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编者言

当今世界正在经历百年未有之大变局，和平与发展仍是时代主题，但不稳定性与不确定性却更加突出。在目前中美贸易战、新冠肺炎疫情全球大流行、气候问题日益突出的大背景下，海洋经济、海洋技术实施等方面的发展面临着诸多不确定因素，其带来的新风险与新挑战日益受到关注。在积极响应海南自由贸易港建设、推进 21 世纪海上丝绸之路发展的号召下，《海洋法律与政策》（Marine Law and Policy），ISSN 2709-3948，ISSN 2710-1738（online）紧扣国际法、海洋法、海商法、海事行政法律及政策等主题，以期达到交流成果，启迪智慧，紧跟学术思潮，为广大读者服务的目的。

本期《海洋法律与政策》刊发的论文包含了中美贸易战和新冠肺炎疫情影响下的海商法、商品合同和不可抗力条款的解释与适用、欧洲航运业碳治理政策、运输合同下承运人查验提单真实的责任、蓝碳保护体系构建等热点问题。

在贸易高度全球化的今天，中美贸易战及新冠疫情的爆发无疑会给众多领域带来巨大打击，这在跨国贸易中体现得尤为明显。多变的贸易政策会给商品合同的履行带来较以往更大的风险与困难，如何更加积极地应对风险是现在急需解决的问题。为此，海商法领域的专家大连海事大学的 Filippo Lorenzon 教授联合澳门大学的汪超教授通过对涉及不可抗力条款的判例进行分析，认为应当明确将特定关税水平拟定为合同受阻或不可抗力事件，相较标准格式合同，就特殊事件的处理制定专门条款能够更有效地分配此类风险。

虽然《联合国气候变化框架公约》以及国际海事组织对碳减排问题均提出一定的要求，但是国际航运业在实现预计的减排目标方面并不理想，给未来实现碳排放目标带来一定的阻碍。上海海事大学法学院博士研究生孙悦通过对国际公约和 IMO 中关于航运业碳排放的要求进行梳理，关注到欧盟有意将航运业纳入碳排放交易体系内，未来全球航运业的碳排放治理可能会形成区域内治理和全球治理两种模式并存的混合治理格局，并呈现出欧盟以其区域型治理优势向全球治理领域扩张的态势。在此基础上，文章结合我国碳中和的目标，为未来航运业碳减排政策的制定提供有效的建议和措施。

近日最高人民法院对湖南华升工贸有限公司诉长荣海运股份有限公司案进行再审，并对海上货物运输合同下承运人对提单承担的责任进一步作出澄清。中国海事服务中心的魏长庚船长对该案进行详细的分析，通过比较承运人在中国法与英国法下对提单核查所承担的责任，对承运人的抗辩和救济提供思路，也为同类问题提供参考。

全球气候变化是 21 世纪人类面临的最重大挑战之一，为应对气候异常，世界各国都在积极推动国际气候谈判合作。2020 年 9 月，习近平总书记在第 75 届联合国大会上正式宣布，中国力争于 2030 年前二氧化碳排放量达到峰值，努力争取在 2060 年前实现碳中和。海洋是

地球碳循环不可分割的一部分，海洋碳汇作为世界上最大的活性碳汇，是地球碳汇系统的重要组成部分。我国拥有丰富的海岸带生态系统，海洋碳汇的开发与保护在我国实现碳达峰和碳中和的过程中不可忽视。在此背景下，大连海洋大学法学院朱晖教授及大连海洋大学法学院硕士研究生李梦言从海洋碳汇的开发与保护的重要意义出发，对蓝碳保护体系的理论基础和现有蓝碳保护制度框架进行分析，提出可以通过设计陆海统筹碳固存计划、建立蓝碳交易市场和构建生态补偿机制，建立蓝碳保护和发展的制度体系。

另外，本刊将提供“海上加油法律问题专题学术研讨会”以及“2021 海南潜水运动法律与政策问题研讨会”两次研讨会会议综述，供广大读者阅读及思考。海上加油法律问题专题学术研讨会的主题是“关注海上加油法律问题，探究海域性质差异造成的影响，加强对违法行为的监管、提倡海上加油法律化”，旨在探析海上加油在立法、司法及实务层面存在的法律问题，以期能解决海上成品油走私、船舶保税油监管不足、公海加油管辖问题等实际难题。2021 海南潜水运动法律与政策问题研讨会则讨论了海南潜水运动经营管理存在的问题，例如相关法律法规繁多且实行存在现实障碍、取得潜水经营资格之规定不够合理、潜水经营管理规定的缺漏以及潜水事故处理中的司法困境等，并提出了相应对策建议，与会者们还就海南潜水产业发展提出倡议，主张可以通过开发人造景点的方式发展海南特色潜水产业，同时发挥潜水活动在海洋生态环境保护方面的积极作用，实现旅游业发展与生态保护的双丰收。

本期在“新发展与新文献”栏目呈现了四份相关文献，分别是《联合国秘书长在第二届全球可持续交通大会上的讲话》《中华人民共和国海事局关于外国籍船舶进入中华人民共和国领海报告要求的公告》《三亚市冲浪旅游服务规范》《三亚市潜水旅游服务规范》。

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

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Editor's Note

The world today is undergoing profound changes unseen in a century. Peace and development remain the themes of the times, except for growing instability and uncertainties. Against the backdrop of the Sino-US trade war, the COVID-19 pandemic, and the increasingly urgent climate change issues, the development of marine-related industries including marine economy and marine technology is faced with many uncertain factors, which brings new risks and challenges and draws growing attention around the globe. In response to the call for the construction of Hainan Free Trade Port and the development of the 21st-Century Maritime Silk Road, this journal, ***Marine Law and Policy*** [ISSN 2709-3948, ISSN 2710-1738(online)], which aims to provide a platform for all practitioners and academics to exchange ideas, to inspire each other, and to keep up with the trending academic views, is open to all kinds of papers and case reviews covering international law, oceans law, maritime law, maritime administrative law and policy, etc.

This Issue covers a range of hot topics including analyses of the force majeure clause involving contracts of commodities under the impact of the Sino-US trade war and the COVID-19 pandemic, carbon governance policies for the European shipping industry, the carrier's responsibility to check the bill of lading under the contract of transportation, and the establishment of a system for blue carbon protection.

In today's highly globalized world, many industries have been hit hard by the Sino-US trade war and the outbreak of COVID-19, which is particularly evident in cross-border trade. The lack of coherent trade policies will bring greater risks and difficulties to the performance of contracts in the commodities market than before. How to deal with the risks more effectively is an urgent problem that needs to be tackled now. To this end, two experts in the field of maritime law, Professor Filippo Lorenzon from Dalian Maritime University and Professor WANG Chao from the University of Macau, analyzed the case laws on the force majeure clause and believed that a specific tariff level should be regarded as a frustrating or force majeure event. They held that bespoke clauses for the handling of special events can allocate such risks more effectively compared with standard contracts.

There're already certain requirements on carbon emission reduction set out in the United Nations Framework Convention on Climate Change and put forward by the International Maritime Organization, but the expected goals on emission reduction haven't been met yet in the

international shipping industry, which will bring certain obstacles to the realization of future carbon emission goals. Ms SUN Yue, a PhD student at the School of Law of Shanghai Maritime University, reviewed the requirements of international conventions and IMO on carbon emissions in the shipping industry, and noticed that the EU is likely to include the shipping industry into the carbon emissions trading system. Therefore, chances are that a mixed governance pattern in which two patterns, namely, regional governance and global governance coexist will be established in due course as the EU expands into the field of global governance with its regional governance advantages. On this basis and taking China's carbon neutrality goal into account, the article provides useful suggestions and measures for the formulation of carbon emission reduction policies for the shipping industry in time to come.

Recently, the Supreme People's Court of the People's Republic of China heard an appeal *(Hunan Huasheng Industry and Trade Co., Ltd. v. Evergreen Marine Co., Ltd.)* and further clarified the carrier's responsibility for the bill of lading under the contract for the carriage of goods by sea. Captain WEI Changgeng of China Maritime Service Center made a detailed analysis of the case. By comparing the carrier's responsibilities for the verification of the bill of lading under Chinese law and English law, he shared ideas for carriers to defend themselves and to better deal with this kind of problem in the future.

Global climate change is one of the most daunting challenges facing mankind in the 21st century. In order to cope with the abnormal climate, countries around the world are actively promoting international cooperation in climate negotiations. China aims to have CO_2 emissions peak before 2030 and achieve carbon neutrality before 2060, announced by General Secretary XI Jinping at the 75th session of the United Nations General Assembly in September 2020. The ocean is an inseparable part of the earth's carbon cycle, and accordingly, the ocean carbon sink, as the world's largest active carbon sink, plays a crucial part in the earth's carbon sink system. China has different types of coastal ecosystems, so the development and protection of marine carbon sinks cannot be ignored in the process of achieving the goals of carbon peaking and carbon neutrality. In this context, Professor ZHU Hui from the Law School of Dalian Ocean University and her graduate student LI Mengyan clarified the significance of the development and protection of ocean carbon sinks, and further analyzed the theoretical basis and the existing blue carbon protection system. They finally proposed that an institutional system for blue carbon protection and development can be established by designing a land-sea coordinated carbon sequestration plan, developing a blue carbon trading market, and building an ecological compensation mechanism.

In this Issue, we also introduced two summaries of two different seminars, namely, the

"Seminar on Legal Issues of Marine Bunkering" and the "2021 Seminar on Legal Issues of Hainan Diving Sports". The theme of the former is to "focus on legal issues of marine bunkering, explore the impact of different sea areas, strengthen the supervision of illegal acts, and advocate the legalization of marine bunkering". This seminar aims to analyze the legal problems existing in the legislative, judicial, and practical aspects of marine bunkering with a view to addressing practical issues such as smuggling of marine refined oil, insufficient supervision of ships' bonded oil, and jurisdiction over high seas bunkering. While the latter discusses the problems existing in the operation and management of diving sports in Hainan province, such as redundant laws and regulations in this respect and practical obstacles to their implementation, unreasonable requirements for obtaining diving management qualifications, lack of diving management regulations, and difficulties in fairly handling diving accidents, etc. Corresponding countermeasures and suggestions were put forward in the seminar. The participants also brought forward proposals on the development of the diving industry in Hainan, and advocated that the diving industry with Hainan's characteristics can be developed by creating man-made scenic spots, but at the same time full attention should be given to the active role of diving activities in marine ecological environmental protection. In this way, we can strike a great balance between tourism development and ecological protection.

This Issue also provides our readers with easy access to four documents in the column of Recent Developments and Documents, namely, Remarks by the Secretary-General of the United Nations at the Second Global Sustainable Transport Conference; Announcement by Maritime Safety Administration of the People's Republic of China on Reporting Requirements for Vessels of Foreign Nationality Entering the Territorial Sea of the People's Republic of China; Rules on Sanya Surfing Tourism Service; and Rules on Sanya Diving Tourism Service.

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

MLP Editorial

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中美贸易战和新冠肺炎疫情影响下的海商法、商品合同与不可抗力条款

Filippo Lorenzon，汪超*

摘要：着眼于中美贸易战和新冠肺炎疫情对大宗商品市场合同履约之影响，结合对有关不可抗力条款的判例的具体分析，本文认为合同受阻或不可抗力条款在司法实践中难以被有效援引，除非合同明确将特定关税水平约定为合同受阻或不可抗力事件。所有可能受到新冠肺炎疫情或中美贸易战影响的当事人，不管他们来自任何行业，都应做好准备以应对和缓解不断变化的贸易格局。明确的风险分配和在定价中反映这些风险，有助于双方当事人在签订合同前清楚、充分地了解他们所达成的协议。标准格式合同虽然有助分配此类风险，但都不如制定应对诸如潜在贸易战争、“关税”等特殊事件的专门条款更为有效。

关键词：不可抗力条款；商品合同；合同受阻；谷物与饲料贸易协会（GAFTA）；新冠肺炎疫情

一、引言

受中美贸易战和新冠肺炎疫情的影响，大宗商品贸易很可能成为中美贸易战的下一个战略重点，大豆、小麦甚至棉花贸易等在不久的将来很可能就会卷入报复性贸易战争。长期合同的履行过程中可能会出现关税政策调整，而征收短期、中期或长期的关税则可能会给贸易商造成重大的贸易困难，尤其是在市场受到重大影响的情况下。

通常而言，如果关税价目在签订合同前知晓，贸易商在确定价格和其他涉及合同履行的相关因素时就会把关税问题考虑在内。然而，如果贸易商签订合同时新的关税尚未生效和实施，他们将很难通过财务收入再分配来对冲风险。

二、涉及关税的明示条款

有些合同可能有清晰明确的条款，以分配突然征收贸易关税的风险，例如：

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• FOSFA（国际油、油籽和油脂协会，全称为 The Federation of Oils, Seeds and Fats Associations）散装大豆标准格式合同第 20 条规定："卸货港/目的国现在或将来的所有进口关税、税款、征税等均由买方承担。"（重点补充）如果中国对美国大豆征收进口关税，买方应按照 FOSFA 条款承担这部分关税。

• 英国 GAFTA（谷物与饲料贸易协会，全称为 The Grain and Feed Trade Association）关于加拿大和美国谷物的第 27 号合同第 14 条规定："目的国现在或将来的所有进口关税、税款、征税等均由买方承担"（重点补充）。因此，如果贸易伙伴所在的任何国家决定提高对美国谷物征收的进口关税，买方应根据第 27 号合同条款承担额外费用。

• 若货物以 FOB 条款交易，卖方必须支付"出口时应付的所有关税、税款和其他费用"，买方必须支付"进口时所有关税、税款和其他费用"。而以 EXW 条款交易货物时，进出口关税通常由买方负担。

三、高昂且不可预见的关税能否认定为合同受阻或不可抗力情形？

合同受阻原则和不可抗力条款能否在特定的 CIF 或 FOB 贸易合同下适用?并为读者了解上文讨论的超出买卖双方控制的事件如何影响其责任提供一般性指导呢？

商品销售合同通常包含不同详细程度的不可抗力条款，可能试图通过合同约定的方式来解决合同受阻原则（也称为合同落空原则）的适用问题。英国法未明确规定不可抗力的概念，因而通常采取合同具体解释规则，以解释解除商业合同履行责任的条款，此类条款通常包含双方当事人同意解除合同履行责任的具体事件清单，通常包括天灾、罢工、停工、骚乱、内乱和火灾等。[1]若合同当事人试图援引此类条款，需要证明实际发生的事件是否属于合同约定的"一项或多项不可抗力事件"。一旦确定实际发生的事件属于所列举的一项或多项不可抗力事件，则须通过解释合同，以确定双方希望该事件对受影响方的合同义务产生何种影响。[2]例如某些合同约定发生合同受阻事件时装运日期自动延长固定天数，或者一直延长直至受阻事件或其后果停止。某些合同则约定发生合同受阻事件时可以解除合同。[3]无论合同约定什么法律后果，英国法院都将根据其对当事人意图的判断来执行合同。根据近年来的裁决，强烈

[1] FOSFA 54 (2008 edn) l.214.
[2] Navrom *v.* Callitsis Ship Management SA (The Radauti) [1987] 2 Lloyd's Rep. 276 at [281] (affirmed [1988] 2 Lloyd's Rep. 416).
[3] FOSFA 54 (2008 edn) l.217.

建议双方当事人订立合同时仔细考虑合同受阻事件的相关内容及其法律后果。[1]

2003 年，ICC（国际商会，全称为 the International Chamber of Commerce）起草了不可抗力条款，[2]试图将上述普通法理论与大陆法结合起来，后者的不可抗力条款措辞明确因而更容易执行。正如引言中所述，“该条款……提供了一个通用的不可抗力公式，由援引该条款的当事人承担不可抗力条款适用的举证责任。[3]该条款亦列举不可抗力事件清单，该清单符合通用的不可抗力公式所规定的构成要件，但对援引该条款的当事人而言具有证据优势”。[4]然而，当英国法律适用于本合同时，将适用下文讨论的一般严格解释规则，因此笔者建议谨慎定制合同条款。

以商事法庭审判的一起涉及具体的不可抗力条款的案件——The Marine Star 案为例。[5]本案中当事人不履行合同的原因是没有任何可购买替代货物的市场。相关条款——正如在 Mance J.的判决中所述——具体如下：

> “不可抗力条款：
>
> 合同任一方因以下事由对本协议的约定，无论是构成全部原因或部分原因、直接或间接导致或造成的违约、延迟或不履行，均不承担任何责任：（1）革命或其他动乱、宣战或未宣战的战争、公敌行为、禁运或其他法律禁止的行为、官员、统治者或人民的逮捕或限制，海难或其他天灾、航行事故；（2）卖方或者给卖方提供合同产品的人的船舶、管道、机器或其他设施发生故障，而这些设施正是用于生产、运输、接收、制造、装卸或交付产品或者生产该些产品的原材料，或者卖方的供应、运输或其他设施受到损害或干扰；（3）因火灾、风暴、爆炸等造成人员伤亡；（4）或因罢工、停工或限制劳工等导致的，无论是出于何种原因，无论是部分原因还是全部原因，或者履行合同会违反政府、联邦、州或外国及其机构或代表的任何法律、规则、命令或要求，或者这些法律规则和命令要求会妨碍、延迟或阻止合同的履行，无论这些原因是否为本合同所规定类别的特定原因，只要这些原因是卖方或买方无法控制的，即是本条款所指

[1] 当事人应注意不要过分依赖泛指任何其他超出其控制范围的事件的笼统的“席卷一切”的措辞。虽然在商业文件中没有自动适用同类规则（Chandris *v.* Isbrandtsen Moller Co Inc [1951] 1 K.B. 240 at [244–255]），但是当事人如果不打算适用该规则，应明确排除其适用。参见 Tandrin Aviation Holdings Ltd *v.* Aero Toy Store LLC [2010] EWHC 40 (Comm)。关于“阻止”一词在此语境中的使用的讨论，参见 Dunavant Enterprises Inc *v.* Olympia Spinning & Weaving Mills Ltd [2011] EWHC 2028 (Comm)。

[2] 《国际商会 2003 年不可抗力条款》，巴黎：国际商会第 640 号出版物，2004 年。参见 GAFTA 第 100 号合同（装运受阻条款）第 19 条以及 FOSFA 第 54 号合同第 22 条关于不可抗力的规定。

[3] ICC 在 2003 年还起草了艰难情形条款，根据该条款的解释性说明（第 34 页），其与 2003 年不可抗力条款是分开的，尽管它们可以合并到同一份合同中。艰难情形条款第 2 款规定，“当发生超出其合理控制范围的事件时，如果（一方）继续履行合同义务变得过于繁重”，双方当事人应当“协商一种能够合理考虑到事件后果的替代性合同条款”（第 33 页）。

[4] 国际商会《艰难情形条款》，第 26 页。

[5] Coastal (Bermuda) Petroleum Ltd *v.* VTT Vulcan Petroleum SA (No.2) (The Marine Star) [1994] 2 Lloyd’s Rep. 629（上诉法院在 [1996] 2 Lloyd’s Rep. 383 中驳回了该决定）。

的不可抗力事件。在上述情况下，除合同中指定的情形外，以及在合同没有规定任何此类指定的情形下，无论是否存在商业上合理的替代履行方法，卖方都没有义务按比例分配产品和/或交付本协议项下的货物，亦没有义务使用停泊、装卸设施，或是使用其他运输工具或其他交付方式在码头交付货物。”

在 Mance J.的判决中，该条款的措辞不足以成为支撑不履行合同后免责的理由：

“以 Lebeaupin v Crispin 案为例，开始出现两种基本观点。[1]

第一种基本观点认为：“……在每一起案件中，不可抗力条款应结合该条款的前后措辞予以解释，并适当考虑合同的性质和一般条款。该条款的效力可能因具体文本的不同而不同……”[2]

第二种基本观点表明：“……如果卖方希望在目前这种情况下逃避责任，他必须注意使用足够清晰和宽泛的措辞……”。这一观点在 Elderslie Steamship Co. v Borthwick 案件中得到 Macnaghten 勋爵的支持。[3]其认为：“含糊不清的合同是不受法律保护的。”……在本案中，原告不可也无权根据不可抗力条款来免除他们对被告的任何责任。其主要原因在于，原告与 Coastal Aruba 之间签订的合同本质上属于背靠背合同。根据证据和常识，该合同的存在理由是为确保“商事交易的流通”，使原告和 Coastal Aruba 之间的地位如同“原告与被告之间的地位”一样。原告与 Coastal Aruba 之间的合同中存在不可抗力条款，以便被告在与原告的合同中可以援引该不可抗力条款。该不可抗力条款的设置并非是为了让原告在原被告不属于背靠背合同的情形下对 Coastal Aruba 提出抗辩；正如本案所证明，如果该条款被解释为具有独立性质的条款，这将损害 Coastal Aruba 的利益，而非有助于实现其预期目的。

在我看来，这一条款的措辞很容易作出符合双方当事人一般意图的解释。前三个划线的段落主要集中于对卖家供应源的客观干扰；原因与法官 McCardie 先生在 Lebeaupin v. Crispin 案件第 721 页所提及的事实部分相似，即它们不能涵盖卖方自己的合同违约。最后一个划线的段落通常比较宽泛，以便涵盖更多情形——

……任何违约……或不履行……如果直接或间接地是由于卖方无法控制的原因造成的，不论该原因是否属于本合同明确规定的类别。

然而，这就需要考虑：一个原因在当时情况下能否被视为卖方无法控制的原因，如果被告作为这些卖方自己的卖方而订立合同，由此而造成当前的情形或者造成当前背靠背的关系，那么将认定这是构成被告简单违约的原因。我毫不犹豫地得出结论，不应如此看待它，因为如果

[1] Lebeaupin v. Crispin (1920) 2 K.B. 714.
[2] Lebeaupin v. Crispin (1920) 2 K.B. 714, per McCardie J. at 720.
[3] Elderslie Steamship Co v. Borthwick [1905] A.C. 93 at 96.

