Co. (hereinafter as the Haikou Port Container).As the insurer, China Pacific Property Insurance Co., Ltd. Zhuhai Central Branch (Zhuhai Branch) signed an insurance claim agreement with Haima Company and paid for the loss of goods.

II. Dispute Focus

A. whether the subject qualification of Haikou Container Company is appropriate;
B. whether force majeure should be applied as the exemption of Haikou Container Company;
C. whether the Haikou Container Company is at fault.

III. Court's View

(A) Is Haikou Container Company qualified for the subject?

The court held that, regarding the goods belonging to Haima Company stored in the Haikou Container Company port yard, a de facto contractual relationship of port cargo custody existed between Haima Company and Haikou Container Company. After the loss of the container and cargo in the port due to the typhoon, Zhuhai Branch paid the insurance compensation to the insured, Haima Company, and obtained the relevant rights and interests. Therefore, Zhuhai Branch has the right to claim the subrogation to Haikou Container Company for the loss involved in the case, so Haikou Container Company as the defendant's subject is suitable.

(B) Whether force majeure should be applied as a cause of exclusion of Haikou Container Company.

The court held that; first of all, the height of the typhoon far exceeded the forecasted, and one of the factors that caused the seawater to back up was the storm surge brought by the high wind. In addition, the interval between the forecast and the typhoon landing was extremely short.Neither the power of the typhoon nor the tidal height under and the disastrous consequences of the seawater backup could be foreseen. Secondly, the container yard drainage facilities of Haikou Container Company conformed to the national construction standards, but the tidal height caused by typhoon Rammasun had actually exceeded the top elevation of the front of the company's container yard terminal, and the intensive precipitation caused inevitable and insurmountable damage to the goods in the yard.

(C) The question of whether the Haikou container company is at fault.

The court believes that Haikou Container Company as a professional port operator must be experienced in stack containers and typhoon-prevention measures and water flooding. Haikou Container Company held an emergency meeting for the typhoon deployment that the container in the yard according to the heavy box and empty box classification stacked tied.Heavy boxes laid flat to ensure that the port drainage, based on its professional judgment of the typhoon operations, to be prudent enough to keep the goods. There is no poor storage and fault of the situation.

IV. Summary

The focus of the controversy in this case is the subject qualification of Haikou Container Company "force majeure" can be used as the exemption of Haikou Container Company, whether there is fault in Haikou Container Company.

On the question of whether the subject qualification of Haikou Container Company is appropriate, the court held that Zhuhai Branch Company has the right to claim subrogation to the Haikou Container Company for the loss involved. Thus, the subject of Haikou Container Company as the defendant is eligible.

Regarding "force majeure", the court argued from two aspects, "unforeseeable" and "unavoidable". In the aspect of "unforeseeable", the court explained the height of typhoon and the short interval between the forecast time and the time of the typhoon's landing from the Rammasun. The typhoon's huge damage to goods could not have been foreseen. In the discussion of "unavoidable and insurmountable", the court held that the tidal height caused by Typhoon Rammasun had actually exceeded the top elevation of the front of the company's container yard terminal, and the intensive precipitation brought by the typhoon led to inevitable damage to the goods in the yard due to flooding, and cannot be overcome.

On the question of whether the Haikou container company is at fault, the court held that, before the typhoon landed, Haikou Container Company had carried out corresponding measures to prevent the typhoon, fulfilling its duty to keep the goods with good care. Hence, Haikou Container Company is not at fault for improper storage.

Case-collectors: REN Yanbing
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中国人民财产保险股份有限公司泉州市分公司、海口港集装箱码头有限公司港口货物保管合同纠纷案

案例摘要

一、案件信息

（一）基本信息

案由：	货物保管合同纠纷
案号：	（2017）最高法民申 3252 号
原告：	中国人民财产保险股份有限公司泉州市分公司
被告：	海口港集装箱码头有限公司
出判时间：	2017.09.20

（二）案件事实（主要为台风因素）

在“威马逊”台风的影响下，中国人民财产保险股份有限公司泉州市分公司保管在海口集装箱码头有限公司的货物发生损失，本案讨论此损失是否可以援用“不可抗力”进行减责或免责抗辩。

二、争议焦点

案涉“威马逊”台风是否构成不可抗力；

海口集装箱公司是否履行了谨慎的管货义务，是否应赔偿部分经济损失。

三、法院观点

案涉“威马逊”台风是否构成不可抗力；

法院认为“不可抗力”为通常依据现有技术水平和一般人的认知而不可能预知为不能预见。对于台风而言，目前无法无法准确、及时预见其发生的确切时间、地点、延续时间、影响范围等。

不能预见：

预见的范围包括客观情况的发生及其影响程度，而本案中的损害结果正是由于无法准确预见的台风影响范围及影响程度所造成的。

法院认为，台风“威马逊”直接引起天文潮和风暴潮叠加，随之发生的海水倒灌是引发本案货损的直接原因。在台风“威马逊”发生前，海南省以及海口市新闻媒体对台风登陆时间和最大风力进行预报，但法院认为这并非实际情况的准确反映，而且作为货物损失最直接的原因——海水倒灌并未在预报中有所体现。

不能避免且不能克服：

海口市潮水位高达 3.83 米，在海口市大面积内涝积水的情况下，海口集装箱公司码头集装箱堆场被淹没在所难免。同时，申请人提出如果将货物层数增加到五层，将会减少 40%的货物损失，但其并无证据证明通过增加层高减少底层箱量的方案可以降低台风造成的损失。法院认为申请人提出在时间紧迫及全城被淹的情况下，要求海口集装箱公司将重箱转移到更为安全的地方并

不现实。

本案中，海口集装箱公司堆场呈平面结构且面积达到 28 万 ㎡，采用堆放沙包等防水措施并不现实，即使采取上述措施，海水仍可通过排水管道以及市内河渠等涌进集装箱堆场，因此，本案台风引起的海水倒灌实属不能避免、不能克服。

在本案台风发生前，海口集装箱公司及时通知货主、船运公司提货以降低损失，同时还召开紧急会议，明确防台方案为重箱区域施行平铺，层高不能超过三层，并将堆场内的集装箱按重箱与空箱分类堆放绑扎。防台重在防风，该方案符合港口经营人防台抗台的惯常做法。

综上，涉案“威马逊”台风符合不可抗力的构成要件。

海口集装箱公司是否履行了谨慎的管货义务，是否应赔偿部分经济损失。

在认定台风“威马逊”已经构成不可抗力的前提下，应当审查在不可抗力因素之外，是否因海口集装箱公司的过错导致损害结果的扩大。

法院认为,海口集装箱公司采取了对集装箱挪箱堆放以及绑扎、督促货主将货物提箱离港等实质性措施且其集装箱堆场排水设施符合国家建设标准。

综上，可以认定海口集装箱公司已尽到了合理的货物管理义务。

四、小结

本案中的争议焦点为台风是否构成不可抗力和海口集装箱公司的货物管理义务认定。

关于不可抗力最高院从“不能预见”和“不可避免且不能克服”两个方面论证。

有关“不能预见”的论述中，最高院首先对预见范围做了解释，将“影响程度”也作为预见范围纳入不可抗力认定中；此外，法院认为最直接导致损失的海水倒灌媒体报道并没有预见，因此“亚马逊”构成不可抗力。

有关“不可避免且不能克服”的论述中，法院首先驳回了申请人主张的“货物层数增加到五层，将会减少 40%的货物损失”和 “要求被申请人将重箱转移到更为安全的地方”两项主张。理由为申请人无法证明通过增加层高减少底层箱量的方案可以降低台风造成的损失，并且在时间紧迫及全城被淹的情况下，转移方案并不现实。

同时，法院认为被申请人有“实质性举动”即：取了对集装箱挪箱堆放以及绑扎、督促货主将货物提箱离港等；同时通过认定集装箱堆场排水设施符合国家建设标准认为海口集装箱公司已尽到合理的管货义务。

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Case of Dispute over a Contract for the Custody of Cargoes at the Port between Quanzhou Branch of People's Insurance Company of China Limited and Haikou Port Container Terminal Company Limited

Case Summary

I. Case Information

(1) Basic information

Cause:	Dispute over Port Cargo Custody Contract
Case Number:	No.3252 [2017] Petition, Civil Division, SPC
Plaintiff:	Quanzhou Branch of the PICC
Defendant:	Haikou Port Container Terminal Co., Ltd.
Judgment Time:	September 20, 2017

(2) Case facts (mainly due to typhoon factors)

Under the influence of Typhoon "Rammasun", the goods of Quanzhou Branch of People's Insurance Company of China Limited (hereinafter referred to as PICC) kept in Haikou Port Container Terminal Company, Limited (hereinafter referred to as the Haikou Company) suffered losses. This case discusses whether "force majeure" can be invoked for liability reduction or exemption defense.

II. Controversial Focus

(1) Whether the Typhoon Rammasun involved in the case is "force majeure".

(2) Whether the Haikou Company has fulfilled its obligation of prudent cargo management and whether it should compensate for some economic losses.

III. The Supreme People's Court's Opinion

(1) Whether the Typhoon Rammasun involved in the case is "force majeure"

The Supreme People's Court (hereinafter referred to as the Court) believed that "force majeure" is usually unpredictable based on the current technical level and ordinary People's cognition. For typhoons, it is currently impossible to accurately and timely predict the exact time, location, duration, and scope of their occurrence.

1. Unpredictable:

The foreseeable scope includes the occurrence of objective circumstances and the extent of its impact, and the damage in this case is precisely caused by the unpredictable scope and extent of the impact of the typhoon.

The Court held that Typhoon "Rammasun" directly caused the superposition of astronomical tide and storm surge, and the subsequent seawater intrusion was the direct cause of the damage in this case. Before the typhoon "Rammasun" occurred, the news media in Hainan Province and its City, Haikou, predicted the landing time and maximum wind force of the typhoon, but the Court believed that this was not an accurate reflection of the actual situation, and as the most direct cause of the loss of goods, seawater intrusion was not reflected in the forecast.

2. Unavoidable and insurmountable.

The tide level in Haikou city was as high as 3.83 meters, and it was inevitable that the container yard of the Haikou Company at the terminal would be flooded under the situation of waterlogging in a

large area of Haikou city. At the same time, the applicant proposed that if the number of layers of goods was increased to five layers, it would reduce the loss of goods by 40%, but there is no evidence to prove that by increasing the height of the layer and reducing the amount of containers on the bottom layer, the loss caused by the typhoon could be reduced. The Court held that it was unrealistic for the applicant to ask the Haikou Company to transfer heavy containers to a safer place, considering the limited time against the fact that the whole city was flooded.

In this case, the storage yard of the Haikou Company has a plane structure with an area of 280,000 m2. It is unrealistic to adopt waterproof measures such as stacking sandbags. Even if the above measures are taken, seawater can still flood into the container storage yard through drainage pipelines and canals in the city. Therefore, the backward flow of seawater caused by the typhoon in this case is unavoidable and insurmountable.

Before the occurrence of the typhoon in this case, the Haikou Company promptly notified the owner and shipping company to pick up the cargo to reduce losses. At the same time, it also believed an emergency meeting was held to clarify that the typhoon prevention plan should be tiled in the heavy container area, and the number of the layers should not exceed three. The containers are stacked and lashed according to heavy and empty containers. Anti-typhoon focuses on wind protection, and this plan is in line with the usual practice of port operators for air defense and typhoon resistance.

To sum up, the typhoon "Rammasun" involved in the case meets the constitutive requirements of force majeure.

(2) Whether the Haikou Company has fulfilled its obligation of prudent cargo management and whether it should compensate for some economic losses.

On the premise that Typhoon "Rammasun" has constituted force majeure, it should be examined whether the resulting damage is expanded due to the fault of the Haikou Company besides the force majeure factor.

The Court held that the Haikou Company had taken substantive measures such as moving containers, stacking and binding them, urging shippers to carry the goods out of the port, and its drainage facilities met the national construction standards.

To sum up, it can be concluded that the Haikou Company has fulfilled its reasonable cargo management obligations.

IV. Summary

The focus of the dispute in this case is whether the typhoon is force majeure, and the identification of the Haikou Company's cargo management obligations.

The Court demonstrated "force majeure" from two aspects: "unforeseeable", "inevitable and insurmountable".

In the discussion of "unforeseeable", the SPC first explained the scope of foresight and included "degree of influence" as the scope of foresight in the identification of force majeure. In addition, the Court believed that the media report of seawater intrusion, which directly caused the loss, was not foreseeable, so Typhoon "Rammasun" is force majeure.

In the discussion of the "inevitable and insurmountable" argument, the Court first rejected the applicant's two claims of "increasing the number of layers of goods to five will reduce the loss of goods by 40%" and "requiring the respondent to transfer the heavy containers to a safer place". The reason is that the applicant cannot prove that the plan to reduce the number of bottom boxes by increasing the floor height can reduce the losses caused by typhoons. Moreover, the transfer plan is unrealistic when time is short and the whole city is flooded.

At the same time, the Court held that the respondent had "substantial actions", which is, taking the containers, stacking and binding them, and urging the shippers to carry the goods out of the port. Meanwhile, the Haikou Company has fulfilled its reasonable obligation to manage goods by confirming that the drainage facilities of the container yard meet the national construction standards.

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中捷缝纫机股份有限公司与宁波经济技术开发区远亚仓储有限公司保管合同纠纷上诉案

案例摘要

一、案件信息

（一）基本信息

案由：	保管合同纠纷
案号：	(2006)浙民三终字第 142 号
原告：	中捷缝纫机股份有限公司
被告：	宁波经济技术开发区远亚仓储有限公司
出判时间：	2006.08.18

（二）案件事实（主要为台风因素）

在“麦莎”台风的影响下，中捷缝纫机股份有限公司保管在宁波经济技术开发区远亚仓储有限公司货物发生损失。

二、争议焦点

（一）台风等恶劣气候所致的货物损失是否构成履行合同的不可抗力。

（二）对于不可抗力发生后因未采取减损措施所产生的货物扩大损失，如何确定损害赔偿责任？

三、法院观点

（一）台风等恶劣气候所致的货物损失是否构成履行合同的不可抗力。

法院认为，涉案的中捷公司的货物受损系由于“麦莎”台风所致，关于“麦莎”台风对宁波的影响，虽然新闻媒体进行过大量预报，但此次台风的实际强度已超过预期。对于“麦莎”台风的初步预报，并不等同于当事人对于“麦莎”台风将给北仑区乃至中捷公司的仓储货物带来灾难性的后果具有现实的可预见性。并且宁波经济技术开发区远亚仓储有限公司对仓库采取了沙包堵水等抗台措施，但未能避免仓库全面进水。因此，本次台风给中捷公司的仓储货物所造成的损害是当事人所不能预见、不能避免并不能克服的客观情况，当属不可抗力。

（二）对于不可抗力发生后因未采取减损措施所产生的货物扩大损失，如何确定损害赔偿责任？

法院认为，关于受损货物在台风灾害后，由于双方当事人均未采取任何减损措施，放任货物继续存放所造成损失扩大，双方均有过错，应平均负担该部分损失。

四、小结

本案的争议焦点为台风等恶劣气候所致的货物损失是否构成履行合同的不可抗力，对于不可抗力发生后因未采取减损措施所产生的货物扩大损失，如何确定损害赔偿责任？

关于“不可抗力”，法院从“不能预见”和“不能避免且不能克服”两方面进行论证。

在“不能预见”的论述中，法院认为，“麦莎”台风的实际强度已超过预期，对于台风的初步预报并不等同于当事人对于“麦莎”台风将给北仑区乃至中捷公司的仓储货物带来灾难性的后果具有现实的可预见性。因此，台风造成的损失是宁波经济技术开发区远亚仓储有限公司所不能预见。

在“不能避免、不能克服”的论述中，法院认为，由于此次台风的实际强度已超过预期，虽然宁波经济技术开发区远亚仓储有限公司对仓库采取了沙包堵水等抗台措施，对其保管的货物已尽到足够谨慎的抗台义务，但未能避免仓库全面进水，因此，台风造成的损失是宁波经济技术开发区远亚仓储有限公司所不能避免、不能克服的。

对于不可抗力发生后因未采取减损措施所产生的货物扩大损失的损害赔偿责任问题。法院认为，在台风灾害后，由于双方当事人均未采取任何减损措施，放任货物继续存放所造成损失扩大，双方均有过错，应平均负担该部分损失。

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Appeal Case of Dispute over a Custody Contract between ZOJE Sewing Machine Company Limited and Yuanya Warehousing Co., Ltd. in Ningbo Economic and Technical Development Zone

Case Summary

I. Case Information

(1) Basic information

Cause:	Dispute over a Custody Contract
Case Number:	No.142 [2006] the Third Civil Tribunal of the Higher People's Court of Zhejiang Province
Plaintiff:	ZOJE Sewing Machine Company Limited
Defendant:	Yuanya Warehousing Co., Ltd. in Ningbo Economic and Technical Development Zone
Judgment Time:	August 18, 2006

(2) Case facts (mainly due to typhoon factors)

Under the influence of Typhoon "Matsa", the goods kept by ZOJE Sewing Machine Co., Ltd. in Yuanya Warehousing Co., Ltd. (hereinafter referred to as the ZOJE Company) in Ningbo Economic and Technical Development Zone (hereinafter referred to as the Yuanya Company) suffered losses.

II. Focus of Dispute

(1) Whether the loss of cargoes caused by severe weather such as typhoons is an event of force majeure for the performance of the contract.

(2) How to ascertain the compensation liabilities for the enlarged loss of goods caused by failure to take mitigation measures after the occurrence of force majeure.

III. Opinions of the Higher People's Court of Zhejiang Province

(1) Whether the loss of cargo caused by severe weather such as typhoon is an event of force majeure for the performance of the contract.

The Higher People's Court of Zhejiang Province (hereinafter referred as to the Court) held that the damage to the cargo of the ZOJE Company involved in the case was caused by Typhoon Matsa. Regarding the impact of the Typhoon on Ningbo, although the news media had made series of forecasts, the actual intensity had exceeded what was forecasted. The preliminary forecast of Typhoon "Matsa" does not mean that the plaintiff has realistic predictability that Typhoon "Matsa" will bring disastrous consequences to Beilun District, and even ZOJE's stored goods. In addition, the Yuanya Company has adopted anti-typhoon measures such as sandbags to block water in the warehouse, but failed to prevent the warehouse from flooding. Therefore, the damage caused by the typhoon to the warehoused goods of the ZOJE Company is an event of force majeure that cannot be foreseen, avoided and overcome by the plaintiff.

(2) How to ascertain the compensation liabilities for the enlarged loss of goods caused by failure to take mitigation measures after the occurrence of force majeure.

The Court held that after the typhoon disaster, both parties did not take any mitigation measures, increasing the losses caused by allowing the goods to remain in storage.Therefore both parties were at fault and should bear the loss equally.

IV. Summary

The dispute areas of focus in this case are, firstly, whether the loss of cargo caused by severe weather such as typhoon is an event of force majeure for the performance of the contract. Secondly, how to ascertain the compensation liabilities for the enlarged loss of goods caused by failure to take mitigation measures after the occurrence of force majeure.

The Court demonstrated "force majeure" from two aspects: "unforeseeable", "inevitable and insurmountable".

In the "unforeseeable" argument, the Court held that the actual intensity of Typhoon Matsa had exceeded the expectations, and the preliminary forecast of the typhoon did not mean that the parties had realistic predictability that the Typhoon would bring disastrous consequences to Beilun District and even the ZOJE Company's stored goods. Therefore, the losses caused by the typhoon could not be foreseen by the Yuanya Company.

In the "unavoidable and insurmountable"argument, according to the Court, since the actual intensity of the typhoon has exceeded expectations, although the Yuanya Company has taken anti-typhoon measures such as sandbags to block water in its warehouses, fulfilled its duty to resist the typhoon with sufficient caution for the goods in its custody, it still could not prevent the full flooding of the warehouse.Therefore, the losses caused by the typhoon cannot be avoided and overcome by the Yuanya Company.

As for the compensation liabilities for the enlarged loss of goods caused by failure to take any mitigation measure after the occurrence of force majeure, the Court judged that after the typhoon disaster, both parties did not take any mitigation measure, hence, the losses caused by allowing the goods to remain in storage had increased. Therefore both parties were at fault and should bear the loss equally.

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台州市太平海运有限公司与中国平安财产保险股份有限公司张家港支公司水路货物运输合同纠纷案

案例摘要

一、案件信息

（一）基本信息

案由：	货物运输合同纠纷
案号：	(2011)民申字第 448 号
再审申请人：	台州市太平海运有限公司
再审被申请人：	中国平安财产保险股份有限公司张家港支公司
出判时间：	2011.05.13

（二）案件事实（主要为台风因素）

二审法院认定，2007 年 8 月 16 日在大麦屿“太平山 5”知道台风“圣帕”将要登录，“太平山 5”轮便在大麦屿抛锚避风。

8 月 19 日台风登陆，有部分海水进入船舱。

8 月 20 日重新开船后遇到东南风，浪较大，进入船舱海水较多，风浪把前舱盖上的篷布吹开，海水从前舱盖与前舱舱体之间的缝隙进入。船员发现后又去重新盖好篷布，因为风浪太大，篷布又被吹开。海水在篷布被吹开后到重新盖好之间浸入船舱。

8 月 29 日，到广州五矿码头后打开前舱卸货时发现螺纹钢表面有锈蚀现象，舱底有海水，大约 10 厘米深。

二、争议焦点

平保公司张家港支公司的诉讼主体资格、损失认定及责任承担。

三、法院观点

二审法院：尽管承运船舶在运输途中遭遇台风，但台风登陆前已有预报，太平公司应做好相应的准备。运输途中由于篷布捆扎不牢致使篷布被吹开海水进入船舱，且船上人员直至卸货时才发现船舱进水，致使涉案钢材锈蚀。本案货损的发生与遭遇台风并无必然因果关系。太平公司关于本案货损因不可抗力发生故可免责的主张，依据不足，亦不予支持。

最高院：尽管承运船舶在运输途中遭遇台风，但台风登陆前已有预报，太平公司应做好相应的准备。因篷布捆扎不牢被吹开导致海水进入船舱，同时船员没有及时检查船舱进水情况并立即排水，而是在台风于 2007 年 8 月 19 日登陆后，直至 8 月 29 日在船舶靠码头卸货时才发现船舱进水、钢材锈蚀，然后排水。

就本案货损而言，太平公司有明显的管货过失；台风不属于《中华人民共和国民法通则》第一百五十三条规定的“不能预见、不能避免并不能克服的客观情况”，即不构成不可抗力。原审法院依照《中华人民共和国合同法》第三百一十一条的规定，判决太平公司承担货损赔偿责任，事实和法律依据充分，本院予以维持。太平公司以货物锈蚀系不可抗力所致为由主张免责，没有

事实和法律依据，本院不予支持。

四、小结

最高院认为，本案中由于台风导致的船舱进水不属于不可抗力，不能依据不可抗力主张免责或者减责。最高院理由如下：

首先，台风登陆前有预报，太平公司应做好相应的准备。

其次，“篷布捆扎不牢”加“船员没有及时检查船舱进水情况并立即排水”，构成明显的管货过失，不能以不可抗力主张免责。

总体来说，最高院实质在论证台风导致的船舱进水不构成不可抗力。首先为不可预见，最高院理由为台风有相关预报，应当预见；其次为不能避免并不能克服，最高院认定船舱进水为太平公司的明显管货过失，属于本应避免却由于过失没有避免情况，不构成不可抗力的认定要件。

综上，本案中台风不属于不可抗力，太平公司不能因此减责或免责。

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Case of Dispute over a Waterway Cargo Transport Contract between Taiping Shipping Company Limited in Taizhou City and Zhangjiagang Branch of Ping An Property & Casualty Insurance Company of China, Ltd.
Case Summary

I. Case Information

(1) Basic information

Cause:	Dispute over a Waterway Cargo Transport Contract
Case Number:	No.448 [2011] Petition, Civil Division, SPC
Retrial Applicant:	台州市太平海运有限公司
Retrial Respondent:	中国平安财产保险股份有限公司张家港支公司
Judgment Time:	March 22, 2021

(2) Case facts (mainly due to typhoon factors)

The Court of Second Instance judged that the vessel "Taipingshan No.5" anchored in Damaiyu Port to take shelter knowing Typhoon "Sepat" was about to land.