这样做，将与合同的性质和目的相冲突。”[1]

上诉法院推翻了 Mance J.在这一点上的判决，具体如下：

“我认为，法官采用这种方法解释不可抗力条款是错误的，因为他一开始关注的不是双方使用的措辞，而是考虑双方的“一般意图”。在“The Sea Queen”案中，仲裁员对延迟风险采取了类似的方法，我认为：首要关注应为当事人选择使用的措辞。为了分担船东和承租人之间的延误风险，或者为了从抽象意义上认定延误风险的合理分配，由此出发去解释一般或者普遍接受的原则并试图将租船合同条款强加于该原则或该原则的合理内容中（或者参考 Goff 勋爵在 Societe Anonyme Marocaine de l’Industrie du Raffinage v. Notos Maritime Corp.一案中所述的内容），这种解释方法是不被允许的。因为这意味着合同当事人必须采取他们选择使用的措辞重新达成协议。”[2]

据此，上诉法院认为，该条款确实涵盖了因没有相关市场而导致合同履行不能的情况。[3]尽管此特定案件的情况相当特殊，但法院对该条款的审判显然表明，法官是采用合同具体解释规则对一般措辞的不可抗力条款予以解释。[4]

销售合同通常包含若干条款，以解决一些在相同或类似情况下具有相关性的问题（尽管不完全相同）。目前，在出口销售合同的禁止条款和不可抗力条款之间可以找到这种潜在相互作用的典型例子。上诉法院最近在 Seagrain LLC v Glencore Grain BV 案[5]中阐明 GAFTA 合同中这两个条款之间的关系：

“GAFTA 第 49 号合同包含两项明确处理延迟发货的条款。第 9 条规定卖方享有单方面选择权，可通过调整合同价格将装运期限最多延长 8 天。第 19 条关于不可抗力条款，处理因特定原因引起的延迟装运，并规定卖方必须发出延长装运期限的通知。若装运连续延迟超过 30 天，买方有权选择是否取消延迟部分的货物。若买方不行使此选择权，则延迟部分的货物将自动延长一段时间，此后进一步延长将被视为无效，但若卖家已提供充足的证据证明延迟或不履行是正当的，买方就不得因延迟或不装运而向卖方提出索赔。以导致罢工的财政紧缩措施为例，对卖

[1] *The Marine Star* [1994] 2 Lloyd’s Rep. 629 at 637.
[2] *The Marine Star* [1996] 2 Lloyd’s Rep. 383 at 385, 386.
[3] 关于本案的进一步讨论以及与 Fyffes Group Ltd *v.* Reefer Express Lines Pty Ltd (The Kriti Rex) [1996] 2 Lloyd’s Rep. 171 中讨论的条款中不同措辞的比较，参见 *Treitel*, at para.12-026。
[4] 有关类似方法，参见 Great Elephant Corporation *v.* Trafigura Beheer BV (The “Crudesky”) [2012] EWHC 1745 (Comm), [2012] 2 Lloyd’s Rep 503。有关原棉贸易的示例，参见 Dunavant Enterprises Inc *v.* Olympia Spinning & Weaving Mills Ltd [2011] EWHC 2028 (Comm), [2011] 2 Lloyd’s Rep 619。
[5] Seagrain LLC *v.* Glencore Grain BV [2013] EWCA Civ 1627, [2014] 1 Lloyd’s Rep 598.

方而言，罢工属于禁止条款的范围并导致合同自动解除，尽管罢工本身属于不可抗力条款，但其后果与不可抗力条款所赋予后果大不相同……综上所述，一项“法案”只会增加清关难度，可能会导致清关速度变慢，从而延迟出口，但最终不会阻断出口。因此，它与其他三种触发行为在性质上是不同的。此外，正如延迟最终不会阻断出口的发生一样，它也不会“阻止”合同的履行，而只是延迟合同的履行。诚然，在合同履行的期限范围很短的情况下，超出该期限范围的延迟将“阻止”合同履行，但这不是该行为的后果。这是延误的后果。”[1]

在这些情况下，法院处理的是合同解释问题，并判断案件发生的事实涉及合同的哪一项条款。

1.新 GAFTA 标准格式合同的“装运受阻”条款

鉴于其新颖性和相关性，最近在 CIF GAFTA 标准格式合同中引入的一个新条款值得一提，该条款合并了旧的禁止条款和不可抗力条款，即装运受阻条款。[2]该条款的结构在某种程度上类似于国际商会的不可抗力条款。[3]从某种意义而言，它包含两个独立的部分：第一个部分规定“不可抗力事件”，[4]第二个部分在沿袭旧规定中典型的补救框架的基础上，[5]作了一些重大修改，这些修改很可能影响到贸易商的惯常程序。其中两项改动值得特别注意：第一，该条款不再由可能影响合同履行的障碍引发，而是要求“阻止履行合同”；[6]第二，禁令的取消不再是自动的，如果构成禁令的事件持续超过 21 天，则须立即发出取消通知。该条款就是一个典型的例子，它的条款清晰明确，但使用最新 GAFTA 标准格式合同的贸易商也应修改其内部程序，以遵守新的合同框架。

2.合同受阻：现代法律之陈述

当提及现代合同受阻原则时，可在 The Super Servant Two 案[7]中找到 Bingham LJ 对其作出的最简洁、最完整、最权威的总结：

“Radcliffe 勋爵在 Davis Contractors Ltd v Fareham Urban District Council 案中所作的现代法律陈述是很经典的：[8]

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[1] Ivi, at [36]-[37].
[2] GAFTA 第 100 号合同第 19 条。有关该条款的评论，参见 R. Veal, GAFTA 装运受阻条款介绍[2014] STL。FOSFA 没有修改其规定为两个不同条款的合同结构，参见 FOSFA 第 53 号合同第 23 条和第 24 条。
[3] 关于国际商会的不可抗力条款，参见上文[13-003]。
[4] Ll. 277-282.
[5] Ll. 284-306.
[6] 参见 R. Veal，GAFTA 装运受阻条款介绍 [2014] STL 1。
[7] J Lauritzen AS *v/* Wijsmuller BV [1990] 1 Lloyd’s Rep 1, at p. 8.
[8] Davis Contractors Ltd *v.* Fareham Urban District Council [1956] AC 696.

‘……当按照法律，合同义务已无法履行，因为要求履行的情况将使其与根据合同所承担的义务完全不同，且任何一方都没有过错时，合同落空事件就发生了。我不同意这些条款——因为这不是我承诺要做的事。’

正如 Reid 勋爵在同一案件中所述（第 721 页）：

‘……没有必要考虑双方当事人的意图，亦没有必要考虑如果他们或理性人在事先预见此种新情况时会如何处理。关键在于他们所签订的合同内容是否足够广泛，以适用于新情况：如果不是，则合同终止。’

最高权力机构确立的原则是不容置疑的，具体如下：

A.合同受阻原则的形成是为了缓和普通法“绝对合同责任理论”所产生的不公平……[1]该原则作为一种权宜之计，旨在避免因发生重大变化后履行合同字面条款所造成的不公正，以回应伸张正义的诉求，以实现公平、合理为要求，寻求公正、合理的结果……[2]

B.由于合同受阻会产生合同终止以及双方当事人不再履行后期义务的结果，因此该原则的适用应限制在非常有限范围内，而不能随意扩展……[3]

C.合同受阻使合同立即自动终止。[4]

D.合同受阻事件本质上不应归咎于请求免责的一方的行为或选择。[5]

E.合同受阻事件不是因请求免责的一方的过错而发生……[6]”[7]

这一原则适用于所有合同，包括以 CIF 和 FOB 为价格条款的货物买卖合同。无论它们

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[1] Hirji Mulji *v.* Cheong Yue Steamship Co Ltd (sub nom Dharsi Nanji *v.* Cheong Yue Steamship Co Ltd) (1926) 24 Ll L Rep 209, at p. 213 col 2; [1926] AC 497, at p. 510; Denny Mott & Dickson Ltd *v.* James B Fraser & Co Ltd [1944] AC 265, at p. 275; Joseph Constantine Steamship Line Ltd *v.* Imperial Smelting Corporation Ltd (1941) 70 Ll L Rep 1, at p. 12, col 2; (1941) 70 Ll L Rep 1 [1942] AC 154, at p. 171.

[2] Hirji Mulji *v.* Cheong Yue Steamship Co Ltd (sub nom Dharsi Nanji *v.* Cheong Yue Steamship Co Ltd) (1926) 24 Ll L Rep 209, at p. 213, col 2; Joseph Constantine Steamship Line Ltd *v.* Imperial Smelting Corporation Ltd (1941) 70 Ll L Rep 1, at p.18, col 2; p. 23, col 1; p. 183, 193; National Carriers Ltd *v.* Panalpina (Northern) Ltd [1981] AC 675, at p. 701.

[3] Bank Line Ltd *v.* Arthur Capel & Co [1919] AC 435, at p. 459; Davis Contractors Ltd *v.* Fareham Urban District Council [1956] AC 696, at pp. 715, 727; Pioneer Shipping Ltd *v.* BTP Tioxide Ltd (The Nema) [1981] 2 Lloyd’s Rep 239, at p. 253 col 2; [1982] AC 724 at p. 752.

[4] Hirji Mulji *v.* Cheong Yue Steamship Co Ltd (sub nom Dharsi Nanji *v.* Cheong Yue Steamship Co Ltd) (1926) 24 Ll L Rep 209, at p. 211, 212; p. 505, 509; Maritime National Fish Ltd *v.* Ocean Trawlers Ltd (1935) 51 Ll L Rep 299, at p 302; [1935] AC 524 at p 527; Joseph Constantine Steamship Line Ltd *v.* Imperial Smelting Corporation Ltd (1941) 70 Ll L Rep 1, at p. 9, 11, 12, 20, 25; p. 163, 170, 171, 187, 200; Denny Mott & Dickson Ltd *v.* James B Fraser & Co Ltd [1944] AC 265, at p. 274.

[5] Hirji Mulji *v.* Cheong Yue Steamship Co Ltd (sub nom Dharsi Nanji *v.* Cheong Yue Steamship Co Ltd) (1926) 24 Ll L Rep 209, at p. 213; p. 510; Maritime National Fish Ltd *v.* Ocean Trawlers Ltd (1935) 51 Ll L Rep 299, at p. 303; p. 530; Joseph Constantine Steamship Line Ltd *v.* Imperial Smelting Corporation Ltd (1941) 70 Ll L Rep 1, at p. 12; p. 170; Denny Mott & Dickson Ltd *v.* James B Fraser & Co Ltd [1944] AC 265, at p. 274; Paal Wilson & Co A/S *v.* Partenreederi Hannah Blumenthal (The Hannah Blumenthal) [1983] 1 Lloyd’s Rep 103, at p. 112; [1983] 1 AC 854, at p. 909.

[6] Bank Line Ltd *v.* Arthur Capel & Co [1919] AC 435, at p. 452; Joseph Constantine Steamship Line Ltd *v.* Imperial Smelting Corporation Ltd (1941) 70 Ll L Rep 1, at p. 12; p. 171; Davis Contractors Ltd *v.* Fareham Urban District Council [1956] AC 696, at p. 729; The Hannah Blumenthal, [1982] 1 Lloyd’s Rep 582, at p. 592; [1983] 1 Lloyd’s Rep 103, at p. 112; [1983] AC 854, at p. 882, 909.

[7] J Lauritzen AS *v.* Wijsmuller BV (The Super Servant Two) [1990] 1 Lloyd’s Rep 1, at p. 8 col 1. See also Bunge SA *v.* Kyla Shipping Co Ltd (The “Kyla”) [2012] EWHC 3522 (Comm), [2013] 1 Lloyd’s Rep. 565.

是否受 1979 年《货物买卖法》的约束。[1]

3.供应受阻

在 Atisa SA v Aztec AG 案[2]中，卖方无法依赖不可抗力条款对糖类买卖合同提出索赔，因为该合同明确规定卖方有责任获得任何必要的出口许可证，因此不能将未取得许可证作为不可抗力索赔的依据。本案中卖方与唯一的供应来源者肯尼亚政府签订了合同。在装运之前，肯尼亚内阁通过了一项决议，规定在没有总统或内阁授权的情况下不得出口多余的食品，但在糖类出口方面该决议没有立即付诸实施。大约一个月后，肯尼亚政府决定取消除这份糖类合同以外的所有合同。该糖类合同并没有被取消，但大约六个月后（在此期间装运期被延长，买方要求交货），肯尼亚政府告知卖方该糖类买卖合同无效，因为此前该合同并未被肯尼亚政府认定为生效执行。卖方将此结果通知买方，买方在寻求友好协商后，根据协会规则提出仲裁。仲裁员不支持卖方关于合同受阻的主张，上诉法院维持了这一裁决，因为合同明确规定卖方有责任获得出口许可证，并承担未取得出口许可证的风险。卖方的供应商（和唯一供应商）决定不供货并对该合同的效力征求建议。在被告知合同不具有约束力后，供应商拒绝履行。如果该建议是正确的，则卖方无法履行适当的供应合同，但如果该建议是错误的，则卖方应当采取行动履行供应合同。Parker J.支持仲裁员的决定，他认为：

> “关于合同受阻理论的效力范围必须要定下来。问题在于：在任何一方都没有过错的情况下，因为履行合同的义务与订立合同时所承诺的义务完全不同，此时合同义务是否已经无法履行。然而，正如 Roskil 勋爵所说，在处理此问题时应始终牢记不能轻易援引该理论，避免缔约方借此逃避因不谨慎的商业交易而产生的正常后果。
>
> 值得注意的是，仅证明任何一方都没有过错以及合同无法履行是不足以成立合同受阻的，必须证明合同无法履行是因为履行合同的义务与订立合同时所承诺的义务已经完全不同。”

仲裁员认为情况并非如此，Parker J.也同意，并表示他会得出相同的结论。因此卖家上诉失败。

在 CTI Group Inc v. Transclear SA (The Mary Nour)案中，[3]买方成功地对仲裁员的裁决提出上诉。该案的合同没有不可抗力条款，但买家主张两份 FOB 水泥销售合同因供应商履约

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[1] PST Energy 7 Shipping LLC and Another *v.* O W Bunker Malta Ltd and Another (The “Res Cogitans”) [2016] UKSC 23, [2016] 1 Lloyd’s Rep 589, 参见上文 [1-006]。

[2] Atisa SA *v.* Aztec AG [1983] 2 Lloyd’s Rep. 579.

[3] CTI Group Inc *v.* Transclear SA (The Mary Nour) [2007] EWHC 2070 (Comm); [2008] 1 All E.R. (Comm) 192; 上诉法院在 [2008] EWCA Civ 856 维持该判决; [2009] 2 All E.R. (Comm) 25.

不能而导致合同受阻，因而上诉成功。仲裁员认为，由于买方的竞争对手对潜在供应商施加压力，使得买方在商业上无法履行合同的实质内容，从而形成合同受阻。可法院认为情况并非如此，真正的案件事实和仲裁员认定的事实存在差异，本案中合同并非履行不能，而是履行所需的行动和/或费用与最初设想的完全不同。本案中，合同因供应受阻履行不能，但是在法律上，预期供应失败的风险由做出不合格的销售承诺的卖方承担（在本案的情况下任何供应商都没有供应的义务）。上诉法院 Moore-Bick L.J.在维持一审判决时指出：

> “……本案中合同受阻是无法成立的。正如先例所示，供应商选择不提供货物致使卖方无法履约，这一事实本身并不足以使此类合同目的落空。适用合同受阻原则，必须在合同成立后出现一个后续事件使卖方无法履行合同义务，或者使履行合同的义务在性质上与订立合同时承诺的义务有根本不同。”[1]

尽管该合同在商业上无法履行，但仲裁员错误地认定该 FOB 合同的履行存在合同受阻，因为卖方本可以通过将合同约定为以供应商履行为条件，和/或与供应商签订有约束力的合同来解决这一风险。[2]

4.无法运输或取得已装船货物

若合同没有规定无法运输或取得已装船货物的后果，应结合有关合同的情况，决定卖方能否以合同受阻为由解除合同。问题在于：在任何一方均不存在任何过错的情况下，因实际情况使履行合同的义务与双方在合同中所承担的义务完全不同，是否可以认定为合同已实际不可能履行或无法履行。但是，Roskill 勋爵在 The Nema 案[3]中认为：“不能轻易援引该原则来免除缔约方不谨慎的商业交易所造成的正常后果。”

5.市场波动不构成合同受阻

仅仅是履行费用增加并不足以构成合同受阻。正如 Donaldson J.在 Intertradex SA v Lesieur-Tourteaux SARL 案[4]中所述：

> “合同是否受阻是一个事实和法律的混合问题……CIF 合同的卖方基本义务是按照合同约定交付货物（或货物凭证）。他们预见的基本风险是供应短缺和价格上涨……仅仅由于机械故障

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[1] CTI Group Inc *v.* Transclear SA (The Mary Nour) [2008] EWCA Civ 856; [2009] 2 All E.R. (Comm) 25 at [27].
[2] Dany Lions Ltd *v.* Bristol Cars Ltd [2013] EWHC 2997 (QB), [2014] 1 Lloyd’s Rep 281.
[3] Pioneer Shipping Co Ltd *v.* BTP Tioxide (The Nema) [1981] 2 Lloyd’s Rep. 239 at 253; [1982] A.C. 724 at 752.
[4] Intertradex SA *v.* Lesieur-Tourteaux SARL [1977] 2 Lloyd’s Rep. 146 at 154；上诉法院在[1978] 2 Lloyd’s Rep. 509 中维持该判决。

或铁路运输供给不足（合同约定需要将货物运至装运港的情况下）等常见事件而减少供应，即使供应商是唯一的，亦不属于合同受阻情形。”

在本案中，合同采用 CIF 鲁昂价格条款，销售 800 公吨马里花生榨油机，装运时间为 1973 年 3 月。卖方打算采购某一供应商的货物，据卖方所知（不是买方所知）该供应商是马里花生榨油机的唯一生产商，其工厂距离阿比让有 10 天的铁路路程，而距离达喀尔（唯一的出口港口）约三四天路程。由于供应商工厂的配电盘故障，必须从德国获得更换部件，以及工厂原材料的铁路供应中断，最后供应商和卖方都无法完全履行各自的合同义务。合同包含不可抗力条款，问题在于在此情况下卖方能否主张不可抗力条款，或者当不可抗力条款不适用卖方能否以合同受阻为由进行抗辩。争议提交仲裁，GAFTA 上诉委员会支持卖方的主张，但 Donaldson J.推翻了此裁决。他认为，本案中，即使没有其他供应来源，卖方既不能主张不可抗力条款的保护（因为卖方主张不可抗力的原因仅仅只有机器故障，而材料短缺也是缺货的重要原因），亦不能以合同受阻为由不履行合同。

6.罢工

在装运或购买已装船货物时，卖方必须向买方提供提单（或合同规定代替提单的其他同等文件），根据该提单，货物将交付到合同规定的目的地。若货物的装运是由 CIF 卖方或其代表负责，卖方有权在交付单据等文件时获得货款，当船舶触礁后不能驶离或驶向目的地时，因延迟而造成的任何损害应由买方承担。这种情况以 Badhwar v Colorado Fuel & Iron Corp 案[1]为例，本案卖方以 CIF 孟买价格条款销售了 2,000 吨烧碱。机舱船员的罢工造成货船无法按期航行，也无法将货物卸载并重新装载至另一艘空闲的船舶上，最终导致在新奥尔良装船的货物几个月后才抵达孟买。通常而言，本案中卖方已经履行合同义务，其没有义务寻找一艘不受罢工限制的船舶。因为罢工的可能性及其可能持续的时间始终是存在的（且通常是存在的），但它们不属于 CIF 卖方应承担责任的可预见性问题（除非合同另有约定或存在不当行为）。

7.没有可用的合理航线

在没有明示条款时，路线须是合理的、尽可能是惯常或通常的航线。在合同履行时而非合同签订时，若没有惯常或通常的航线，必须选择一条切实可行的商业航线履行合同。[2]在没有特殊情况下，合同不会仅以订立合同时设想的航线变得不可行，并且履行对卖方来说成本

[1] Badhwar *v.* Colorado Fuel & Iron Corp (1955) 138 F. Supp. 595.
[2] 参见 Tsakiroglou & Co Ltd *v.* Noblee Thorl GmbH [1962] A.C. 93。

更高为由而成立合同受阻。因为在这种情况下，卖方须结合具体情况选择合理或可行的替代航线运输货物。合理或可行的航线应结合案件事实予以确定。但是，卖方也可被认定为履行了合同，若其能够证明其行为符合 1979 年《货物买卖法》第 32 条第 2 款的规定，即“卖方已订立与承运人的合同……当考虑到货物的性质和其他情况，可能是合理的……”[1]这条航线不一定是最短的地理航线或不变的航线。因此，当有多个常用航线时，使用任何常用航线运输都能满足合同的履行。如果合同履行时只有一条航线，在切实可行且不损害货物状况或从根本上改变交易性质的情况下，可以采取这条航线。

8.无法装运货物

若合同明文规定“装运”，除非合同另有规定，否则其将被视为是将货物装船。Mowbray, Robinson & Co v Rosser 案中，[2]美国卖方的经纪人在英国签订了一份销售美国木材的合同，合同规定“装运时间不得迟于明年 11 月底”，而英国买方以货物未在规定的日期内装运为由拒绝履行合同。卖方辩称根据美国的贸易习惯，“装运”是指装上铁路车辆或装在锯木厂的汽车上，但其抗辩未获得支持。在英国合同法中，“装运”是指将货物装到船上，除非合同另有规定。

9.替代履行方法

值得注意的是，CIF 合同的卖方可选择（或有义务）通过两种替代方法之一履行合同，即货物的实际装运或购买已装船货物，除非合同另有规定。[3]然而，合同可以明示或必要的默示约定拒绝任何替代性选择，规定只能通过装运来履行合同。在这种情况下，卖方因缺乏船舶或其他设施工具的运输或政府禁运而导致合同受阻，其无需证明“合同因不能购买已装船货物而无法履行”。如果这些事件因卖方没有承担履行或支付损害赔偿的绝对义务而导致合同受阻，则合同因此解除。因此，在一份以 CIF 鹿特丹为价格条款的埃及棉籽油销售合同规定：“除合同另有规定以外，如果由于……禁止出口……或‘不可抗力’一词所指的除战争以外的任何其他原因延迟装运……装运时间应延长两个月。”McNair J.驳回了买方的主张，即其为了享受该规定的利益，主张卖方还须证明他们无法购买不受埃及政府禁止出口棉籽油规定影响的已装船货物。[4]该判决被上诉法院推翻后又得到上议院的支持，[5]其指出：

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[1] See above at 2-024 et seq., and F. Lorenzon, “CIF 卖方的运输合同何时不合理——以 1979 年《货物买卖法》第 32 条第 2 款为视角” (2007) 13(4) J.I.M.L. 241-257.

[2] Mowbray, Robinson & Co *v.* Rosser (1922) 91 L.J.K.B. 524 CA.

[3] See further, *Treitel*, Ch.10.

[4] JH Vantol Ltd *v.* Fairclough Dodd & Jones Ltd [1955] 1 W.L.R. 642; [1955] 2 All E.R. 516.

[5] JH Vantol Ltd *v.* Fairclough Dodd & Jones Ltd [1955] 1 W.L.R. 1302 CA; Fairclough Dodd & Jones Ltd *v.* JH Vantol Ltd [1957] 1 W.L.R. 136; [1956] 3 All E.R. 921 HL.

“关于卖方须证明他们不能购买已装船货物的建议，我认为在合同中对‘装运’一词的使用以及加上后面‘托运人一旦宣布其无装运能力’一短语，这清楚地表明在这一特定合同中，双方当事人在条款设计上为‘卖方以第一种方式履行 CIF 合同项下的义务，即由其或其代理人装运时被延误’的情况提供保护。我认为，如果认定卖方除证明预期的装运延迟以外，还须进一步证明他们无法购买不受禁令影响的已装船货物，这一条款本质上在商业上行不通。”[1]

在 Lewis Emanuel & Son Ltd v Sammut 案，[2]一份以 CIF 伦敦为价格条款的 1,000 袋马耳他春季新作物马铃薯销售合同于 1958 年 4 月 14 日签订，合同约定：“货物应在 4 月 24 日或之前装运。”在 4 月 14 日至 24 日期间，因卖方无法在停靠马耳他的唯一一艘船只上取得舱位，致使合同未能按期履行。Pearson J 支持仲裁员所作出的“卖方应承担损害赔偿责任”的裁决。该仲裁员认为不存在卖方声称的任何习惯或惯例，凭合同中的默示应保证在规定的装运期限内提供装运空间，并且如果无法装运合同即告终止。Pearson J.进一步认为，虽然没有什么可影响将合同受阻原则适用于销售未确定货物的 CIF 合同，[3]但该案中的合同并不是受阻，而是因卖方无法获得装运空间而导致合同无法履行。然而，买方关于“没有证明合同无法履行并且可通过购买已装船货物来履行合同”的观点亦未获得支持。不是因为“装运”一词排除了它，[4]从实际角度而言是因为货物描述表明合同无法被履行，除非在 4 月 14 日至 24 日期间停靠马耳他的一艘船上装载有合同描述的土豆。然而，无需确定合同描述中的货物是否确实存在于该船上，因为即使没有，亦不会因为这种不可能性而终止合同：

“根据此类合同，卖方有义务或有责任提供货物、舱位、保险合同。如果他不确定是否能够提供货物或舱位或保险单，他可通过合同中的某些条款来保护自己，这取决于可利用的舱位或可提供的土豆，以及可获取的保险合同。但我认为，如果买家被问及合同是否会在卖家无法获得舱位的情况下终止，买家会说‘当然不会，因为这是卖方的义务和责任。获取舱位是卖方的责任，这是他承诺要做的，这是他在这份合同中获得报酬的来源’。如我所述，这是一个看法的问题，只不过这是我对这份合同可能产生的商业影响的看法。”[5]

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[1] JH Vantol Ltd *v.* Fairclough Dodd & Jones Ltd [1955] 2 All E.R. 516 at 520.

[2] Lewis Emanuel & Son Ltd *v.* Sammut [1959] 2 Lloyd’s Rep. 629.

[3] 通过审查大量的先例，Pearson J.得出结论：“我认为，对于未确定货物的 CIF 合同，合同受阻原则的适用并没有特殊之处。但鉴于这些合同的性质，很可能比在其他一些特别确定货物等合同的情况下更难形成合同受阻。但我认为，合同受阻原则同样可以适用于本案合同。只是在这种情况下，很难适用该原则。”（第 640 页）

[4] “答案可能主要是该合同属于货物销售合同，它真正的含义是指卖方根据 CIF 价格条款交付货物于买方，在此期间无论这些货物是由卖方还是其他任何人负责装运，只要他们的履行符合合同所有要求。”（第 639 页）

[5] Lewis Emanuel & Son Ltd *v.* Sammut [1959] 2 Lloyd’s Rep. 629 at 642.

在 Sociedad Iberica De Molturacion SA v Tradax Export SA 案[1]中，涉及一份 CIF 为价格条款的美国大豆销售合同，该合同装运期为 1971 年 10 月 5 日至 25 日，其中一项条款规定：

> “如果在合同期内……由于一个或多个装运港的罢工……货物或部分货物在这期间被阻止装运……则托运人应有权在此类……罢工期间……延长装运时间……如果托运人打算延长装运时间，其应通过电报发出通知……”

1971 年 10 月 25 日，卖方向买方发出电报援引罢工延长条款，但买方声称卖方违约，详细列举了八个潜在的装货港为罢工港，并且指出罢工的性质不足以完全阻止卖方从非西海岸港口的任何其他美国港口装运货物。Donaldson J.同意裁判员和仲裁上诉法庭的裁决，反对将这两项指控作为对买方违约责任的依据，并拒绝推断在这种情况下卖方有义务从另一个美国港口装运货物。“如果装运……在一个或多个装货港……由……罢工……而被阻止”，这些措辞意指卖方打算装运的港口，或者如果没有发生罢工他实际上会装运的港口。因此，尽管对此类条款的解释存在疑问应以有利于履行合同的方式解决，但这一事实，即罢工的规模不足以完全阻止卖方从任何其他美国港口（不包含西海岸港口）装船，并不重要。

10.隐含的不可抗力

在美国 Madeirense Do Brasil S/A v Stulman-Emerick Lumber Co 案中，[2]第二巡回上诉法院认为，该案中以 CIF 价格条款出售巴西木材的卖方，因第二次世界大战造成的舱位稀缺而无法确保舱位空间，他将因此承担违约责任。该合同是在第二次世界大战进行一年多之后签订的，尽管卖方能够获得舱位，但运费却意外上涨，一些木材被安排在甲板上面而不是甲板下面运输。卖方声称，由于战争致使舱位稀缺而形成不可抗力，他对上涨的运费或违反运输合同的规定不承担任何责任。法院驳回了这些主张，理由是这是自愿承担的可预见风险，并补充说：“即使没有可用的船舶，在本案的情况下，原告亦不能被免除履行义务。”[3]

因此，除非合同明确将特定关税水平拟定为合同受阻或不可抗力事件，否则极不可能有效援引合同受阻或一般不可抗力条款。

四、结论

着眼于中美贸易战和新冠肺炎疫情对大宗商品市场合同履约之影响，结合对有关不可抗

[1] Sociedad Iberica De Molturacion SA *v.* Tradax Export SA [1978] 2 Lloyd’s Rep. 545.
[2] Madeirense Do Brasil S/A *v.* Stulman-Emerick Lumber Co, 147 F. 2d 399 (1945).
[3] Madeirense Do Brasil S/A *v.* Stulman-Emerick Lumber Co, 147 F. 2d 399 (1945) at 403.

力条款的判例研判，本文认为合同受阻或不可抗力条款在司法实践中难以被有效援引，除非合同明确将特定关税水平约定为合同受阻或不可抗力事件。所有可能受到新冠肺炎疫情或中美贸易战影响的当事人，不管他们来自任何行业，都应做好准备以应对和缓解不断变化的贸易格局。明确的风险分配和在定价中反映这些风险，有助于双方当事人在签订合同前清楚、充分地了解他们所达成的协议。标准格式合同虽然有助分配此类风险，但都不如制定应对诸如潜在贸易战争、“关税”等特殊事件的专门条款更为有效。

总体而言，有人认为新冠肺炎疫情导致全球主义向孤立主义转变，例如由于贸易和政治局势紧张，中美这两个超级贸易大国可能出现脱钩。在一定程度上，新冠病毒疫情迫使当前全球化、高效的供应链体系，转向以国内为基础的供应链，以降低政治风险并确保对国内消费者的基本供应，这进一步加剧了贸易脱钩。

然而，笔者认为新冠病毒疫情反而及时提醒人们，国际经济是相互依存、共生共存的。新冠病毒不是全球主义的终结，相反，开展更高程度的社会经济合作、建立相互依存的多边主义和全球供应链，能让我们在这个不断变化的世界中更好地应对新冠病毒疫情，我们应对新冠病毒疫情的战略也将决定我们的世界将如何变化。[1]

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[1] WANG Chao, To Cope with a New Coronavirus Pandemic: *How Life May Be Changed Forever*, Chinese Journal of International Law, Volume 19, Issue 2, June 2020, Pages 221–228, https://doi.org/10.1093/chinesejil/jmaa020.

The Force Majeure Clause, Contracts of Commodities, and Maritime Law in the Era of Sino-US Trade War and Covid-19

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Abstract: This paper looks at the issue of effects of the performance of contracts in the commodities market as affected by the Sino-US trade war and in light of the Covid-19 pandemic. With a detailed examination of the case laws on the Force Majeure Clause, this article argues that it is highly unlikely that frustration or a general force majeure clause may be usefully invoked, unless specifically dressing up a specific tariff level as a frustrating or force majeure event. For all those likely to be affected either by the Covid-19 or the trade war, which could be parties within a number of different industries, should make preparations to manage and mitigate against the changing trade landscape. Clear allocation of risk and a reflection of those risks in the pricing can help both parties clearly and fully understand the bargain they have struck before committing to a contract. Although standard contracts may assist in allocating such risk, there is no substitute for a bespoke clause to deal specifically with issues such as potential trade wars and "tariffs" and/or to perhaps share some of the risks.

Keywords: Force Majeure Clause; Contracts of Commodities; frustration of contracts; GAFTA; Covid-19

I. Introduction

Against the backdrop of the Sino-US Trade War and the Covid-19 pandemic, commodities businesses may well end up in the front line of the next strategic move of the trade war between the two trade superpowers. It seems in fact possible that soybean, wheat and even cotton could be caught up in retaliatory trade warfare in the near future. As tariffs can come into effect in the course of the performance of a long term contract, the short, medium and long term effects of imposing

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tariffs may create significant difficulties to traders, particularly when their exposure on the affected market is significant.

Of course, once a tariff is known before the contract is entered into, it will be taken into account by the traders when fixing the price and the other relevant factors of the operational performance of the contract. However, when at the time of contracting tariffs are not on the horizon, redistributing or reallocating their financial income to hedge the trader's exposure may be difficult indeed.

II. Express Clauses Directly Addressing Tariffs

Some contracts may have clear and express clauses allocating the risk of a sudden imposition of a trade tariff. For example:

- The FOSFA standard contract for soybeans in bulk, provides at clause 20 that: *"All import duties, taxes, levies, etc.,* ***present or future*** *in port of discharge/country of destination shall be for Buyers' account."* (emphasis added) If China were to impose import duties on US soybeans, the buyer on these FOSFA terms would bear the cost of those duties.
- GAFTA Contract No.27 for Canadian and US Grain, clause 14 provides that *"all import duties, taxes, levies, etc.,* ***present or future****, in country of destination, shall be for Buyers' account"* (emphasis added). Accordingly, if any country where a trading partner is based decided to hike up import duties for US grain, the buyer on Contract No. 27 terms, would be liable to pay the additional costs.
- If goods are sold on "Free on Board" (FOB) terms, the seller must pay *"all duties, taxes and other charges payable upon export"* and the buyer must pay *"all duties, taxes and other charges... payable upon import of the goods"*. For goods sold on "Ex Works" (EXW) terms, both export and import duties are usually for the buyer's account.

III. Can (Expensive and Unforeseen Tariffs) Frustrate the Contract or Be a Force Majeure Event?

But can the doctrine of frustration and contractual force majeure provisions may be used in the specific context of c.i.f. and f.o.b. contracts, as well as to offer the reader general guidance on how the duties of sellers and buyers discussed above may be affected by events beyond their control.

Contracts for the sale of commodities invariably contain force majeure clauses of varying degree of detail and may also attempt a contractual solution to the situation where the Common law doctrine of frustration applies. There is no general principle of force majeure in English law and

because of this, and the general contra proferentem approach which English law adopts towards stipulations which seek to excuse performance in commercial contracts, such clauses tend to contain a detailed list of events which the parties agree may be invoked to excuse performance. These typically include act of God, strikes, lockouts, riots, civil commotions, and fires.[1] If a party seeks to rely on such a provision, the issue is one of fact to establish whether the event which occurred could be fitted into one or more of the express exclusions. Once ascertained that the actual occurrence falls within one or more of the listed force majeure events, the contract has to be construed to determine what effect the parties intended the event to have on the affected party's contractual obligation.[2] Some contracts will provide for an automatic right to extend the date of shipment for a fixed number of days or until the named event, or its consequences, cease. Others provide for the contract to be cancelled.[3] Whatever the consequence agreed for, it will be enforced by the English court based on its determination of the intention of the parties. In light of recent decisions, careful consideration of what events are relevant and what consequences should result is highly recommended.[4]

In 2003, the International Chamber of Commerce drafted a Force Majeure Clause[5] which tries to marry the common law tradition summarised above with the civil law approach where generally worded force majeure clauses are more easily enforced. As stated in its introduction "the Clause [...] provid[es] a general force majeure formula placing the burden of proving the requirements for the application of the clause on the party invoking it.[6] The Clause also provides a list of force majeure events, however, which is subject to the same conditions as established for the general force majeure formula but with evidential advantages for a party invoking the close through this route".[7] Where English law applies to the contract, however, the general strict rule of interpretation discussed below will apply and carefully tailored drafting is always advisable.

A case where a detailed force majeure clause came to the scrutiny of the Commercial Court is

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1 FOSFA 54 (2008 edn) l.214.

2 Navrom *v.* Callitsis Ship Management SA (The Radauti) [1987] 2 Lloyd's Rep. 276 at [281] (affirmed [1988] 2 Lloyd's Rep. 416).

3 FOSFA 54 (2008 edn) l.217.

4 Parties should be careful not to rely too heavily on general "sweep up" wording referring to any other event beyond a party's control. Although there is no automatic application of the *eiusdem generis* rule in commercial documents (Chandris *v.* Isbrandtsen Moller Co Inc [1951] 1 K.B. 240 at [244–255), the parties should expressly exclude its application if they do not intend it to apply. See also Tandrin Aviation Holdings Ltd *v.* Aero Toy Store LLC [2010] EWHC 40 (Comm), and for a discussion on the use of the word "prevented" in this context, see Dunavant Enterprises Inc *v.* Olympia Spinning & Weaving Mills Ltd [2011] EWHC 2028 (Comm).

5 ICC, Force Majeure Clause 2003, ICC Publication n.650, Paris 2004. See cl.19 of GAFTA 100 (Prevention of Shipment Clause) and cl.22 of FOSFA 54 for other examples of force majeure clauses.

6 The ICC in 2003 also drafted a Hardship Clause which in the explanatory notes (at p.34) is said to stand separately from the 2003 Force Majeure clause, although they can both be incorporated into the same contract. Paragraph 2 of the Hardship Clause requires the parties, in the event that "the continued performance of [a party's] contractual duties has become excessively onerous due to an event beyond its reasonable control", to "negotiate alternative contractual terms which reasonably allow for the consequences of the event". (at p.33).

7 ICC Hardship Clause at p.26.

that of The Marine Star.[1] The reason for non-performance of the contract in this case was the absence of any available market in which to acquire a replacement cargo. The relevant clause—as reported and emphasised in the judgment of Mance J.—reads as follows:

> "Force Majeure Clause
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> *Neither party shall be liable for any breach, delay or non-performance hereunder which directly or indirectly results from or is caused, in whole or in part*, by revolutions or other disorders, wars, declared or undeclared, acts of public enemies, embargoes or other restrictions imposed by law, arrest, or restraint of officials, rulers or people, perils of the sea or other acts of God, accidents of navigation, *or by breakdown or injury* to ships, pipelines, machinery or other *facilities of the seller or those from whom the seller obtained products purchased hereunder,* used for production transportation, receiving, manufacturing, handling, or delivery of the products purchased hereunder, or the raw materials from which such products are manufactured, *or other impairment or interference with sellers' means of supply, transportation* or other facilities, or by fires, storms, explosions, or other casualties, or by strikes, lookouts or restraint of labor, either partial or general from whatever cause, or if performance hereunder is hindered, delayed or prevented by, or would violate or controvert, any law, rule, order or request of government, federal, state or foreign, or any agency or representative thereof, *or which directly or indirectly results from any cause beyond sellers or buyers control, whether such other causes be of the classes herein specifically provided or not.* In the event of the foregoing, seller shall not be obligated to prorate product and/or deliveries hereunder nor shall seller be obligated to deliver from a terminal, use a berthing, loading or unloading facilities, type of carrier or manner of delivery other than those designated in the contract and in the absence of any such designation(s) those customarily used in the performance hereunder, regardless of whether a commercially reasonable substitute is available."

In the judgment of Mance J., the wording of the clause was not wide enough to excuse non-performance:

> "Two general points arise at the outset, both to be found in *Lebeaupin v Crispin*.[2]
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> First: ... a *'force majeure'* clause should be construed in each case with a close attention to the words which precede or follow it, and with a due regard to the nature and general terms of the

[1] Coastal (Bermuda) Petroleum Ltd *v.* VTT Vulcan Petroleum SA (No.2) (The Marine Star) [1994] 2 Lloyd's Rep. 629 (a decision overruled by the Court of Appeal in [1996] 2 Lloyd's Rep. 383).

[2] Lebeaupin *v.* Crispin (1920) 2 K.B. 714.

contract. The effect of the clause may vary with each instrument...[1]

Second: ... if a seller desires to escape from liability in such a case as the present, he must take care to use words of adequate clearness and width ... The point was cogently put by Lord Macnaghten in *Elderslie Steamship Co. v Borthwick*[2] when he said: 'An ambiguous document is no protection'.[...] In my judgment the plaintiffs would not have been and are not entitled to rely on the force majeure clause in the circumstances of this case to negative any liability on their part towards [the defendants]. The main reason for this conclusion lies in the essentially back-to-back nature of the contract between the plaintiffs and Coastal Aruba. The raison d'être of that contract was, on the evidence and as a matter of common sense, to ensure a 'flow of contracts' putting the plaintiffs and Coastal Aruba in the same position vis-a-vis each other as the defendants and the plaintiffs were towards each other. The *force majeure* clause was present in the contract between the plaintiffs and Coastal Aruba in case the defendants could rely on the *force majeure* clause in their contract with the plaintiffs. It was not there to enable the plaintiffs to set up defences against Coastal Aruba when the defendants had none vis-À-vis the plaintiffs; as the present case demonstrates, it would work to the detriment of the Coastal group rather than to its intended advantage if it were to be construed as having an independent operation of such a nature.

The wording of the clause lends itself without difficulty in my view to a construction which matches the parties' general intentions. The first three underlined passages all clearly focus on objective interferences with the sellers' source of supply; for reasons which parallel those given by Mr. Justice McCardie at p. 721 on the facts of *Lebeaupin v Crispin*, they could not cover simple contractual default by the sellers' own seller. The last underlined passage is worded entirely generally, so as to cover—

...any breach ... or non-performance ... which directly or indirectly results from any cause beyond sellers' control, whether such other causes be of the classes herein specifically provided or not.

However, this leaves for consideration whether a cause is in the present context to be regarded as beyond sellers' control when it consists in simple default by the defendants as the sellers' own seller under a contract with which the present was intended to be and was effectively back-to-back. I have no hesitation in concluding that it should not be so regarded, because it would conflict with the nature and purpose of the contractual scheme if it were."[3]

The Court of Appeal reversed Mance J.'s decision on this point as follows:

[1] Lebeaupin *v.* Crispin (1920) 2 K.B. 714, per McCardie J. at 720.
[2] Elderslie Steamship Co *v.* Borthwick [1905] A.C. 93 at 96.
[3] *The Marine Star* [1994] 2 Lloyd's Rep. 629 at 637.