The typhoon landed on August 19 and some seawater entered the cabin.

After re-sailing on August 20th, it encountered southeast wind, with strong waves and more seawater entering the cabin. The wind and waves blew open the tarpaulin on the front hatch cover, and seawater entered the gap between the front hatch cover and the front hatch body. When the crew found out, they went to cover the tarpaulin again, because the wind and waves were too strong, the tarpaulin was blown open again. Seawater soaks into the cabin between the tarpaulin being blown open and the tarpaulin being re-covered.

On August 29, when opening the front cabin for unloading after arriving at Wukuang Wharf in Guangzhou, it was found that the surface of the rebar and seawater had corroded about 10cm deep on the bilge.

II. Dispute Focus

Issues concerning the qualifications of the litigation subject, the determination of losses and the assumption of liabilities of Zhangjiagang Branch of Ping An Property & Casualty Insurance Company of China, Ltd..

III. Opinions of the Courts

The Court of Second Instance: Although the carrier ship encountered a typhoon in transit, it was predicted before the typhoon landed, and Taiping Shipping Company Limited in Taizhou City (hereinafter referred to as the Taiping Company) should make corresponding preparations. During transportation, the tarpaulin was blown open and seawater entered the cabin due to the poor binding of the tarpaulin, and the personnel on board did not find water in the cabin until unloading, resulting in corrosion of the steel involved. There is no necessary causal relationship between the occurrence of cargo damage in this case and the typhoon. The Taiping Company's claim that the damage to the goods in this case can be exempted due to force majeure is not based on sufficient evidence and will not be

supported.

The Supreme People's Court (hereinafter referred to as the SPC): Although the carrier ship encountered a typhoon during transportation, it was predicted before the typhoon landed, and Taiping Company should make corresponding preparations. Seawater entered the cabin because the tarpaulin was not tightly tied and blown away. At the same time, the crew did not check the water inflow in the cabin in time to drain it immediately. Instead, after the typhoon landed on August 19, 2007, it was not until August 29 when the ship was unloaded at the dock that water inflow and steel corrosion were found in the cabin and then drained.

As far as the damage in this case is concerned, the Taiping Company has obviously faulted in managing the goods; typhoon does not belong to the "unforeseeable, unavoidable and insurmountable objective situation" stipulated in Article 153 of the General Principles of the Civil Law of the People's Republic of China, that is, it is not force majeure. In accordance with the provisions of Article 311 of the Contract Law of the People's Republic of China, the Court of First Instance ruled that the Taiping Company should bear the liability for compensation for damage to the goods. The factual and legal basis was sufficient and the Court upheld it. The Taiping Company claimed exemption on the grounds that the corrosion of goods was caused by force majeure. There was no factual or legal basis and the Court did not support it.

IV. Summary

The SPC held that the water inflow in the cabin caused by typhoon in this case was not an event of force majeure, and could not claim exemption or reduction of liability according to force majeure. The reasons are as follows:

First of all, there is a forecast before the typhoon lands, and the Taiping Company should make corresponding preparations.

Secondly, the fact that "the tarpaulin is not tied firmly" and "the crew failed to check the water inflow in the cabin in time and drain the water immediately" constitutes obvious fault in cargo management, which cannot be allowed exemption by force majeure.

Generally speaking, the SPC is actually demonstrating that the water inflow in the cabin caused by the typhoon was not force majeure. First of all, regarding the aspect of being unforeseeable; There are some relevant forecast about the typhoon, so it should be foreseen. Secondly, for the aspect of being unavoidable and insurmountable. The SPC decided that the water inflow in the cabin was the Taiping Company's obvious fault in managing the goods, a situation that should have been avoided but was not due to their fault, hence, did not constitute an element of force majeure.

To sum up, the typhoon in this case is not force majeure, and the Taiping Company cannot reduce or exempt from liability.

Case-collectors: REN Yanbing
HAN Shuyue
Translator: YUE Shan
Editor (English): Evans Tetteh
Executive editor: YANG Wei

北京康利石材有限公司与厦门中远国际货运有限公司、厦门中远国际货运有限公司泉州分公司水路货物运输合同纠纷案

案例摘要

一、案件信息

（一）基本信息

案由：	多式联运合同纠纷
案号：	(2014)民申字第 577 号
再审申请人：	北京康利石材有限公司
被申请人：	厦门中远国际货运有限公司、厦门中远国际货运有限公司泉州分公司、泉州市中阳货运代理有限公司
出判时间：	2014.06．27

（二）案件事实（主要为台风因素）

涉案货物由康利公司在工厂提货，由厦门中货泉州分公司委托中联公司空箱拖至工厂，重箱拖至泉州石湖港，水路运输由泛亚公司承运至天津港，厦门中货泉州分公司的天津港代理委托颖辉公司于天津港码头提箱运至康利公司工厂。

泛亚公司在承运期间遭遇了恶劣天气，分别为台风“天秤”和“布拉万”期间货物遭受了损失。根据航海日志的记载，涉案船舶开航时海况为 5 级风 4 级浪，并且此时台风“天秤”的移动方向与船舶航向相反。8 月 26 日 17：05 时在天气为 6 级风 5 级浪情况下，涉案船舶在渔山列岛西侧抛锚避让另一台风“布拉万”，8 月 27 日 22：00 时起锚开船。

二、争议焦点

涉案货损发生的原因是否由台风导致。

三、法院观点

根据航海日志的记载，涉案船舶开航时海况为 5 级风 4 级浪，并且此时台风“天秤”的移动方向与船舶航向相反。8 月 26 日 17：05 时在天气为 6 级风 5 级浪情况下，涉案船舶在渔山列岛西侧抛锚避让另一台风“布拉万”，8 月 27 日 22：00 时起锚开船。

结合航海日志分析，检验报告中关于船舶遭受恶劣天气导致货损的这一认定，缺乏事实依据，二审法院对其不予采纳并无不当。同时法院认为，检验人在检验报告和一审开庭中均陈述，检验报告中提出船舶遭受恶劣天气系基于康利公司和泛亚公司的介绍，检验人并未实际查看航海日志，两份检验报告均属于分析、推测，并未明确确定事故原因。

同时法院认为，康利公司对该航海日志提出异议，但未提供相反证据证明。康利公司主张二

审法院对涉案货损发生的原因认定错误，缺乏充分的事实依据和法律依据。

四、小结

本案中法院认定货损并非由台风导致的主要原因是缺乏事实依据，所以法院对提供的检测报告中的关于船舶遭受恶劣天气导致货损的分析不予采纳。

本案属无法证明是由于台风天气导致的货架移位还是由于承运人管货义务履行不当所导致的没有防震措施、货物间有一定的空隙、绑扎系固不当所导致的损害。根据航海日志和检测分析报告，法院以检测分析报告检验人并未实际查看航海日志，均属于分析、推测，并未明确确定事故原因等理由不予采纳。而仅根据航海日志又没有充分依据，所以法院对于船舶遭受恶劣天气导致货损不予认定。

案例提供者：任雁冰
韩淑越
责任编辑：杨伟

Case of Dispute over Waterway Cargo Transport Contract between Beijing Kangli Stone Co., Ltd., Xiamen, Zhongyuan International Freighting Co., Ltd., and Quanzhou Branch of Xiamen Zhongyuan International Freighting Co., Ltd

Case Briefing

I.Case Information

A. Basic Information

Cause of Action:	Dispute over A Multimodal Transport Contract
Case Number:	No. 577 [2014], Civil Petition
Retrial Petitioner:	Beijing Kangli Stone Co., Ltd..
Respondents:	Xiamen Zhongyuan International Freighting Co., Ltd., Quanzhou Branch of Xiamen Zhongyuan International Freighting Co., Ltd., Quanzhou Zhongyang Freight Forwarding Agency Co., Ltd..
Judgment Time:	2014.06.27

B. Case Facts (Typhoon is the main factor)

The cargoes involved in the case were picked up by Beijing Kangli Stone Co., Ltd. (hereinafter referred to as "Kangli Company") at the factory, and Quanzhou Zhongyang Freight Forwarding Agency Co., Ltd. (hereinafter referred to as "Quanzhou Branch") entrusted Shishi Zhonglian Transport Co., Ltd. (hereinafter referred to as "Zhonglian Company") to tow the empty boxes to the factory and the heavy boxes to Shihu Port, Quanzhou. The waterway was to be shipped to Tianjin Port by Shanghai PAN-ASIA Shipping Co.,Ltd. (hereinafter referred to as "Pan-Asia Company").The Tianjin Port Agent of Quanzhou Branch entrusted Tianjin Yinghui Freight Forwarding Co., Ltd (hereinafter referred to as "Yinghui Company") to pick up the cases at the Tianjin Port and deliver them to the factory of Kangli Company.

Pan-Asia Company was hit by bad weather, typhoon Tembin and Blaven, during the shipment damaging the cargoes. According to the log records, the sea condition was fresh breeze and moderate sea when the ship involved set sail, and the direction of typhoon Tembin at that time was opposite to the ship's course. At 17:05 on August 26, the ship involved cast anchor on the west side of Yushan Island to avoid another typhoon Blaven under strong breeze and rough sea. At 22:00 on August 27, the ship lifted anchor and set sail.

II. Dispute Focus

Whether the damage to the involved cargoes was caused by the typhoon.

III. The Court's Opinion

According to the log records, the sea condition was fresh breeze and moderate sea when the ship involved set sail, and the direction of typhoon Tembin at that time was opposite to the ship's course. At 17:05 on August 26, the ship involved cast anchor on the west side of Yushan Island to avoid another typhoon Blaven under strong breeze and rough sea. At 22:00 on August 27, the ship lifted anchor and set sail.

Combined with the log analysis, the identification that the ship suffered from bad weather caused the damage in the inspection report lacks factual basis.It is not justified for the court of second instance not to adopt it.At the same time, the court held that the surveyor stated both in the survey report and in the first instance court that, the record stating that the ship suffered from bad weather was based on the introduction of Kangli Company and Pan-Asia Company, as the surveyor did not actually check the ship log. Both survey reports were analysis and speculation, and the cause of the accident was not clearly determined.

The court also found that Kangli Company raised an objection about the log without providing evidence to the contrary.Kangli Company claimed that the court of second instance had wrongly identified the causes of the damage to the involved cargoes in the case and lacked sufficient factual and legal basis.

IV. Summary

In this case, the court determined that the main reason for the damage to the cargoes to have been caused by the typhoon lacks factual basis. Therefore, the court did not accept the analysis of damage caused by bad weather on the ship in the provided inspection report.

In this case, it is impossible to prove whether the damage is caused by the shift of shelves because of typhoon or by the improper performance of the carrier's cargo responsibility, which resulted in the absence of anti-shock measures, certain gaps between the goods, and binding and fastening. The court did not adopt the inspection analysis report because the surveyor did not actually check the log, which were all analysis and speculation, and the cause of the accident was not clearly determined. Therefore, information only according to the ship log was not sufficient evidence, as a result of which the court didn't identify the ship to have suffered damage due to the bad weather.

Case-collectors: REN Yanbing
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Executive editor: YANG Wei

威马逊台风-广东红土地物流有限公司、平安广东分公司合同纠纷

案例摘要

一、案件信息

（一）基本信息

案由：	合同纠纷
案号：	(2018)最高法民申 3910 号
原告：	中国平安财产保险股份有限公司广东分公司
被告：	广东红土地物流有限公司、海口南青集装箱班轮有限公司湛江分公司、海口南青集装箱班轮有限公司
出判时间：	2018.10.16

（二）案件事实（主要为台风因素）

红土地公司与广东信威家具发展有限公司签订运输合同，约定由红土地公司负责将涉案货物从湛江市宝满码头运到上海市嘉定区兴华公路 2369 号，红土地公司与信威公司之间成立多式联运合同关系。在运输期间，涉案货物因遭遇风暴潮发生毁损，红土地公司主张不承担责任。

二、争议焦点

（一）本案的风暴潮是否属于不可抗力，以及红土地公司是否承担相关举证责任；

（二）涉案《公估报告》是否具有足够证明力且能够作为定案依据，红土地公司能否据此内容免除赔偿责任。

三、法院观点

（一）本案的风暴潮是否属于不可抗力，以及红土地公司是否承担相关举证责任

根据《中华人民共和国合同法》第三百一十一条的规定，承运人对运输过程中货物的毁损、灭失承担损害赔偿责任，但承运人证明货物的毁损、灭失是因不可抗力、货物本身的自然性质或者合理损耗以及托运人、收货人的过错造成的，不承担损害赔偿责任。涉案货物在运输期间发生毁损，货物毁损系因遭遇不可预测、不可避免且不可克服的风暴潮造成。

国家海洋预报台在风暴潮来临前已经提醒注意防范风暴潮可能引发的次生灾害，且在之后将海浪预警级别提升为红色、风暴潮的警报级别提升为橙色。在案涉事故发生前，气象部门已经多次提醒并对风暴潮的来临进行了预报，红土地公司关于风暴潮不可预测的主张没有事实依据，也

不能举证证明其采取了必要措施应对风暴潮。

综上，本案涉及的风暴潮是否属于不可抗力，红土地公司应就此举证予以证明。

（二）涉案《公估报告》是否具有足够证明力且能够作为定案依据，红土地公司能否据此内容免除赔偿责任。

根据《最高人民法院关于民事诉讼证据的若干规定》第六十四条的规定，审判人员应当依照法定程序，全面、客观地审核证据，依据法律的规定，运用逻辑推理和日常生活经验，对证据有无证明力和证明力大小进行判断。上海恒量保险公估有限公司接受平安保险公司委托，对受损货物进行查勘，并形成涉案《公估报告》。《公估报告》附有查勘记录，可以证明公估从业人员进行了查勘。即便存在只有一名保险公估从业人员签名、保险公估从业人员未按规定进行执业登记等瑕疵，《公估报告》反映出的查勘结果、货物受损情况等内容，对本案相关事实仍具有一定的证明力。

《公估报告》中关于”本次事故系自然灾害造成货物水湿受损，仅保单原因不存在第三责任方”的表述，系保险公估人作出的结论，而非托运人免除承运人赔偿责任的意思表示，也不能免除红土地公司对存在不可抗力免责事由的举证义务。红土地公司据此主张免除赔偿责任，没有法律依据。

综上，《公估报告》具有一定证明力，能够作为定案依据，红土地公司不能根据《公估报告》免除赔偿责任。

四、小结

依照《中华人民共和国合同法》第三百一十七条的规定，红土地公司为多式联运经营人，对全程运输负责。根据《中华人民共和国合同法》第三百一十一条的规定，承运人对运输过程中货物的毁损、灭失承担损害赔偿责任，但承运人证明货物的毁损、灭失是因不可抗力、货物本身的自然性质或者合理损耗以及托运人、收货人的过错造成的，不承担损害赔偿责任。

国家海洋预报台于风暴潮来临前发布的海浪橙色警报中，已经提醒注意防范风暴潮可能引发的次生灾害，且在之后将海浪预警级别提升为红色、风暴潮的警报级别提升为橙色。在案涉事故发生前，气象部门已经多次提醒并对风暴潮的来临进行了预报，红土地公司关于风暴潮不可预测的主张没有事实依据，也不能举证证明其采取了必要措施应对风暴潮。

涉案《公估报告》的形成符合法定程序，仅存在部分瑕疵，不影响《公估报告》内容的准确性，且其中的结论性话语也不能免除红土地公司的举证义务。

案例提供者：任雁冰
辜韧佳
李庆霖
责任编辑：杨伟

Typhoon Rammasun - Summary of Contract Disputes Case about Zhanjiang Hongtudi Logistics Co., Ltd. and China Ping'an Property Insurance Co.,Ltd. Guangdong Branch

I. Case Information

A. Basic Information

Cause of Action:	Contract disputes
Case Number:	No. 3910 [2018], Civil Division, of the Supreme People's Court
Plaintiffs:	China Ping'an Property Insurance Co., Ltd. Guangdong Branch
Defendants:	**Zhanjiang Hongtudi Logistics Co., Ltd., Zhanjiang Branch** Nanqing Container Lines Co., Ltd. and Haikou Nantsing Container Lines Co., Ltd.
Judgment Time:	2018.10.16

B. Case Facts (Typhoon is the main factor)

Zhanjiang Hongtudi Logistics Co., Ltd.(hereinafter referred to as "Hongtudi Company") and Guangdong Xinwei Domestic Industry Group Co.,Ltd. (hereinafter referred to as "Xinwei Company") have signed a transport contract, which stipulates that Hongtudi Company shall be responsible for transporting the cargoes involved from Baoman Wharf, Zhanjiangto No. 2369, Xinghua Road, Jiading District, Shanghai. Hongtudi Company and Xinwei Company established a multimodal transport contract relationship. During the transportation, the cargoes involved in the storm surge were damaged, Hongtudi Company claims not to bear liability.

II. Dispute Focus

A. Whether the storm surge in this case is force majeure, and whether Hongtudi Company bears the relevant burden of proof

B. Whether the "Assessment Report" involved in the case has enough proof and can be used as the basis for the conclusion of the case, and whether Hongtudi Company can be exempted from compensation liability according to the content of "Assessment report"

III. The Court's Opinion

A. Whether the storm surge in this case is force majeure, and whether Hongtudi Company bears the relevant burden of proof

According to the provisions of Article 311 of the Contract Law of the People's Republic of China, the carrier is liable in case of damage to or loss of the cargoes in the course of carriage, and further provided that it is not liable for damages if it proves that such damage to or loss of the cargoes is caused by force majeure, the intrinsic characteristics of the cargoes reasonable depletion,or the fault of the consignor or consignee.The cargoes were damaged during transportation due to the unpredictable, unavoidable and insurmountable storm surge.

The National Oceanic Forecast Office had warned of possible secondary disasters caused by storm surges in advance, and later raised the wave alert to red and the storm surge alert to orange. Before the accident happened, the Meteorological Department had warned and forecasted the storm surge for many times. There is no factual basis for Hongtudi Company to claim that the storm surge was unpredictable, and no evidence that the company did what was necessary to deal with them.

To sum up, Hongtudi Company shall provide evidence to prove whether the storm surge involved is force majeure.

B. Whether the "Assessment Report" of the case has enough proof and can be used as the basis for the conclusion of the case, and whether Hongtudi Company can be exempted from compensation liability according to the content of "Assessment Report"

According to Article 64 of the Provisions of Supreme People's Court on Evidence in Civil Procedures, the judges shall verify the evidences according to the legal procedures all-roundly and objectively, shall observe the provisions of law, follow the professional ethics of judges, use logic reasoning and daily life experience to make independent judgments concerning the validity and forcefulness of the evidences.Shanghai High levels Surveying Co., Ltd. was entrusted by China Ping'an Property Insurance Co.,Ltd. Guangdong Branch (hereinafter referred to as Ping'an Company) to survey the damaged goods and form the "Assessment Report". "Assessment Report" is attached to the appraisal report, which can prove that the appraisal practitioners have surveyed. Even if there is only one signature of the insurance valuation practitioner and the insurance valuation practitioner did not register as required, the survey results and the damage of the goods reflected in the "Assessment Report" still have certain power of proof for the relevant facts of the case.

The statement in the "Assessment Report" about "this accident is caused by natural disaster, and there is no third party responsible for affirmative covenant" was the conclusion made by the insurance assessor, not by that implying that the shipper exempts the carrier from the liability. This did not exempt Hongtudi Company from the obligation to prove the cause of exoneration of force majeure. Accordingly, Hongtudi Company claiming to be exempt from liability for compensation, had no legal basis.

To sum up, the "Assessment Report" has certain power of proof and can be used as the basis for the conclusion of the case. Therefore, Hongtudi Company cannot be exempted from compensation liability according to the "Assessment Report".

IV. Summary

In accordance with the provisions of Article 317 of the Contract Law of the People's Republic of China, Hongtudi Company is the multi-modal transport operator responsible for the whole transport. According to the provisions of Article 311 of the Contract Law of the People's Republic of China, the carrier is liable for damages in case of damage to or loss of the cargoes in the course of carriage, provided that it is not liable for damages if it proves that such damages to or loss of the cargoes is caused by force majeure, the intrinsic characteristic of the cargoes, reasonable depletion, or the fault of the consignor or consignee.

The National Oceanic Forecast Office had warned of possible secondary disasters caused by storm surges in advance, and later raised the wave alert to red and the storm surge alert to orange. Before the accident happened, the Meteorological Department had warned and forecasted the storm surge for many times. There is no factual basis for Hongtudi Company to claim that the storm surge was unpredictable, and no evidence that the company did what was necessary to deal with them.

Although there are some defects in the "Assessment Report" of the case, its formation conforms to the legal procedures, so it does not affect the accuracy of the content, and its conclusion cannot exempt Hongtudi Company from the burden of proof.

Case-collectors: REN Yanbing
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LI Qinglin
Translator: BAI Xue
Editor (English): Evans Tetteh
Executive editor: YANG Wei

广东奥科特新材料科技股份有限公司诉广东中外运国际货代有限公司，金星轮船有限公司(GOLD STAR LINE LIMITED)，广州南沙海港集装箱码头有限公司海上货运代理合同纠纷案

案例摘要

一、案件信息

（一）基本信息

案由：	海上货运代理合同纠纷
案号：	(2018)粤 72 民初 261 号
原告：	广东奥科特新材料科技股份有限公司
被告：	广东中外运国际货代有限公司，金星轮船有限公司(GOLD STAR LINE LIMITED)，广州南沙海港集装箱码头有限公司
出判时间：	2019．05．07

（二）案件事实（主要为台风因素）

奥科特公司与中外运公司签订有出口货物运输代理服务合同。甲方以星公司、金星公司，乙方广州港股份有限公司和丙方南沙港公司签订有外贸班轮港口作业合同。8 月 3 日，奥科特公司根据中外运公司的安排，将 1651 箱电子灯具交金星公司从中山市小榄镇运至尼日利亚廷坎岛(Tin Can Island)。8 月 23 日，金星公司将货物存放在南沙港公司集装箱堆场，并因台风“天鸽”影响导致货物产生损失。

二、争议焦点

本案中“天鸽”台风是否构成不可抗力。

三、法院观点

根据《中华人民共和国民法总则》第一百八十条第二款的规定，“不可抗力”是指不能预见、不能避免且不能克服的客观情况。依据现有技术水平和一般人的认知而不可能预知为不能预见。

对于台风而言，根据现有技术手段，人类虽可能在一定程度上提前预知，但是无法准确、及时预见其发生的确切时间、地点、延续时间、影响范围及程度。虽然在台风“天鸽”发生前，气象部门、新闻媒体等对台风“天鸽”登陆时间和风力进行了预报，但该台风带来的风、雨、浪、湖产生的叠加效果以及珠江口多个站点均超历史最高潮位并未在预报中有所体现。本案中的损害结果正是由于无法准确预见的台风影响范围及影响程度所造成的。

不能避免且不能克服，表明某一事件的发生具有客观必然性。不能避免，指当事人尽了最大的努力，仍然不能避免事件的发生。不能克服，指当事人在事件发生后，尽了最大的努力，仍然不能克服事件造成的损害后果。客观情况，是指独立于当事人行为之外的客观情况。台风“天鸽”直接带来风、雨、浪、潮等灾害，叠加产生的潮水漫灌是引发本案货损的直接原因。

本案已查明，广州南沙潮水位高达 3.13 米(超警戒潮位 123 厘米)，超历史实测最高潮位，南沙港公司集装箱堆场遭受水淹在所难免。集装箱堆场呈平面结构，采用堆放沙包等防水措施并不现实，即使采取上述措施，潮水仍可通过排水管道以及市内河渠等涌进集装箱堆场，因此，本案台风引起的水淹实属不能避免。南沙港公司制定有防风防台、防讯专项应急预案。

在本案台风发生前，南沙港公司及时通知了货主、船运公司防台，并采取对堆场内的集装箱进行绑扎加固等措施。防台重在防风，该措施符合港口经营人防合抗台的惯常做法。奥科特公司主张南沙港公司没有采取合理的保管措施导致货损，与本案调查的事实不符，法院不予支持。

综上所述，法院认为对存放本案货物的南沙港公司而言，“天鸽”台风符合不可抗力构成要件，构成不可抗力。

四、小结

《中华人民共和国海商法》第五十一条第一款第三项规定：“在责任期间货物发生的灭失或者损坏是由于下列原因之一造成的承运人不负赔偿责任：…… (三)天灾，海上或者其他可航水域的危险或者意外事故……”。

天灾是指足以直接造成货损的自然现象。本案货物在南沙港公司集装箱堆场存放期间因遭受“天鸽”台风影响被水浸泡导致货损，属于天灾的范畴，且该天灾属于承运人或其受托方采取了合理措施后仍不能抵御和防止的。在托运人未举证证明承运人因其他违约行为造成本案货损的情况下，承运人金星公司对因天灾“天鸽”台风造成的货物损坏不承担赔偿责任。

案例提供者：任雁冰
辜韧佳
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Case of Dispute over A Maritime Freight Forwarding Contract Between Guangdong Aokete New Material Technology Share Holding Co., Ltd. V. Guangdong Sinotrans International Freight Forwarding Co., Ltd., Gold Star Line Limited, and Guangzhou South China Oceangate Container Terminal Co., Ltd.