"In my judgment the Judge erred in adopting this method of construing the force majeure clause, since he started by looking not at the words the parties had used, but with what he considered were 'the parties' 'general intentions'. In *The Sea Queen*, [1988] 1 Lloyd's Rep. 500 at p. 502, where arbitrators had adopted a similar approach with regard to the risk of delay, I said this: The starting point must be the words and phrases the parties have chosen to use. It is not a permissible method of construction to propound a general or generally accepted principle for sharing the risk of delay between owners and charterers or seeking in the abstract to determine a reasonable allocation of risk of delay and then (to use the words of Lord Goff in *Societe Anonyme Marocaine de l'Industrie du Raffinage v. Notos Maritime Corp., The Notos*, [1987] 1 Lloyd's Rep. 503 at p. 506) to seek to force the provisions of the charter into the straitjacket of that principle or into that concept of reasonableness. To do so is to rewrite the bargain that the parties must be taken to have made by the words that they have chosen to use."[1]

On this ground the Court of Appeal found that the clause did cover the failure to perform due to the unavailability of the relevant market.[2] Although the circumstances of this particular case were rather peculiar, the level of scrutiny given to the clause by the courts is clearly indicative of the contra proferentem approach judges have vis-à-vis generally-worded force majeure clauses.[3]

Sale contracts often contain a number of clauses which deal with related – albeit not identical – issues and may therefore become relevant in the same or similar circumstances. For present purposes, a good example of such potential interaction may be found between the prohibition clause and the force majeure clause of an export sale contract. The relationship between these two clauses in a GAFTA contract was recently illustrated by the Court of Appeal in *Seagrain LLC v Glencore Grain BV*[4] as follows:

"GAFTA 49 contains two clauses expressly dealing with delays in shipment. Clause 9 grants the seller an option unilaterally to extend the shipment period by up to eight days subject to an adjustment in the contract price. Clause 19, the force majeure clause, deals with delay in shipment occasioned by the specified causes with provision for the seller to serve notices requiring an extension of the shipping period. It also provides that, if shipment be delayed for more than 30 consecutive days, the buyers shall have the option of cancelling the delayed portion

[1] *The Marine Star* [1996] 2 Lloyd's Rep. 383 at 385, 386.

[2] For a wider discussion on this case and a comparison with the different wording in *the clause discussed in Fyffes Group Ltd v. Reefer Express Lines Pty Ltd* (The Kriti Rex) [1996] 2 Lloyd's Rep. 171, see *Treitel*, at para.12–026.

[3] For a similar approach see Great Elephant Corporation *v.* Trafigura Beheer BV (The "Crudesky") [2012] EWHC 1745 (Comm), [2012] 2 Lloyd's Rep 503. For an example in the raw cotton trade see Dunavant Enterprises Inc *v.* Olympia Spinning & Weaving Mills Ltd [2011] EWHC 2028 (Comm), [2011] 2 Lloyd's Rep 619.

[4] Seagrain LLC *v.* Glencore Grain BV [2013] EWCA Civ 1627, [2014] 1 Lloyd's Rep 598.

> of the contract. Absent exercise of this option by the buyers, there is provision for the delayed portion to be automatically extended for a further period, after which further extension the contract shall be considered void, but the buyers shall have no claim against the seller for delay or non-shipment provided the sellers have supplied satisfactory evidence justifying the delay or non-fulfilment. So, taking the example of austerity measures that lead to a strike, this would, on the sellers' case, fall within the scope of the Prohibition Clause and lead to the automatic discharge of the contract, although the strike itself falls within the force majeure clause with its very different consequences. [⋯] In summary, an "act" which only makes it more onerous to obtain customs clearance may make the obtaining of clearance slower, and thus delay export, but it does not stop export from taking place eventually. It is thus qualitatively of a different kind to the three other triggering acts. Moreover, just as delay does not stop export from taking place eventually, so it does not "prevent" fulfilment of the contract but merely postpones it. It is true that, where there is a narrow time frame for contractual performance, a delay which takes the matter outside that time frame will "prevent" fulfilment, but that is not the consequence of the act. It is the consequence of the extent of the delay."[1]

In these circumstances the courts will look at the contract as a matter of construction and decide which one of the clauses invoked by the parties is triggered by the events occurred in the circumstances of the case.

1. The New GAFTA "Prevention of Shipment" Clause

Given its novelty and relevance it seems appropriate to mention the recent introduction in the c.i.f. GAFTA forms of a new clause which merges the old Prohibition and Force Majeure provisions: the Prevention of Shipment clause.[2] The structure of the clause, to an extent, resembles the ICC Force Majeure clause[3] in the sense that it contains two separate sections: the first defining an "event of Force Majeure"[4] and the second with reproduces the familiar remedial framework typical of the old provisions[5] with some important alterations which are likely to affect the customary procedures of traders. Two of such alterations deserve specific attention: (a) the clause is no longer triggered by impediments likely to affect performance but requires "performance of [the] contract [to] be prevented";[6] (b) cancellation by prohibition is no longer automatic and a notice of

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1 Ivi, at [36]-[37].
2 GAFTA 100, cl. 19. For a commentary on the clause see R. Veal, *Introducing GAFTA's Prevention of Shipment Clause* [2014] STL. FOSFA has not amended the structure of their contracts which still provide for two distinct clauses; see FOSFA 53 (1st April 2016) cll. 23 and 24.
3 On the ICC Force Majeure Clause see above, at [13-003].
4 Ll. 277-282.
5 Ll. 284-306.
6 See R. Veal, *Introducing GAFTA's Prevention of Shipment Clause* [2014] STL 1.

cancellation is now required if the event constituting a prohibition persists for more than 21 days. The clause is a good example of clear drafting but traders using the most recent GAFTA forms should revise their in-house procedures to comply with the new contractual framework.

2. Frustration: a Statement of the Modern Law

When it comes to stating the modern law of frustration, the most concise, complete and authoritative summary of the applicable principles is to be found in the judgment of Bingham LJ in *The Super Servant Two*:[1]

> "The classical statement of the modem law is that of Lord Radcliffe in Davis Contractors Ltd v Fareham Urban District Council[2]:
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> '... frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do.'
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> As Lord Reid observed in the same case (at p 721):
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> '... there is no need to consider what the parties thought or how they or reasonable men in their shoes would have dealt with the new situation if they had foreseen it. The question is whether the contract which they did make is, on its true construction, wide enough to apply to the new situation: if it is not, then it is at an end.'
>
> Certain propositions, established by the highest authority, are not open to question:
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> A. The doctrine of frustration was evolved to mitigate the harshness of the common law's insistence on literal performance of absolute promises [⋯].[3] The object of the doctrine was to give effect to the demands of justice, to achieve a just and reasonable result, to do what is reasonable and fair, as an expedient to avoid injustice where such would result from enforcement of a contract in its literal terms after a significant change in circumstances [⋯].[4]
>
> B. Since the effect of frustration is to kill the contract and discharge the parties from further liability under it, the doctrine is not to be lightly invoked, must be kept within very narrow limits and ought not to be extended [⋯].[5]

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1 J Lauritzen AS *v.* Wijsmuller BV [1990] 1 Lloyd's Rep 1, at p. 8.

2 Davis Contractors Ltd *v.* Fareham Urban District Council [1956] AC 696.

3 Hirji Mulji *v.* Cheong Yue Steamship Co Ltd (sub nom Dharsi Nanji *v.* Cheong Yue Steamship Co Ltd) (1926) 24 Ll L Rep 209, at p. 213 col 2; [1926] AC 497, at p 510; Denny Mott & Dickson Ltd *v.* James B Fraser & Co Ltd [1944] AC 265, at p. 275; Joseph Constantine Steamship Line Ltd *v.* Imperial Smelting Corporation Ltd (1941) 70 Ll L Rep 1, at p. 12, col 2; (1941) 70 Ll L Rep 1 [1942] AC 154, at p. 171.

4 Hirji Mulji *v.* Cheong Yue Steamship Co Ltd (sub nom Dharsi Nanji *v.* Cheong Yue Steamship Co Ltd) (1926) 24 Ll L Rep 209, at p. 213, col 2; Joseph Constantine Steamship Line Ltd *v.* Imperial Smelting Corporation Ltd (1941) 70 Ll L Rep 1, at p. 18, col 2; p. 23, col 1; p. 183, 193; National Carriers Ltd *v.* Panalpina (Northern) Ltd [1981] AC 675, at p. 701.

5 Bank Line Ltd *v.* Arthur Capel & Co [1919] AC 435, at p. 459; Davis Contractors Ltd *v.* Fareham Urban District Council [1956] AC 696, at p. 715, 727; Pioneer Shipping Ltd *v.* BTP Tioxide Ltd (The Nema) [1981] 2 Lloyd's Rep 239, at p. 253 col 2; [1982] AC 724 at p. 752.

C. Frustration brings the contract to an end forthwith, without more and automatically [⋯].[1]

D. The essence of frustration is that it should not be due to the act or election of the party seeking to rely on it [⋯].[2]

E. A frustrating event must take place without blame or fault on the side of the party seeking to rely on it [⋯].[3]" [4]

This general doctrine applies to all contracts, including those for the sale of goods on c.i.f. and f.o.b. terms, whether or not they are subject to the Sale of Goods Act 1979.[5]

3. Frustration and Failure of Supply

In *Atisa SA v Aztec AG*[6] a claim for frustration of a contract for the sale of sugar was brought by a seller who was unable to rely on the contract's force majeure provisions, since the contract clearly provided that the seller was responsible for obtaining any necessary export licence and that failure to do so could not be grounds for a force majeure claim. The only source of supply was the Kenyan Government, with whom the seller had a contract. Prior to shipment, a resolution was passed by the Kenyan Cabinet recommending that no surplus food be exported without Presidential or Cabinet authority, but nothing was immediately done to give effect to this resolution with regard to sugar exports. About a month later, it was decided that all but one sugar contract should be cancelled. The contract in question was not cancelled, but some six months later (during which the shipment period was extended and the buyer pressed for delivery), the Kenyan Government advised the sellers that the sugar contract was invalid because it had not been properly executed on behalf of the Kenyan Government. The sellers notified the buyers who, after seeking amicable resolution, brought a claim in arbitration under the association rules. The arbitrators did not uphold the seller's frustration claim and this finding was upheld by the court on appeal; the contract

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1 Hirji Mulji *v.* Cheong Yue Steamship Co Ltd (sub nom Dharsi Nanji *v.* Cheong Yue Steamship Co Ltd) (1926) 24 Ll L Rep 209, at p. 211, 212; p. 505, 509; Maritime National Fish Ltd *v.* Ocean Trawlers Ltd (1935) 51 Ll L Rep 299, at p 302; [1935] AC 524 at p 527; Joseph Constantine Steamship Line Ltd *v.* Imperial Smelting Corporation Ltd (1941) 70 Ll L Rep 1, at p. 9, 11, 12, 20, 25; p. 163, 170, 171, 187, 200; Denny Mott & Dickson Ltd *v.* James B Fraser & Co Ltd [1944] AC 265, at p. 274.

2 Hirji Mulji *v.* Cheong Yue Steamship Co Ltd (sub nom Dharsi Nanji *v.* Cheong Yue Steamship Co Ltd) (1926) 24 Ll L Rep 209, at p. 213; p. 510; Maritime National Fish Ltd *v.* Ocean Trawlers Ltd (1935) 51 Ll L Rep 299, at p. 303; p. 530; Joseph Constantine Steamship Line Ltd *v.* Imperial Smelting Corporation Ltd (1941) 70 Ll L Rep 1, at p. 12; p. 170; Denny Mott & Dickson Ltd *v.* James B Fraser & Co Ltd [1944] AC 265, at p 274; Paal Wilson & Co A/S *v.* Partenreederi Hannah Blumenthal (The Hannah Blumenthal) [1983] 1 Lloyd's Rep 103, at p. 112; [1983] 1 AC 854, at p. 909.

3 Bank Line Ltd *v.* Arthur Capel & Co [1919] AC 435, at p. 452; Joseph Constantine Steamship Line Ltd *v.* Imperial Smelting Corporation Ltd (1941) 70 Ll L Rep 1, at p. 12; p. 171; Davis Contractors Ltd *v.* Fareham Urban District Council [1956] AC 696, at p. 729; *The Hannah Blumenthal*, [1982] 1 Lloyd's Rep 582, at p. 592; [1983] 1 Lloyd's Rep 103, at p. 112; [1983] AC 854, at p. 882, 909.

4 J Lauritzen AS *v.* Wijsmuller BV (The Super Servant Two) [1990] 1 Lloyd's Rep 1, at p. 8 col 1. See also Bunge SA *v.* Kyla Shipping Co Ltd (The "Kyla") [2012] EWHC 3522 (Comm), [2013] 1 Lloyd's Rep. 565.

5 *PST Energy 7 Shipping LLC and Another v O W Bunker Malta Ltd and Another (The "Res Cogitans")* [2016] UKSC 23, [2016] 1 Lloyd's Rep 589, on which see above at [1-006].

6 Atisa SA *v.* Aztec AG [1983] 2 Lloyd's Rep. 579.

specifically placed the responsibility for obtaining - and the risk of refusal of - an export licence on the sellers. The sellers' supplier (and the sole supplier) decided that it did not want to supply and took advice on the contract. Having been advised that the contract was not binding, the supplier refused to perform. If that advice was correct the sellers had failed to make a proper supply contract, but if it was incorrect the sellers would have an action on the supply contract. Parker J. affirmed the decision of the arbitrators, stating that:

> "The test for frustration must then be taken to be settled. The question to be asked is whether without default of either party the contractual obligation has become incapable of being performed, because, the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. As Lord Roskill said, however, it must always be borne in mind when approaching the question that the doctrine is not lightly to be invoked to relieve contracting parties of the normal consequences of imprudent commercial bargains.
>
> It is to be observed that for the question to be answered in the affirmative it is not enough to show that without default of either party the contract has become incapable of being performed. It must be shown that the incapability is because the circumstances at the time would render performance radically different from that which was undertaken by the contract."

The arbitrators did not feel that this was the case and Parker J. agreed, stating that he would have reached the same conclusion. Therefore the sellers' appeal failed.

In *CTI Group Inc v Transclear SA (The Mary Nour)*,[1] where there was no force majeure provision, a buyer successfully appealed against an arbitrators' award holding that two f.o.b. contracts for the sale of cement had been frustrated on the grounds of supplier failure. The arbitrators had found that the performance of the substance of the contracts had become commercially impossible as a result of the pressure placed by a competitor of the buyer on potential suppliers and as such, were frustrated. The court found otherwise, distinguishing the relevant facts from cases where performance of the contract was not impossible, but performance required actions and/or expense radically different from what was originally contemplated. In this case, performance had become impossible through supplier failure and at law, the risk of failure of a contemplated supply (in this case there was no obligation on any supplier to supply) was on the seller who made an unqualified promise to sell. Moore-Bick L.J. in the Court of Appeal, affirming the first instance decision, stated that:

[1] CTI Group Inc *v.* Transclear SA (The Mary Nour) [2007] EWHC 2070 (Comm); [2008] 1 All E.R. (Comm) 192; a decision affirmed by the Court of Appeal in [2008] EWCA Civ 856; [2009] 2 All E.R. (Comm) 25.

"...it is impossible to hold that the contract in this case was frustrated. As the decided cases show, the fact that a supplier chooses not to make goods available for shipment, thus rendering performance by the seller impossible, is not of itself sufficient to frustrate a contract of this kind. In order to rely on the doctrine of frustration it is necessary for there to have been a supervening event which renders the performance of the seller's obligations impossible or fundamentally different in nature from that which was envisaged when the contract was made."[1]

Although the contract has been commercially impossible to perform, the arbitrators had erred in finding that the f.o.b. contracts were frustrated, as the seller could have addressed this risk by making the contracts conditional on supplier performance, and/or entering into binding contracts with the supplier.[2]

4. Impossibility to Ship or Procure Goods Afloat

The general rule is that where the contract contains no provision as to the consequences of impossibility to ship or of the purchase of goods afloat, the circumstances surrounding the contract will determine whether or not the seller is discharged from his contract on the grounds of frustration. The question is whether, without any fault of either party, performance becomes a practical impossibility or becomes incapable of being performed, because the circumstances render performance radically different from that which was undertaken by the parties in the contract. As Lord Roskill said in *The Nema*[3] however, "the doctrine is not lightly to be invoked to relieve contracting parties of the normal consequences of imprudent commercial bargains".

5. Market Fluctuations Are Not Frustrating Events

Certainly the mere fact that performance becomes more costly would not usually suffice to constitute frustration. In *Intertradex SA v Lesieur-Tourteaux SARL*[4] Donaldson J. opined that:

"whether or not a contract is frustrated is a mixed question of fact and law... The sellers' basic obligation [under a c.i.f. contract] was to deliver the goods (or documents covering the goods) in accordance with their contract. The basic risks which they assumed were those of shortage of supply and a rise in price... a mere reduction in the supplies available, even from a sole supplier, due to such commonplace events as a breakdown of machinery or the inadequacies of a railway [by means of which the goods are to be transported to the port of shipment] are far removed from th[e] category [of

[1] CTI Group Inc *v.* Transclear SA (The Mary Nour) [2008] EWCA Civ 856; [2009] 2 All E.R. (Comm) 25 at [27].
[2] Dany Lions Ltd *v.* Bristol Cars Ltd [2013] EWHC 2997 (QB), [2014] 1 Lloyd's Rep 281.
[3] Pioneer Shipping Co Ltd *v.* BTP Tioxide (The Nema) [1981] 2 Lloyd's Rep. 239 at 253; [1982] A.C. 724 at 752.
[4] Intertradex SA *v.* Lesieur-Tourteaux SARL [1977] 2 Lloyd's Rep. 146 at 154; a decision affirmed by the Court of Appeal in [1978] 2 Lloyd's Rep. 509.

events constituting frustration].”

In this case the contract was for the sale of 800 metric tonnes of Mali groundnut expellers c.i.f. Rouen, shipment in March 1973. The sellers intended to fulfil their obligation by purchasing from suppliers who, to their knowledge (but not the buyers') were the sole producers of Mali groundnut expellers, and whose factory was 10 days by rail from Abidjan and three or four days from Dakar, the only export ports. Due to the breakdown of the electrical distribution panel at the suppliers' factory, the fact that a replacement part had to be obtained from Germany, and interruptions in the supply by rail of raw materials for the factory, the suppliers (and as a result, the sellers) were unable to meet their commitments in full. The contract contained a force majeure clause, and the question arose as to whether the sellers could claim the protection of the clause, or, failing its application in the circumstances, defend the claim on the grounds that the contract was frustrated. The dispute went to arbitration, and the Board of Appeal of the GAFTA held in favour of the sellers, but Donaldson J. reversed their decision. He ruled that in the circumstances, the sellers could neither claim the benefit of the force majeure clause (because their notice to the buyers alleging the force majeure was bad as it was based only upon breakdown of machinery, whereas shortage of materials was also an effective cause of non-shipment) nor succeed on the grounds that non-performance was justified by frustration, albeit there being no alternative source of supply available at the time.

6. Strikes

On shipment, or upon purchase of goods afloat, the seller must procure a bill of lading (or such other equivalent document in lieu thereof as the contract may prescribe) for tender to the buyer, under which the goods will be delivered at the destination provided in the contract. Where loading is effected by or on behalf of the c.i.f. seller, but the vessel is struck and unable to depart or sail for its destination, the seller is entitled to payment on tender of the documents, and any resulting damages due to the delay are for the account of the buyer. Such a situation arose in *Badhwar v Colorado Fuel & Iron Corp*[1] where 2,000 tons of caustic soda were sold “CIF Bombay”. The vessel on which the cargo was shipped arrived in Bombay some months after it had been loaded in New Orleans, due to a strike by the engine room crew that prevented sailing, as well as unloading and reloading it on board some other vessel that was free to sail. It was held, correctly it is submitted, that the contract was performed by the seller, and that there was no duty to find a ship that would not be strike-bound. The potential for strikes and their possible duration were (and

[1] Badhwar *v.* Colorado Fuel & Iron Corp (1955) 138 F. Supp. 595.

usually are) always present, but they are not (in the absence malfeasance or an agreement to the contrary) matters of foreseeability for which the c.i.f. seller would be liable.

7. Unavailability of a Reasonable Route

In the absence of express terms, the route must be a reasonable route, i.e. in all probability, the customary or usual route. If there is no customary or usual route, then a practicable commercial route must be chosen, the question depending on the circumstances prevailing not on the date of the contract, but at the time of performance thereof.[1] In the absence of special considerations the contract is not frustrated merely because the route contemplated at the time the contract was concluded becomes unavailable and performance is more costly to the seller. For in such a case, the seller must ship by some alternative route which may be reasonable or practicable in the circumstances. What is reasonable or practicable will naturally depend on the facts of any given case, but the seller will, it is thought, be deemed to have satisfied his contract if he can show that he has, in the words of s.32(2) of the Sale of Goods Act 1979, made "such contract with the carrier... as may be reasonable having regard to the nature of the goods and the other circumstances...".[2] It is not necessary for this route to be the shortest geographical route, nor need it be the invariable route. When, therefore, there is more than one usual route, shipment by any usual route will perform the contract. And if there is only one route at the time of performance, that may be taken if it is practicable and is not prejudicial to the condition of the goods or fundamentally alters the nature of the transaction.

8. Impossibility to Ship the Cargo

If the contract contains an express provision as to "shipment", this will be taken to refer to loading on to a ship, unless there is a specific provision otherwise. Thus in *Mowbray, Robinson & Co v Rosser*,[3] where a contract was made in England through the American sellers' broker for the sale of American timber, "*shipment* to be made not later than the end of November next", and the English buyers refused to carry out the contract because (inter alia) the goods had not been shipped by the specified date, it was unsuccessfully contended by the sellers that by the custom of the trade in America, "shipment" meant loading on railroad cars or loading on cars at the saw mills from which the timber comes. In an English contract, "shipment" means putting on board a ship, unless the sense is varied by other terms of the contract.