Case Summary

I. Case Information

A. Basic Information

Cause of Action:	Dispute over A Maritime Freight Forwarding Contract
Case Number:	No. 261 [2018], First, Civil Division, 72, of the Guangzhou Maritime Court, Guangdong
The plaintiff:	Guangdong Aokete New Material Technology Share Holding Co., Ltd.
Defendants:	Guangdong Sinotrans International Freight Forwarding Co., Ltd., Gold Star Line Limited, Guangzhou South China Oceangate Container Terminal Co., Ltd.
Judgment Time:	2019．05．07

B. Case Facts(Typhoon is the main factor)

Guangdong Aokete New Material Technology Share Holding Co., Ltd. (hereinafter referred to as "Aokete Company") and Guangdong Sinotrans International Freight Forwarding Co., Ltd.(hereinafter referred to as "Sinotrans Company) have signed the contract of forwarding agent service for export goods. Party A (Zim Integrated Shipping Services (China) Ltd., Gold Star Line Limited (hereinafter referred to as Gold Star Company)), Party B (Guangzhou Port Company Limited) and Party C (Guangzhou South China Oceangate Container Terminal Co., Ltd. (hereinafter referred to as Nansha Company)) have signed a port operation contract for foreign trade liners. According to the arrangement of Sinotrans Company, Aokete Company delivered 1,651 cases of electronic lamps to Gold Star Company from Xiaolan Town, Zhongshan City to Tin Can Island, Nigeria on August 3, 2017. Gold Star Company deposited the goods in the containerized yard of Nansha Company, and the goods suffered losses due to typhoon Hato.

II. Dispute Focus

Whether "Hato" typhoon constitutes force majeure in this case.

III. The Court's Opinion

According to paragraph 2 of Article 180 of General Provisions of the Civil Law of the People's Republic of China, "Force Majeure" means unforeseeable, unavoidable and unconquerable objective situations. "Unforeseeable" means that it is impossible to predict with the current state of technology and ordinary People's understanding.

For typhoons, whilst human beings may predict in advance to some extent by experiment, they cannot predict the exact time, place, duration, impact range and extent of their occurrence accurately and timely. Although the Meteorological Department and news media had forecasted the landing time and wind power of Typhoon Hato before it hit, the multiple effect of wind, rain, wave and lake brought by Typhoon Hato and the surpassing of the highest water level in history at several stations in the Pearl River Estuary were not reflected in the forecast. The damage in this case was caused by the extent and magnitude of the impact of the typhoon, which could not be accurately predicted.

"Inevitable and insurmountable" indicates that the occurrence of an event is objectively inevitable. "Inevitable" refers to the fact that an event cannot be avoided despite the best efforts of the person involved. "Insurmountable" refers to the fact that the persons involved tried their possible best after the occurrence of the event, but still could not overcome the damage caused by the event. An objective situation is one that is independent of the actions of the persons involved. Typhoon Hato directly brought wind, rain, waves, tides and other disasters, and the tidal flooding caused by these disasters was the direct cause of the cargo damage in this case.

The case has been found out that the tidal level in Nansha, Guangzhou is as high as 3.13 meters (123 centimeters above the warning tide level), exceeding the highest tidal level measured before. Therefore, it is inevitable that the container yard of Nansha Company will be flooded. The container yard is a plane structure, so it is not practical to adopt waterproof measures such as stacking sandbags. Even if sandbags are stacked, the tide can still flow into the container yard through sewers and city canals. Therefore, the flooding caused by typhoon in this case is unavoidable. Nansha Company has formulated a special emergency plan for wind and typhoon prevention and communication prevention.

Before the typhoon of this case, Nansha Port Company informed the shipper and shipping company to prevent the typhoon timely, and took measures such as binding and strengthening the containers in the yard.

The key point of typhoon prevention is to prevent wind. The practice of Nansha Company was in line with the usual practice of typhoon prevention of port operators. Aokete Company claimed that the damage was caused by the failure of the Nansha Company to take reasonable safekeeping measures. The claim was inconsistent with the facts under investigation in this case, so the court did not support it.

To sum up, the court holds that for the Nansha Company which stored the goods in this case, Typhoon Hato met the constitutive requirements of force majeure. Therefore Hato is force majeure.

IV. Summary

Article 51, paragraph 1 (3) of the Maritime Law of the People's Republic of China stipulates: "The carrier shall not be liable for the loss of or damage to the goods occurred during the period of carrier's responsibility arising or resulting from any of the following causes... (3) Force majeure and perils, dangers and accidents of the sea or other navigable waters... ".

Force majeure and peril is a natural phenomenon that directly causes damage to the cargo. During storage in the container yard of Nansha Company, the goods in this case were soaked in water due to typhoon Hato. The incident falls under the category of force majeure and peril. The force majeure and peril belongs to the carrier or its trustee after taking reasonable measures still unable to resist and prevent. Since the shipper has not proved that the carrier has caused the damage to the goods in this case by any other breach of contract, the carrier Gold Star Company shall not be liable for the damage caused by typhoon "Hato".

Case-collectors: REN Yanbing
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美亚财产保险有限公司广东分公司与广东卓志跨境电商供应链服务有限公司、德宝海运有限公司多式联运合同纠纷案

案例摘要

一、案件信息

（一）基本信息

案由：	多式联运合同纠纷
案号：	(2019)粤 72 民初 2222 号
原告：	美亚财产保险有限公司广东分公司
被告：	德宝海运有限公司 (TURBO MARITIME LIMITED)
出判时间：	2020.10.29

（二）案件事实（主要为台风因素）

卓志公司根据百德沃公司的指定，委托被告将前述家用电器自香港运输到南沙。被告同意承运并于 2018 年 9 月 14 日出具了 4101 号提单副本，载明托运人为百德沃公司，收货人和通知人为卓志公司，装货港为香港，卸货港为南沙新港，运输条款为“门到港”，9 月 15 日前述货物被卸载于南沙二期码头，同日德宝海运有限公司通知卓志公司可换单清关。

由于台风“山竹”与天文大潮、大浪、暴雨叠加，涌浪通过码头排水管倒灌进入港区，台风期间的强暴雨也导致珠江潮水倒灌入南沙二期码头集装箱堆场，致使集装箱堆场被水浸。9 月 16 日水浸时间超过 10 个小时。南沙二期码头重箱堆场水浸深度约 0.5 米，底层集装箱遭受水浸。

二、争议焦点

（一）原告是否享有合法的代位求偿权；

（二）涉案货损是否发生于被告责任期间及其合理数额；

（三）被告是否无需承担赔偿责任。

三、法院观点

（一）原告是否享有合法的代位求偿权

关于原告是否享有保险代位求偿权问题。百德沃公司是与被告成立多式联运合同关系的托运人，如果被告存在违约行为且需要承担赔偿义务，作为多式联运合同的相对方，百德沃公司依法享有对被告的索赔请求权。被告关于百德沃公司没有实际损失不享有向被告索赔权的抗辩，并无法律依据，原告作为依法取得代位百德沃公司的主体，享有对被告的索赔权。

综上，原告享有合法的求偿权。

（二）涉案货损是否发生于被告责任期间及其合理数额

涉案货损是否发生于被告责任期间及其合理数额。被告作为多式联运经营人的责任期间自接

收涉案货物的 2018 年 9 月 14 日起至将涉案货物交付于百德沃公司的代理人卓志公司 2019 年 9 月 19 日止。在原告未提交其他证据证明百德沃公司存在其他合理损失的情况下，如被告需向原告赔偿涉案货损损失，人民币 84436.38 元是其赔偿责任上限。

综上，涉案货损发生于被告责任期间，赔偿数额应不超过人民币 84436.38 元。

（三）被告是否无需承担赔偿责任

关于被告是否无需承担赔偿贵任。虽然涉案 80 台厨师机在被告责任期间因水浸事件发生损坏，但造成厨师机损坏的唯一原因是超强台风“山竹”与大雨、大浪、天文大潮叠加产生的潮水倒灌，前述情形属于天灾。被告已尽合理、妥善、谨慎的管货义务且不存在其他违约行为，对天灾原因造成的货物损坏不负赔偿贵任。

综上，被告不需承担赔偿责任。

四、小结

本案的争议点在于：原告是否享有合法的代位求偿权、涉案货损是否发生于被告责任期间及其合理数额，以及被告是否无需承担赔偿责任。

卓志公司的前述行为源于百德沃公司的指示，百德沃公司作为托运人对作为多式联运经营人的被告享有实体索赔权，原告作为依法取得代位百德沃公司的主体，享有对被告的索赔权。

根据海商法第一百零三条“多式联运经营人对多式联运货物的责任期间，自接收货物时起至交付货物时止”的规定，被告作为多式联运经营人的责任期间自接收涉案货物的 2018 年 9 月 14 日起至将涉案货物交付于百德沃公司的代理人卓志公司 2019 年 9 月 19 日止。百德沃公司和其代理人卓志公司未及时以书面形式通知被告涉案货物遭受湿损，仅构成涉案货物状况良好的初步证据而不是最终证据。在原告未提交其他证据证明百德沃公司存在其他合理损失的情况下，如被告需向原告赔偿涉案货损损失，人民币 84436.38 元是其赔偿责任上限。

对于台风而言，根据现有技术手段，人类虽可能在一定程度上提前预知，但仍无法准确、及时预见其发生的确切时间、地点、延续时间、影响范围及程度。在台风“山竹”登陆前，气象部门对台风的登陆时间和风力进行了预报，但该台风带来的风、浪、潮产生的叠加效果以及涌浪可能将潮水倒灌漫入涉案集装箱堆场等并未在预报中有所体现。台风“山竹”登陆期间，被告对堆存于南沙二期码头的涉案货物已尽到妥善、谨慎的管货义务。对于天灾造成的货物损坏，被告可以不负赔偿责任。关于被告是否存在其他违约行为。虽然涉案货物存放在南沙二期码头期间因遭受天灾受损，但被告也仅能就该天灾事件造成的直接损失不负赔偿责任。

案例提供者：任雁冰
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李庆霖
责任编辑：杨伟

Case of Dispute over Multimodal Transport Contract between Guangdong Branch of AIG Insurance Company China Limited, Guangdong Top Ideal Cross-border E-commerce SCM Service Co., Ltd., and Turbo Maritime Limited
Case Briefing

I. Case Information

A. Basic Information

Cause of Action:	Dispute over A Multimodal Transport Contract
Case Number:	No. 2222 [2019], First, Civil Division, 72, of the Guangzhou Maritime Court, Guangdong
The Plaintiff	Guangdong Branch of AIG Insurance Company China Limited
The Defendant:	TURBO MARITIME LIMITED
Judgment Time:	2020.10.29

B. Case Facts(Typhoon is the main factor)

Guangdong Top Ideal Cross-border E-commerce SCM Service Co., Ltd.(hereinafter referred to as Top Ideal Company), as appointed by BUY THE WORLD CO., LIMITED(hereinafter referred to as BUY THE WORLD COMPANY), entrusted the defendant TURBO MARITIME LIMITED to transport the household electrical appliances from Hong Kong to Nansha.The Defendant agreed to undertake and delivered a copy of Bill of Lading No. 4101on the 14th of September 2018,indicating that the shipper is BUY THE WORLD COMPANY, the consignee and the notifier is Top Ideal Company, the loading port is Hong Kong, the discharging port is Nansha New Port, and the carriage clause is “Door to Port”. On September 15th, the goods were unloaded at Nansha Phase II Port. On the same day, TURBO MARITIME LIMITED informed Top Ideal Company that they could switch bills of ladingfor customs clearance.

As Typhoon Mankhut and astronomical tide, big waves, heavy rain occurred together, the surge through the dock drainage piped into the port. The heavy rainstorm during the typhoon also caused the Pearl River tidal water to flow backward into the container yard of Nansha Phase II Terminal, which caused the container yard to be flooded.The flood lasted more than 10 hours on September 16. The depth of water flooding in the heavy container storage yard of Nansha Phase II port was about 0.5 meters, even the bottom container was flooded.

II. Dispute Focus

A. Whether the plaintiff has a legal right of subrogation.

B. Whether the goods damage involved occurred during the period for which the defendant is liable and what is a reasonable amount of compensation.

C. Whether the defendant is not liable for compensation.

III. The Court’s Opinion

A. Whether the plaintiff has a legal right of subrogation.

BUY THE WORLD COMPANY is a shipper under a multimodal transport contract with the defendant. Therefore, if the defendant breaches the contract and needs to undertake the obligation of compensation, BUY THE WORLD COMPANY, as the other party of the multimodal transport contract, has the right to claim for compensation against the defendant according to law.

To sum up, the plaintiff has a legal right of subrogation.

B. Whether the damage to goods involved occurred during the period for which the defendant is liable and what is a reasonable amount of compensation.

The defendant's liability period as the multimodal transport operator began on September 14, 2018, when the cargoes involved were received, and ended on September 19, 2019, when the cargoes were delivered to Top Ideal Company. In the absence of other evidence by the plaintiff to prove that BUY THE WORLD COMPANY suffered other reasonable losses, if the defendant is required to compensate the plaintiff for the loss of the goods involved in the case, the maximum compensation amount shall be RMB 84,436.38.

To sum up, the damage to cargo involved occurred during the period of liability of the defendant, and the amount of compensation should not exceed RMB 84,436.38.

C. Whether the defendant is not liable for compensation.

Although the 80 cooking machines involved were damaged due to flooding during the period of responsibility of the defendant,the only reason for the damage of the cooking machines was the back flooding caused by Typhoon Mangkhut, heavy rain, big waves and astronomical tides. This is force majeure. The Defendant performed reasonable, proper and prudent duties in the care of the cargoes and had no other breach of contract. The Defendant shall not be liable for any damages to the cargoes caused by force majeure.

To sum up, the defendant does not need to bear the liability for compensation.

IV. Summary

The controversial points of this case are: whether the plaintiff has a legal right of subrogation; whether the damage to the goods occurred during the period for which the defendant is liable and what is a reasonable amount of compensation;and whether the defendant is not liable for compensation.

The foregoing actions of Top Ideal Company are based on the instructions of BUY THE WORLD COMPANY. As the shipper, BUY THE WORLD COMPANY has an entity right of claim against the defendant as the operator of the multimodal transport. As the subject of subrogation of BUY THE WORLD COMPANY, the plaintiff has the right to claim against the defendant.

According to Article 103 of Maritime Law of the People's Republic of China "The responsibility of the multimodal transport operator with respect to the goods under multimodal transport contract covers the period from the time he takes the goods in his charge to the time of their delivery.", the defendant's liability period as the multimodal transport operator began on September 14, 2018, when the cargoes involved were received, and ended on September 19, 2019, when the cargoes were delivered to Top Ideal Company. BUY THE WORLD COMPANY and its agent, Top Ideal Company, did not timely notify the defendant in writing of the wet damage to the cargoes involved, so it is only preliminary evidence rather than final evidence that the cargoes involved are in good condition.In the absence of other evidence by the plaintiff to prove that BUY THE WORLD COMPANY suffered other reasonable losses, if the defendant is required to compensate the plaintiff for the loss of the goods involved in the case, the maximum compensation amount shall be RMB 84,436.38.

For typhoons, whilst human beings may predict them in advance to some extent by experiment, they cannot predict the exact time, place, duration, impact range and extent of their occurrence accurately and timely. Although the Meteorological Department and news media had forecasted the landing time and wind power of Typhoon Mangkhut before it hit, the multiple effect of wind, rain, wave and lake brought by Typhoon Mangkhutand the possibility surge flooding the tide backward into the container yard were not reflected in the forecast. The defendant may not be liable for damage caused by natural disasters. Lastly, as to whether there is any other breach of contract by the defendant. Although the cargoes involved were damaged by the natural disaster when they were stored at the Nansha Phase II Port, the defendant shall not be liable for the direct losses caused by the natural disasters.

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中国人民财产保险股份有限公司泉州市分公司诉广州港股份有限公司、广州港股份有限公司南沙集装箱码头分公司港口作业纠纷案

案例摘要

一、案件信息

（一）基本信息

案由：	港口作业纠纷
案号：	（2019）粤 72 民初 2314 号
原告：	中国人民财产保险股份有限公司泉州市分公司
被告：	广州港股份有限公司、广州港股份有限公司南沙集装箱码头分公司
出判时间：	2019.12.26

（二）案件事实（主要为台风因素）

2018 年 8 月，亚太森博（山东）浆纸有限公司（以下简称森博山东公司）委托泉州安通物流有限公司（以下简称安通公司）运输货物，安通公司作为承运人签发了运单，并将货物由日照经南沙港中转运往新会亚太，安通公司作为被保险人向原告投保了水路货物运输险。8 月 31 日，安通公司运输货物抵达南沙港，货物被卸至被告广州港股份有限公司南沙集装箱码头分公司（以下简称广州港南沙分公司）堆场中转、等待安排下一程运输的过程中，由于受台风“山竹”影响，堆场水淹导致货损。事故后，安通公司向原告申请保险理赔。

二、争议焦点

1.台风“山竹”是否构成不可抗力；

2.被告是否保管货物不当。

三、法院观点

1.关于台风“山竹”是否构成不可抗力的问题

根据《中华人民共和国民法总则》第一百八十条第二款的规定，“不可抗力”是指不能预见、不能避免且不能克服的客观情况。依据现有技术水平和一般人的认知而不可能预知为不能预见。对于台风而言，根据现有技术手段，人类虽可能在一定程度上提前预知，但是无法准确、及时预见其发生的确切时间、地点、延续时间、影响范围及程度。不能避免，指当事人尽了最大的努力，仍然不能避免事件的发生。不能克服，指当事人在事件发生后，尽了最大的努力，仍然不能克服事件造成的损害后果。不能避免且不能克服，表明某一事件的发生具有客观必然性。台风“山竹”直接带来风、雨、浪、潮等灾害，叠加产生的海水倒灌是引发本案货损的直接原因。被告广州港

南沙分公司制定有防风防汛专项应急预案，在本案台风发生前，被告广州港南沙分公司及时通知了货主、船运公司提货，并采取对堆场内的集装箱进行绑扎加固等措施。防台重在防风，该措施符合港口经营人防台抗台的惯常做法，要求被告广州港南沙分公司额外采取措施防止海水倒灌不符合实际情况。据此，可以认定本案台风引起的水淹实属不能避免和不可克服，台风“山竹”符合不可抗力的构成要件，构成不可抗力。

2.关于两被告是否保管货物不当的问题

根据《中华人民共和国合同法》第一百一十七条的规定，因不可抗力不能履行合同的，根据不可抗力的影响，部分或者全部免除责任，但法律另有规定的除外。本案在认定台风“山竹”作为不可抗力对于货物损失之原因力的基础上，还应认定台风“山竹”对于本案货物损失的影响有多少，或者说在不可抗力因素之外，是否因两被告的过错导致损害结果的扩大。在台风登陆前，被告已采取通知货主提货、召开防台会议、部署防台方案等措施，并在收到安通公司邮件通知后根据实际情况积极回应。台风过境后，被告广州港南沙分公司召开应急抢救工作会议，及时通知货物受损情况，催促提货。据此，在原告没有提交充分证据证明两被告采取防台措施和减损措施不当的情况下，可以认定两被告已尽到合理谨慎的货物保管义务。

四、小结

人类现有技术手段无法预报台风“山竹”带来的风、雨、浪、潮产生的叠加效果以及潮水最高水位可能超过码头高度，港口经营人已经采取了各项必要合理措施后，仍然不能避免事件的发生，不能克服事件造成的损害后果，对港口经营人而言，台风“山竹”构成不可抗力。先前发生的偶发事件不能阻却后发事件的不可预见性。在台风来临前和过境后，港口经营人已经尽到合理谨慎的货物保管义务，就不应承担货损的责任。

案例提供者：任雁冰
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Quanzhou Branch of PICC Property and Casualty Company Limited v. Guangzhou Port Group Co., Nansha Container Terminal Branch of Guangzhou Port Group Co. (dispute over port operation)

Case Brief

I. Case Summery

(I) Basic information

Case	Dispute over port operation
Case No.	(2019) Yue 72 Min Chu No. 2314
Plaintiff	Quanzhou Branch of PICC Property and Casualty Company Limited
Defendant	Guangzhou Port Group Co., Nansha Container Terminal Branch of Guangzhou Port Group Co.
Date of Adjudication	December 26, 2019

(II) Facts (mainly because of typhoon)

In August 2018, Asia Symbol (Shandong) Pulp & Paper Co., Ltd.(hereafter referred to as Symbol Shandong) entrusted Quanzhou Antong Logistics Co. Ltd (hereafter referred to as Antong) to transport goods. Antong, as the carrier, issued the waybill and transferred the goods from Rizhao, Shangdong to Xinhui Asia Symbol, Guangdong via Nansha Port. Antong, as the insured, insured against the plaintiff's Waterway Transportation Cargo Insurance. On August 31, Antong transported the goods to Nansha Port, and the goods were unloaded to Defendant Nansha Container Terminal Branch of Guangzhou Port Group Co.'s storage yard for transit. While waiting for the next transportation, the cargo was damaged due to the flooding of the storage yard from to the impact of Typhoon Mangkhut. After the accident, Antong applied to the plaintiff for insurance settlement.

II.Issues

(I) Whether Typhoon Mangkhut constitutes force majeure.

(II) Whether the defendant improperly stored the goods.

III.Rationale& Holding

(I) On whether Typhoon Mangkhut constitutes force majeure

According to Article One Hundred and Eighty, paragraph 2, of the general principles of the Civil Law of the People's Republic of China, Force Majeure means an objective situation which cannot be foreseen, avoided or overcome.

Unforseeability means that it is impossible to predict according to the current level of technology and common People's cognition. For typhoons, according to the existing technical means, although human beings can predict in advance to a certain extent, they cannot accurately and timely predict the exact time, place, duration, scope and extent of impact.

Unavoidability means that the party concerned has made his best efforts, but still cannot avoid the occurrence of the incident. Inability to overcome means that the party concerned, after the event has occurred, has tried their best, but still cannot overcome the consequences of the damage caused by the event. The fact that an event cannot be avoided and cannot be overcome shows that it is objectively inevitable.

Typhoon Mangkhut directly brought wind, rain, wave, tide and other disasters, the direct cause of the cargo damage in this case is the overlying sea water.

Defendant Nansha Container Terminal Branch of Guangzhou Port Group Co. made a special contingency plan for preventing wind and flood. In the case, before the typhoon the defendant Nansha Container Terminal Branch of Guangzhou Port Group Co. timely notified the owners and shipping companies to pick up the goods, and the container yard binding reinforced.

This measure is in line with the usual practice of port operation of civil defense. It is not factually correct to require defendant Nansha Container Terminal Branch of Guangzhou Port Group Co. to take additional measures to prevent seawater intrusion. Therefore, it can be concluded that the flooding caused by typhoon in this case is unavoidable and insurmountable, and that, Typhoon Mangkhut meets the constitutive requirements of the force majeure, hence, constitutes a force majeure.

(II) On the question of whether the two defendants improperly stored the goods

In accordance with Article 117 of the Contract Law of the People's Republic of China, a party who was unable to perform a contract due to force majeure is exempted from liability in part or in whole in light of the impact of the event of force majeure, except otherwise provided bylaw.

On the basis of determining that Typhoon Mangkhut caused the loss of goods as force majeure, this case should also determine how much Typhoon Mangkhut affected the loss of goods in question, or whether the damage was aggravated due to the fault of the two defendants in addition to the force majeure factor.

Before the typhoon landed, the defendant had taken such measures as notifying the shipper to take delivery of the goods, holding a typhoon prevention meeting, and deploying the typhoon prevention plan. After receiving the notification by email from Antong, the defendant responded positively according to the actual situation. After the typhoon passed through, Defendant Nansha Container Terminal Branch of Guangzhou Port Group Co. held an emergency rescue work meeting to timely notify on the extent of damage of the goods, and urge the delivery of the goods.

Accordingly, in the case that the plaintiff did not submit sufficient evidence to prove that the two defendants had taken improper measures to prevent the typhoon and reduce the damage, the two defendants could be determined to have fulfilled the duty of keeping the goods with reasonable care.

IV. Summary

The existing technical means of human beings cannot predict the superposition effect of wind, rain, wave and tide brought by Typhoon Mangkhut, and the possibility that the highest tide level may exceed the height of the wharf. The port operator has taken all necessary and reasonable measures, but still cannot avoid the occurrence of the incident and overcome the consequences of damage from the incident. For port operators, Typhoon Mangkhut constitutes force majeure. Previous contingencies cannot prevent the unpredictability of subsequent events. The port operator shall not be liable for damage to the goods if he has performed his duty of reasonable care for the care of the goods before and after the typhoon.

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海南省高级人民法院 2020 年涉海案例评述

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摘要：为了探寻海南省高级人民法院涉海案件实际司法情况，通过检索其作出的涉海案件裁判文书是一条重要途径。通过检索威科先行（Wolters Kluwer）法律信息库于 2020 年 1 月 1 日至 12 月 31 日公布的海南省高级人民法院作出的 1451 件裁判文书，发现其中有 8 份裁判文书含有涉案基本事实和裁判规则，包括涉海商事案例 4 件、涉海行政案例 2 件和涉海刑事案例 1 件，至于其他缺乏案件基本事实的撤诉裁定书和发回重审裁定书等不计在内。本文对其裁判要点进行了整理。

关键词：涉海司法

一、海南省高级人民法院 2020 年涉海案例裁判文书检索和统计

为了探寻海南省高级人民法院涉海案件实际司法情况，通过检索其作出的涉海案件裁判文书是一条重要途径。

通过检索威科先行（Wolters Kluwer）法律信息库于 2020 年 1 月 1 日至 12 月 31 日公布的海南省高级人民法院作出的 1451 件裁判文书，发现其中有 8 份裁判文书含有涉案基本事实和裁判规则，包括涉海商事案例 4 件、涉海行政案例 2 件和涉海刑事案例 1 件，至于其他缺乏案件基本事实的撤诉裁定书和发回重审裁定书等不计在内。

上述 8 份涉海案例裁判文书依次如下：

（一）涉海商事案例

1、海南省高级人民法院：(2020)琼民辖终 22 号民事裁定书，案由：船舶营运借款合同纠纷管辖权争议；

2、海南省高级人民法院：(2020)琼民终 17 号民事判决书，案由：航次租船合同纠纷；

3、海南省高级人民法院：(2020)琼民终 101 号民事判决书，案由：航次租船合同纠纷；

4、海南省高级人民法院：(2020)琼民终 478 号民事判决书，案由：海洋建设工程合同纠纷。

（二）涉海行政案例

1、海南省高级法院人民法院：(2020)琼行终 299 号行政裁定书，案由：渔业行政管理纠纷；

2、海南省高级人民法院：(2020)琼行终 420 号行政判决书，案由：水域滩涂养殖行政管理纠纷。

（三）涉海刑事案例

1、海南省高级人民法院：(2020)琼刑终 155 号刑事判决书，案由：非法采矿罪。

二、海南省高级人民法院 2020 年涉海案例裁判要点

（一）涉海商事案例

1、海南省高级人民法院：(2020)琼民辖终 22 号民事裁定书，案由：船舶营运借款合同纠纷管辖权争议

（1）基本事实

原、被告双方于 2018 年 4 月 24 日签订了一份《协议书》，约定原告向被告支付渔船投资费用 15 万元，投资期限内被告向原告支付分红，投资到期后被告将 15 万元投资费用归还原告。履行过程中，双方发生争议，原告在海口海事法院提起诉讼。

被告对管辖权提出异议，认为本案与船舶营运无关，名为渔船投资合同法律关系，实属普通的民间借贷法律关系。根据我国《民事诉讼法》第二十三条之规定，本案应当由三亚市城郊人民法院管辖。

（2）裁判要点

根据《最高人民法院关于海事法院受理案件范围的规定》第 49 项之规定，为购买、建造、经营特定船舶而发生的借款合同纠纷案件由海事法院专属管辖。

本案中，上诉人与被上诉人就渔船投资事项签订《协议书》，约定被上诉人向上诉人支付渔船投资款，上诉人在投资期间每月给予被上诉人固定的投资分红，且到期后归还投资款本金，该《协议书》未体现共担风险、共享利润的投资行为特点，符合借贷关系特征。

被上诉人依据《协议书》主张上诉人违约并提起本案诉讼，属于海事法院管辖范围。至于案涉款项实际是否按照约定用于渔船经营、所涉渔船具体信息等，属于实体审理中需要查明的问题。

综上，海口海事法院对本案具有管辖权。

2、海南省高级人民法院：(2020)琼民终 17 号民事判决书，案由：航次租船合同纠纷

（1）基本事实

2019 年 7 月 18 日，海南中郦公司与漳州海恒公司签订《年度航次租船合同》，约定海南中郦公司租用漳州海恒公司“昌宁 6 号”船。

合同签订后，“昌宁 6 号”船于 2019 年 7 月 19 日 1255 时抵达八所港锚地，因无货可载于同年 7 月 22 日 0837 时起锚离港。漳州海恒公司因货物落空，引起本案诉讼。

（2）裁判要点

①关于海南中郦公司是否应承担违约责任的问题。

首先，双方当事人签订的航次租船合同合法有效，漳州海恒公司已经按照合同约定安排“昌宁 6 号”船在合同约定的时间到达装货港，但因海南中郦公司原因，未能及时办理装船手续及安排装货，至“昌宁 6 号”船无货可装而离港。海南中郦公司已经构成违约，应当承担相应的违约责任。

海南中郦公司主张因其未按约定支付全部 25 万元定金，而仅支付了 15 万元定金，故涉案航次租船合同尚未生效，但双方均已开始履行涉案合同，故该主张不能成立。

该公司还主张报备手续未能完成系由于漳州海恒公司未提供全部所需材料所致，与事实不符。

且虽“昌宁 6 号”船早于曾庆昌发出指令就出发，但曾庆昌也明确表示预计 7 月 19 日晚可能装货，该船于 7 月 19 日 14 时许到达八所港锚地，与曾庆昌要求时间并不冲突，也符合涉案合同的约定，且该船系在等待两天后才于 7 月 22 日空船离港。因此海南中郦公司构成违约并应承担违约责任。

②关于违约金应如何计算的问题。

海南中郦公司未依合同约定提供相应货物受载，造成漳州海恒公司货物落空损失，违反了合同约定，应承担相应的违约责任，向漳州海恒公司支付违约金。

根据涉案航次租船合同的约定，一个月保底 5 个航次，任何一方违约须支付对方违约金航次总运费的 30%。“总运费”应理解为五个航次的总运费，本案违约金的计算为：22652 吨（订舱数量）×23 元/吨（运价）×5×30%＝781494 元。

海南中郦公司主张违约金过高，但并未提供证据予以证明，法院不予支持。

根据双方当事人在二审庭审过程中的陈述，法院查明海南中郦公司已经向漳州海恒公司支付 15 万元定金，漳州海恒公司已将该 15 万元罚没。根据《中华人民共和国合同法》第一百一十六条之规定，当事人既约定违约金，又约定定金的，一方违约时，对方可以选择适用违约金或者定金条款。本案漳州海恒公司的诉讼请求是判决海南中郦公司向其支付违约金，不能再适用定金条款，其已经罚没的 15 万元定金应从违约金中予以扣减，故海南中郦公司应向漳州海恒公司支付的违约金为 781494 元-150000 元＝631494 元。

3、海南省高级人民法院：(2020)琼民终 101 号民事判决书，案由：航次租船合同纠纷

（1）基本事实

2016 年 6 月 13 日，宏成公司与金圣达公司、江鹏公司签订《航次租船合同》，约定由宏成公司提供“梅山岗 7”轮、“梅山岗 17”轮承运货物。在合同履行过程中，因运费拖欠引起本案诉讼。

（2）裁判要点

①有关宏成公司提起本案诉讼是否超过诉讼时效的问题。

《最高人民法院关于如何确定沿海、内河货物运输赔偿请求权时效期间问题的批复》有关“根据《中华人民共和国海商法》第二百五十七条第一款规定的精神，结合审判实践，托运人、收货人就沿海、内河货物运输合同向承运人要求赔偿的请求权，或者承运人就沿海、内河货物运输向托运人、收货人要求赔偿的请求权，时效期间为一年，自承运人交付或者应当交付货物之日起计算”的规定，系对海商法第二百五十七条第一款有关海上货物运输和沿海、内河货物运输合同中要求赔偿请求权的诉讼时效问题所作的解释，而非对于第二百五十七条第二款有关航次运输合同的诉讼时效问题所作的解释。

海商法第二百五十七条第二款规定：有关航次租船合同的请求权，时效期间为二年，自知道或者应当知道权利被侵害之日起计算。

涉案合同为航次租船合同，根据上述规定诉讼时效为两年。双方当事人于 2017 年 12 月 25 日就涉案航次租船合同中江鹏公司、金圣达公司拖欠宏成公司的款项进行结算，但江鹏公司、金圣达公司并未支付欠款，宏成公司自此知道其权利被侵害，诉讼时效应从当日计算，宏成公司于 2019 年 11 月 8 日起诉，并未超过诉讼时效。

②有关江鹏公司、金圣达公司是否应向宏成公司支付运费及利息的问题。

有关宏成公司是否违反先履行义务的问题。根据合同法第六十七条的规定，当事人互负债务，有先后履行顺序，先履行一方未履行的，后履行一方有权拒绝其履行要求。先履行一方履行债务不符合约定的，后履行一方有权拒绝其相应的履行要求。该条款中的债务系合同主要义务。

在航次租船合同纠纷中，出租人的主要义务是将货物运输至承租人指定的港口，而承租人的主要义务则是向出租人支付运费。宏成公司已履行了其主要义务，江鹏公司、金圣达公司无权拒绝履行支付运费的义务。

有关江鹏公司、金圣达公司是否能以宏成公司未开具发票为由拒绝履行支付欠款及利息的问题。江鹏公司、金圣达公司明知宏成公司已经开具足额发票，既未索要发票也未支付欠款。因此其以宏成公司未开具发票为由拒付欠款的理由不能成立。

4、海南省高级人民法院：(2020)琼民终 478 号民事判决书，案由：海洋建设工程合同纠纷

（一）基本事实

2015 年 1 月，港湾公司与如意岛公司签订《总承包合同》，约定由港湾公司作为总承包人承包如意岛公司作为业主所开发的海口如意岛填岛工程东标段工程的施工。在后续履行过程中，产生争议引发本案。

（二）裁判要点

①关于《总承包合同》及《补充协议》等合同是否有效的问题。

根据《最高人民法院关于适用<中华人民共和国合同法>若干问题的解释（二）》第十四条的规定，《中华人民共和国合同法》第五十二条第（五）项规定的“强制性规定”是指效力性强制性规定。

如意岛公司为涉案工程的发包人，其在未取得相应海域使用权证的情况下进行该海域的填岛工程，违反了《中华人民共和国海域适用管理法》第三条第二款“单位和个人使用海域，必须依法取得海域使用权”的规定，其后果是应当依照该法第四十二条的规定承担相应的行政处罚责任。

故法院认为，前述第三条第二款为管理性强制性规定，而非效力性强制性规定，违反该规定并不导致相应的填岛工程承包合同无效。因此，港湾公司与如意岛公司签订的《总承包合同》及《补充协议》等合同应为合法有效合同，双方均应按照合同约定全面履行各自义务，如有违约行为，应按约定承担违约责任。

②关于港湾公司和如意岛公司关于《总承包合同》及《补充协议》是否解除的问题。

根据已查明的案件事实，如意岛多次逾期支付工程进度款且长期、大金额拖欠工程进度款。港湾公司在 2017 年 8 月停工至 2019 年 1 月 24 日发出解除合同通知期间，多次通过会商甚至起诉方式向两被告催要工程进度款，但两被告至今未能支付。

在港湾公司于 2019 年 1 月 24 日向如意岛公司发出解除合同通知之时，整个如意岛填岛项目施工全部停止，如意岛公司及其独资股东中弘公司面临多个诉讼，中弘公司已从深交所退市，两被告履约能力大为降低。

前述情形已达到《通用条款》第 16.2 条（b）（e）（f）项约定的解除条件，港湾公司主张解除前述合同，符合法律规定。

同时，根据《中华人民共和国合同法》第九十六条的规定，以前述第九十四条第三款或达到约定条件为由解除合同的，应当通知对方，合同自通知到达对方时解除。本案中，港湾公司于 2019 年 1 月 24 日通过 EMS 向如意岛公司发出《解除合同通知》，投递记录显示如意岛公司于同年 1 月 28 日签收该文件，故法院认定《总承包合同》及其补充协议于 2019 年 1 月 28 日解除。

③关于如意岛公司拖欠的工程款金额及合同解除后逾期付款违约金问题。

首先，关于港湾公司已完成的工程产值。法院（2018）琼 72 民初 215 号民事判决书虽认定截至 2018 年 12 月 25 日，如意岛公司已批复港湾公司施工产值为 918413993 元，但该产值为计算工程进度款时所用的产值，并非港湾公司在合同解除前实际完成的产值。如意岛公司主张《产

值确认申请表》中胡小波的签字（2018 年 3 月 22 日签字）不能代表公司对该产值的确认，但结合其他施工周期中《产值确认申请表》上的签字以及中弘公司、如意岛公司、港湾公司于 2018 年 1 月 18 日召开的《海口如意岛填岛工程 I（东）标段项目协调会纪要》、2018 年 5 月 17 日《关于如意岛东标段需要解决的主要问题情况汇报及处理意见专题讨论会会议纪要》的内容，法院认定港湾公司在合同解除前实际完成的产值为 979103454 元。

其次，关于质保金是否扣除的问题。《总承包合同》专用条款第 14.7 条约定将结算总价的 5% 作为质量保修金，在整体工程缺陷通知期限届满后支付。但通用条款第 19.6 条和第 19.7 条的约定，承包商通知解除合同后，业主应当向承包商支付已完成工程的价款。法院认为，从 2017 年 8 月停工至今，已超过合同约定的两年的质保期，如意岛公司并未举证证明已完工工程存在质量瑕疵，故质保金不应从拖欠的工程款中扣除。

再次，关于合同解除后的逾期付款违约金问题。根据《最高人民法院关于审理建设工程施工合同纠纷案件适用法律若干问题的解释》第十条的规定及通用条款第 19.6 条和第 19.7 条的约定，如意岛公司应当在合同解除后支付全部工程款。扣除已支付的进度款 554874705 元和（2018）琼 72 民初 215 号民事判决书已判决如意岛公司支付的进度款 183856490 元，如意岛公司在合同解除后应当立即支付的工程款为 240372259 元（979103454 元-554874705 元-183856490 元），逾期支付的，应当依法计算违约金。

因合同未约定合同解除后工程款逾期支付的违约金计算标准，根据《最高人民法院关于审理建设工程施工合同纠纷案件适用法律若干问题的解释》第十七条的规定，自合同解除之日即 2019 年 1 月 28 日起至同年 8 月 19 日，应当按照中国人民银行同期同类贷款利率计息；自 2019 年 8 月 20 日起，按照同期全国银行间同业拆借中心公布的贷款市场报价利率计算至实际支付之日止。

④关于港湾公司因停工遭受的损失金额问题。

根据已查明的案件事实，港湾公司自 2017 年 8 月开始的停工是应如意岛公司要求所采取的措施，而如意岛公司要求港湾公司停工的原因是涉案项目存在未取得海域使用权证等违法情形，故导致停工发生的原因在如意岛公司。如意岛公司应当承担港湾公司停工期间的损失。

本次停工是港湾公司应如意岛公司要求所被动采取的紧急措施，人员、机械设备撤离等应对时间相对不足，且在停工后，如意岛公司一直未能就是否复工以及何时复工作出明确的答复，在此情况下港湾公司派驻必要人员等待复工和留守看护施工现场确有必要。

在前述停工期间，港湾公司已将其待工人员数量、船舶机具等情况向监理单位和如意岛公司进行书面报告，监理单位和如意岛公司也做出了“属实”的书面批复，且人员、船舶机具待工情况符合项目施工规模和进展，故根据前述情况计算得出相关费用予以认可。

⑤关于如意岛公司是否应当向港湾公司支付合同解除前应付部分工程价款逾期付款违约金的问题。

根据双方在《专用条款》第 14.7 条（付款的时间安排）中的约定，如意岛公司每月按完成产值的 75%向港湾公司支付进度款，如业主监理考核后得分在 90 分以上增加支付 5%；工程竣工并经政府质检部门、业主、监理及设计单位等四方验收合格的，在 30 个工作日内支付至合格工程量产值的 85%；竣工备案手续完成后，30 个工作日内支付至合格工程量产值的 90%；本合同整体工程接收证书发出后，工程结算完成并经双方签字盖章确认后，30 个工作日内支付至双方签字盖章确认的结算金额的 95%；结算总价的 5%作为质量保修金，质保期限届满且修复全部质量缺陷并得到业主书面确认后支付。

因此，已计量部分除5%质量保证金外的15%的预留款的支付是以竣工验收、竣工验收备案、发出接受证书为条件的，在停工之日起至2019年1月28日合同解除前，该15%的预留款并未达到合同约定付款条件。

综合考虑逾期支付进度款违约金、停工损失以及合同约定的付款条件，法院认为港湾公司主张该15%预留款自停工之日至合同解除之日的逾期付款违约金没有合同依据和法律依据，应不予支持。

⑥关于如意岛公司是否应当向港湾公司赔偿保险未获理赔的损失及逾期付款利息问题。

根据港湾公司在《通用条款》第18.1.1条约定中的约定，作为业主方的被告应当投保“建筑工程一切险及第三者责任险”。被告虽证明其已经购买了该项保险，但其未能举证证明其已经按期足额支付保费。

根据已查明的案件事实，在保险期间内，港湾公司因莎莉嘉台风应当获得的保险理赔金额为830万元，该830万元为扣除免赔额以后的理赔金额，并非受损金额，但却未能获赔。法院认为，港湾公司未能获赔与如意岛公司未能按期足额支付保费具有直接关系，如意岛公司应当对原告未能获赔的部分承担赔偿责任，并承担逾期未能获赔的利息损失。自定损之日即2018年2月7日起至2019年8月19日，应当按照中国人民银行同期同类贷款利率计息；自2019年8月20日起，按照同期全国银行间同业拆借中心公布的贷款市场报价利率计算至实际支付之日止。根据计算，计至开庭之日即2020年5月20日为860357.53元。

⑦关于如意岛公司是否应当向港湾公司支付未完工程预期利润的问题。

根据《中华人民共和国合同法》第九十七条的规定，合同解除后，尚未履行的部分不再履行，由此给守约方造成损失的，应当由违约方承担赔偿责任。

本案中，涉案合同解除的原因是如意岛公司违约和存在过错，故其应向港湾公司赔偿合同未履行部分的预期利润损失。

经鉴定，按合同清单计价未完工程的预期利润为2547691.68元，按港湾公司主张即《沿海港口建设工程概算预算编制规定》计算未完工程的预期利润为17833841.76元。

法院认为，相较于《沿海港口建设工程概算预算编制规定》按照固定比例计算利润，按照港湾公司与如意岛公司签订的合同清单计价计算未履行部分的预期利润更加客观、科学，故法院认定本案中未履行部分的预期利润为2547691.68元。

⑧关于港湾公司是否就如意岛公司拖欠的工程款享有优先受偿权的问题。

《中华人民共和国合同法》第二百八十六条规定：“发包人未按照约定支付价款的，承包人可以催告发包人在合理期限内支付价款。发包人逾期不支付的，除按照建设工程的性质不宜折价、拍卖的以外，承包人可以与发包人协议将该工程折价，也可以申请人民法院将该工程依法拍卖。建设工程的价款就该工程折价或者拍卖的价款优先受偿”，《最高人民法院关于审理建设工程施工合同纠纷案件适用法律问题的解释（二）》第十七条规定：“与发包人订立建设工程施工合同的承包人，根据合同法第二百八十六规定请求其承建工程的价款就工程折价或者拍卖的价款优先受偿的，人民法院应予支持”，从上述法律规定可以看出，承包人是对其承建的工程项目的所得价款享有优先受偿权，而非对其承建的工程享有优先受偿权。并且，优先受偿权的实现应当以承包人承建的工程项目可以折价或者拍卖为前提。因此，涉案工程具有变价的可能性是承包人享有优先受偿权的前提和基础。

就本案来看，涉案工程是一项填海工程，发包人至今尚未取得海域使用权证，且该项目被海

域监管部门作出责令退还非法占用的海域、恢复海域原状的行政处罚。港湾公司在二审中提交的《整改方案》是对如意岛（一期、二期）工程规划进行优化调整，方案中未提及涉案工程。因此，涉案工程尚不具备变价的可能性。

故港湾公司关于其对如意岛公司拖欠的工程款享有优先受偿权的上诉理由，没有事实及法律依据，法院不予支持。

⑨关于中弘公司是否承担连带保证责任的问题。

首先，中弘公司与港湾公司保证合同关系成立。结合中弘公司 2015 年 1 月 22 日向港湾公司出具《担保函》的名称、内容，以及 2018 年 1 月 28 日的《会议纪要》，法院认为中弘公司对如意岛公司在《总承包合同》项下对港湾公司所负债务承担连带责任保证的意思表示明确，担保合同法律关系成立。

其次，涉案担保有效。虽然根据《中华人民共和国公司法》第十六条及中弘公司《公司章程》的有关规定，中弘公司对外担保达到一定数额应当经董事会决议。

但法院认为：1.公司对外担保需经董事会审议属公司内部决议程序,不得约束第三人;2.根据中弘公司《公司章程》第一百一十条的规定，需经董事会决议的对外担保应当根据所涉标的额与总资产、主营业收入、净利润、净资产等占比来确定，相对于港湾公司，中弘公司对其内部决议程序和相关数据更为熟悉；3.如意岛公司为中弘公司全资子公司，涉案交易的全部收益最终归属于中弘公司，并未损害公司股东的利益；4.认定担保无效,既不利于维护合同的稳定和交易的安全，也有违诚实信用原则。