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[1] See Tsakiroglou & Co Ltd *v.* Noblee Thorl GmbH [1962] A.C. 93.

[2] See above at 2–024 et seq., and F. Lorenzon, *When is a CIF seller's carriage contract unreasonable? - Section 32(2) of the Sale of Goods Act 1979* (2007) 13(4) J.I.M.L. 241–257.

[3] Mowbray, Robinson & Co *v.* Rosser (1922) 91 L.J.K.B. 524 CA.

9. Alternative Performance

It has already been noted that in the absence of a stipulation to the contrary, a c.i.f. contract can normally be performed in one of two alternative methods, and the seller has the option (or obligation) of either arranging for the actual shipment of the goods or of purchasing them afloat.[1] However, the contract may expressly or by necessary implication, deny any such option by providing that it shall be performed by shipment only. In that case the seller, who is prevented by lack of shipping or other facilities or by governmental prohibition from shipping, need not prove that the contract could not be performed by purchasing goods afloat. If these events amount to frustration of the contract because the seller has not undertaken an absolute obligation to perform or to pay damages in lieu thereof, the contract is thereby discharged. Accordingly, where a contract for the sale of Egyptian cotton seed oil c.i.f. Rotterdam, provided, inter alia, that "should the shipment be delayed by... prohibition of export... or any other cause comprehended in the term *force majeure* other than war... the time of shipment shall be extended by two months", McNair J. rejected the contention of the buyers that in order to enjoy the benefit of this stipulation, the sellers also had to prove that they could not purchase goods afloat that were not affected by a prohibition imposed by the Egyptian Government on the export of cotton seed oil.[2] The judgment, which was affirmed by the House of Lords after originally being overturned by the Court of Appeal,[3] states:

> "In regard to the suggestion that the sellers have to show that they could not buy goods afloat, it seems to me that the use of the phrase 'the shipment' coupled with the later phrase 'as soon as shippers announce their inability to ship', in the [contract], points clearly to the conclusion that, in this particular contract, the parties are, in terms and designedly, providing protection for the sellers in a case where the first method of performing their obligation under the c.i.f. contract, namely, shipping by themselves or by their agents, is delayed. In my judgment, this clause will not work in any business sense if it were held that the sellers, in addition to proving that the contemplated shipment was delayed, had further to prove that they were unable to purchase goods afloat which were unaffected by the prohibition."[4]

In *Lewis Emanuel & Son Ltd v Sammut*[5] a contract for the sale of 1,000 half sacks of Maltese new spring crop potatoes, c.i.f. London, entered into on April 14, 1958, provided, inter alia, for

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1 See further, *Treitel*, Ch.10.
2 JH Vantol Ltd *v.* Fairclough Dodd & Jones Ltd [1955] 1 W.L.R. 642; [1955] 2 All E.R. 516.
3 JH Vantol Ltd *v.* Fairclough Dodd & Jones Ltd [1955] 1 W.L.R. 1302 CA; Fairclough Dodd & Jones Ltd *v.* JH Vantol Ltd [1957] 1 W.L.R. 136; [1956] 3 All E.R. 921 HL.
4 JH Vantol Ltd *v.* Fairclough Dodd & Jones Ltd [1955] 2 All E.R. 516 at 520.
5 Lewis Emanuel & Son Ltd *v.* Sammut [1959] 2 Lloyd's Rep. 629.

"shipment on or before April 24th". The contract was not performed because the seller was unable to obtain space on the one and only vessel that called at Malta between April 14 and 24. An award by an umpire holding the seller responsible for damages was affirmed by Pearson J. The umpire had found that no usage or custom, as the seller alleged, existed by virtue of which an implied warranty that shipping space would be available within the shipment period stipulated was to be imported into the contract, and that, in the event of shipping not being available, the contract would be at an end. Pearson J. further held that although there was nothing to prevent the application of the doctrine of frustration to the case of a c.i.f. contract for the sale of unascertained goods,[1] the contract in the case before him was not frustrated as a result of the seller's inability to obtain shipping space. However, the buyers' contention that no impossibility of performance was proven and that the contract could have been performed by purchasing goods afloat, also failed. Not because the word "shipment" excluded it,[2] but because the description of the goods was such that from a practical point of view, the contract could not have been performed unless potatoes of the contract description were present on the one ship which called at Malta between April 14 and 24. However, there was no need to establish whether or not goods of the contract description were in fact present on that one ship, because even if they were not, the contract would not be at an end by virtue of such impossibility:

> "Under a contract of this kind the seller has an obligation, and he undertakes the duty of finding or providing cargo, finding or providing shipping space, and providing a contract of insurance; that is the responsibility which he undertakes. If he is not sure of being able to provide cargo or shipping space or a policy of insurance, he can guard himself by some provision in the contract, that it is subject to shipping space being available or such potatoes being available, or subject to a contract of insurance being procurable. But it seems to me that, if the buyers had been asked whether, in the event of the seller being unable to obtain shipping space, the contract would be off, the buyers would have said 'Certainly not. That is the seller's duty and responsibility. It is his job to find shipping space. That is what he undertakes to do. That is what he is being paid for in this contract, among other things.' As I say, it is a matter of impression, but that is my impression of the possible business effect of this

[1] Having reviewed a long line of authorities, Pearson J. concluded: "In my view, there is nothing exceptional in principle as regards c.i.f. contracts for unascertained goods. But, of course, it may well be that, in view of the nature of these contracts, it would be more difficult to find a frustrating event than it would in the case of some other contracts for specifically ascertained goods and so on. But, to my mind, exactly the same principle of frustration applies; it is only that there may be greater difficulty in showing it in cases of that character" (at 640).

[2] "The answer [to that] may be this, that this is a sale of goods predominantly, and what it really means is that the seller will procure to be delivered to the buyers, through the mechanism of a c.i.f. contract, goods shipped in that period, and it does not matter whether they are shipped by him or anybody else so long as they comply with all the requirements of the contract" (at 639).

contract."[1]

In *Sociedad Iberica De Molturacion SA v Tradax Export SA*[2] a clause in a c.i.f. contract for the sale of US soya beans for shipment October 5 – 25, 1971 provided that:

> "should shipment of the goods or any part thereof be prevented at any time during ... contract period ... by reason of ... strikes ... at port or ports of loading ... then shipper shall be entitled at the termination of such ... strikes ... to an extension of time for shipment ... Shipper shall give notice by cable ... if he intends to claim an extension of time for shipment".

On October 25, 1971 the sellers sent a telex message to the buyers invoking the strike extension clause, but the buyers alleged that the sellers were in default, inter alia, by specifying eight potential loading ports as being strikebound, and because the strikes were not of such a nature as to have totally prevented the sellers from shipping from any other US port not being a West Coast port. Donaldson J., affirming a decision of an umpire, and of an arbitration appeal tribunal, rejected both allegations as a basis for liability to the buyers for breach of contract, and refused to infer an obligation on the part of the sellers to ship from an alternative US port which might have been possible in the circumstances. The words "should shipment ... be prevented ... by ... strikes ... at port or ports of loading" are intended to refer to the ports through which the seller intended to ship or through which he would in fact have shipped but for the occurrence of the strike. Therefore the fact that the strikes were not of such a magnitude as to have totally prevented the sellers shipping from any other US port (not being a West Coast port) was not material, although any doubts as to the construction of such clauses is to be resolved in favour of requiring performance.

10. Implying Force Majeure

In the American case of *Madeirense Do Brasil S/A v Stulman-Emerick Lumber Co*,[3] the Second Circuit Court of Appeals opined that a seller of Brazilian lumber sold on c. and f. terms would have been liable for breach if he was unable to secure shipping space as a result of scarcity caused by the Second World War. The contract was entered into after the Second World War had been under way for over a year, and although the seller was able to obtain shipping space there was an unexpected increase in freight and some of the lumber was shipped "on" instead of "below" deck. The seller alleged that he was not responsible for the increased freight, or for breach in not

[1] Lewis Emanuel & Son Ltd *v.* Sammut [1959] 2 Lloyd's Rep. 629 at 642.
[2] Sociedad Iberica De Molturacion SA *v.* Tradax Export SA [1978] 2 Lloyd's Rep. 545.
[3] Madeirense Do Brasil S/A *v.* Stulman-Emerick Lumber Co, 147 F. 2d 399 (1945).

procuring the required contract of carriage, on the grounds of force majeure resulting from the scarcity of shipping space due to the war. The court dismissed these allegations on the grounds that it was a foreseeable risk willingly undertaken, adding that "even had there been no ships available, plaintiff was not, under the circumstances of this case, excused from performance".[1]

It is therefore highly unlikely that frustration or a general force majeure clause may be usefully invoked, unless specifically dressing up a specific tariff level as a frustrating or force majeure event.

IV. Conclusions

This article looks at the issue of effects of the performance of contracts in the commodities market as affected by the Sino-US trade war in light of the Covid-19 pandemic. Technically speaking, with a detailed examination of the case laws on the Force Majeure Clause, this article argues that it is highly unlikely that frustration or a general force majeure clause may be usefully invoked, unless specifically dressing up a specific tariff level as a frustrating or force majeure event. For all those likely to be affected either by the Covid-19 or the trade war, which could be parties within a number of different industries, they should make preparations to manage and mitigate against the changing trade landscape. Clear allocation of risk and a reflection of those risks in the pricing can help both parties clearly and fully understand the bargain they have struck before committing to a contract. Although standard contracts may assist in allocating such risk, there is no substitute for a bespoke clause to deal specifically with issues such as potential trade wars and "tariffs" and/or to perhaps share some of the risks.

In a big picture, it has been argued that the pandemic has caused a shift from globalism to isolationism, such as the decoupling arguably taking place between China and the United States, the two trade superpowers in the world, due to trade and political tensions between the two countries. The coronavirus pandemic has increased trade decoupling by forcing a currently globalised and efficient supply chain system to switch to a domestic-based supply chain to reduce political risks and ensure supply to domestic consumers.

However, from the author's point of view, the coronavirus pandemic offers a timely reminder of international economic interdependence for co-existence. The coronavirus is not the end of globalism; on the contrary, multilateralism and global supply chain, established through a higher degree of social and economic cooperation and interdependence, should be our strategy for dealing with the coronavirus pandemic in this changing world, and our strategy for coping with the

[1] Madeirense Do Brasil S/A *v.* Stulman-Emerick Lumber Co, 147 F. 2d 399 (1945) at 403.

coronavirus pandemic will determine how our world may change.[1]

[1] WANG Chao, To Cope with a New Coronavirus Pandemic: *How Life May Be Changed Forever*, Chinese Journal of International Law, Volume 19, Issue 2, June 2020, Pages 221–228, https://doi.org/10.1093/chinesejil/jmaa020.

欧盟航运业碳治理政策的演进逻辑、走向及启示

孙悦*

摘要：在航运业碳治理政策演进过程中，欧盟经历了从区域内立法治理到试图以单边行动突破国际公约既有原则来规制全球碳排放的阶段，终回“共同但有区别原则”以寻求多边合作模式的转变，但始终以区域减排目标的达成为政策导向。EU ETS 和 EU MRV 两个正式立法以及 Green Deal 是欧盟进行航运业碳治理的主要法律手段和政策。未来全球航运业的碳排放治理会形成区域内治理和全球治理两种模式并存的混合治理格局，并呈现出欧盟以其区域型治理优势向全球治理领域扩张的态势。我国应当秉承“共同但有区别责任原则”的立法基石，建立航运业碳交易体系以强化我国在气候变化谈判中的地位,促进国际碳交易规则的规范化，共建全球一体化的航运碳排放交易市场。

关键词：欧盟航运业；碳治理；碳交易体系；演进逻辑；共同但有区别原则

作为《联合国气候变化框架公约》和《京都议定书》的附件一组织，同时也是国际海事组织（International Maritime Organization，简称“IMO”）成员，在公约和 IMO 双重减排压力下，欧盟一直致力于气候变化多途径解决方式的探索。欧盟是首个承诺到 2050 年实现净零碳排放，并以法律的形式确定下来的地区。[1]欧盟有意将现存碳排放交易体系的管制范围扩大至航运业。[2]欧盟委员会（European Commission）于 2021 年 7 月 14 日提议，分阶段将航运纳入欧盟排放交易体系（Emissions Trading System，简称“ETS”），以此监管国际航行。

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[1] 谢伏瞻、刘雅鸣主编：《应对气候变化报告（2020）》，社会科学出版社 2020 年 11 月版，第 7 页。

[2] 2008 年，欧盟通过 2008/101/EC 指令，将航空业纳入到了欧盟碳排放交易体系。从 2012 年开始，所有飞往或飞离任意欧盟机场的航班都必须购买碳排放配额。未能上缴足够配额的航空器运营人将被施以罚款、扣留航空器甚至禁运等处罚。舆论一致认为，与航空业有着类似性质的航运业，也可以通过类似的程序纳入到欧盟碳排放交易体系。

[1]尽管提议只是进一步谈判的起点，但一旦提案公布，将航运业纳入全球最大的碳排放交易体系的方案将最终形成。[2]

本文通过对国际公约和 IMO 中关于航运业碳排放的要求进行梳理，关注到基于自身减排的压力，航运业将成为欧盟纳入碳排放交易体系的新行业，并且大概率会尽快采取措施推动全球航运业碳减排进程，以期达成欧盟区的整体减排目标。因此，欧盟在航运业碳减排问题上的政策动向非常重要，且有必要分析其碳排放政策演变历程，以此来预判未来可能的政策走向。结合我国碳中和的目标，为未来航运业碳减排政策的制定提供有效的建议和措施。

一、欧盟航运业碳排放政策的缘起

《联合国气候变化框架公约》（以下简称“UNFCCC”）是迄今为止在国际环境与发展领域影响最大、涉及面最广、意义最为深远的国际法律文书。[3]其目标是：“将大气中温室气体的浓度稳定在防止气候系统受到危险的人为干扰的水平上”。[4]为实现 UNFCCC 的目标，《京都议定书》（以下简称《议定书》）于 2005 年正式生效，是第一份有法律约束力的气候协议，《议定书》的签署正式打开了全球碳交易快速成长的局面。[5]UNFCCC 的近 200 个缔约方达成的《巴黎协定》，是第二份有法律约束力的气候协议，为 2020 年后全球应对气候变化行动作出了安排。UNFCCC、《议定书》和《巴黎协定》根据“公平原则”和“共同但有区别责任原则”要求附件一国家首先采取行动，对全球气候变化承担更多责任。

IMO 最新报告显示，航运总碳排放量从 2012 年的 9.77 亿吨增加到 2018 年的 10.76 亿吨（增长 9.6%）；而目标是：2012 年二氧化碳排放目标为 9.62 亿吨，2018 年二氧化碳排放目标为 10.56 亿吨（增长 9.3%）。[6]国际航运业并未实现预计的减排目标，给接下来减排目标的达成造成了一定的阻碍。以散货船、油船、集装箱船、化学品船、液化气船、普通货船和冷

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[1] 欧盟碳排放交易体系管制的行业排放量覆盖率将从 2023 年的 20%逐年提高到 2026 年的 100%。提案将建议欧盟排放市场包括欧洲经济区内部航行的排放量，以及船舶全部进港国际航程的排放量，或进港航程 50%的排放量和出港航程 50%的排放量。虽然欧盟委员会的气候行动总局和 ETS 的负责机构已建议将完整的入港航程包括在内但是其他部门表示希望在国际航程中采用 50%/50%的进出港模式。委员会提案还建议，从 2023 年开始，ETS 将逐步适用于航运，届时企业将不得不 ZS 为其船舶排放量的 20%支付费用。从 2026 年开始，这一数字将逐年上升，达到 100%的覆盖率。这种分阶段实施方法将不包括分配给企业随后可以进行交易的免费排放配额。受欧盟 ETS 约束的公司每年从委员会发放的有限限额中购买排放配额。他们可以保留这些额度来弥补自己的排放量，也可以在不需要时出售给其他公司。航运公司必须通过监测、报告和验证法规报告其往返欧洲经济港区的航程中的年度二氧化碳排放量。

[2] 在过去的 12 个月里，二氧化碳的价格几乎翻了一番，每吨约为 55 欧元（约合 65.6 美元）。如果该项提议被通过，这将成为针对国际航运排放量的首个基于市场的措施。

[3] 张蕊娇：《中国应对全球绿色碳博弈之破立有道——构建中国碳交易市场机制与建立碳盘查体系研究》，2013 年东华大学硕士学位论文，第 24 页。

[4] See UNFCCC article 2.

[5] Teall Crossen, *The Kyoto Protocol Compliance Regime: Origins, Outcomes and the Amendment Dilemma,* Resource Management Journal, 2004, 1:3.

[6] *IMO GHG study 2020*. https://www.imo.org/en/OurWork/Environment/Pages/GHG-Emissions.aspx.

藏散货船等七种典型船型作为世界船队的代表，二氧化碳排放量占世界总量的 88%左右，运输工作量占世界总量的 98%左右。[1]可见，航运业的碳减排完成的效果如何，直接影响了整体碳减排目标的达成。2020 年度 IMO 报告提出了碳强度的四个指标，即能效操作指标(EEOI, gCO_2/t/nm)，年效率比（AER, gCO_2/dwt/nm), DIST（千克 CO_2/nm）和 TIME (tCO_2/hr）。这些指标可以用数据收集系统的数据计算，也可以包含在 SEEMP 指南中。这些指标在研究中用于评估国际航运的碳强度表现。可以预见，这些指标在未来都将用于全球航运业碳减排的监管，以期尽早实现航运业的零碳排放。IMO 已经要求各成员国收集和报告 2019 年 1 月 1 日起的燃油消耗数据。[2]IMO 是《议定书》授权协调航运业碳减排问题的国际组织，对减少船舶温室气体（GHG）排放的要求如下图所示。[3]

时间（年）	GHG排放要求
1997	“船舶二氧化碳排放”决议确立，授权IMO控制GHG排放。
2003	决议“IMO有关减少船舶GHG排放的政策和实施”。
2013	提高国际船舶能效的新的监管工具：
	a.针对新型船舶-强制的设计要求（EEDI），设定了严格的碳强度标准。
	b.针对所有船舶-强制性船舶能效管理计划（SEEMP），提高船舶的能源效率。
2015	EEDI第一阶段：减少10%的船舶碳强度。
2016	强制性的IMO数据收集系统：自2019年1月1日起，5000总吨位以上船舶（占国际航运排放的85%以上）必须收集燃油消耗数据，并每年向IMO提交报告。
2018	决议“IMO关于减少船舶GHG排放的初步战略”。
2019	采用一种程序来评估备选措施对国家的影响。加强一些船舶类型的EEDI要求。关于港口和航运合作的决议。在IMO内部设立“GHG技术合作信托基金”。
2020	EEDI第二阶段：减少20%的船舶碳强度。
2023	完成短期措施，修订初步战略。
2025	EEDI第三阶段：减少30%的船舶碳强度。提前生效（2022年）的几种船舶类型，最大的集装箱船减少高达50%的碳强度。
2023-2030	中期措施：减少至少40%的船队碳强度。
2030-2050	长期措施：将船队的碳排放强度减少至少70%。
2050	每年温室气体（GHG）总排放量至少减少50%（要求每艘船舶减少约85%的二氧化碳），本世纪尽快达成碳中和。

图 1：笔者自制 IMO 减少船舶温室气体（GHG）排放的要求

欧盟为了实现自身利益，达成减排目标，不得不将眼光投向全球碳减排市场，尽管此举

[1] *IMO GHG study 2020*. https://www.imo.org/en/OurWork/Environment/Pages/GHG-Emissions.aspx.
[2] *IMO DCS, SEEMP, and CII*, ClassNK, https://www.classnk.or.jp/hp/zh/activities/statutory/seemp/index.html.
[3] *Greenhouse Gas Emissions*, IMO, https://www.imo.org/en/OurWork/Environment/Pages/GHG-Emissions.aspx.

可能会带来管辖权越界等政治或道德风险。然而依法现实主义观点，以权力利益为准绳，运用各种手段最大化自己目的的行为实属合理。因此，欧盟的碳治理政策呈现出一种超越管辖权的政治策略，[1] 归根结底是为了实现其自身利益的目的。典型的案例便是欧盟航空业 ETS 指令要求：从 2012 年 1 月 1 日开始，所有飞入、飞出和飞经欧盟的航空公司都拥有足够的碳排放限额，以覆盖其温室气体排放。[2]该法令是欧盟碳排放立法规制向全球领域扩张的首次尝试，为后续继续推进其在气候变化领域的领导力奠定了一定的基础。但不得不指出，在欧盟推行其碳治理政策和标准的过程中，确遭到了国际社会的反对和诟病，因此，欧盟不得不暂缓对全球进行碳治理的脚步，转而采取一种既以组织整体利益为首要出发点，又希望通过影响力推动国际各主体间合作共赢的策略。

二、欧盟航运业碳治理政策的演进逻辑

就欧盟航运碳治理立法及政策发展而言，在欧盟有计划地将航运碳排放纳入欧盟总体的碳减排法律框架前，就已经开始了相应的前置准备措施，主要表现为欧盟航运 MRV 机制的实施。[3]MRV 和 ETS 已成为欧盟进行航运业碳排放治理的两个主要法律手段；Green Deal 为进一步推进气候变化治理提供了多种方式并行的理念。

1.欧盟碳排放交易体系（EU ETS）

欧盟指令 2003/87/EC 以立法的形式正式开始规范碳排放问题，该法规已于 2005 年正式生效。以此规则为基石，欧盟在其成员国范围内建立了碳排放交易体系（EU ETS）。通过规制排放实体助力欧盟完成了区域内 45%的碳减排目标，约占欧盟温室气体排放总量的 20%。[4]一项研究显示，航运业的排放量占全球排放总量的 2.7%，航运业纳入 ETS 进行规范给欧盟整体减排目标的达成提供了新的解决方案。同时非政府环保组织多次呼吁欧盟制定一项文书，以减少航运产生的碳排放。[5]据推测，碳排放交易计划是减少航运业碳排放的有力而有效的工具。基于此，欧盟会为减少温室气体排放而不断努力将航运业纳入 ETS 进行规制。

ETS 调整碳排放的逻辑是，旨在通过配额限制的方式控制温室气体的排放量,因为温室气体总排放量的上限是事先设定的，目的是为排放量的分配提供规划的空间。该规则投射到航

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[1] The EU grew out of the European Community, with six founding member states and now has 27 Member States, which formed the EU's structure as a supranational organization. This supranational organization is itself characterized by a transcendental jurisdiction.