因此，法院认为中弘公司的前述担保不存在《中华人民共和国合同法》第五十二条规定的无效情形，应认定为有效。

综上，根据《中华人民共和国担保法》第十八条的规定，中弘公司对如意岛公司因履行《总承包合同》及其补充协议对港湾公司所负的债务承担连带清偿责任。

（二）涉海行政案件

1、海南省高级法院人民法院：(2020)琼行终 299 号行政裁定书，案由：渔业行政管理纠纷

（1）基本事实

2019 年 2 月 14 日，海南省农业厅作出 27 号通知：原海南省海洋与渔业厅 2013 年下达南鹰公司的海南 065、066、067、068 等 4 艘南沙生产渔船更新建造计划，其指标来源船”琼洋浦 32004、32007、32009、32011”的渔船证书系利用虚假材料补办，不符合南沙生产渔船更新建造管理的相关规定。南鹰公司不服，引起本案诉讼。

（2）裁判要点

当事人向人民法院提起行政诉讼,不仅要符合《中华人民共和国行政诉讼法》所规定的起诉条件,还应当对所诉标的具有诉的利益，即请求法院解决相关争议的必要性。

当事人提起诉讼最终能否获得审理判决要取决于诉的内容,即当事人的请求是否具有利用国家审判制度加以解决的实际价值和必要性。仅具备法定形式并符合法定程序,但不具备诉的利益的诉讼,人民法院可不进行实体审理。

就本案而言,本案被诉 27 号通知的实质内容与 34 号批复涉及南鹰公司的实质内容一致，都是行政机关废止序号为海南 065、066、067、068 四艘渔船更新建造计划的行政行为，对南鹰公司权利义务影响也相同。

南鹰公司在 2019 年以农业农村部为被告、省农业厅为第三人，向北京三中院提起行政诉讼，

请求撤销 34 号批复。该案经北京三中院、北京高院一审、二审实体审理，对南鹰公司不服农业农村部废止海南省计划序号为海南 065、066、067、068 四艘渔船更新建造计划的行政行为是否符合法律规定进行了实体审理。北京高院于 2019 年 12 月 18 日作出（2019）京行终 8078 号行政判决，认定南鹰公司以“琼洋浦 32004、32007、32009、32011”四艘渔船作为指标来源船，申请报废拆解旧船从而获取计划序号为海南 065、海南 066、海南 067、海南 068 等四艘渔船更新建造计划指标，系南鹰公司通过不正当手段非法取得拟报废渔船相关权利凭证，其对于经核准的涉案四艘渔船更新建造计划之废止，不受信赖利益的保护。34 号批复中废止海南省计划序号为海南 065、海南 066、海南 067、海南 068 四艘渔船更新建造计划之行政行为事实清楚，证据确凿，适用法律、法规正确，符合法定程序。该行政判决已生效。

本案与上述案件的实质争议一致，人民法院在上述案件中已经对相关争议进行了实体审理和判决，废止序号为海南 065、海南 066、海南 067、海南 068 四艘渔船更新建造计划之行政行为的合法性已经生效判决明确确认，南鹰公司的诉讼权利已得到充分保障。

因此，一审裁定驳回南鹰公司的起诉，并不会造成剥夺南鹰公司诉权的后果。

2、海南省高级人民法院：(2020)琼行终 420 号行政判决书，案由：水域滩涂养殖行政管理纠纷

（1）基本事实

2014 年 3 月 14 日，儋州市人民政府向儋州永乐兴公司颁发琼儋州市府（海）养证〔2014〕第 00001 号《水域滩涂养殖证》。

2018 年 9 月 13 日，儋州市生态环境局作出儋环罚告字〔2018〕29 号《行政处罚事先告知书》，告知儋州永乐兴公司因实施非法建设规模化养殖及其他破坏生态红线和污染环境的建设项目环境违法行为，违反《海南省生态红线规定》第二十条规定。根据《海南省生态红线规定》第三十一条规定，拟决定责令其 3 日内对违法养殖场进行拆除，并留置送达。11 月 12 日，儋州市生态环境局留置送达了《行政处罚决定书》。儋州永乐兴公司不服，引起本案诉讼。

（2）裁判要点

本案审查的标的是被诉行政行为是否合法。法院认为，本案争议焦点：一、被诉行政行为是否属于滥用职权；二、被诉行政行为认定儋州永乐兴公司违法的证据是否确凿。分析如下：

①关于被诉行政行为是否属于滥用职权的问题

分析被诉行政行为是否属于滥用职权，需得先行考察被诉行政行为在行政法中的性质。

行政处罚是行政机关基于行政相对人的违法事实，对行政相对人给予处罚的行政行为，与其他行政行为的根本区别在于其具有处罚性。行政命令是行政机关基于行政管理的目的，对行政相对人提出作为或者不作为要求的行政行为。

本案中，被诉行政机关基于认定儋州永乐兴公司实施了非法建设规模化养殖及其他破坏生态红线和污染环境建设项目行为，作出责令限期拆除的被诉行政行为，不具有行政机关对行政相对人给予处罚的特征，也不属于《行政处罚法》规定的警告，罚款，没收违法所得、没收非法财物，责令停产停业，暂扣或者吊销许可证、暂扣或者吊销执照，行政拘留，法律、行政法规规定的其他行政处罚种类，不属于行政处罚。

《环境行政处罚办法》第十二条规定，责令限期拆除属于责令改正的形式之一，属于行政命令。被诉行政行为是被诉行政机关对儋州永乐兴公司提出限期拆除作为要求的行政行为，属于行政命令。

《环境行政处罚办法》第十一条第二款规定“责令改正期限届满，当事人未按要求改正，违法行为仍处于继续或者连续状态的，可以认定为新的环境违法行为。”本案中，儋州永乐兴公司虽然已就《责令改正决定书》提出行政复议申请，但其未在《责令改正决定书》限定期限内自行改正，其行为仍处于继续或者连续状态，被诉行政机关认定儋州永乐兴公司有新的环境违法行为，作出被诉行政行为责令儋州永乐兴公司改正的行政命令，符合上述规定。

儋州市生态环境局关于被诉行政行为不属于滥用职权的上诉理由成立，法院予以支持。

②关于被诉行政行为认定儋州永乐兴公司违法的证据是否确凿的问题

被诉行政行为认定儋州永乐兴公司在已划定的Ⅱ类生态保护红线范围规模化养殖行为违法，证据是《儋州市总体规划（空间类 2015－2030）局部图》。

但《儋州市总体规划（空间类 2015－2030）》于 2018 年 12 月 1 日才经海南省人民政府批复同意，被诉行政机关在海南省人民政府批复同意前适用属于《儋州市总体规划（空间类 2015－2030 年）》成果的《儋州市总体规划（空间类 2015－2030）局部图》，认定儋州永乐兴公司违法的主要证据不足。

儋州市生态环境局关于被诉行政行为证据确凿的上诉理由不能成立，法院不予支持。

综上，被诉行政行为主要证据不足，依法应予撤销。鉴于儋州永乐兴公司养殖场已被拆除，不具有可撤销内容，应当确认被诉行政行为违法。

（三）涉海刑事案例

1、海南省高级人民法院：(2020)琼刑终 155 号刑事判决书，案由：非法采矿罪

（1）基本事实

2018 年 8 月 21 日，被告人张某与蔡某商定后，由蔡某组织船员到文昌市西南浅滩海域采挖海砂（E110° 34.632 ′，N20° 16.340 ′），在采砂过程中被查获，查扣海砂 4385 立方米。由此引发本案诉讼。

（2）裁判要点

①关于原判根据《关于办理非法采矿、破坏性采矿刑事案件适用法律若干问题的解释》（下称《解释》）第三条第一款第（一）项认定被告人蔡某犯非法采矿罪及非法采挖海砂价值 13.395 万元是否正确的问题。

经查，被告人蔡某、张某分别于 2018 年 3 月 31 日和 8 月 11 日两次非法采矿，同年 5 月 9 日和 10 月 10 日，广东省徐闻县海洋与渔业局和海南省文昌市海洋与渔业局分别对蔡某作出行政处罚。后蔡某、张某又于同年 8 月 22 日第三次非法采矿，矿产价值 8.77 万元。根据《解释》第三条第一款第（三）项“二年内曾因非法采矿受过两次以上行政处罚，又实施非法采矿行为，应当认定为刑法第三百四十三条第一款规定的‘情节严重’”的规定，蔡某未取得海砂开采海域使用权证及采矿许可证，在二年内因非法采矿受过两次以上行政处罚又实施非法采矿行为，采砂价值 8.77 万元，构成非法采矿罪。

②关于原判认定被告人张某系坦白是否正确的问题。

经查，海南省公安边防总队海警第三支队在二审中出具的《归案经过》可以证实被告人张某于 2018 年 11 月 28 日经办案民警在办公室电话传唤后，于当日主动到案接受调查。张某在侦查机关发觉其犯罪事实但尚未被采取强制措施，只是接到侦查机关电话传唤后即到案，并如实供述自己和蔡某的罪行，应当认定为自首。

原判认定张某为坦白不当，法院予以纠正。检察机关关于张某构成自首的抗诉理由成立，法

院予以采纳。

③关于被告人蔡某、张某量刑是否失衡的问题。

经查，本案非法采砂共同犯罪中，蔡某、张某约定由蔡某提供船只、组织人员采砂，张某提供采砂的时间、地点并联系销售海砂。张某联系福河砂场老板朱某以每立方米31元收购海砂，蔡某采砂每立方米收取30元。上述事实有运输承揽合同、被告人蔡某及张某的供述、证人朱某的证言等证据相互印证，足以证实。

在本案共同犯罪中，蔡某与张某虽不区分主从，但所采海砂出售款项蔡某占大部分，张某占小部分，蔡某在共同犯罪中所起作用重于张某，且蔡某因非法采矿受过两次行政处罚，主观恶性较大，故原判对蔡某、张某的量刑并无失衡。

原判虽认定张某坦白不当，但鉴于张某认罪态度好，缴清生态赔偿金及预缴罚金，已对其从轻处罚，量刑适当。综上，检察机关关于蔡某、张某量刑失衡的抗诉理由不能成立，法院不予采纳。

④关于被告人蔡某、张某罚金折抵的问题。

蔡某罚金折抵问题。《行政处罚法》第二十八条规定，违法行为构成犯罪，人民法院判处罚金时，行政机关已经给予当事人罚款的，应当折抵相应罚金。该条所称的违法行为应与犯罪行为具有同一性。

本案中，蔡某是因二年内非法采矿被两次行政处罚后又再实施非法采矿行为，构成非法采矿罪。蔡某两次行政处罚所缴纳的罚款是对其犯罪行为之前违法行为的处罚，不应折抵其犯罪行为的罚金。故原判判定蔡某的罚金以行政处罚罚款折抵不当，应予纠正。

张某罚金折抵问题。本案行政机关针对第一、二宗事实作出的行政处罚责任主体是蔡某，未对张某作出行政处罚，故原判将两次行政处罚罚款折抵张某的罚金不当，应予纠正。综上，检察机关关于蔡某、张某以行政罚款折抵罚金不当的抗诉理由成立，法院予以采纳。

⑤关于被告人蔡某上诉后又申请撤回上诉的问题。

经查，一审法院于2020年6月8日向被告人蔡某宣判，蔡某于当日表示要上诉。后蔡某于2020年6月19书写《撤回上诉申请书》提交一审法院。

根据《最高人民法院关于适用<中华人民共和国刑事诉讼法>的解释》第三百零五条：“上诉人在上诉期满后要求撤回上诉的，第二审人民法院应当审查。经审查，认为原判认定事实和适用法律正确，量刑适当的，应当裁定准许撤回上诉；认为原判事实不清、证据不足或者将无罪判为有罪、轻罪重判等的，应当不予准许，继续按照上诉案件审理。”的规定，蔡某在上诉期满后要求撤回上诉，经法院审查，原判确有认定事实不清和法律适用错误的问题，本案应继续审理，故对蔡某的撤回上诉申请，法院不予准许。

法院认为，被告人蔡某未取得海砂开采海域使用权证及采矿许可证，在二年内因非法采矿受过两次以上行政处罚又实施非法采矿行为，情节严重，其行为已构成非法采矿罪。

被告人张某违反矿产资源法的规定，未取得海砂开采海域使用权证及采矿许可证擅自采矿，涉案海砂价值13.395万元，情节严重，其行为已构成非法采矿罪。

公诉机关指控被告人蔡某、张某的犯罪事实清楚，证据确实、充分，定性准确，罪名成立，法院予以支持。

被告人蔡某、张某系自首，依法可以从轻或者减轻处罚。

被告人蔡某已预缴纳罚金3万元，被告人张某已预缴纳罚金2万元。此外，二被告人分别向

海口海事法院缴纳生态赔偿金等各项费用 18.65 万元（共计 37.3 万元），认罪认罚。

被告人蔡某被依法扣押并随案移送的蓝色 OPPO 牌手机一部，予以没收，上缴国库。随案移送的登记保存的“宏达 899”船舶 1 艘，是被告人蔡某和福建省莆田市湄洲轮船公司共有，蔡某占 49%股份，福建省莆田市湄洲轮船公司占 51%的股份，该船舶中被告人蔡某所占的 49%的份额予以没收，上缴国库。

另判决被告人蔡某犯非法采矿罪，判处有期徒刑十一个月,并处罚金 30000 元；判决被告人张某犯非法采矿罪，判处有期徒刑七个月，并处罚金 20000 元。

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A Review of Cases Involving the Sea Decided by the Higher People's Court of Hainan Province in 2020

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Abstract: In order to understand the judicial situation of the Higher People's Court of Hainan Province with regard to maritime related cases, one of the efficient ways is by legal research of the relevant legal cases. From the 1,451 judicial case documents issued by the People's Court of Hainan Province as published by the Wolters Kluwer Legal Information Database during January 1 to December 31, 2020, eight cases involving the sea were found which includes four commercial cases, two administrative cases and one criminal case.

Keywords: maritime justice

I. The Number of Cases Involving the Sea Decided by the Higher People's Court of Hainan Province in 2020

By searching the 1,451 judgments issued by the Higher People's Court of Hainan Province as published by the Wolters Kluwer Legal Information Database from January 1 to December 31, 2020, it was found that eight judgments contained basic facts and adjudication rules, including four maritime-related commercial cases, two maritime-related administrative cases and one maritime-related criminal case.

Cases involving maritime commerce

1. The Higher People's Court of Hainan Province: Civil Judgment No. 22 [2020] of the Final Instance by the Civil Division of Hainan Province; jurisdiction dispute over a contract of vessel operation loan;
2. The Higher People's Court of Hainan Province: Civil Judgment No. 17 [2020] of the Final Instance of Hainan Province; disputes over voyage charter party;
3. The Higher People's Court of Hainan Province: Civil Judgment No. 101 [2020] of the Final Instance of Hainan Province; disputes over voyage charter party;
4. The Higher People's Court of Hainan Province: Civil Judgment No. 478 [2020] of the Final Instance of Hainan Province; disputes over a contract or agreement.

Cases involving Maritime Administration

1. The Higher People's Court of Hainan Province: (No. 299 [2020], Administrative Ruling of the Administrative Tribunal of Hainan Province) fishery administrative disputes;
2. The Higher People's Court of Hainan Province: Administrative Judgment No. 420 [2020] of the Administrative Tribunal of Hainan Province, disputes over the administrative ruling of water area and beach aquaculture.

Case involving maritime crimes

1. The Higher People's Court of Hainan Province: Criminal Judgment No. 155 (2020) of the Final Instance of Hainan Province; illegal mining.

A. Cases involving maritime commerce

1. The Higher People's Court of Hainan Province: Civil Ruling No. 22 [2020] of the Final Instance by

the Civil Division of Hainan Province; Jurisdictional Dispute over Contract of Vessel Operating Loan

(1) Basic Facts

The plaintiff and the defendant entered into an Agreement on April 24, 2018, which stipulated that the plaintiff would pay the defemdamt150,000 yuan as an investment for the fishing vessel, and the defendant would pay a monthly dividends to the plaintiff within the investment period, and the defendant would return 150,000 yuan of principal to the plaintiff after the investment term. In the course of performance, both parties had disputes, and consequently the plaintiff brought a lawsuit in Haikou Maritime Court.

The defendant raised an objection to the jurisdiction, and held that this case had nothing to do with the operation of the vessel. The agreement involved is a private loan. In accordance with Article 23 of the Civil Procedure Law of the People's Republic of China, this case shall be under the jurisdiction of the Suburban People's Court of Sanya City.

(2) Key Points of Judgment

In accordance with Item 49 of the Provisions of the Supreme People's Court on the Scope of Cases Accepted by Maritime Courts, cases involving disputes over loan contracts arising from the purchase, construction or operation of specific vessels shall be under the exclusive jurisdiction of maritime courts. This case involves breach of contract. Whether the funds involved in the case were actually used for the operation of the fishing vessel is to be decided at the trial.

In conclusion, the Haikou Maritime Court had the jurisdiction over the case.

2. The Higher People's Court of Hainan Province: Civil Judgment No. 17 [2020] of the Final Instance of Hainan Province; Disputes over voyage charter

(1) Basic Facts

On July 18, 2019, Hainan Zhongli and Zhangzhou Haiheng Company entered into an Annual Voyage Charter Party, in which Hainan Zhongli Co., Ltd. agreed to rent the "Changning No. 6" ship of Zhangzhou Haiheng Company.

After the conclusion of the contract, the vessel "Changning No. 6" arrived at the Eight Harbor Anchored at 1255 hours on July 19, 2019. The vessel left the harbor with no cargo loaded since the cargo was not delivered for loading at the time agreed upon which is 0837 hours on July 22, 2019.

(2) Key Points of Judgment

(a)Whether Hainan Zhongli Co., Ltd. should be liable for breach of contract-

First, the voyage charter contract concluded by both parties was lawful and valid. Zhangzhou Haiheng Company's vessel "Changning No. 6" ship arrived at the loading port at the time agreed upon in the contract, Hainan Zhongli Co., Ltd. failed to perform the loading process therefore Hainan Zhongli Co., Ltd. was liable for breach of contract.

Hainan Zhongli Co., Ltd. claimed that the voyage charter contract in question was not effective because it failed to pay all the earnest money of 250,000 yuan as agreed on and only paid the deposit of 150,000 yuan. Since, both parties have started the performance of the contract in question, the claim was denied.

Zeng Qingchang also made clear that it was expected that the vessel might be loaded in the evening of July 19. The vessel arrived at Bahang and anchored at about 14: 00 on July 19 which was in conform to the provisions of the contract. Therefore, Hainan Zhongli Co., Ltd. is liable for breach of contract.

(b) The issue of how liquidated damages should be calculated-

Hainan Zhongli Co., Ltd. failed to make delivery of goods as provided in the contract, which caused losses to Zhangzhou Haiheng Co. In violation of the terms of the contract, Hainan Zhongli Co., Ltd. is liable for breach of contract and pay the damages to Zhangzhou Haiheng Co.

In accordance with the stipulations of the voyage charter party in question, the minimum voyage charter number is five times a month, and either party shall, in breach of the contract, pay 30% of the total voyage freight of the other party. "Total Freight" shall be understood as the total freight of five voyages, and the liquidated damages for this case are calculated as follows: 22,652 tons (quantity ordered) × 23 yuan/ton (freight rate) × 5 × 30% = 781,494 yuan.

Hainan Zhongli Co., Ltd. claimed that the default penalty was too high, but did not provide

evidence to prove it, for which reason the court refused to support it.

According to the statements of both parties at the trial of second instance, the court found that Hainan Zhongli Co., Ltd. had paid 150,000 yuan to Zhangzhou Haiheng Co.In accordance with Article 116 of the Contract Law of the People's Republic of China, where both liquidated damages and deposit are agreed upon by the parties, one party may choose for compensation either the liquidated damages or the deposit when the other party breaches the contract. The fine of 150,000 yuan that has been collected by Hainan Zhongli should be deducted from the breach of contract damages.

3. The Higher People's Court of Hainan Province: Civil Judgment No. 101 [2020] of the Final Instance of Hainan Province; Disputes over voyage charter contract

(1) Basic Facts

On June 13, 2016, Hongcheng Company and Jinshengda Company and Jiangpeng Company entered into a Voyage Charter Party, which stipulated that Hongcheng Company should provide "Meishan Gang 7" and "Meishan Gang 17" to undertake the carriage of goods. This case was brought to the court due to delay in payment.

(2) Key Points of Judgment

(a) Whether the limitation of actions in this case brought by Hongcheng Company has expired-

Paragraph 2 of Article 257 of the Maritime Law provides that: The limitation period for claims in relation to voyage charter party is two years, counting from the date on which the claimant knew or should have known that his right was infringed upon.

The contract involved in this case was a voyage charter, and the statute of limitations in accordance with the above provisions was two years.

(b) Whether Jiangpeng Company and Jinshengda Company should pay the freight charge and the interests incurred to Hongcheng Company-

In a voyage charter dispute, the duty of the ship-owner is to transport the goods to the designated port, and the obligation of the charterer is to pay the ship-owner the freight charge. Hongcheng Company fulfilled its obligations, and Jiangpeng Company and Jinshengda Company had no right to refuse to perform to pay for the freight.

Pertaining to whether Jiangpeng Company and Jinshengda Company could refuse to pay Hongcheng Company on the ground that Hongcheng did not issue an invoice, the fact was that Jianpeng Company and Jinshengda Company were aware that an invoice in full amount was available on request.

4. The Higher People's Court of Hainan Province: Civil Judgment No. 478 [2020] of the Final Instance of Hainan Province; Disputes over marine construction project contracts

(1) Basic facts

In January 2015, Gangwan Company and Ruyidao Company entered into a General Contractor Agreement, which stipulated that Gangwan Company, as the general contractor, shall undertake the construction of the eastern section of the Haikou Ruyi Island Project developed by Ruyidao Company. Disputes arose during the performance of the contract.

(2) Key Points of Judgment

(a) On the validity of the General Contractor Contract and the Supplementary Agreement-

In accordance with Article 14 of the Interpretation (II) of the Supreme People's Court on Several Issues concerning the Application of the Contract Law of the People's Republic of China, the "mandatory provisions" as prescribed in Item 5 of Article 52 of the Contract Law of the People's Republic of China refers to mandatory provisions and administrative regulations.

Ruyidao Company, the developer of the project involved in this case, filled out the sea areas without obtaining the corresponding certificate of right to use sea areas, which violated the provision of paragraph 2, Article 3 of the Law of the People's Republic of China on the Administration of Sea Areas that "any entity or individual that intends to use sea areas must obtain the right to use sea areas according to law", and the consequences would be administrative punishment under Article 4422.

Therefore, the court held that the aforementioned paragraph 2 of Article 3 was a mandatory administrative provision. The violation of this provision did not result in the invalidity of the contract

for the project. Accordingly,the General Contractor Contract and the Supplementary Agreement concluded between Gangwan Company and Ruyidao were lawful and effective, under which both parties should fully perform their respective obligations as agreed upon in the contracts, and assume the liability for breach of contract.

(b) Whether the General Contractor and the Supplementary Agreement was ever rescinded by Gangwan Company and Ruyidao Company-

According to the facts of the case, Ruyidao Company repeatedly failed to pay the progress payments of the project for a long period of time with a large amount past due.

From August 2017 when Gangwan suspended the construction work to January 24, 2019 whenGangwan Company sent a notice to rescind the contract with a demand for all the payment overdue, the two defendants failed to make any payment.

During this period of time Ruyidao Company and its wholly-owned parent company, Zhonghong Company faced several lawsuits. Eventually, Zhonghong Company delisted from the Shenzhen Stock Exchange, which adversely affected the defendants' obligation to pay. The aforesaid circumstances have met the conditions for rescission as set out in subparagraph (b) (e) (f) of Article 16.2 of the General Terms, and the rescission of the said contract was in conformity with the legal provisions.

At the same time, in accordance with the provisions of Article 96 of the Contract Law of the People's Republic of China, where a contract is terminated on the ground that paragraph 3 of Article 94 above or the conditions agreed upon are satisfied, the other party shall be notified, and the contract shall be terminated upon the receipt of the notification. In this case, on January 24, 2019, Gangwan Company sent a notice to terminate the Contract to Ruyidao Company through EMS. The delivery records showed that Ruyidao Company signed and received the document on January 28 of the same year, so the court held that the General Contractor Contract and its supplementary agreement were terminated on January 28, 209.

(c) The issues of amount owed by Ruyidao Company and the breach of contract damages after the contract was rescinded-

First of all, with regard to the value of the work completed by Gangwan Company,the Civil Judgment No. 215 [2018] of the Court of Hainan Province held that, Ruyidao Company recognized that all delayed progress payments to be 918413993 Yuan.However, the court held that the actual value of the construction work completed before the contract was rescinded by Gangwan Company should be 979103454 Yuan.

Second, the question of whether the retention money should be deducted. Article 14.7 of the contract provides that 5% of the total settlement price shall be reserved as quality warranty. However, as agreed in Articles 19.6 and 19.7, after the contractor notifies the rescission of the contract, the owner shall pay the contractor for the completed work. The Court held that since the suspension of construction in August 2017, the two-year warranty period has expired. In that respect, if Ruyidao Company did not provide evidence to prove that the completed project had any quality defects, the quality assurance fund should not be deducted from the overdue project payment.

Thirdly, on the issue of liquidated damage after the termination of the contract.In accordance with Article 10 of the Interpretation of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Cases of Disputes over Contracts on Construction Projects and the provisions of Articles 19.6 and 19.7 of the General Articles of Association, Ruyidao Company shall pay all the project money after the contract is rescinded. After deducting the progress payments of 5,548,747,055 yuan and 1,838,564,900 yuan paid by Ruyidao Company (979103453-5548747055-1838564900=240372259 yuan).

Again, in accordance with the provisions of Article 17 of the Interpretation of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Cases on Disputes over Contracts on Construction Projects, from January 28, 2019 to August 19 of the same year, the interest rate in the loan market announced by the People's Bank of Republic of China shall apply until the day of actual payment by Rruyidao Company.

(d) On the amount of losses suffered by Gangwan Company due to suspension of construction-

According to the facts of the case that has been ascertained, the suspension of work of Gangwan Company since August 2017 was a measure taken upon the request of Ruyidao Company due to the facts that Ruyindao failed to obtain the certificate of right to use sea areas, etc. As a result, Ruyidao Company shall compensate Gangwan Company for the losses incurred during the period of suspension of construction.

This suspension was an urgent measure taken by Gangwan Company as required by Yidao Company. During the aforesaid period of suspension of construction, Gangwan Company reported the number of staff members and vessel machinery and equipment, etc. to the supervising personnel of Ruyidao Company in writing, Ruyidao Company confirmed that the conditions of staff members and vessel machinery and equipment were in line with the scale and progress of the project construction. Therefore all expenses claimed were related to the project.

(e) Whether Ruyidao liable for breach of contract damages for the overdue payment of part of the construction before the rescission of the contract-

The 15% reserve for the part already measured except 5% of the quality assurance fund is conditioned upon the completion acceptance, filing of the completion acceptance, and issuance of the acceptance certificate. From the date of suspension of construction to the date of contract rescission, the reserve of 15% does not meet the contractual payment conditions.

(f) On whether Ruyidao should compensate Gangwan Company for the portion of damages that was not paid by the insurance company-

According to the stipulation of Article 18.1.1 of the General Clauses, the defendant as the owner shall buy "all construction project insurance and third party liability insurance". Although the defendant proved that it had purchased the insurance, it failed to provide evidence that it had paid the insurance premium on schedule.

Therefore, the court held that Ruyidao was liable for the damages which was unpaid by the insurance Company and relevant interest shall apply.

(g) Whether Ruyidao Company should pay Gangwan Company for the expected profits from the unfinished projects-

According to Article 97 of the Contract Law of the People's Republic of China, after the termination of a contract, performance shall cease.

In this case, the reason for the rescission of the contract was due to Ruyidao's default, so Ruyidao should compensate Gangwan Company for the expected loss of profits from unfinished portion of the project.

Upon appraisal, the expected profit of the unfinished project based on the list of contracts was 2,547,691.68 yuan.

The court held that, compared with the Provisions on the Budget Preparation of Budgetary Estimates of Coastal Port Construction Projects, the calculation of the expected profits of the unfulfilled portion based on the list of contract between Gangwan Company and Ruyidao Company was objective and scientific, so the expected profits of the unfulfilled portion in this case should be 2,547,691.68 yuan.

(h) Whether Gangwan Company has a priority right for compensation for the construction money owed by Ruyidao Company-

Article 286 of the Contract Law of the People's Republic of China provides that: "Where the developer fails to pay the price as agreed upon, the contractor may demand payment from the developer within a reasonable period of time. If the developer fails to pay within the time limit, the contractor may, in accordance with the nature of the construction project, enter into an agreement with the developer to liquidate the project, or petition the People's Court to auction the project in accordance with the law, unless the project is not suitable for liquidation or auction in light of its nature.Consequently, the

contractor shall have the priority right to the distribution of the liquidation or auction proceeds.

In this case, the project was for land reclamation (land fill), which the developer did not obtain the required certificate for the right to use sea areas, so the maritime safety administration ordered the project to return and restore the sea areas to their original state. The Rectification Plan submitted by Gangwan Company in the second instance was for the improvement of the Ruyi Island (Phase I and Phase II) which is not related to the project this case. The court held that the value of the project involved could not be assessed and Gangwan Company could not have the priority right for compensation from Ruyidao Company.

(i) Whether Zhonghong Company assumed the joint and several liabillity as a guarantor-

In light of the name and contents of the Guarantee Letter issued by Zhonghong Company to Gangwan Company on January 22, 2015, and the Meeting Minutes of January 28, 2018, the court held that Zhonghong Company had a clear intention to be joint and several liable for the debts towards Gangwan Company. The guarantee contract was valid. The bylaws of Zhonghong Company stated that when the guarantee reached a certain amount, it should be decided by its board of directors. The court held that the fact that a company's guarantee contract shall be subject to the deliberation of the board of directors is the company's internal business, it does not bind any third party. Therefore, the court held that the aforesaid guarantee provided by Zhonghong Company did not fall under any of the circumstances as prescribed in Article 52 of the Contract Law of the People's Republic of China, and should be determined valid.

In conclusion, in accordance with Article 18 of the Guarantee Law of the People's Republic of China, Zhonghong Company was jointly and severally liable for the debts of Ruyidao Company towards Gangwan Company.

B. Maritime-related administrative cases

1. The Higher People's Court of Hainan Province: (No. 299 [2020], Administrative Ruling of the Administrative Tribunal of Hainan Province); fishery related administrative disputes

(1) Basic Facts

On February 14, 2019, the Department of Agriculture of Hainan Province issued Notice No. 27 to repeal the plan of 2013 for the reconstruction of Nansha Fishing Vessels No. 065, 066, 067,068 vessels owned by Nanying Company; the vessel reconstruction permits were acquired by forged documents. Nanying Company objected to the ruling and brought the lawsuit against the administrative departments.

(2) Key Points of Judgment

When a party files an administrative lawsuit with the People's court, it shall not only meet the conditions for instituting an action as prescribed in the Administrative Procedure Law of the People's Republic of China, but also has the interests in the subject matter of the legal action.

A People's Court can denya hearing on cases that only complies with the statutory form and procedures but of no interests to the party that brings the lawsuit.

In this case, the substance of the Official Notice No. 27 and the Official Reply No. 34 were all administrative acts to repeal the plans for the reconstruction of four fishing boats with the serial numbers of 065, 066, 067 and 068 of Hainan Province, resulting in the same impact on the rights and obligations of Nanying Company.

In 2019, Nanying Company filed an administrative lawsuit with the Third Intermediate People's Court of Beijing against the Ministry of Agriculture and the Department of Agriculture of Guangdong Province, requesting the revocation of the Official Reply No. 34. The case was tried by the Third Intermediate Court of Beijing Municipality and the entities of the first and second instances of the Higher People's Court of Beijing Municipality. The trial was conducted on the grounds of whether Nanying Company was satisfied with the ruling of the Ministry of Agriculture and Rural Areas to abolish the Plan Serial Number of 065, 066, 067 and 068 plans of Hainan. The Supreme People's Court

of Beijing made an administrative judgment on December 18, 2019 (No. 8078 [2019] of the Administrative Tribunal of Beijing Municipality), affirming that Nanying Company used forged documents to obtain permits for the reconstruction of aforementioned vessels. In the Official Reply No. 34, the administrative acts of abolishing the reconstruction plan of the 4 fishing boats involved were supported by evidence, with correct application of laws and regulations, and complied with the statutory procedures. Ultimately, the administrative judgment was effective and in force.

Therefore, the ruling of the court to dismiss the lawsuit of Nanying Company did not deprive Nanying Company of its right to sue.

2. The Higher People's Court of Hainan Province: Administrative Judgment No. 420 [2020] of the Administrative Tribunal of Hainan Province, the case cause: Administrative dispute over aquaculture in waters and tidal flats

(1) Basic Facts

On March 14, 2014, the People's Government of Danzhou City issued Danzhou City Government (Sea) Aquaculture License (2014) No. 00001) to Danzhou Yonglexing Company.

On September 13, 2018, the Danzhou Municipal Ecological Environment Bureau made Announcement No. 29 [2018] on Administrative Punishment Advance Notice, notifying Danzhou Yonglexing Company that it violated Article 20 of the Ecological Red Line Regulations of Hainan Province for its illegal construction of large scale breeding and other construction projects damaging ecological red line and causing environmental pollution. In accordance with Article 31 of Hainan Province Regulations on Ecological Red Line, the decision was to order the violator to demolish, within three days, the illegal breeding farm. On November 12, the written decision on administrative penalty was served by Danzhou Municipal Ecological Environment Bureau. Danzhou Yonglexing Company was dissatisfied and thus brought an action.

(2) Key Points of Judgment

The subject matter of review in this case was whether the alleged administrative action was lawful. The points of dispute are:(a) Whether the alleged administrative action is abuse of power; (b) Whether the evidence for determining the violation of law by Danzhou Yonglexing Company due to administrative action was conclusive.

(a) On whether the alleged administrative act constitutes abuse of power.

In analyzing whether the alleged administrative action is abuse of power, the nature of the alleged administrative action in the Administrative Law must be examined first.

Administrative penalty is an administrative act of an administrative organization to impose punishment on the subject of penalty on the basis of illegal acts.

In this case, the administrative organization, based on its findings that Danzhou Yongxing Company conducted illegal large scale breeding and other construction projects that crossed the ecological red line and polluted the environment, made the decision to order Danzhou Yongsing Company to dismantle illegal constructions within a prescribed time limit.Under Article 12 of the Measures for Environmental Administrative Punishment, ordering demolition within a prescribed time limit is one of the administrative forms of ordering for correction.

Paragraph 2 of Article 11 of the Measures for Environmental Administrative Punishment provides that "Where a party fails to make corrections within the time limit as required and the violation is still ongoing, the violation may be determined as a new environmental violation. In this case, although Danzhou Yongxing Company filed an application for administrative reconsideration within the time limit, it not only failed to make correction within the time limit prescribed in the Decision on Ordering for Correction but also continued with the illegal activities. The court held that Danzhou Municipal Ecological Environment Bureau's decision did not fall within the scope of abuse of power.

(b) Whether the evidence for the determination of Danzhou Yonglexing Company for illegal administrative act is conclusive.

The alleged administrative action determined that Danzhou Yonglexing Company made illegal large-scale breeding within the designated red line of Class II ecological protection, the evidence of which is the Partial Map of Danzhou Comprehensive Plan (Space Class 2015-2030).

However, the Danzhou Comprehensive Plan (Space Type 2015-2030) was approved by the People's Government of Hainan Province on December 1, 2018 after the administrative decision for correction was made. In sum, the abovementioned evidence shall be revoked. Considering that the illegal breeding farm and constructions of Danzhou Yonglexing Company has been dismantled, the administrative order for correction was invalid.

(C) ***Cases involving maritime crimes***

1. The Higher People's Court of Hainan Province: Criminal Judgment No. 155 (2020) of the Final Instance of Hainan Province; illegal mining crime

(1) Basic Facts

On August 21, 2018, Zhang and Cai came to an agreement in which Cai would organize a crew to excavate sea sand (E110°34.632', N20°16.340') in the sea area of the southwest sandy beach of Wenchang City. During the operation, 4,385 cubic meters of sea sand was seized.

(2) Key Points of Judgment

(a) As to whether the original judgment was valid by applying Item 1, Paragraph 1 of Article 3 of the Interpretation on Several Issues Concerning the Application of Law in the Handling of Criminal Cases of Illegal or Destructive Mining (hereinafter referred to as the Interpretation)-

Upon investigation, defendants Cai and Zhang illegally engaged in sand mining on March 31 and August 11, 2018, and on May 9 and October 10 of the same year, the Bureau of Ocean and Fishery of Xuwen County of Guangdong Province and the Bureau of Ocean and Fishery of Wenchang City of Hainan Province respectively imposed administrative punishments on Cai. Afterwards, Cai and Zhang engaged in another illegal mining on August 22 of the same year, the value of the sand excavated was 87,700 yuan. In accordance with item (3), paragraph 1 of Article 3 of the Interpretation,a person who received two or more administrative penalties for illegal mining within two years but continues to engage in such illegal sand mining shall be deemed as "serious circumstance" as prescribed in paragraph 1 of Article 343 of the Criminal Law. The facts that Cai did not obtain the certificate of right to use sea areas and the permit for sand mining constitute the crime of illegal sand mining.

(b)Whether the original judgment was correct on the issue of Zhang's voluntary surrender-

Upon investigation, the "process of investigation" issued by the No. 3 Branch of the Maritime Police of the General Armed Police of Public Security and Frontier Defense of Hainan Province provided that on November 28, 2018 defendant Zhang voluntarily appeared at the police station after receiving a telephone call from the police handling the subject case. Zhang's voluntary confession of his activities of illegal mining to the police should be construed as voluntary surrender.

(c) Whether the sentencing of defendants Cai and Zhang was fair-.

Upon investigation, Cai and Zhang agreed that Cai would provide vessels and crew to excavate sand, Zhang would provide the time and place for sand mining and to make contacts to sell sand. Zhang contacted Zhu, owner of Fuhe Sand Field. Zhu would purchase the sea sand at 31 yuan per cubic meter, while Cai would receive 30 yuan per cubic meter for sand mining. The above-mentioned facts were verified by the confessions of Cai and Zhang, and the testimonies of witness Zhu, as well as other evidence.

In this case, Cai received the majority of the sales of illegally excavated sea sand. Cai also played a more active role in the illegal activities.In addition, Cai continued the illegal mining after receiving the administrative penalties twice. Based on the above, the original judgment was fair in the sentencing of Cai and Zhang.

(d) On the issue of reducing the fines on the defendants-

Article 28 of the Administrative Penalty Law provides that if a person has been fined by an administrative organization, the monetary penalty can be deducted from the judgment of the court for the same illegal activity. In this case, Cai was imposed upon two administrative penalties for illegal mining within two years before committing the subject crime for trial. The monetary penalty paid by Cai for the two administrative was a penalty for the illegal act before the trial of the subject crime. Therefore, the court judgment on Cai should not be reduced by the two administrative penalties. Zhang was not given any administrative punishment. Therefore, it was improper to apply the two

administrative punishment received by Cai to offset the court penalty received by Zhang.

(e) On the issue of defendant Cai's withdrawal of appeal after filed for appealed.

Upon investigation, on June 8, 2020, the court of first instance pronounced a judgment on defendant Cai, who on the same day expressed his intention to appeal. Afterwards, on June 19, 2020, Cai filed the Application for Withdrawal of Appeal and submitted it to the court of first instance.

In accordance with Article 305 of the Interpretation of the Supreme People's Court on the Application of the Criminal Procedure Law of the People's Republic of China: "Where an appellant requests to withdraw his appeal after the expiration of the term of appeal, the People's court of second instance shall examine the request. If, upon examination, the People's court deems that the facts determined in the first trial and the applications of laws are correct and the sentencing is appropriate, it shall render a ruling to permit the withdrawal of the appeal. If it considers that the facts at the original trial are not clear, the evidence is insufficient, or an innocent person is convicted and a heavy punishment is given for a minor offense, it shall not grant permission, and the case shall continue to be heard as an appellate case."Cai requested to withdraw his appeal after the expiration of the appeal period, the court found that the original court did not verify the facts, and the application of laws was wrong. Therefore, the court should continue the trial of this case. Accordingly, the court did not approve Cai's withdrawal of the application for an appeal.

Defendant Zhang violated the provisions of the Mineral Resources Law by engaging in mining without obtaining the certificate of right to use sea areas for the exploitation of sea sand as well as the mining license which constituted the crime of illegal mining. The value of the sea sand involved in this case was 133,950 yuan.

Defendants Cai and Zhang voluntarily pleaded guilty and confessed to their crimes, thus a lighter or lenient punishment could be considered by law.

Defendant Cai paid a fine of 30,000 yuan in advance, and defendant Zhang paid a fine of 20,000 yuan in advance. In addition, the two defendants separately paid ecological compensation and other expenses of 186,500 yuan (total of 373,000 yuan) to the Haikou Maritime Court.

In addition, defendant Cai was sentenced to fixed-term imprisonment of 11 months and a fine of 30,000 yuan; Zhang was sentenced to a fixed-term imprisonment of seven months and a fine of 20,000 yuan.

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中华人民共和国海警法

全国人民代表大会常务委员会

中华人民共和国主席令

《中华人民共和国海警法》已由中华人民共和国第十三届全国人民代表大会常务委员会第二十五次会议于 2021 年 1 月 22 日通过，现予公布，自 2021 年 2 月 1 日起施行。

中华人民共和国主席　习近平

2021 年 1 月 22 日

中华人民共和国海警法

（2021 年 1 月 22 日第十三届全国人民代表大会常务委员会第二十五次会议通过）

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第一条　为了规范和保障海警机构履行职责，维护国家主权、安全和海洋权益，保护公民、法人和其他组织的合法权益，制定本法。

第二条　人民武装警察部队海警部队即海警机构，统一履行海上维权执法职责。

海警机构包括中国海警局及其海区分局和直属局、省级海警局、市级海警局、海警工作站。

第三条　海警机构在中华人民共和国管辖海域（以下简称我国管辖海域）及其上空开展海上维权执法活动，适用本法。

第四条　海上维权执法工作坚持中国共产党的领导，贯彻总体国家安全观，遵循依法管理、综合治理、规范高效、公正文明的原则。

第五条　海上维权执法工作的基本任务是开展海上安全保卫，维护海上治安秩序，打击海上走私、偷渡，在职责范围内对海洋资源开发利用、海洋生态环境保护、海洋渔业生产作业等活动进行监督检查，预防、制止和惩治海上违法犯罪活动。

第六条　海警机构及其工作人员依法执行职务受法律保护，任何组织和个人不得非法干涉、拒绝和阻碍。

第七条　海警机构工作人员应当遵守宪法和法律，崇尚荣誉，忠于职守，纪律严明，严格执法，清正廉洁。

第八条　国家建立陆海统筹、分工合作、科学高效的海上维权执法协作配合机制。国务院有关部门、沿海地方人民政府、军队有关部门和海警机构应当相互加强协作配合，做好海上维权执法工作。

第九条　对在海上维权执法活动中做出突出贡献的组织和个人，依照有关法律、法规的规定给予表彰和奖励。

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第十一条　海警机构管辖区域应当根据海上维权执法工作的需要合理划定和调整，可以不受行政区划限制。

海警机构管辖区域的划定和调整应当及时向社会公布，并通报有关机关。

第十二条　海警机构依法履行下列职责：

（一）在我国管辖海域开展巡航、警戒，值守重点岛礁，管护海上界线，预防、制止、排除危害国家主权、安全和海洋权益的行为；

（二）对海上重要目标和重大活动实施安全保卫，采取必要措施保护重点岛礁以及专属经济区和大陆架的人工岛屿、设施和结构安全；

（三）实施海上治安管理，查处海上违反治安管理、入境出境管理的行为，防范和处置海上恐怖活动，维护海上治安秩序；

（四）对海上有走私嫌疑的运输工具或者货物、物品、人员进行检查，查处海上走私违法行为；

（五）在职责范围内对海域使用、海岛保护以及无居民海岛开发利用、海洋矿产资源勘查开发、海底电（光）缆和管道铺设与保护、海洋

调查测量、海洋基础测绘、涉外海洋科学研究等活动进行监督检查，查处违法行为；

（六）在职责范围内对海洋工程建设项目、海洋倾倒废弃物对海洋污染损害、自然保护地海岸线向海一侧保护利用等活动进行监督检查，查处违法行为，按照规定权限参与海洋环境污染事故的应急处置和调查处理；

（七）对机动渔船底拖网禁渔区线外侧海域和特定渔业资源渔场渔业生产作业、海洋野生动物保护等活动进行监督检查，查处违法行为，依法组织或者参与调查处理海上渔业生产安全事故和渔业生产纠纷；

（八）预防、制止和侦查海上犯罪活动；

（九）按照国家有关职责分工，处置海上突发事件；

（十）依照法律、法规和我国缔结、参加的国际条约，在我国管辖海域以外的区域承担相关执法任务；

（十一）法律、法规规定的其他职责。

海警机构与公安、自然资源、生态环境、交通运输、渔业渔政、海关等主管部门的职责分工，按照国家有关规定执行。

第十三条　海警机构接到因海上自然灾害、事故灾难等紧急求助，应当及时通报有关主管部门，并积极开展应急救援和救助。

第十四条　中央国家机关按照国家有关规定对海上维权执法工作实行业务指导。

第十五条　中国海警局及其海区分局按照国家有关规定，协调指导沿海地方人民政府海上执法队伍开展海域使用、海岛保护开发、海洋生

态环境保护、海洋渔业管理等相关执法工作。

根据海上维权执法工作需要，中国海警局及其海区分局可以统一协调组织沿海地方人民政府海上执法队伍的船舶、人员参与海上重大维权执法行动。

第三章　海上安全保卫

第十六条　为维护海上安全和秩序，海警机构有权依法对在我国管辖海域航行、停泊、作业的外国船舶进行识别查证，判明船舶的基本信息及其航行、作业的基本情况。对有违法嫌疑的外国船舶，海警机构有权采取跟踪监视等措施。

第十七条　对非法进入我国领海及其以内海域的外国船舶，海警机构有权责令其立即离开，或者采取扣留、强制驱离、强制拖离等措施。

第十八条　海警机构执行海上安全保卫任务，可以对在我国管辖海域航行、停泊、作业的船舶依法登临、检查。

海警机构登临、检查船舶，应当通过明确的指令要求被检查船舶停船接受检查。被检查船舶应当按照指令停船接受检查，并提供必要的便利；拒不配合检查的，海警机构可以强制检查；现场逃跑的，海警机构有权采取必要的措施进行拦截、紧追。

海警机构检查船舶，有权依法查验船舶和生产作业许可有关的证书、资料以及人员身份信息，检查船舶及其所载货物、物品，对有关违法事实进行调查取证。

对外国船舶登临、检查、拦截、紧追，遵守我国缔结、参加的国际条约的有关规定。

第十九条　海警机构因处置海上突发事件的紧急需要，可以采取下列措施：

（一）责令船舶停止航行、作业；

（二）责令船舶改变航线或者驶向指定地点；

（三）责令船舶上的人员下船，或者限制、禁止人员上船、下船；

（四）责令船舶卸载货物，或者限制、禁止船舶卸载货物；

（五）法律、法规规定的其他措施。

第二十条　未经我国主管机关批准，外国组织和个人在我国管辖海域和岛礁建造建筑物、构筑物，以及布设各类固定或者浮动装置的，海警机构有权责令其停止上述违法行为或者限期拆除；对拒不停止违法行为或者逾期不拆除的，海警机构有权予以制止或者强制拆除。