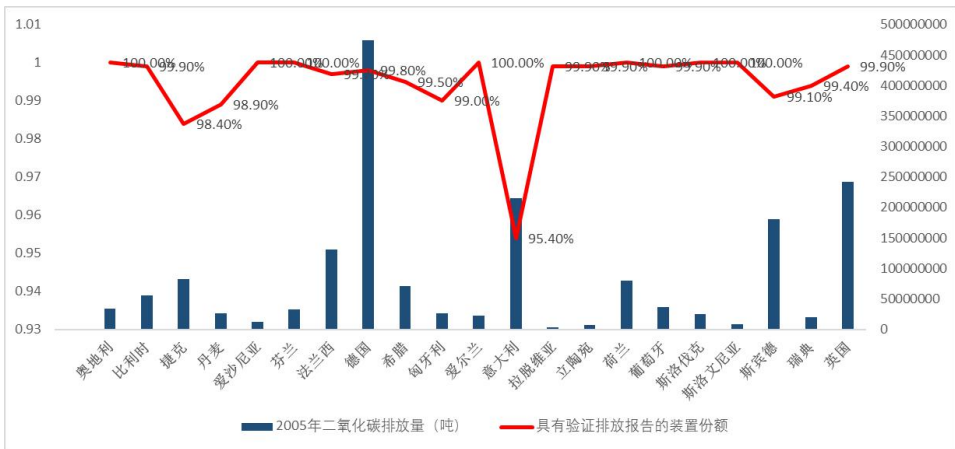
[2] *Air Transport Association of America v. Secretary of State for Energy and Climate Change (EU Court of Justice, 2011)*, https://climate-laws.org/geographies/european-union/litigation_cases/air-transport-association-of-america-v-secretary-of-state-for-energy-and-climate-change-eu-court-of-justice-2011.

[3] 胡斌：《欧盟海运碳排放交易机制的国际法分析》，中国社会科学出版社 2017 年版，第 34 页。

[4] http://europa.eu.int/scadplus/leg/en/lvb/l28012.htm.

[5] Smets I. NGOs, *EU should prepare inclusion of shipping in ETS,* Euro politics environment, 2011(810): p.5.

运业存在一个关键阻碍便是以欧盟区域排放上线规制进入欧盟区域的船舶是否合理且可行。原因在于，ETS 是通过立法对碳排放总量进行分配，结合市场自由交易机制的碳治理模式。船舶的流动性导致了其在航程上一直排放碳量，这个碳量在该船舶的船旗国排放总量范围内又应当受到航程区域环境政策规制，碳排放量的交叉定性如何协调犹未可知。欧盟碳交易市场于 2005 年成立，为世界上历史最悠久、规模最大的碳交易市场。[1]碳配额由免费发放转为有偿发放造成了碳配额的稀缺性，一方面促使碳交易价格不断攀升，另一方面促使排放主体在进行排放过程中更加谨慎，以此保证碳排放总量逐步降低。由于欧盟 ETS 法令在区域内强执行力，第一阶段各排放实体已提交数据并作出承诺，因为超额排放将会面临罚款。[2]ETS 区域内管制的效果值得肯定，但是只要船舶碳排放量归属船旗国或行程区域的问题没有定



论，或者说 ETS 调整来往船舶的规则不被相关利益方认可，ETS 将航运业纳入管辖范围可能沦为一纸空谈。

图 2：笔者自制 欧盟成员国 2005 年落实 ETS 法令要求的数据

ETS 并非完美，碳配额的发放容易受到经济形势、气候条件、技术水平等因素影响，很难准确确定其科学性和合理性。[3]从欧盟 ETS 第一期碳排放配额的分配与《议定书》要求的减排量进行比较可以看出，欧盟绝大部分成员国都超过《议定书》减排量，难以达成欧盟承诺的减排目标。[4]在此情形下，将航运业纳入 ETS 管辖令情况变得更为复杂，进一步加剧了各方对 ETS 科学性和合理性的诟病。

[1] Ellinghaus, U., Ebsen, P., & Schloemann, H., *Eu emissions trading scheme (EU ETS): status report,* Journal for European Environmental & Planning Law, 1(1), p.3-9 (2004).

[2] Gründinger W. (2017) *The European Emissions Trading Scheme (EU-ETS)*. In: Drivers of Energy Transition. Energiepolitik und Klimaschutz. Energy Policy and Climate Protection. Springer VS, Wiesbaden.

[3] Parker L. *Climate Change: The European Union's Emissions Trading System (EU-ETS)* [C]// Congressional Research Service Reports. Congressional Research Service, Library of Congress, 2006.

[4] Gründinger W. (2017) *The European Emissions Trading Scheme (EU-ETS)*. In: Drivers of Energy Transition. Energiepolitik und Klimaschutz. Energy Policy and Climate Protection. Springer VS, Wiesbaden.

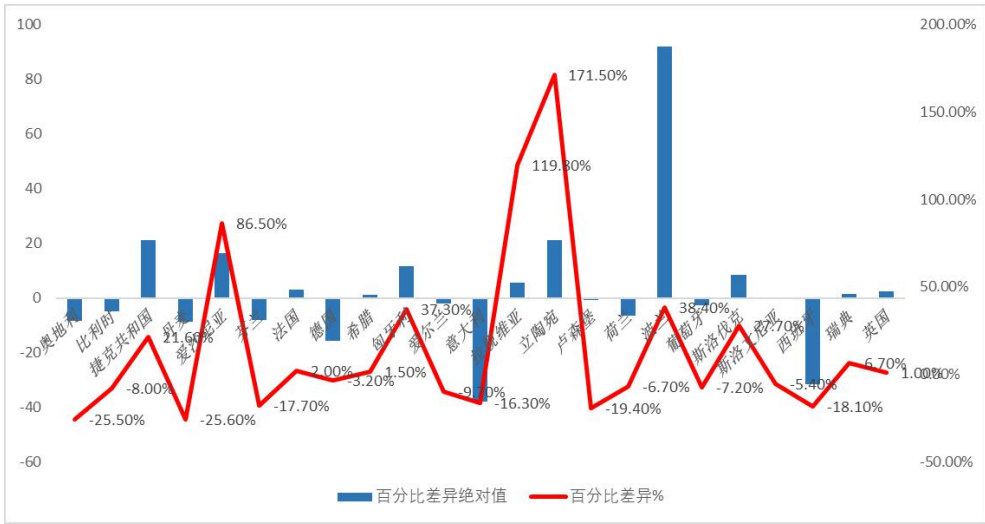


图 3：笔者自制 ETS 第一期上限设置与《议定书》要求减排量的比较

从国际法的角度来看，欧盟将航运业纳入 EU ETS 并不违反国际法的义务，[1]但其忽略气候变化问题需要多边协商共同应对的态度，用单边管制调整国际减排问题的做法并不符合国际法的原则并且实质性地侵害了他国利益。典型的就是在欧盟利用 IMO 独具特色的“简单多数”表决机制的推动下，通过了未来船舶温室气体减排法律框架的九大原则。其中原则二“强制、平等地适用于所有船旗国”违反了 UNFCCC 及《京都议定书》所确立的 “共同但有区别责任”原则。[2]

2.欧盟“监控、报告、验证”法规草案（EU MRV）

2013 年 6 月，欧盟委员会提出了航运温室气体排放“监控、报告、验证”法规草案（Monitor、Report、Verification，以下简称“MRV”），该法规已于 2015 年 7 月 1 日正式生效。这标志着该法规已经完成所有立法程序，正式成为欧盟法律之一。[3]MRV 的作用是通过强制管制措施进行数据收集，并将确定所需的数据提供给欧盟以便做出相应的减排目标。可见，欧盟航运业碳排放是市场措施与立法手段并行，市场化措施的目的是利用经济政策工具来影响决策，特别是通过协调的双重激励盈利来减少排放；而立法手段是强制获得信息以作为市场机制完善的辅助。MRV 作为一种数据资源管制方法，一方面用以增强 ETS 的权能，一方面向全球范围内推行欧盟的治理理念和标准。[4]根据 MRV 的规定，自 2018 年 1 月 1 日起，每个航次上停靠欧盟港口或从事相关的运输工作的所有船只都必须接受二氧化碳排放监测并提

[1] 《联合国海洋法公约》规定了港口国预防船舶污染的管辖权。由于港口位于一国内水，属于该国的主权范围之内，船舶在国际法上并不享有当然进入他国港口的习惯性权利。船舶如果想进入他国港口，就必须遵循该港口国设定的进港条件（包括环保方面的要求）。因此，只要欧盟通过港口国管辖权无歧视的适用欧盟法，那么理论上其行动并不违反国际法。

[2] 姚莹：《“共同但有区别责任”原则下海运减排路径探析》，载《当代法学》2012 年第 1 期，第 57-58 页。

[3] 周健：《EU MRV 法规解读及应对建议》，载《中国远洋海运》2017 年 7 月，第 72 页。

[4] *EU ETS Monitoring and Reporting Regulation (MRR)*, https://www.emissions-euets.com/monitoring-and-reporting-regulation.

供报告。[1] MRV 要求被监管方持有由独立验证人签发的有效性文件,并接受会员国当局的检查。[2]尽管第一个年度监测期为 2018 年，但这一措施在 2018 年的前后都会引起监管环境和监管对象的不确定性和不断演变。[3]MRV 带来的问题是，规定的管制范围包括往返欧盟的全部航程，这意味着欧盟将对领土之外的二氧化碳排放进行监管，并要求船舶提供检测报告和数据。[4]此举是否构成域外管辖，在国际法尚存争议。

可见，欧盟在航运业的碳排放量数据监管方面具备一定的潜力，在全球范围内其航运业碳交易立法规制方面也处于领先地位。ETS 强调碳排放额总量的限制和在交易市场上的再次流转，但都不能突破立法确立的总量上限。MRV 从来往船舶排放量的数据统计对 ETS 交易的合理性和可行性提供数据支持。ETS 和 MRV 作为正式立法，二者相辅相成，为欧盟航运业碳排放的初次分配和二次分配提出了一个可行的法律解决方案。同时，作为 IMO 成员国，欧盟一直致力于推动 IMO 温室气体排放法律法规的发展。MRV 不仅是欧盟区域航运业减排市场的法律规范也是区域内外船舶能效标准建立的重要标准。该措施将为未来在 IMO 或 UNFCCC 框架内构建一个全球性航运减排市场机制和法律规范提供大量的数据支持。[5]MRV 加速了建立航运温室气体排放全球数据收集系统的进程，借此机会欧盟继续对 IMO 施加压力，以期碳减排国际法律规范的形成取得实质性进展。[6]由于 IMO 尚未开展对船舶碳排放的数据统计，欧盟又是航运强国，来往船只的数据为 IMO 提供了较好的政策决策基础。因此，IMO 在航运管制政策形成或立法过程中很难摒弃欧盟的现有成果。换言之，欧盟航运业立法先行潜移默化地影响了 IMO 未来的政策选择与决策。可见，欧盟立法与 IMO 法律法规的制定会形成一种迭代推进的方式而互相作用。因此，未来全球航运业的碳排放治理会形成区域内治理和全球治理两种模式并存的“混合治理”格局（hybrid governance），区域治理和 IMO 治理相互作用，相互影响。[7]由于欧盟立法的超前性，不难得出欧盟期望以其区域型治理优势向全球治理领域扩张的结论。在此扩张过程中，欧盟区域立法是否构成域外管制的问题再次显现，航运业即将面临的困境如同多年前欧盟进行航空业碳排放管制行动一样。可见，欧盟区域立法的实质是通过立法进行权力的争夺以期重新分配在碳排放问题上的各方利益。该困

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1 Woodall P, Director, D A /S. *Shipping MRV for shipowners and operators: challenges and readiness.*

2 Dufour J, Dufour J. *Verifavia Launches First Dedicated Shipping Verification Service as EU 'MRV' Rules Come into Force.*

3 EU-MRV (n 4).

4 Dobson, N. L., & Ryngaert, C., *Provocative climate protection: Eu extraterritorial regulation of maritime emissions*, International and Comparative Law Quarterly, 66(2), 295-334(2017).

5 胡斌：《欧盟海运碳排放交易机制的国际法分析》，中国社会科学出版社 2017 年版，第 40 页。

6 COM (2013) 479, 'Integrating maritime transport emissions in the EU's greenhouse gas reduction policies' 5.

7 The term hybrid governance can be used to describe different phenomena. Levi-Faur includes different concepts within this broad category including co-regulation, enforced self-regulation, meta-regulation and multi-level regulation. We are using the term to refer mainly to meta-regulation but it also captures the multi-level elements as between the EU and the IMO. See David Levi-Faur, 'Regulation and Regulatory Governance' in David Levi-Faur (eds), *Handbook on the Politics of Regulation* (Edward Elgar 2011).

境可以通过多边谈判的政治手段来解决，也可以通过法律手段来解决。因此，国际法在解决“混合治理”中权力争夺的冲突与协调方面具有一定的作用，可能成为“混合治理”中一种富有成效的治理方式。[1]

3.欧洲绿色复苏计划（European Green Deal）

2020 年夏季欧盟委员会提出一项影响评估计划，以负责任的方式将欧盟 2030 年的温室气体排放量目标提高到至少 50%，与 1990 年的水平相比达到 55%。欧盟“绿色复苏计划”便是在这样的背景下出台，计划将就海上运输采取行动，包括管制污染最严重的船只进入欧盟港口，并迫使停靠的船只使用岸边电力。[2]这意味着航运业纳入 ETS 管制已成定局，只是具体的管制方式，是否区别船舶国籍国，配额如何分配等问题尚未确定。欧盟委员会曾发布关于欧盟 2030 年能源和气候框架的提案，提案包括对欧盟 ETS 的改革。[3]同时，委员会提议利用条约中允许欧洲议会和理事会通过普通立法程序，以合格多数票而不是一致方式通过这一领域的提案。这种程序上的松绑也体现了欧盟加速航运业碳排放纳入 ETS 的决心。

欧盟绿色复苏计划的形成，一方面是欧盟意识到，在全球碳治理的背景下，欧盟针对航运业的单边行动难以取得国际社会的认同，其他国家对其域外管制采取的反制措施并不利于欧盟碳排放目标的达成；另一方面，欧盟注意到发展中国家的碳排放效果的优劣有助于全球碳排放目的的达成。欧盟碳排放交易市场已经形成的先手优势，如何合理合法地将航运业纳入 ETS 规制，如何取得更多的国际支持者是欧盟航运业碳治理政策的走向。

三、欧盟碳治理政策的走向

欧盟作为 UNFCCC 唯一的国际组织缔约方，随着区域内碳排放管制的政策与立法的完备，欧盟将其碳减排的政策和立法模式向全球推行的意图明显，航空业的失败令其目光投向了航运业。这不但是欧盟本国利益的需要，也是在气候变化国际影响力塑造上一次绝佳的机会。欧盟全球航运业碳治理的策略选择有三条路径，一是再次尝试以区域内立法规制全球航运业的碳减排问题；二是进一步向 IMO 施压，催使航运业碳排放标准及法律法规出台；三是通过多边合作模式，重回 UNFCCC 框架下的共同但有区别原则，与发展中国家达成新的协议，但在协议磋商过程中，无论技术或标准方面，欧盟的经验和先手优势都会对谈判产生较强的影响力。欧盟法令在开始的时候仅限于技术问题，但是今天却影响着法律的各个方面。

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[1] Scott J, Smith T, Rehmatulla N, et al, *The Promise and Limits of Private Standards to Reduce Greenhouse Gas Emissions from Shipping*. Journal of Environmental Law, 29(2): p. 231-262(2017).

[2] European commission, *A European Green Deal*, https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en#documents.

[3] Gunter, B., *In the market: Reforming the EU ETS revisited,* Carbon & Climate Law Review (CCLR), (1), p.65-68(2014).

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欧盟 ETS 被认为是实现欧盟到 2020 年将温室气体排放量比 1990 年水平至少减少 20%的目标的关键，对于欧盟来讲这是一种成本效益和经济效益高的方式。[2]航运业未纳入 ETS 为此提供了机会，同时航运业的全球化特征，在助力欧盟达成碳减排目标方面具有极强的效用。但可预见的是，此举会遭到国际社会特别是来自发展中国家的反对。理由是《议定书》的调整范围内未纳入国际航运业，[3]同时《议定书》作为 UNFCCC 补充条款，是 UNFCCC 框架下航运碳减排最具相关性的国际法依据。《议定书》继承 UNFCCC 确立的“共同但有区别的责任”原则，该原则是国际社会应对气候变化问题的一项基本的国际法原则。欧盟这种单边行动将减排的压力推向发展中国家，在此基础上形成的多边条约将变得毫无吸引力。在发展中国家的反对下，欧盟第一条路径的推进道阻且长。

欧盟的第二条路径是通过影响 IMO 决策，推动 IMO 公约的迭代更新及发展，逐渐成为国际航运碳排放政策形成的推动力。[4]另外欧盟一直在游说 IMO 通过设定可量化的减排目标监管海洋排放，并多次提交 ETS 提案，直到 2015 年 5 月的 MEPC68 会议上，这些重复的努力仍然没有取得任何成果，委员会再次决定不为海洋排放设定可量化的减排目标。随后，欧盟环保部通过了削减现有船舶碳排放强度的新强制性法规草案。这是建立在现行的强制性能源效率要求的基础上的，以进一步减少航运产生的温室气体排放。这与 IMO 最初的温室气体战略目标相一致，该战略旨在到 2030 年将国际航运的碳强度在 2008 年的基础上降低 40%。修正案是 2020 年 10 月 19 日至 23 日作为远程会议举行的减少船舶温室气体排放闭会期间工作组第七届会议（ISWG-GHG 7）制定的。修正案草案将连同影响评估结果一起提交 2021 年 6 月举行的 MEPC 76 届会议正式通过。[5]可见，在欧盟不断施压的情况下，IMO 对船舶能效和管理的要求不断提高，基于欧盟船舶能效和 MRV 数据的先进性和超前性，在 IMO 即将出台的法律法规中，欧盟法律和欧盟标准的影子必然存在。换言之，IMO 推行的国际标准的背后实际是欧盟标准，欧盟以其标准与技术先进性间接的实现了全球碳排放规制。可见，欧盟第二条路径的推进初步取得了成效，标准是立法科学性的一个重要考量因素，标准的提升也会催生 IMO 在碳治理方面的政策和立法的进程。由于航运业纳入 ETS 管制大概率只是时

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[1] [法]米海伊·戴尔玛斯-玛蒂（Mireille Delmas-Marty）：《一起迈向世界的共同法》，刘文玲，刘小妍译，北京大学出版社 2019 年版，第 6 页。

[2] Hertogen, A., *Sovereignty as decisional independence over domestic affairs: The dispute over aviation in the eu emissions trading system*, Transnational Environmental Law*, 1(2),* 281-302 (2012).

[3] 胡斌：《欧盟海运碳排放交易机制的国际法分析》，中国社会科学出版社 2017 年版，第 32 页。

[4] 郑海琦：《欧盟海洋治理模式论析》，载《太平洋学报》2020 年 4 月，第 54-68 页。

[5] *Marine Environment Protection Committee (MEPC) 75, 16-20 November (virtual session),* https://www.imo.org/en/MediaCentre/MeetingSummaries/Pages/MEPC-75th-session.aspx.