第二十一条　对外国军用船舶和用于非商业目的的外国政府船舶在我国管辖海域违反我国法律、法规的行为，海警机构有权采取必要的警戒和管制措施予以制止，责令其立即离开相关海域；对拒不离开并造成严重危害或者威胁的，海警机构有权采取强制驱离、强制拖离等措施。

第二十二条　国家主权、主权权利和管辖权在海上正在受到外国组织和个人的不法侵害或者面临不法侵害的紧迫危险时，海警机构有权依照本法和其他相关法律、法规，采取包括使用武器在内的一切必要措施制止侵害、排除危险。

第四章　海上行政执法

第二十三条　海警机构对违反海上治安、海关、海洋资源开发利用、海洋生态环境保护、海洋渔业管理等法律、法规、规章的组织和个人，

依法实施包括限制人身自由在内的行政处罚、行政强制或者法律、法规规定的其他措施。

海警机构依照海洋资源开发利用、海洋生态环境保护、海洋渔业管理等法律、法规的规定，对海上生产作业现场进行监督检查。

海警机构因调查海上违法行为的需要，有权向有关组织和个人收集、调取证据。有关组织和个人应当如实提供证据。

海警机构为维护海上治安秩序，对有违法犯罪嫌疑的人员进行当场盘问、检查或者继续盘问的，依照《中华人民共和国人民警察法》的规定执行。

第二十四条　海警机构因开展行政执法需要登临、检查、拦截、紧追相关船舶的，依照本法第十八条规定执行。

第二十五条　有下列情形之一，省级海警局以上海警机构可以在我国管辖海域划定海上临时警戒区，限制或者禁止船舶、人员通行、停留：

（一）执行海上安全保卫任务需要的；

（二）打击海上违法犯罪活动需要的；

（三）处置海上突发事件需要的；

（四）保护海洋资源和生态环境需要的；

（五）其他需要划定海上临时警戒区的情形。

划定海上临时警戒区，应当明确海上临时警戒区的区域范围、警戒期限、管理措施等事项并予以公告。其中，可能影响海上交通安全的，应当在划定前征求海事管理机构的意见，并按照相关规定向海事管理机构申请发布航行通告、航行警告；涉及军事用海或者可能影响海上军事

设施安全和使用的，应当依法征得军队有关部门的同意。

对于不需要继续限制或者禁止船舶、人员通行、停留的，海警机构应当及时解除警戒，并予公告。

第二十六条　对涉嫌违法正在接受调查处理的船舶，海警机构可以责令其暂停航行、作业，在指定地点停泊或者禁止其离港。必要时，海警机构可以将嫌疑船舶押解至指定地点接受调查处理。

第二十七条　国际组织、外国组织和个人的船舶经我国主管机关批准在我国管辖海域从事渔业生产作业以及其他自然资源勘查开发、海洋科学研究、海底电（光）缆和管道铺设等活动的，海警机构应当依法进行监管，可以派出执法人员随船监管。

第二十八条　为预防、制止和惩治在我国陆地领土、内水或者领海内违反有关安全、海关、财政、卫生或者入境出境管理法律、法规的行为，海警机构有权在毗连区行使管制权，依法实施行政强制措施或者法律、法规规定的其他措施。

第二十九条　违法事实确凿，并有下列情形之一，海警机构执法人员可以当场作出处罚决定：

（一）对个人处五百元以下罚款或者警告、对单位处五千元以下罚款或者警告的；

（二）罚款处罚决定不在海上当场作出，事后难以处罚的。

当场作出的处罚决定，应当及时报所属海警机构备案。

第三十条　对不适用当场处罚，但事实清楚，当事人自愿认错认罚，且对违法事实和法律适用没有异议的海上行政案件，海警机构征得当事

人书面同意后，可以通过简化取证方式和审核审批等措施快速办理。

对符合快速办理条件的海上行政案件，当事人在自行书写材料或者询问笔录中承认违法事实、认错认罚，并有视听资料、电子数据、检查笔录等关键证据能够相互印证的，海警机构可以不再开展其他调查取证工作。

使用执法记录仪等设备对询问过程录音录像的，可以替代书面询问笔录。必要时，对视听资料的关键内容和相应时间段等作文字说明。

对快速办理的海上行政案件，海警机构应当在当事人到案后四十八小时内作出处理决定。

第三十一条　海上行政案件有下列情形之一，不适用快速办理：

（一）依法应当适用听证程序的；

（二）可能作出十日以上行政拘留处罚的；

（三）有重大社会影响的；

（四）可能涉嫌犯罪的；

（五）其他不宜快速办理的。

第三十二条　海警机构实施行政强制措施前，执法人员应当向本单位负责人报告并经批准。情况紧急，需要在海上当场实施行政强制措施的，应当在二十四小时内向本单位负责人报告，抵岸后及时补办批准手续；因不可抗力无法在二十四小时内向本单位负责人报告的，应当在不可抗力影响消除后二十四小时内向本单位负责人报告。海警机构负责人认为不应当采取行政强制措施的，应当立即解除。

第三十三条　当事人逾期不履行处罚决定的，作出处罚决定的海警

机构可以依法采取下列措施：

（一）到期不缴纳罚款的，每日按罚款数额的百分之三加处罚款；

（二）将查封、扣押的财物依法拍卖、变卖或者将冻结的存款、汇款划拨抵缴罚款；

（三）根据法律规定，采取其他行政强制执行方式。

本法和其他法律没有规定海警机构可以实施行政强制执行的事项，海警机构应当申请人民法院强制执行。

第三十四条　各级海警机构对海上行政案件的管辖分工，由中国海警局规定。

海警机构与其他机关对海上行政案件管辖有争议的，由海警机构与其他机关按照有利于案件调查处理的原则进行协商。

第三十五条　海警机构办理海上行政案件时，有证据证明当事人在海上实施将物品倒入海中等故意毁灭证据的行为，给海警机构举证造成困难的，可以结合其他证据，推定有关违法事实成立，但是当事人有证据足以推翻的除外。

第三十六条　海警机构开展巡航、警戒、拦截、紧追等海上执法工作，使用标示有专用标志的执法船舶、航空器的，即为表明身份。

海警机构在进行行政执法 调查或者检查时，执法人员不得少于两人，并应当主动出示执法证件表明身份。当事人或者其他有关人员有权要求执法人员出示执法证件。

第三十七条　海警机构开展海上行政执法的程序，本法未作规定的，适用《中华人民共和国行政处罚法》、《中华人民共和国行政强制

法》、《中华人民共和国治安管理处罚法》等有关法律的规定。

第五章　海上犯罪侦查

第三十八条　海警机构办理海上发生的刑事案件，依照《中华人民共和国刑事诉讼法》和本法的有关规定行使侦查权，采取侦查措施和刑事强制措施。

第三十九条　海警机构在立案后，对于危害国家安全犯罪、恐怖活动犯罪、黑社会性质的组织犯罪、重大毒品犯罪或者其他严重危害社会的犯罪案件，依照《中华人民共和国刑事诉讼法》和有关规定，经过严格的批准手续，可以采取技术侦查措施，按照规定交由有关机关执行。

追捕被通缉或者批准、决定逮捕的在逃的犯罪嫌疑人、被告人，经过批准，可以采取追捕所必需的技术侦查措施。

第四十条　应当逮捕的犯罪嫌疑人在逃，海警机构可以按照规定发布通缉令，采取有效措施，追捕归案。

海警机构对犯罪嫌疑人发布通缉令的，可以商请公安机关协助追捕。

第四十一条　海警机构因办理海上刑事案件需要登临、检查、拦截、紧追相关船舶的，依照本法第十八条规定执行。

第四十二条　海警机构、人民检察院、人民法院依法对海上刑事案件的犯罪嫌疑人、被告人决定取保候审的，由被取保候审人居住地的海警机构执行。被取保候审人居住地未设海警机构的，当地公安机关应当协助执行。

第四十三条　海警机构、人民检察院、人民法院依法对海上刑事案

件的犯罪嫌疑人、被告人决定监视居住的，由海警机构在被监视居住人住处执行；被监视居住人在负责办案的海警机构所在的市、县没有固定住处的，可以在指定的居所执行。对于涉嫌危害国家安全犯罪、恐怖活动犯罪，在住处执行可能有碍侦查的，经上一级海警机构批准，也可以在指定的居所执行。但是，不得在羁押场所、专门的办案场所执行。

第四十四条　海警工作站负责侦查发生在本管辖区域内的海上刑事案件。

市级海警局以上海警机构负责侦查管辖区域内的重大的危害国家安全犯罪、恐怖活动犯罪、涉外犯罪、经济犯罪、集团犯罪案件以及其他重大犯罪案件。

上级海警机构认为有必要的，可以侦查下级海警机构管辖范围内的海上刑事案件；下级海警机构认为案情重大需要上级海警机构侦查的海上刑事案件，可以报请上级海警机构管辖。

第四十五条　海警机构办理海上刑事案件，需要提请批准逮捕或者移送起诉的，应当向所在地相应人民检察院提请或者移送。

第六章　警械和武器使用

第四十六条　有下列情形之一，海警机构工作人员可以使用警械或者现场的其他装备、工具：

（一）依法登临、检查、拦截、紧追船舶时，需要迫使船舶停止航行的；

（二）依法强制驱离、强制拖离船舶的；

（三）依法执行职务过程中遭遇阻碍、妨害的；

（四）需要现场制止违法犯罪行为的其他情形。

第四十七条　有下列情形之一，经警告无效的，海警机构工作人员可以使用手持武器：

（一）有证据表明船舶载有犯罪嫌疑人或者非法载运武器、弹药、国家秘密资料、毒品等物品，拒不服从停船指令的；

（二）外国船舶进入我国管辖海域非法从事生产作业活动，拒不服从停船指令或者以其他方式拒绝接受登临、检查，使用其他措施不足以制止违法行为的。

第四十八条　有下列情形之一，海警机构工作人员除可以使用手持武器外，还可以使用舰载或者机载武器：

（一）执行海上反恐怖任务的；

（二）处置海上严重暴力事件的；

（三）执法船舶、航空器受到武器或者其他危险方式攻击的。

第四十九条　海警机构工作人员依法使用武器，来不及警告或者警告后可能导致更为严重危害后果的，可以直接使用武器。

第五十条　海警机构工作人员应当根据违法犯罪行为和违法犯罪行为人的危险性质、程度和紧迫性，合理判断使用武器的必要限度，尽量避免或者减少不必要的人员伤亡、财产损失。

第五十一条　海警机构工作人员使用警械和武器，本法未作规定的，依照人民警察使用警械和武器的规定以及其他有关法律、法规的规定执行。

第七章　保障和协作

第五十二条　国家建立与海警机构担负海上维权执法任务和建设发展相适应的经费保障机制。所需经费按照国家有关规定列入预算。

第五十三条　国务院有关部门、沿海县级以上地方人民政府及其有关部门在编制国土空间规划和相关专项规划时，应当统筹海上维权执法工作需求，按照国家有关规定对海警机构执法办案、执勤训练、生活等场地和设施建设等予以保障。

第五十四条　海警机构因海上维权执法紧急需要，可以依照法律、法规、规章的规定优先使用或者征用组织和个人的交通工具、通信工具、场地，用后应当及时归还，并支付适当费用；造成损失的，按照国家有关规定给予补偿。

第五十五条　海警机构应当优化力量体系，建强人才队伍，加强教育培训，保障海警机构工作人员具备履行法定职责的知识、技能和素质，提高海上维权执法专业能力。

海上维权执法实行持证上岗和资格管理制度。

第五十六条　国家加强海上维权执法装备体系建设，保障海警机构配备与其履行职责相适应的船舶、航空器、武器以及其他装备。

第五十七条　海警机构应当加强信息化建设，运用现代信息技术，促进执法公开，强化便民服务，提高海上维权执法工作效率。

海警机构应当开通海上报警服务平台，及时受理人民群众报警、紧急求助。

第五十八条　海警机构分别与相应的外交（外事）、公安、自然资源、生态环境、交通运输、渔业渔政、应急管理、海关等主管部门，以

及人民法院、人民检察院和军队有关部门建立信息共享和工作协作配合机制。

有关主管部门应当及时向海警机构提供与开展海上维权执法工作相关的基础数据、行政许可、行政管理政策等信息服务和技术支持。

海警机构应当将海上监督检查、查处违法犯罪等工作数据、信息，及时反馈有关主管部门，配合有关主管部门做好海上行政管理工作。海警机构依法实施行政处罚，认为需要吊销许可证件的，应当将相关材料移送发证机关处理。

第五十九条　海警机构因开展海上维权执法工作需要，可以向有关主管部门提出协助请求。协助请求属于有关主管部门职责范围内的，有关主管部门应当配合。

第六十条　海警机构对依法决定行政拘留的违法行为人和拘留审查的外国人，以及决定刑事拘留、执行逮捕的犯罪嫌疑人，分别送海警机构所在地拘留所或者看守所执行。

第六十一条　海警机构对依法扣押、扣留的涉案财物，应当妥善保管，不得损毁或者擅自处理。但是，对下列货物、物品，经市级海警局以上海警机构负责人批准，可以先行依法拍卖或者变卖并通知所有人，所有人不明确的，通知其他当事人：

（一）成品油等危险品；

（二）鲜活、易腐、易失效等不宜长期保存的；

（三）长期不使用容易导致机械性能下降、价值贬损的车辆、船舶等；

（四）体量巨大难以保管的；

（五）所有人申请先行拍卖或者变卖的。

拍卖或者变卖所得款项由海警机构暂行保存，待结案后按照国家有关规定处理。

第六十二条　海警机构对应当退还所有人或者其他当事人的涉案财物，通知所有人或者其他当事人在六个月内领取；所有人不明确的，应当采取公告方式告知所有人认领。在通知所有人、其他当事人或者公告后六个月内无人认领的，按无主财物处理，依法拍卖或者变卖后将所得款项上缴国库。遇有特殊情况的，可以延期处理，延长期限最长不超过三个月。

第八章　国际合作

第六十三条　中国海警局根据中华人民共和国缔结、参加的国际条约或者按照对等、互利的原则，开展海上执法国际合作；在规定权限内组织或者参与有关海上执法国际条约实施工作，商签海上执法合作性文件。

第六十四条　海警机构开展海上执法国际合作的主要任务是参与处置涉外海上突发事件，协调解决海上执法争端，管控海上危机，与外国海上执法机构和有关国际组织合作打击海上违法犯罪活动，保护海洋资源环境，共同维护国际和地区海洋公共安全和秩序。

第六十五条　海警机构可以与外国海上执法机构和有关国际组织开展下列海上执法国际合作：

（一）建立双边、多边海上执法合作机制，参加海上执法合作机制

的活动；

（二）交流和共享海上执法情报信息；

（三）海上联合巡逻、检查、演练、训练；

（四）教育培训交流；

（五）互派海上执法国际合作联络人员；

（六）其他海上执法国际合作活动。

第九章　监督

第六十六条　海警机构及其工作人员应当依照法律、法规规定的条件、权限和程序履行职责、行使职权，不得滥用职权、玩忽职守、徇私舞弊，不得侵犯组织和个人的合法权益。

第六十七条　海警机构应当尊重和依法保障公民、法人和其他组织对海警机构执法工作的知情权、参与权和监督权，增强执法工作透明度和公信力。

海警机构应当依法公开海上执法工作信息。

第六十八条　海警机构询问、讯问、继续盘问、辨认违法犯罪嫌疑人以及对违法犯罪嫌疑人进行安全检查、信息采集等执法活动，应当在办案场所进行。紧急情况下必须在现场进行询问、讯问或者有其他不宜在办案场所进行询问、讯问的情形除外。

海警机构应当按照国家有关规定以文字、音像等形式，对海上维权执法活动进行全过程记录，归档保存。

第六十九条　海警机构及其工作人员开展海上维权执法工作，依法接受检察机关、军队监察机关的监督。

第七十条　人民政府及其有关部门、公民、法人和其他组织对海警机构及其工作人员的违法违纪行为，有权向检察机关、军队监察机关通报、检举、控告。对海警机构及其工作人员正在发生的违法违纪或者失职行为，可以通过海上报警服务平台进行投诉、举报。

对依法检举、控告或者投诉、举报的公民、法人和其他组织，任何机关和个人不得压制和打击报复。

第七十一条　上级海警机构应当对下级海警机构的海上维权执法工作进行监督，发现其作出的处理措施或者决定有错误的，有权撤销、变更或者责令下级海警机构撤销、变更；发现其不履行法定职责的，有权责令其依法履行。

第七十二条　中国海警局应当建立健全海上维权执法工作监督机制和执法过错责任追究制度。

第十章　法律责任

第七十三条　有下列阻碍海警机构及其工作人员依法执行职务的行为之一，由公安机关或者海警机构依照《中华人民共和国治安管理处罚法》关于阻碍人民警察依法执行职务的规定予以处罚：

（一）侮辱、威胁、围堵、拦截、袭击海警机构工作人员的；

（二）阻碍调查取证的；

（三）强行冲闯海上临时警戒区的；

（四）阻碍执行追捕、检查、搜查、救险、警卫等任务的；

（五）阻碍执法船舶、航空器、车辆和人员通行的；

（六）采取危险驾驶、设置障碍等方法驾驶船舶逃窜，危及执法船

舶、人员安全的；

（七）其他严重阻碍海警机构及其工作人员执行职务的行为。

第七十四条　海警机构工作人员在执行职务中，有下列行为之一，按照中央军事委员会的有关规定给予处分：

（一）泄露国家秘密、商业秘密和个人隐私的；

（二）弄虚作假，隐瞒案情，包庇、纵容违法犯罪活动的；

（三）刑讯逼供或者体罚、虐待违法犯罪嫌疑人的；

（四）违反规定使用警械、武器的；

（五）非法剥夺、限制人身自由，非法检查或者搜查人身、货物、物品、交通工具、住所或者场所的；

（六）敲诈勒索，索取、收受贿赂或者接受当事人及其代理人请客送礼的；

（七）违法实施行政处罚、行政强制，采取刑事强制措施或者收取费用的；

（八）玩忽职守，不履行法定义务的；

（九）其他违法违纪行为。

第七十五条　违反本法规定，构成犯罪的，依法追究刑事责任。

第七十六条　组织和个人对海警机构作出的行政行为不服的，有权依照《中华人民共和国行政复议法》的规定向上一级海警机构申请行政复议；或者依照《中华人民共和国行政诉讼法》的规定向有管辖权的人民法院提起行政诉讼。

第七十七条　海警机构及其工作人员违法行使职权，侵犯组织和个

人合法权益造成损害的，应当依照《中华人民共和国国家赔偿法》和其他有关法律、法规的规定给予赔偿。

第十一章　附则

第七十八条　本法下列用语的含义是：

（一）省级海警局，是指直接由中国海警局领导，在沿海省、自治区、直辖市设立的海警局；市级海警局，是指由省级海警局领导，在沿海省、自治区下辖市和直辖市下辖区设立的海警局；海警工作站，通常是指由市级海警局领导，在沿海县级行政区域设立的基层海警机构。

（二）船舶，是指各类排水或者非排水的船、艇、筏、水上飞行器、潜水器等移动式装置，不包括海上石油、天然气等作业平台。

第七十九条　外国在海上执法方面对我国公民、法人和其他组织采取歧视性的禁止、限制或者其他特别措施的，海警机构可以按照国家有关规定采取相应的对等措施。

第八十条　本法规定的对船舶的维权执法措施适用于海上各种固定或者浮动建筑、装置，固定或者移动式平台。

第八十一条　海警机构依照法律、法规和我国缔结、参加的国际条约，在我国管辖海域以外的区域执行执法任务时，相关程序可以参照本法有关规定执行。

第八十二条　中国海警局根据法律、行政法规和国务院、中央军事委员会的决定，就海上维权执法事项制定规章，并按照规定备案。

第八十三条　海警机构依照《中华人民共和国国防法》、《中华人民共和国人民武装警察法》等有关法律、军事法规和中央军事委员会的

命令，执行防卫作战等任务。

第八十四条　本法自 2021 年 2 月 1 日起施行。

省高院发布 2020 年度环资审判十大典型案例

海南省第二中级人民法院

2 月 8 日，省高院召开新闻发布会，通报了全省法院环境资源审判工作情况，并发布了环境资源审判十大典型案例。

案例 1

某海运公司、钟某某海洋环境污染损害责任纠纷民事公益诉讼案

基本案情："弘龙 869"轮自 2018 年 11 月 5 日起由钟某某承租并使用，"飞雄 6"轮船舶经营人为某海运公司，2018 年 11 月 11 日 19 时许至 12 日 6 时许在东方市墩头湾海域抽采两船海砂，第一船每砂 3000 吨于 11 日晚 23 时许过驳至"飞雄 6"轮，过驳完成后"弘龙 869"轮继续抽采海砂，第二船海砂 2500 吨于 12 日 5 时许开始过驳，过驳过程中被海南省公安边防总队海警第二支队查获，后该案移交东方市海洋执法局处理。"飞雄 6"轮于 2018 年 11 月 7 日到达东方市八所港并在墩头湾海域锚泊，11 月 10 日 23 时至 12 日 6 时期间，先后接收了包括"弘龙 869"轮在内多艘船舶过驳的海砂 18600 吨。2019 年 2 月 18 日，东方市海洋丸法局以钟某某未取得开采海砂行政许可且未进行专项环境影构评价为由，作出"东海执处罚〔2018〕026 号"《行政处罚决定书》，责令停止海砂开采并罚款 4.9 万元，该罚款已足额缴纳罚款。事件发生后，公益诉讼起诉人于 2019 年 8 月 15 日在《检察日报·正义网》发布公告，并向东方市自然资源和规划局发函，督促有关单位和社会组织提起诉讼，但无任何适格主体提起诉讼。海南省人民检察院第二分院向海口海事法院提起公益诉讼请求。

裁判结果：被告钟某某、某海运公司赔偿非法开采海砂造成的海洋生态损害 403725.6 元，该款项上交国库用于修复被损害的海洋生态环境。

典型意义：非法采砂是海南环境资源保护领域重点打击的违法犯罪行为，非法采挖海砂不仅危害海洋环境，流入建筑市场还会威胁建筑安全，整治非法采砂不仅需要运用刑事审判严厉打击，还应按照损害者担责的原则由侵权人承担民事侵权责任。

案例 2

陈某等海洋倾废民事公益诉讼案

基本案情：海口市秀英区人民检察院发现有船舶多次向近海倾倒建筑垃圾，同时接群众多次举报，遂将线索移送海口市人民检察院，经调查发现，某地产公司与海口某公司签订《海南海口恒大美丽沙项目 0904、0905 地块土石方工程施工合同》，海口某公司承担该地块范围内土石方开挖、装运、回填、土方外运、建筑垃圾清运等工作。之后海口某公司与海南某公司签订分包合同，海南某公司承包土石方运输，土石方自恒大美丽沙工地运往广东省湛江市南三镇坡头区沙头经济合作社用于退塘还林。然而据无人机多次拍摄，船舶自美丽沙临时码头出发后倾倒于海洋。共四艘船舶参与运输，其中两艘系被告陈某所有。据调查，约倾倒了 69360 方建筑垃圾，截至 2018 年 12 月 13 日，海口某公司向海南某公司和陈某支付工程款共计 184.6 万元。其中陈某个人收取、使用了 169.2 万元。

裁判结果：被告海南某有限公司、陈某、海口某公司连带赔偿环境污染损害 860.064 万元，在全国发行的媒体上公开赔礼道歉，并向海口市人民检察院支付鉴定费 47.5 万元，公告费 800 元。