间和具体方式上的调整，在全球航运业碳治理领域，区域治理与全球治理的混合治理模式即将形成。因此，IMO 的政策制定应当以“共同但有区别原则”为基石，在具体的管制方式，是否区别船舶国籍国，配额如何分配等问题充分考虑各方利益平衡，不仅仅注重形式公平亦要关注实质公平。

由于推进气候变化谈判的困难，《巴黎协定》尝试在气候问题上改变传统的自上而下的规制方法，而采用国家自主贡献这种自下而上的治理模式。在此大背景下，国际上对航运业碳减排问题是否可以达成一致的走向渐渐变得模糊。由于各国利益的博弈与矛盾，各国可能会针对本国船舶，建立自己的技术标准、碳排放限额制度等碳政策。这并不利于全球航运业碳排放总量的分配，也不利于形成一个全球化的碳交易市场。在各自为政的过程中，难免形成贸易壁垒，因为航运在贸易中的作用是举足轻重的。因此，国际社会必须找到一个持续降低贸易壁垒的机制，以便在航运业碳治理问题上达成一致。意识到如此拉锯式谈判不利于全球化谈判的推进，欧盟意识到在航运业碳治理问题上中国的影响，重视与中国的合作，[1]特别是重视碳交易体系在航运碳治理中的运用。欧盟也承认在合作过程中，应当践行 UNFCCC 项下的“共同但有区别”原则，对发展中国家提供技术与资金的支持。可见，欧盟未来碳政策的走向会坚定的选择第三条路径，加强与中国的合作。

综上，欧盟 MRV 和 ETS 都是在 IMO 监管惰性以及公约将国际航运排除在气候变化协议之外的背景下产生的，是欧盟进行航运业碳排放管制的主要法律手段。[2]MRV 为 ETS 的推广提供了充分的数据支持，欧盟早期尝试将 ETS 模式向全球范围内进行推广但无法确定是否会取得国际社会的支持和良好的成效。而近年来其重回“共同但有区别原则”项下，重回多边合作模式。旨在国际多边合作过程中推行欧盟的技术、标准和政策，以确立其在国际气候变化问题处理上的领导地位。同时，欧盟将不断提高 IMO 效率确定为一项战略目标，与其共同实施全球航运碳减排法律规制及项目推进，以期尽快达成欧盟的减排目标。在全球航运业区域治理与混合治理共存的情形下，欧盟参与全球碳排放治理的过程呈现出清晰完整的逻辑，这为透视我国参与全球航运业碳治理提供了一定的借鉴和参考。

四、欧盟碳治理政策的启示

[1] 近五年内，达成 2015 年《中欧气候变化联合声明》、2016 年《中欧能源合作路线图》和 2018 年《中欧领导人气候变化和清洁能源联合声明》等。

[2] Regulation 2015/757 of 29 April 2015 on the monitoring, *Reporting and verification of carbon dioxide emissions from maritime transport* [2015] OJ L123/55.

1.国际航运业碳排放交易体系的建立

建立国际航运业碳排放交易体系是激励各国各排放实体选择减排的一个良效机制。到目前为止，欧盟 ETS 市场的创建被认为是相对成功的，尽管在 2005 年至 2012 年的前两个交易阶段出现了超额分配和价格信号不稳定的初期问题。[1]因为，欧盟 ETS 第一和第二阶段的完整数据对欧盟 ETS 在全球碳减排领域的影响竞争力方面起到了极大的作用。[2]从经济角度出发，将世界各地的国内或区域碳排放交易体系连接起来是可行并且有效的，因为这将引入更多参与者入场，无论从技术角度还是企业多样性的角度看都可以增加减排成本的多样性，促进市场的流动性。从配额合理分配的角度看，国际航运业碳排放交易体系的建立，以整体性的视角统筹碳排放配额，提供一个更为广泛的监管框架。另外，中国作为贸易大国和航运大国，国际航运业碳排放交易体系的建立，中国的参与不可或缺。自 2021 年 2 月 1 日起施行的《碳排放权交易管理办法（试行）》提出国家核证自愿减排量的概念（Chinese Certified Emission Reduction, 以下简称为“CCER”），该机制为我国建立健全航运业碳交易体系奠定了良好的基础，以此为契机将中国航运业碳排放量与其他现有或新兴的国内或区域碳排放交易体系(特别是欧盟碳排放交易体系)的碳排放量联系起来并展开“碳量互认制”谈判，将是实现全球排放目标的一个重要的尝试。这种互认制还可以避免碳税和各国汇率差异带来的困境。这种联系的建立必将吸引其他国家和地区加入到全球碳市场的发展中来。[3]鉴于此，中国应尽早将航运业纳入我国 CCER 交易体系或建立自身的航运碳排放交易体系，短期效果是对中国航运业可能受到欧盟政策规制的一种保护；长期效果是在中欧气候变化合作中，以及国际航运业碳排放交易体系的建立过程中，提升中国的影响力和话语权。具体而言之，首先，鉴于我国已有的 CCER 交易机制，应当就碳减排量上与欧盟 ETS 进行衔接并展开以碳量互认为目标的磋商和谈判；欧盟 ETS 与 MRV 互相配合的机制值得我国借鉴，我国应当建立自己的监管、报告认证机制，在此过程中，碳足迹的捕捉与认定是一个困难，结合区块链技术在碳足迹记录方面的应用似乎可以为此做出一定的贡献。一旦 CCER 与 ETS 形成互认和共建，在未来国际航运业碳排放交易体系的建立过程中，我国可以将现有的经验和已获得的数据进行推广。

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[1] Dari-Amttiacci, G., & van Zeben, J., *Legal and market uncertainty in market-based instruments: The case of the eu ets,* New York University Environmental Law Journal*,* 19(3), p.415-453 (2012).

[2] Spinelli, C., *The EU ETS and the European industry competitiveness: Working towards post 2020,* Renewable Energy Law and Policy Review (RELP*)*, 7(3), p.25-34 (2016).

[3] Shen, Y., & Feng, J., *Linking China's ETS with the EU ETS: Possibilities and institutional challenges*, Environmental Policy and Law*,* 47(3-4), p.127-133 (2017).

2.碳交易法律规则的国际化

法律规范是市场良性发展的保障，国际航运业碳排放交易体系的建立和良好的运行同样离不开有效的国际法律规则。法律规则国际化有两个层面的前提，一是需要调整社会关系的全区属性，二是调整社会关系需要法律强制力予以保障。航运业碳治理问题具备以上两个前提，航运业的全球属性是不言而喻的；碳交易规则的首要矛盾是碳配额如何分配，配额的分配前提是有一个总量控制的基础，而这个总量控制和分配机制都需要国际立法予以明确并进行实施保障。具体而言，可采用自下而上的自愿减排机制来实现全球航运业碳排放量的短期目标。由 IMO 作为整体统筹航运业碳交易市场的主体以避免各国各自为政，以便达成减排量互认的效果。理由在于，航运业具有极强的全球化属性，这种全球化属性决定了在碳排放总额分配上，是一个多方协商的过程而非某个国家可以独自决定的。如果缺乏全球性的统筹，容易走向欧盟第二条路径即以单边行动规制全球事务，这是整个国际社会不愿看到的结果，也不利于巩固现有国际社会达成的条约和成就。在国际碳排放权的初次分配上，应当秉承以“共同但有区别责任”原则为气候变化谈判的基础，各国各自的义务将根据该原则予以确定，发达国家承担着与财政负担能力和历史贡献相匹配的减排义务。[1]“共同但有区别责任原则”是气候变化公约最早就确立的原则，可见，国际航运业碳交易法律规则国际化的社会关系前提和法律规范基础都已经存在。

航运业碳减排问题属于国际环境法调整的范畴。环境问题具有同质性特征，未来国际环境法的发展存在一个趋同化的趋势。碳交易法律规则是国际环境法的一部分，其国际化也是未来发展的一个趋势。因此，应该从国家、欧洲经济体和世界三个角度来讨论碳交易法律规则的国际化的问题，其根本也是国际权力重建的问题，如果没有权力的重建，法律规则国际化就会变得很弱，威胁到政治平衡。欧盟航运业碳交易政策在标准的推行、体系的设置和政策模式的推广方面或多或少地渗入和影响了国际碳交易法律规则的形成和发展。国际碳交易法律规则的建立一定是基于多边谈判的基础上，谈判的过程也是权力重建的过程。在此基础上，推动 IMO 形成新的调整航运业碳减排方面的国际公约可能是现实有效的途径。理由在于航运业的规则优化与监管落实大概率会通过 IMO 来进行，这也是基于 IMO 多年来致力于海洋环境保护而取得的经验和成就。IMO 本身对航运业环境问题的调整颇有建树，如已经形成公约并在全世界范围内广泛适用于认可的《修正<1969 国际油污损害民事责任公约>的 1992 年议定书》（1992CLC）、1996 年《国际海运有毒有害物质损害责任和赔偿公约》（HNS）、

[1] Dobson, N. L., & Ryngaert, C., *Provocative climate protection: Eu extraterritorial regulation of maritime emissions,* International and Comparative Law Quarterly, 66(2), p.295-334 (2017).

2001 年《国际燃油污染损害民事责任公约》、《国际防止船舶造成污染公约》（MARPOL73/78）等。从以上针对环境问题的国际公约良好的法律规制效果来看，IMO 在气候变化问题上，依然会做出其应有的贡献。并且，近年来 IMO 对航运业环境问题的关注向气候变化问题倾斜，未来达成新公约的可能令人期待。中国作为航运大国，也是 IMO 的 A 类理事国，近几年中国提案数量明显增加，在 IMO 成员国中位居前五，可见，提案优势非常明显。[1]可以预见的是，在未来航运业碳减排治理过程中，无论从中国船舶数量可以提供的数据来看，还是燃料的改善型船舶的数量来看，中国都会做出极大的贡献。法律从实践中来，因此，结合碳中和的背景，中国应当结合自身经验与优势，在全球航运业碳交易规范的形成过程中贡献中国智慧与中国经验。概言之，应以“共同但有区别原则”为基石，强化国际航运业碳交易法律规则的规范化，对全球一体化航运碳交易体系进行共建共管。

五、结论

由于航运与世界贸易之间存在直接联系，任何碳减排计划都必须允许航运继续满足世界贸易的需求，并保持其重要作用。[2]根据 IMO 的数据，超过 90%的全球贸易流动与国际航运有关，这表明，如果没有航运业，目前的全球贸易流动水平以及全球消费水平是不可能实现的，尤其是因为通过这种方式，货运价格具有竞争力，航运业与贸易经济的关系也正因此紧密相关。[3]理想情况下，国际社会应致力于在全世界范围内整合碳排放交易机制，以避免各国独自行动造成的经济壁垒和贸易价格波动。结合我国碳中和的中长期目标，尽快将航运业纳入 CCER 交易体系或建立我国的航运业碳交易体系，强化我国在气候变化谈判中的地位，并通过法律国际化的方式强化国际碳交易规则的规范化，以促进尽快形成全世界范围内的航运业碳排放交易机制。

[1] 《以提案为例探索中国海事增强国际影响力对策》，载博丰物流，https://www.zhbfwl.com/17030.

[2] Nast, T., *The response of the international shipping industry to global climate change*, Journal of Maritime Law and Commerce, 44(1), p.29-46 (2013).

[3] Leal-Arcas, R., & Filis, A., *Legal Aspects of the Promotion of Renewable Energy within the eu and in Relation to the eu's Obligation in the WTO*, Renewable Energy Law and Policy Review (RELP), 5(1), p.3-25 (2014).

The Evolution Logic, Developing Trend and Enlightenment of EU Carbon Governance Policy in Shipping Industry

SUN Yue*

Abstract：Upon the evolution of the carbon governance policy in the shipping industry, the EU has gone through various stages - from regional legislative governance to a stage attempting to use unilateral actions to break through the established principles of international conventions to regulate global carbon emissions, and finally to the Common but Differentiated Responsibilities Principle (hereinafter referred to as CBDRP) seeking multilateral cooperation. However, the EU policy is always guided by the achievement of regional emission reduction. The two formal legislations, namely the EU Emissions Trading System and EU Monitor, Report and Verification (hereinafter referred to as EU MRV) as well as Green Deal are the EU's main legal means and policies for carbon governance in the shipping industry. In the future, the carbon emission governance of the global shipping industry will form a mixed governance pattern where the two models, namely regional governance and global governance will coexist, leading to a situation whereby the EU will expand into the field of multitiered collaborative global governance with its regional governance advantages. Given all these, China should uphold the legislative cornerstone of CBDRP, establishing a carbon trading system in shipping industry to strengthen its position in climate change negotiations, promote the standardization of international carbon trading rules, and jointly build a globally integrated carbon emissions trading system in shipping industry.

Keywords：EU Shipping Industry; Carbon Governance; Carbon Trading System; Evolution Logic; Common but Differentiated Responsibilities Principle (CBDRP)

As an Annex I organization of the United Nations Framework Convention on Climate Change (hereinafter referred to as UNFCCC) and the Kyoto Protocol, and a member of the International Maritime Organization (hereinafter referred to as IMO), the EU has been committed to the exploration of multi-channel solutions to climate change under the dual emissions pressure

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of the two conventions and IMO. The EU is the first region to commit to achieving net zero carbon emissions by 2050, which is announced by law.[1] The EU intends to include the shipping industry into the scope of control of the existing carbon emissions trading system.[2] The European Commission proposed on 14 July 2021 that shipping should be included in the EU Emissions Trading System (hereinafter referred to as ETS) in stages to regulate international navigation.[3] Although the proposal is only a starting point for further negotiations, once it is announced, a plan to include the shipping industry into the world's largest carbon emissions trading system will eventually be created.[4]

This article sorts out the carbon emission requirements of the shipping industry by international conventions and also the IMO. Given the pressure from its own emission reduction, the shipping industry will become a new industry included in the EU's carbon emissions trading system, and it is very likely that measures will be taken as soon as possible to reduce carbon emissions released by the global shipping industry in order to achieve the overall emission reduction goal of the EU. Therefore, the EU's policy trends on the issue of carbon emission reduction in the shipping industry are very important, and it is as such, necessary to analyze the evolution of its carbon emission policy in order to predict the possible future policy trends. Combined with China's goal of carbon neutrality, it provides effective suggestions and measures for the formulation of future carbon emission reduction policies in the shipping industry.

I.The Origin of EU Carbon Emission Policy in Shipping Industry

UNFCCC is by far the most influential, widest, and far-reaching international legal document

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[1] XIE Fuzhan &LIU Yaming, *Annual Report on Actions to Address Climate Change（2020）*, China Social Sciences Press, November, 2020, 7.

[2] In 2008, the EU passed the 2008/101/EC Directive, including the aviation industry into the EU carbon emissions trading system. Starting in 2012, all flights to or from any EU airport must purchase carbon emission allowances. Aircraft operators who fail to turn in sufficient allowances will be fined, detained and even embargoed. Public opinion unanimously believes that the shipping industry, which is of a similar attribute to the aviation industry, can also be included in the EU carbon emissions trading system through similar procedures.

[3] The industry emissions coverage rate regulated by the EU ETS will increase year by year from 20% in 2023 to 100% in 2026. The proposal will suggest that the EU emissions market includes emissions from voyages within the European economic area and emissions from all ships entering the port for international voyages, or 50% emissions for incoming voyages and 50% emissions for outgoing voyages. Although the European Commission's Directorate-General for Climate Action and the responsible agency of ETS have recommended that the complete inbound voyage be included, other agencies have expressed the hope that a 50%/50% inbound and outbound model will be adopted for international voyages. The committee's proposal also suggests that starting from 2023, ETS will gradually be applied to shipping, by which time companies will have to pay for 20% of their ship's emissions. Starting in 2026, this number will increase year by year, reaching 100% coverage. This phased approach will not include free emission allowances allocated to companies that can subsequently be traded. Companies subject to EU ETS purchase emission allowances from the limited allowances issued by the Commission each year. They can keep these allowances to make up for their own emissions, or sell them to other companies when they are not needed. Shipping companies must report their annual carbon dioxide emissions during the voyage to and from the European economic port area through monitoring, reporting and verification regulations.

[4] In the past 12 months, the price of carbon dioxide has almost doubled, to about 55 Euros (approximately US$65.6) per ton. If the proposal is passed, it will be the first market-based measure for international shipping emissions.

in the field of international environment and development.[1] Its objective is: "to achieve stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system ."[2] To achieve the goal of the UNFCCC, the Kyoto Protocol came into effect in 2005 becoming the first legally binding climate agreement. The signing of the Kyoto Protocol officially opened up the rapid growth of global carbon trading.[3] The Paris Agreement to the UNFCCC, reached by nearly 200 parties is the second legally binding climate agreement and has made arrangements for the global response to climate change after 2020. UNFCCC, the Kyoto Protocol and the Paris Agreement require Annex I countries to take action first and assume more responsibility for global climate change based on the principle of fairness and CBDRP.

The latest IMO report shows that the total carbon emissions from shipping has increased from 977 million tons in 2012 to 1.076 billion tons in 2018 (an increase of 9.6%); while the target was: 962 million tons of carbon dioxide emissions in 2012 and 1.056 billion tons of carbon dioxide emissions in 2018 (an increase of 9.3%).[4] The fact that the international shipping industry has failed to achieve the expected emission reduction targets has caused some hindrance to the achievement of subsequent emission reduction targets. The seven typical ship types, or the representatives of world fleet, namely bulk carriers, oil tankers, container ships, chemical tankers, liquefied gas carriers, general cargo ships and refrigerated bulk carriers, account for about 88% carbon dioxide emissions of the world's total and about 98% workload of the world's total.[5] Consequently, the achievement of the shipping industry's carbon emission reduction target directly affects that of the overall carbon emission reduction target. The Fourth IMO GHG Study 2020 report presents four metrics of carbon intensity, namely Energy Efficiency Operational Indicator (EEOI, g CO_2/t/nm), Annual Efficiency Ratio (AER, g CO_2/dwt/nm), DIST (kg CO_2/nm) and TIME (t CO_2/hr). These metrics can either be calculated with data from the Data Collection System or are included in the SEEMP Guidelines. Also, these metrics are used in research to evaluate the carbon intensity of international shipping. It is foreseeable that these metrics will be used in the supervision of carbon emission reduction in the global shipping industry, with a view to achieving zero carbon emissions in the shipping industry as soon as possible. IMO has required its member

[1] ZHANG Ruijiao, *Chinese Strategy Method for Coping with Global Green Carbon War - Study on Building Carbon Trading Mechanism and Carbon Accounting System of China*, Master's thesis of Donghua University, 2013, p.24.
[2] See UNFCCC article 2.
[3] Teall Crossen, *The Kyoto Protocol Compliance Regime: Origins, Outcomes and the Amendment Dilemma*., Resource Management Journal, 2004, 1:3.
[4] *IMO GHG study 2020*. https://www.imo.org/en/OurWork/Environment/Pages/GHG-Emissions.aspx.
[5] *IMO GHG study 2020*. https://www.imo.org/en/OurWork/Environment/Pages/GHG-Emissions.aspx.

states to collect and report fuel consumption data from 1 January 2019.[1] As an international organization authorized by the Kyoto Protocol to coordinate carbon emission reduction issues in the shipping industry, the IMO has requirements for reducing greenhouse gas (GHG) emissions from ships, which are shown in the figure below.[2]

Date(Y)	GHG Emission Requirements
1997	"Carbon Dioxide Emission from the Ship" Resolution established and authorizes the IMO to control GHG emissions.
2003	IMO entitled to policy and Implement shipping GHG Emission reduction.
2013	New regulatory tools to improve energy efficiency of international ships: A. Strict carbon intensity standards are imposed on new types of ships – the Mandatory Design Requirement (EEDI). B. For all ships – the Mandatory Ship Energy Efficiency Management Program (SEEMP) to improve ship energy efficiency.
2015	EEDI Phase 1: Reduce ship carbon intensity by 10%.
2016	Compulsory IMO data collection system: As from January 1, 2019, any vessel above 5,000 gross tonnage (accounting for more than 85% of international shipping emissions) is required to collect fuel consumption data and submit annual reports to the IMO.
2018	IMO entitled to formulate strategy for reducing GHG Emissions from ships.
2019	Adopt a procedure to assess the impact of alternative measures on countries. Strengthen EEDI requirements for some ship types. Resolution on port and shipping cooperation. Establish the "GHG Technical Cooperation Trust" within the IMO.
2020	EEDI Phase 2: Reduce the carbon intensity of ships by 20%.
2025	EEDI Phase III: Reduce the carbon intensity of ships by 30%. Several types of ships are premature (2022), with the largest container ships reducing carbon intensity by up to 50%.
2023-2030	Medium term action: Reduce fleet carbon intensity by at least 40%.
2030-2050	Long-term action: Reduce the carbon intensity of the fleet by at least 70%.
2050	Reduce the total Greenhouse Gas (GHG) emissions by at least 50% per year (requiring the reduction of carbon dioxide by approximately 85% for each vessel) and achieve carbon neutrality by the earliest possible means of this century.

Figure 1：IMO Requirements to Reduce Greenhouse Gas (GHG) Emissions from Ships

Source: Self-made by the author

In order to realize its own interests and achieve emission reduction targets, the EU has to turn its sights to the global carbon emission reduction market, although such a move may bring political and/or moral hazards like cross-border jurisdiction issues. However, according to legal realism, it is reasonable to use various methods to maximize one's own goals based on the criteria of power and interests. Therefore, the carbon governance policy of the EU presents a political strategy that

[1] *IMO DCS, SEEMP, and CII*, ClassNK, https://www.classnk.or.jp/hp/zh/activities/statutory/seemp/index.html.
[2] *Greenhouse Gas Emissions*, IMO, https://www.imo.org/en/OurWork/Environment/Pages/GHG-Emissions.aspx.

transcends jurisdiction,[1] with the ultimate goal to achieve its own interests. A typical case is the requirement of the EU Aviation Industry ETS directive: Starting from 1 January 2012, all airlines flying into, out of, and within the EU should have enough carbon emission allowances to cover their greenhouse gas emissions.[2] This decree is the first attempt of the EU's carbon emission legislation to expand its power to the global field, and it has laid a certain foundation for promoting its leadership in the field of climate change. However, it has to be pointed out that in the process of implementing its carbon governance policies and standards, the EU has indeed encountered opposition and criticism from the international community. Therefore, the EU has to postpone its pace of global carbon governance, and instead adopt a strategy that not only takes the overall interests of the organization as the primary starting point, but also should hope to promote win-win cooperation among international entities with its influence.

II. The Evolution Logic of EU Carbon Governance Policy in Shipping Industry

As far as EU shipping carbon governance legislation and policy development are concerned, before the EU planned shipping carbon emissions into its overall carbon emission reduction legal framework, it had already begun preparatory measures, which are mainly reflected in the implementation of its shipping MRV mechanism.[3] MRV and ETS have become the EU's two main legal means for carbon emission governance in the shipping industry; Green Deal provides a concept of implementing multiple ways to further promote climate change governance.