典型意义：该案件为海口海事法院一审审理的环境民事公益诉讼，海口海事法院依法支持了公益诉讼起诉人的全部诉讼请求。该案依法采信了具备海洋生态环境损害评估鉴定资质的生态环境部华南科学研究所所作的鉴定意见，考虑生态环境损害已经无法通过恢复工程完全恢复的实际，运用环境价值评估方法中的虚拟治理成本方式计算环境损害赔偿数额，对同类案件环境损害赔偿数额的计算具有借鉴意义。

案例 3

海口某公司不服海口市生态环境局行政处罚、海南省生态环境厅行政复议案

基本案情：2018 年 5 月 3 日，被告海口市生态环境局对原告海口某公司进行现场检查，发现该公司存在建设项目需要配套建设的环境保护设施未经验收已擅自投入生产，以及将危险废物混入非 危险废物中储存的环境违法行为。海口市生态环境环境局作出《行政处罚决定书》，决定对原告处 40 万元罚款，并责令限期改正。该公司不服，向被告省生态环境厅提出行政复议申请，省生态环境厅经复议作出《行政复议决定书》，决定维持海口市生态环境局作出的上述行政处罚决定书。该公司遂提起诉讼，要求撤销市环境局作出的《行政处罚决定书》以及省生态环境厅作出的《行政复议决定书》。

裁判结果：法院最终判决驳回该公司的诉讼请求。

典型意义：新旧法的适用问题是大部分原告争议的一个焦点，在新旧法的适用上，要注意判断处罚的违法行为是否属于持续性，是否已经实行终了。如果行政相对人的行为发生在新法施行以前，行政行为作出在新法施行以后，实体问题适用旧法，程序问题适用新法。但本案原告自 2012 年 1 月 1 日生产至今，一直未经过环评验收，故原告的行为属于持续性违法，并未实行终了故环境局适用新法对原告进行处罚，适用法律正确。

案例 4

海南某公司不服海口市琼山区生态环境局、海口市琼山区人民政府行政处罚纠纷案

基本案情：2018 年 7 月 26 日，琼山区生态环境局委托技术公司对某公司十万头现代化猪场进行检测，发现该公司位于海口市琼山区甲子镇桃村东南侧约 380 米的猪场污水处理站氧化塘排放出的水中的化学需氧量、悬浮物均超过《农田灌溉水质标准》（GB5084-2005）中旱作标准，并将超标废水排放至项目周边村民的农地中，已构成超标排放水污染物的行为。琼山环境局认为该公司违反《中华人民共和国水污染防治法》第十条关于水污染物排放超标的规定，对该公司作出罚款 50 万元的行政处罚。该公司不服，向琼山区政府提出行政复议申请，琼山区政府经复议作出《行政复议决定书》，决定维持琼山区生态环境局作出的上述行政处罚决定书。该公司遂提起诉讼，认为琼山环境局行政处罚主体错误，该公司已将污水系统委托海南省某科技公司管理，且合同明确约定由该科技公司承担因污水处理站造成的所有责任，故应当由该科技公司承担全部环保责任及相关处罚。要求撤销琼山区生态环境局作出的《行政处罚决定书》以及琼山区政府作出的《行政复议决定书》。

裁判结果：法院最终判决驳回该公司的诉讼请求。该公司不服一审判决提出上诉，海口市中级人民法院判决驳回上诉，维持原判。

典型意义：建设单位将建设项目中配套建设的环境保护污染防治设施委托他人运营管理，双方签订相关的委托管理协议，但该协议只能约束合同签订双方，环保责任承担主体未发生转移，建设单位不能以该协议书对抗或逃避监管和处罚，建设单位并不免除其作为作为责任人履行环保法律的义务。

案例 5

海南省人民检察院第一分院诉琼海市自然资源和规划局林业行政管理纠纷案

基本案情：被告于 2019 年 3 月 23 日成立，主管该市自然资源、林业等工作。因海南会山省级自然保护区存在非法侵占天然林的情况，经同级人民检察院向被告发出《检察建议书》，建议被告及时采取措施并逐步恢复被毁坏的生态环境资源。被告作出《关于做好海南会山省级自然保护区人工林调查工作的函》、《关于牛路岭库区周边森林资源保护情况报告》、《海南会山省级自然保护区综合整治方案》等，但涉案违法占地问题未得到有效处理。公益诉讼起诉人海南省人民检察院第一分院遂向法院起诉，请求确认被告怠于履行监督管理职责违法并判令其在指定期限内作出行政处理。经审查，海南会山省级自然保护区面积 51873.1 亩，为一级公益林，经 1991 年与 2018 年数据对比，人工林的面积占比增加。其中非法侵占国有林地、林下种植经济作物的斑块 22 块。经现场查看，牛路岭进山道路两侧可见岭上种植成片槟榔树。进入牛路岭水库区，可见琼海市所辖库区的岭上槟榔树有些是成片式种植，有些是插花式种植，村民生产生活迹象明显，槟榔是该村主要经济作物。本案审理期间，被告组织 15 宗违法占地人员自行清理违法占地并清点登记。现尚有 7 宗应清理而未清理。

裁判结果：限被告琼海市自然资源和规划局在指定期限内对已发现的 7 宗违法占用林地的人员依法作出行政处理，履行法定监管职责。

典型意义：行政机关作为环境资源保护社会治理的直接责任主体，其是否依法在职权范围内履行行政管理职责、履行行政管理职责是否到位、是否充分发挥社会治理作用，对环境资源保护起着关键作用。在本案审理过程中，因被告未能实质性落实其管理 职责，人民法院通过依法审查、监督其履职行为，督促其依法清查“种”“蚕食”林地的情况并予以清理，有效守护了涉案省级自然保护区的绿地青山，同时在判决中引导有关职能部门积极承担生态环境保护社会责任，充分发挥环境资源案件在生态保护中的惩戒和价值引领功能，促进环境资源多元共治。

案例 6

屯昌县生态环境局申请强制执行案

基本案情：被申请人屯昌某公司经营的木材加工项目属于编制环境影响报告类建设项目，因该项目未经审批部门批准，于 2016 年 6 月开工建设。环境保护设施未经验收，于 2017 年 5 月投入使用 一案，屯昌县生态环境局对其下发《行政处罚（事先）告知书》，告知其违法事实、处罚依据和拟作出行政处罚决定，并告知其有权讲行听证、陈述和申辩。屯昌某

公司于 2019 年 7 月 22 日申请听证。但在 2019 年 8 月 2 日听证中，听证申请人主动放弃听证权利。2019 年 8 月 8 日屯昌县生态环境局作出《行政处罚决定书》。即对该公司罚款人民币贰拾肆万叁仟元。逾期不缴纳罚款，按每日罚款额的百分之三加处罚款。屯昌某公司拒签该《行政处罚决定书》，屯昌县生态环境局对其留置送达。之后，在法定期限内，屯昌某公司没有交纳罚款，没有申请行政复议也没有提起行政诉讼。2019 年 9 月 11 日，屯昌县生态环境局对屯昌某公司木材加工项目进行现场检查，发现该项目已停产并拆除设备。2020 年 2 月 17 日，屯昌县生态环境局向屯昌某公司留置送达了《督促履行义务催告书》。在催告书指定的期限内，屯昌某公司仍未履行交纳罚款义务，亦未提出书面陈述、申辩意见。屯昌县生态环境局遂申请本院对被申请人屯昌某公司强制执行。

裁判结果：准予强制执行屯环保罚〔2019〕21 号《屯昌县生态环境保护局行政处罚决定书》，即对被申请人屯昌某公司强制收缴人民币贰拾肆万叁仟元及逾期不缴纳罚款按每日罚款额的百分之三加处罚款。

典型意义：涉环资类的行政机关申请强制执行的情况主要是涉案的当事人在进行生产经营时没有编制环境影响报告，且生产经营的项目未经环保审批部门批准。在生态环境局对其进行行政处罚时又怠于行使权利，以已停产并拆除设备来逃避行政处罚。这种行为在实践中不占少数。对于这种明知行为违法又懈怠的当事人，仍应依法律的规定进行处罚，并予以强制执行，加大环保的力度，以维护环境司法的权威。

案例 7

符某某、梁某某、杨某某、海口某公司非法占用农用地罪案

基本案情：2014 年 9 月 16 日，被告人符某某承租了位于海口市龙华区城西镇苍西村村委会即海榆中线 7 公里处东侧的 296 亩农用土 地后，在没有办理土地性质变更等手续的情况下，先后将该农业用地转租被告人杨某某、梁某某、海口某公司及其他案外人建设厂房、办公楼。被告人符某某、梁某某、杨某某、被告单位海口某公司违反土地管理法规，非法占用耕地，分别造成耕地重度破坏 63 亩、29.09 亩、18.35 亩、11.03 亩。被告人梁某某是海口某公司实施非法占用农用地行为的直接责任人员，被告人符某某、梁某某、杨某某、被告单位海口某公司的行为均触犯了《中华人民共和国刑法》第三百四十二条的规定，公诉机关以非法占用农用地罪向法院提起公诉。

裁判结果：法院最终判 决被告人符某某、梁某某、杨某某、海口某公司、梁某某均构 成非法占用农用地罪，分别判处被告人符某某有期徒刑三年，缓刑四年，并处罚金人民币 30000 元；被告人梁某某有期徒刑 两年，缓刑三年，并处罚金人民币 20000 元；杨某某有期徒刑 一年，缓刑两年，并处罚金人民币 10000 元；被告单位海口某公司判处罚金 20000 元；被告人梁某某有期徒刑六个月，缓刑一年，并处罚金人民币 5000 元。

典型意义：“十分珍惜、合理利用土地和保护耕地”是我国的一项基本国策，农用地是农民赖以生存的根本，是农业农村可持续发展的基础，非法占用农用地的行为不仅破坏了土地管理制度，而且对生态资源造成了严重的损害。司法机关对非法占用农用地行为的惩处，彰显司法机关重拳打击破坏环境资源的坚强决心。被告人对已被破坏的土地进行复垦，并达到

种植条件，在一定程度上对生态环境进行了修复，通过复垦方式弥补犯罪行为造成的生态破坏，被告人的生态修复行为应当作为认定被告人认罪悔罪的具体考量因素，对其宣告缓刑的过程中起到了积极的作用。

案例 8

王某某非法采伐国家重点保护植物罪案

基本案情：2013 年 7 月某日上午，被告人王某某持工具到海口市龙华区龙泉镇儒王村王某某家宅基地与邻居家“仁道园”交界处斜 坡地带上采伐野生花梨树 1 株。经海南省林业科学研究所鉴定，上述被采伐的树木属蝶形花科黄檀属的降香黄檀（别名：花梨，学名DalbergiaodoriferaT.Chen），属国家二级野生保护植物。经向海南省林业厅行政审批办公室查询，王某某采伐上述国家重点保护野生植物降香黄檀的行为未办理相关法律许可手续。王某某于案发后在自家院内种植花梨树 10 棵。

裁判结果：被告人王某某犯非法采伐国家重点保护植物罪，判处有期徒刑一年，并处罚金人民币一万元。

典型意义：野生花梨树是国家二级野生保护植物，不仅对生态环境具

有重要价值，同时花梨制品也受到很多人的喜爱和追捧，致使花梨制品的市场价格日益攀升，因此一些不法分子因经济利益的驱使或法律意识的欠缺，非法采伐、毁坏或贩卖花梨，造成花梨资源不可逆转的破坏，给海南珍稀保护植物生态系统造成极大危害，必然受到法律的严惩。

案例 9

林某某非法猎捕珍贵、濒危野生动物罪案

基本案情：2019 年 7 月初某天，被告人林某某到澄迈县红岗农场三队南蛇洞附近自家种植的橡胶园内除草时，在山顶处的一处鹰窝里发现 2 只幼鹰类动物，便带回自家的后院内使用自制的铁笼进行养殖。2020 年 4 月 15 日，澄迈县森林公安局民警接到举报来到林某某家，当场扣押到该 2 只鹰类动物。2020 年 4 月 22 日，被告人林某某主动到案并如实供述了上述事实。

经江西野生动植物司法鉴定中心鉴定，该 2 只动物为鹰雕 ，为国家二级重点保护野生动物。2020 年 4 月 22 日，被告人林某某到澄迈县森林公安局投案自首。

裁判结果：被告人林某某犯非法猎捕珍贵、濒危野生动物罪，判处有期徒刑十个月，缓刑一年，并处罚金人民币 2000 元。

典型意义：本案中，鹰雕是被列入濒危野生动植物种国际贸易公约附录II 的物种，其在大自然中自有其生存法则，被告人林某某在鹰窝中将两只鹰雕带回，本就破坏了其原本的生存环境，而因为两只鹰雕幼小，故被告人未使用猎捕工具，但不影响认定其 29 实施了非法猎捕行为。林某某猎捕 2 只鹰雕的行为构成非法猎捕珍贵、濒危野生动物罪。

案例 10

李某某、黄某某走私珍贵动物制品罪案

基本案情：2018 年 6 月 20 日左右，被告人李某某在香港受黄某（在逃）的委托，利用其在“惠海龙 729”船工作的便利，将黄某交付的两件绿色编织袋包装的物品从香港走私至海南海口。同时，黄某安排被告人黄某某准备在海口接货。李某某私自将两件包裹存放在“惠海龙 729”船舱内，并随该船从香港运至海口。2018 年 6 月 22 日 6 时许，“惠海龙 729”船到达海口秀英港锚地后，李某某联系林秀宝驾驶运输小船从“惠海龙 729”船上卸下两件走私入境的包裹，并让其运送至海口世纪大桥海岸边交给黄某某。被告人黄某某明知黄某托运的物品是从香港走私入境，仍前往海口世纪大桥海岸边接收上述两件包裹，并按照黄某的指示托运至深圳。2018 年 6 月 25 日，被告人黄某某托运的两件包裹运抵深圳市宝安区运达物流中心，颜某某、林某某受货主蔡某某（该三人均另案处理）的指使到运达物流中心提货，运输至东莞市樟木头镇观音山路段时被缉私民警查获，当场扣押了两根用绿色编织袋包装的象牙。经鉴定，现场查获的两根象牙为现代象象牙原牙，共价值 50 万元。

裁判结果：被告人李某某犯走私珍贵动物制品罪，判处有期徒刑五年，并处罚金人民币 6 万元。罚金限在本判决生效后一个月内向本院缴纳。被告人黄某某犯走私珍贵动物制品罪，判处有期徒刑三年，缓刑四年，并处罚金人民币 3 万元。

典型意义：近年来，受当前国内对珍稀动物制品市场需求旺盛，尤其是国内收藏品及工艺品市场活跃影响，国内象牙收藏的不断升温，国内象牙的非法成交价格暴涨，不法分子受利益驱动，不顾贸易禁令动起了走私、倒卖象牙制品牟利的“歪脑筋”。他们心存侥幸，不惜铤而走险，殊不知自身已涉嫌走私而将被追究刑事责任。法官提醒，不要认为帮忙违规带货就不构成犯罪，不要认为不知道运的是什么货就会按照走私普通货物定罪。在走私犯罪中实现货物位置移动的行为人是起重要作用的主犯。不要错误认识自己的行为，低估了运输行为在走私犯罪中的主要作用。没有买卖就没有伤害，广大公民要提高法律意识，加强对濒危野生动物制品的鉴别力，摒弃侥幸心理，切莫因一时之贪而身陷囹圄，应对法律有敬畏之心，不可因错误认识而一失足成千古恨，留下自己人生路上的污点，留下亲人以泪洗面。

来源：澎湃新闻·澎湃号·政务

海 口 海 事 法 院
公 告

（2021）琼 72 民初 42 号

公益诉讼起诉人海南省人民检察院第二分院与被告谢昌平破坏海洋生态责任纠纷民事公益诉讼一案，在本院主持下，双方当事人达成调解。依照《最高人民法院关于适用<中华人民共和国民事诉讼法>的解释》第二百八十九条规定，现予以公告。公告期三十日。

联系人：张钰、立案庭书记员

联系电话：0898-66118082

联系地址:海南省海口市白龙南路 28 号

特此公告。

附:

一、民事起诉状

诉讼请求：1.判令被告谢昌平承担海洋生态环境资源损害修复费用人民币 13225 元；2.判令被告谢昌平承担本案生态环境损害评估及修复方案编制费用 3000 元。

事实和理由：2019 年 6 月 11 日，谢昌平在明知当时为禁渔期的情况下，仍驾驶“儋 0301058”灯光渔船带着黄玉康、林生荣、李伟等 4 名船员在距离海头港 12 海里的海域使用灯光罩网捕鱼，次日凌晨 1 时，谢昌平等人被海南海警一支队查获，现场查获作案工具灯罩网一张以及非法捕捞渔获物 264.5 公斤（小鱿鱼、银鱼、杂鱼），经变卖，非法渔获物变卖款为 1172 元。经海南省海洋与渔业科学院鉴定：谢昌平船只作业网具为撑开掩网掩罩（俗称灯光罩网、灯诱罩网），最小网目尺寸为 9mm，不符合国家规定的 35mm 标准。经执法人员核定，谢昌平非法捕捞作业时间为 2019 年 6 月 12 日，在禁渔期内。

被告谢昌平因上述违法行为，2020 年 9 月 16 日，海南省第二中级人民法院以（2020）琼 97 刑初 129 号刑事判决书，判决被告人谢昌平犯非法捕捞水产品罪，判处有期徒刑七个月，缓刑一年；对未随案移送的作案工具渔网一张、渔获物变卖款人民币 1172 元由扣押机关儋州海警局依法予以没收。该刑事判决已经发生法律效力。

2020 年 5 月 20 日，本院委托海南省海洋与渔业科学院对谢昌平非法捕捞行为造成的生态环境损害情况以及应承担的生态环境损害赔偿及修复责任进行评估鉴定，经该院评估鉴定，谢昌平于禁渔期在儋州洋浦港附近海域进行非法捕捞作业，其行为严重破坏了渔业资源、大量幼鱼遭到捕捞，不利于渔业资源可持续发展，从保护海洋渔业资源的角度来考虑，应当

对儋州洋浦港附近海域进行相应的生态补偿，采用增殖流放的方式进行生物资源修复，被告谢昌平应当在相关技术单位指导下相关海域增殖鱼苗至少 20038 尾。鉴于现不在休渔期，不具备增殖流放的客观条件，故折算成种苗费及运输技术费共 13225 元。另，本次生态环境损害评估及修复方案编制费用 3000 元应计入本案生态环境损害损失中。

二、调解协议

1.被告谢昌平于本调解协议签订后 3 日内支付海洋生态环境资源损害修复费用 13225 元、生态环境损害评估及修复方案编制费用 3000 元，上述两项费用共计 16225 元。

2.双方共同申请海口海事法院依据本调解协议制作《民事调解书》，案件受理费由被告谢昌平负担。

二〇二一年二月一日

海口海事法院
公告

（2021）琼 72 民初 70 号

公益诉讼起诉人海南省人民检察院第一分院与被告林平破坏海洋生态责任纠纷民事公益诉讼一案，在本院主持下，双方当事人达成调解。依照《最高人民法院关于适用<中华人民共和国民事诉讼法>的解释》第二百八十九条规定，现予以公告。公告期三十日。

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特此公告。

附：

一、民事公益诉讼起诉书

诉讼请求：1.依法判令被告林平承担本案生态资源损害修复费用共计人民币 10195 元，或在当地海域增殖放流符合规格的鱼苗 15447 尾；2.依法判令被告林平承担本案生态环境资源损害评估费用人民币 3000 元。

事实和理由：2020 年 4 月 21 日凌晨 4 时，被告林平驾驶“琼临渔 02005”船，搭载其雇佣的王秀双等 4 名船工，从万宁市分界洲岛外海开往洲仔岛附近海域，在禁渔区线内进行底拖网捕鱼作业，10 时许，被巡逻至此的琼海海警拦截检查，在林平驾驶的“02005 船”上，当场查获捕捞渔获水产品 435 斤和渔网 2 张。经海南省海洋与渔业科学院对渔网进行鉴定，林平使用的渔网为单船有翼单囊拖网，渔网网目 16mm,不符合农业部发布的《农业部关于实行海洋捕捞准用渔具和过渡渔具最小网目尺寸制度的通告》中南海区单船有翼单囊拖网最小网目尺寸（40mm）的规定。同时，经万宁市农业农村局对临琼渔 02005 船捕捞作业时所在经纬度套图核实，确认该船作业地点在南海机动渔船底拖网禁渔区线内。

被告林平因上述违法行为，2020 年 11 月 18 日，海南省第一中级人民法院以（2020）琼 96 刑初 194 号刑事判决书，判决被告人林平犯非法捕捞水产品罪，判处拘役六个月，缓刑一年；对作案工具琼临渔 02005 船渔网 2 张、铁链 3 框、渔获物变卖款人民币 261 元依法予以没收，上缴国库。该刑事判决已经发生法律效力。

2020 年 9 月，为查明被告林平上述非法捕捞行为对海洋生态环境资源是否造成损害、具体损害后果和修复方式以及费用量化问题，本院另委托海南省海洋与渔业科学院进行生态

环境损害评估，根据其出具的《关于林平非法捕捞水产品违法行为导致生态环境损害的评估及修复意见书》得出的评估结论为：本案当事人使用不符合规定的渔具在机动渔船拖网禁渔区线内实施非法捕捞作业，破坏了当地的海洋环境和底栖生物的栖息环境；大量捕捞渔业资源尤其是幼鱼资源，破坏了渔业资源的种群结构，严重威胁着渔业资源的可持续发展，给当地海洋生态环境产生了不可逆的破坏，理应承担海洋生态补偿责任，开展生态修复工作。从保护海洋生态环境的角度考虑，应在万宁洲仔岛海域进行生态补偿，开展增殖放流活动，以修复本次非法捕捞行为对该海域生态环境造成的损害。具体意见：一是本案当事人应在案发附近海域增殖鱼苗数量为 15447 尾；二是根据市场种苗价格，建议林平提交总资金壹万零壹佰玖拾伍元整（10195 元），委托专业单位开展增殖放流活动修复受损的生态环境；三是本次生态环境损害评估费叁仟元（3000 元）另行计入本案生态环境损害损失中。

二、调解协议

1.被告林平于本调解协议签订后 3 日内支付海洋生态环境资源损害修复费用人民币 10195 元（此项费用请打入，户名：万宁市财政局财政性资金；账户：1005712490000038；开户行：海南万宁农商银行政务中心支行。）、生态资源损害评估费用人民币 3000 元（此项费用请打入，户名：海南省海洋与渔业科学院；账户：2119900100008475；开户行：农行海口红坎坡支行。），上述两项费用共计人民币 13195 元。

2.双方共同申请海口海事法院依据本调解协议制作《民事调解书》，案件受理费由被告林平负担。

二〇二一年三月二十四日

内河船舶涉海运输在发现地处罚后，船籍港所在地能否再根据“超越许可范围经营水路运输业务”对经营人进行处罚?

内河船非法涉海运输行为，既违反了关于超航区航行的规定，也违反了关于超许可范围经营的规定。发现地海事管理机构依据《内河交通安全管理条例》和《内河海事行政处罚规定》（交通运输部令 2019 年第 11 号），对“超航区航行” 进行严格处罚；经营人所在地水路运输管理部门依据《国内水路运输管理条例》，对“超许可范围经营”进行严格处罚。

来源：交通运输部微信公众号

《海洋法律与政策》稿约

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[2] 赵耀彤：《一名基层法官眼里好律师的样子》，载微信公众号“中国法律评论”，2018 年 12 月 1 日。

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[1]《民法总则》第 27 条第 2 款第 3 项

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[1] 包郑照诉苍南县人民政府强制拆除房屋案，浙江省高级人民法院（1988）浙法民上字 7 号民事判决书。

[2] 陆红霞诉南通市发改委政府信息公开案，《最高人民法院公报》2015 年第 11 期。

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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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