1. EU Emissions Trading System（EU ETS）

The EU Directive 2003/87/EC, which came into effect in 2005, officially began to regulate carbon emissions in the form of legislation. Based on this directive, the EU has established an Emissions Trading System (EU ETS) between its member states. By regulating emissions from entities, the EU has achieved the 45% carbon emission reduction target in the region, accounting for approximately 20% of the EU's total greenhouse gas emissions.[4] A study shows that emissions from the shipping industry account for 2.7% of the total global emissions. Therefore, including the shipping industry in ETS for regulation has provided a new solution to the EU's overall emission reduction targets. At the same time, non-governmental environmental organizations have

[1] The EU grew out of the European Community, with six founding member states and now has 27 Member States, which formed the EU's structure as a supranational organization. This supranational organization is itself characterized by a transcendental jurisdiction.

[2] *Air Transport Association of America v. Secretary of State for Energy and Climate Change (EU Court of Justice, 2011)*, https://climate-laws.org/geographies/european-union/litigation_cases/air-transport-association-of-america-v-secretary-of-state-for-energy-and-climate-change-eu-court-of-justice-2011.

[3] HU Bin, *Research on the EU Marine ETS in the Context of International Law*, China Social Sciences Press, 2017, p.34.

[4] http://europa.eu.int/scadplus/leg/en/lvb/l28012.htm.

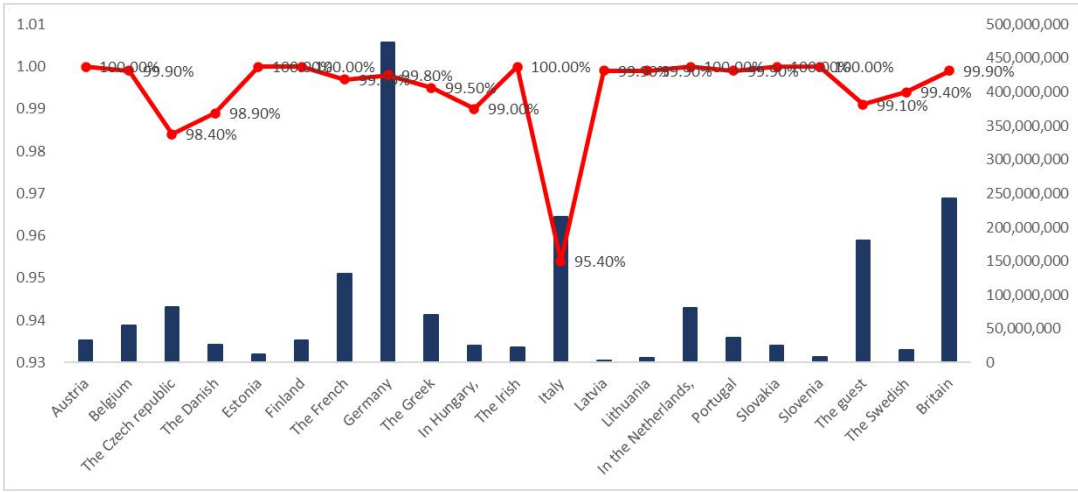
repeatedly called on the EU to formulate an instrument to reduce carbon emissions from shipping.[1] It is speculated that the carbon emissions trading scheme is a powerful and effective tool to reduce carbon emissions from the shipping industry. Based on this, the EU will continue to make efforts to include the shipping industry in ETS for regulation in order to reduce greenhouse gas emissions.

The logic of ETS to regulate carbon emissions is to control greenhouse gas emissions through allowance restrictions. This is because the upper limit of total greenhouse gas emissions is set in advance, and the purpose of this, is to leave space for the allocation of emissions. One of the key obstacles of projecting this directive to the shipping industry is whether it is reasonable and feasible for ships entering the EU region to be regulated by the upper limit of emissions in the EU region. The reason is that ETS is a carbon governance model that allocates total carbon emissions through legislation and combines market free trading mechanisms. The mobility of ships has led to its continuous carbon emissions during the voyage. This carbon emissions not only belong to the total emissions of the flag state of the ship, but should also be regulated by the environmental policy of the voyage area. What's more, how to coordinate the cross-qualification of carbon emissions is still unclear. The EU carbon trading market was established in 2005 and stands, the world's oldest and largest carbon trading market.[2] The shift from free distribution to paid distribution of carbon allowances has resulted in the scarcity of carbon allowances. The price of carbon trading, therefore, has continued to rise, and the entities have to be more cautious in the process of emissions, thus ensuring that total carbon emissions are gradually reduced. Due to the strong enforcement of the EU ETS directive in the region, the emission entities in the first phase have submitted data and made commitments, because excess emissions will face fines.[3] The regional control effect of ETS is worthy of recognition, but as long as the issue of whether the ship's carbon emissions should be attributed to the flag state or the voyage area is inconclusive, or that the rules for ETS to regulate the ships are not recognized by relevant stakeholders, the target for ETS to bring the shipping industry into its jurisdiction will be a talk shop.

[1] Smets I. NGOs, *EU should prepare inclusion of shipping in ETS*, Euro politics environment, 2011(810): p.5.

[2] Ellinghaus, U., Ebsen, P., & Schloemann, H., *Eu emissions trading scheme (EU ETS): status report,* Journal for European Environmental & Planning Law, 1(1), p.3-9 (2004).

[3] Gründinger W. (2017) *The European Emissions Trading Scheme (EU-ETS)*. In: Drivers of Energy Transition. Energiepolitik und Klimaschutz. Energy Policy and Climate Protection. Springer VS, Wiesbaden.



Carbon Dioxide Emissions in 2005 (tons)

Share of Devices with Verified Emissions Reports

Figure 2: Data Required by the EU Member States to Implement the ETS Decree in 2005

Source: Self-made by the author

ETS is not perfect. The issuance of carbon allowances is easily affected by factors such as economic situation, climatic conditions, technical level, etc. It is difficult to accurately determine its scientificity and rationality.[1] Comparing the allocation of the first phase of the EU's ETS carbon emission allowances with the emission reductions required by the Kyoto Protocol, it can be seen that most of the EU member states have exceeded the emission reductions required by the Kyoto Protocol, so it is difficult to achieve the EU's promised emission reduction targets.[2] Under this situation, including shipping industry into the jurisdiction of ETS has become more complicated, which has further aggravated the criticism of the scientificity and rationality of ETS.

[1] Parker L. Climate Change: *The European Union's Emissions Trading System (EU-ETS)* [C]// Congressional Research Service Reports. *Congressional Research Service, Library of Congress,* 2006.

[2] Gründinger W. (2017) *The European Emissions Trading Scheme (EU-ETS)*. In: Drivers of Energy Transition. Energiepolitik und Klimaschutz. Energy Policy and Climate Protection. Springer VS, Wiesbaden.

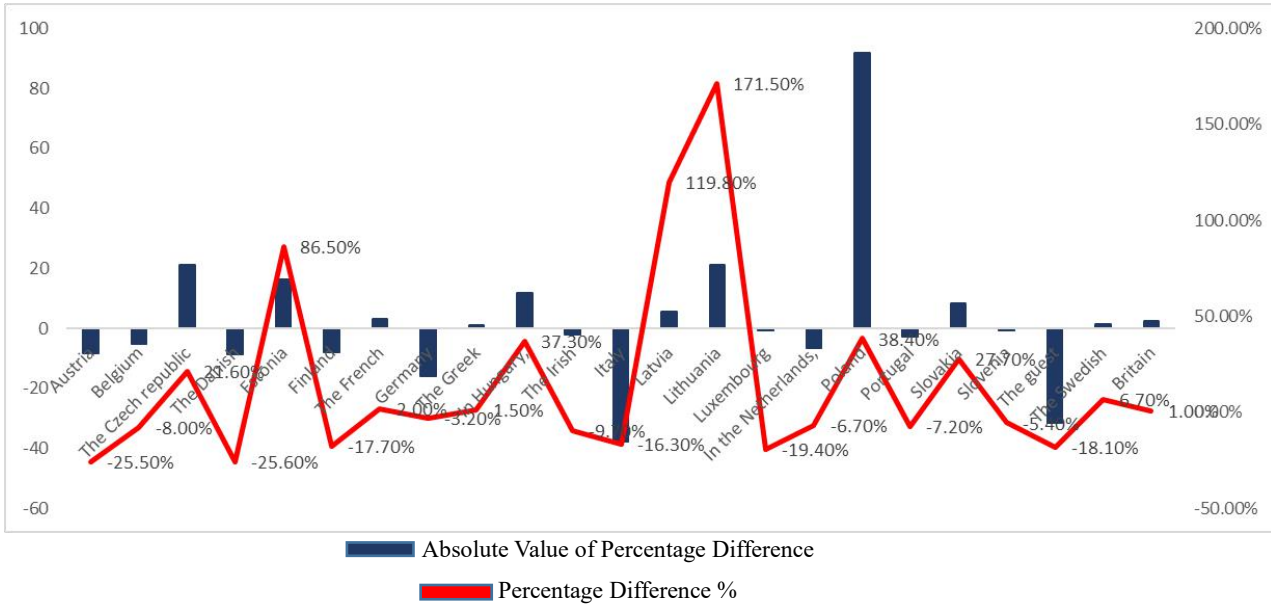


Figure 3：Comparison between the Cap Setting of the First Phase of ETS and the Emission Reduction Required by the Kyoto Protocol

Source: Self-made by the author

From the perspective of international law, the EU's inclusion of the shipping industry into the EU ETS does not violate its obligations under international law,[1] but it ignores that the issues of climate change require an attitude of multilateral consultation and joint response, and the unilateral regulation to adjust international emission reduction issues does not conform to the principles of international law and substantially violates the interests of other countries. A typical example is EU's adoption of the nine principles of the future legal framework for reducing greenhouse gas emissions from ships under the impetus of the IMO's unique "simple majority" voting mechanism. The second principle of "compulsory and equal application to all flag states" violates the CBDRP established by the UNFCCC and the Kyoto Protocol.[2]

2. EU Monitor Report and Verification Draft Regulations（EU MRV）

The European Commission proposed a draft regulation "Monitor, Report, and Verification (hereinafter referred to as MRV) on the monitoring, reporting, and verification of greenhouse gas emissions attributable to shipping in June 2013. This regulation came into effect on 1 July 2015, marking the completion of all legislative procedures and had officially become one of the EU

[1] The United Nations Convention on the Law of the Sea stipulates the jurisdiction of port states to prevent pollution from ships. Since the port is located in the internal waters of a country and falls within the sovereignty of that country, ships do not have the customary right to enter the ports of other countries as a matter of course in international law. If a ship wants to enter a port of another country, it must comply with the entry conditions (including environmental protection requirements) set by the port state. Therefore, as long as the EU applies EU law through port state jurisdiction without discrimination, its actions do not violate international law in theory.

[2] YAO Ying, Analysis of Maritime Emission Reduction under the CBDP, Contemporary Law Review, 26(1), 57-58(2012), .

laws.[1] The role of MRV is to collect data through compulsory control measures and provide the data necessary to the EU in order to set corresponding emission reduction targets. It can be seen that the EU's shipping industry carbon emissions are controlled by a combination of market measures and legislative measures. The purpose of market measures is to use economic policy tools to influence decision-making, especially to reduce emissions through coordinated and dual incentives and profits; while the purpose of legislative measures is to have a compulsory access to information as an aid to the improvement of market mechanisms. As a data resource control method, MRV is used both to enhance the power of ETS, and to promote EU governance concepts and standards globally.[2] According to MRV regulations, starting from 1 January 2018, all vessels calling at EU ports or engaged in related transportation work must accept carbon dioxide emissions monitoring and provide reports.[3] MRV requires the supervised party to hold a validity document issued by an independent verifier and accept inspections by the authorities of member states.[4] Although the first annual monitoring period is 2018, this measure has been and will cause uncertainty and continuous evolution of the regulatory environment and regulatory objects before and after 2018.[5] The problem with MRV is that the regulated scope of control covers the entire voyage to and from the EU, which means that the EU will regulate carbon dioxide emissions outside its territory and require ships to provide reports and data.[6] Whether this action constitutes extraterritorial jurisdiction is still controversial in international law.

It can be seen that the EU has a certain potential in the regulation of carbon emissions data in the shipping industry, and it is also in a leading position in the regulation of carbon trading in the shipping industry on a global scale. ETS emphasizes the limitation of the total amount of carbon emissions and the re-circulation in the trading market, but none of them can break the upper limit of the total amount established by legislation. MRV statistics on past ship emissions provide data support for the rationality and feasibility of ETS transactions. As formal legislation, ETS and MRV complement each other and propose a feasible legal solution for the primary and secondary distribution of carbon emissions from the EU shipping industry. At the same time, as a member of IMO, the EU has been committed to promoting the development of IMO greenhouse gas emission laws and regulations. MRV is not only the legal norm of the EU regional shipping industry emission reduction market, but also an important standard for the establishment of energy

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1 ZHOU Jian, *Interpretation of EU MRV Regulations and Suggestions for Response*, Maritime China, July, p.72(2017).
2 *EU ETS Monitoring and Reporting Regulation (MRR)*, https://www.emissions-euets.com/monitoring-and-reporting-regulation.
3 Woodall P, Director, D A /S. *Shipping MRV for shipowners and operators: challenges and readiness.*
4 Dufour J, Dufour J. *Verifavia Launches First Dedicated Shipping Verification Service as EU 'MRV' Rules Come into Force.*
5 EU-MRV (n 4).
6 Dobson, N. L., & Ryngaert, C., *Provocative climate protection: Eu extraterritorial regulation of maritime emissions*, International and Comparative Law Quarterly, 66(2), 295-334(2017).

efficiency standards for ships inside and outside the region. In the future, this measure will provide a large amount of data support for the establishment of a global shipping emission reduction market mechanism and legal regulations within the framework of IMO or UNFCCC.[1] MRV has accelerated the process of establishing a global data collection system for greenhouse gas emissions caused by shipping, which allows the EU to continue to exert pressure on the IMO to achieve substantial progress in the formation of international laws and regulations on carbon emission reduction.[2] Since the IMO has not yet launched data statistics on ship carbon emissions, and the EU is a powerful shipping bloc, data from ships passing through the jurisdiction of the EU provide a good basis for IMO's policy decision-making. Therefore, it is difficult for IMO to remain unaffected by the EU's achievements in the process of shipping control policy formation or legislation. In other words, the EU shipping industry legislation has subtly affected the future policy choices and decisions of IMO. And it can be seen that the formulation of EU legislation and IMO laws and regulations will form an iterative approach and interact with each other. Therefore, the future carbon emission governance of the global shipping industry will form a hybrid governance pattern in which regional governance and global governance coexist. Regional governance and IMO governance will interact and influence each other.[3] Due to the advancement of EU legislation, it is not difficult to draw the conclusion that the EU expects to expand into the field of global governance with its regional governance advantages. In this process of expansion, the question of whether EU regional legislation constitutes extraterritorial control has once again emerged. The shipping industry is about to face the same dilemma as did the EU's aviation industry carbon emission control actions many years ago. It can be seen that the essence of EU regional legislation is to fight for power through legislation in order to redistribute the interests of all parties on the issue of carbon emissions. This dilemma can be resolved through political means of multilateral negotiations or through legal means. Therefore, international law plays a certain role in coordinating the conflicts of power struggles in hybrid governance and may become an effective way of governance in this regard.[4]

3. European Green Deal（EGD）

In the summer of 2020, the European Commission proposed an impact assessment plan to

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1 HU Bin, *Research on the EU Marine ETS in the Context of International Law*, China Social Sciences Press, p. 40(2017).

2 COM (2013) 479, *Integrating maritime transport emissions in the EU's greenhouse gas reduction policies 5*.

3 The term hybrid governance can be used to describe different phenomena. Levi-Faur includes different concepts within this broad category including co-regulation, enforced self-regulation, meta-regulation and multi-level regulation. We are using the term to refer mainly to meta-regulation but it also captures the multi-level elements as between the EU and the IMO. See David Levi-Faur, *Regulation and Regulatory Governance in David Levi-Faur (eds)*, Handbook on the Politics of Regulation (Edward Elgar 2011).

4 Scott J, Smith T, Rehmatulla N, et al, *The Promise and Limits of Private Standards to Reduce Greenhouse Gas Emissions from Shipping*. Journal of Environmental Law, 29(2): p. 231-262(2017).

raise the EU's 2030 greenhouse gas emission reduction target to at least 50% in a responsible manner, which is 55% compared to the 1990 level. The European Green Deal was launched under such a circumstance. The deal will take action on maritime transport, including controlling the entry of the most polluting ships into EU ports and forcing docked ships to use shore power only.[1] This means that it is a foregone conclusion that the shipping industry will be included in ETS control. Issues such as the specific control method, how to distinguish the country of nationality of the ship, and how the allowance will be allocated, are yet to be determined. The European Commission has issued a proposal on the EU's 2030 energy and climate framework, which includes the reform of the EU ETS.[2] At the same time, the committee proposed to use the treaty to allow the European Parliament and the Council to pass ordinary legislative procedures in this area with a qualified majority rather than a unanimous vote. This procedural loosening also reflects the EU's determination to accelerate the inclusion of carbon emissions in the shipping industry into the ETS.

The formation of EGD, for one thing, signifies the EU's realization that in the context of global carbon governance, its unilateral actions on the shipping industry cannot be recognized by the international community, and the countermeasures from other countries against their extraterritorial controls do no good to the achievement of the EU's carbon emission targets; for another, the EU has noticed that the carbon emission effects of developing countries are good for achieving global carbon emission goals. The EU has already got first-hand advantages on carbon emissions trading market. How to reasonably and legally include the shipping industry into ETS regulation and how to obtain more international support will be the developing trend of the EU's shipping industry carbon governance policy.

III. The Developing Trend of EU Carbon Governance Policy

As the only international organization contracting party of the UNFCCC, with the completion of regional carbon emission control policies and legislation, the EU has obvious intentions to promote its carbon emission reduction policies and legislative models to the world. The failure of the aviation industry makes it turn its attention to the shipping industry, which does not only meet the needs of the EU's own interests, but also an excellent opportunity to shape its international influence on climate change. There are three paths for EU's global shipping industry carbon governance strategy. The first is to try again to regulate the global shipping industry's carbon

[1] European commission, *A European Green Deal*, https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en#documents.

[2] Gunter, B., *In the market: Reforming the EU ETS revisited*，Carbon & Climate Law Review (CCLR), (1), p.65-68(2014).

emission reduction issues with regional legislation; the second is to further pressure the IMO to urge the introduction of carbon emission standards and laws and regulations for the shipping industry; the third is to return to the CBDRP under the UNFCCC framework through a multilateral cooperation model and reach a new agreement with developing countries. However, in the process of negotiation, regardless of technology or standards, the EU's experience and first-hand advantages will have a strong influence on the negotiation. The EU statutes were limited to technical issues at the beginning, but today they affect all aspects of the law.[1]

The EU ETS is considered to be the key to achieving the EU's goal of reducing greenhouse gas emissions by at least 20% from 1990 levels by 2020. This is a cost-effective and economical way for the EU.[2] The fact that the shipping industry is not included in the ETS provides an opportunity for this. At the same time, the globalization of the shipping industry is extremely effective in helping the EU achieve its carbon emission reduction targets. But it is foreseeable that this move will be opposed by the international community, especially by developing countries. The reason is that the Kyoto Protocol does not include the international shipping industry within its scope of adjustments.[3] At the same time, the Kyoto Protocol, as a supplementary clause of UNFCCC, is the most relevant international law basis for shipping carbon emission reduction under the UNFCCC framework. The Kyoto Protocol inherits the CBDRP established by the UNFCCC, which is a basic principle of international law for the international community to deal with climate change issues. The EU's unilateral action pushes the pressure of reducing emissions to developing countries, and the multilateral treaties formed on this basis will become unattractive. Under the opposition of developing countries, the EU's first path will be obstructive and long.

The EU's second path is to promote the iterative update and development of the IMO Convention by influencing IMO's decision-making, and gradually becomes the driving force for the formation of international shipping carbon emission policies.[4] In addition, the EU has been lobbying the IMO to regulate marine emissions by setting quantifiable emission reduction targets, and has submitted ETS proposals many times. But these efforts still bore no fruit even in May 2015 when the MEPC 68 meeting was held. The committee again decided not to set quantifiable emission reduction targets for marine emissions. Subsequently, the EU Ministry of Environmental Protection passed a draft of new mandatory regulations to reduce the carbon emission intensity of

[1] Mireille Delmas-Marty, translated by LIU Wenling & LIU Xiaoyan, *Marcher ensemble vers un droit commun mondial*, Peking University Press, 2019, p. 6.
[2] Hertogen, A., *Sovereignty as decisional independence over domestic affairs: The dispute over aviation in the eu emissions trading system*, Transnational Environmental Law*, 1(2),* 281-302 (2012).
[3] HU Bin, *Research on the EU Marine ETS in the Context of International Law*, China Social Sciences Press, 2017, p.32.
[4] ZHENG Haiqi, *Analysis on the EU's Ocean Governance Models*, Pacific Journal, April, 2020, p.54-68.

existing ships, which is based on the current mandatory energy efficiency requirements to further reduce greenhouse gas emissions from shipping. This is consistent with the IMO's original greenhouse gas strategy, which aims to reduce the carbon intensity of international shipping by 40% by 2030 compared to 2008. The amendments were formulated at the seventh session of the Intersessional Working Group on Reduction of GHG Emissions from Ships (ISWG-GHG 7), held as a teleconference 19-23 October 2020. The draft amendments, together with the findings of the impact assessment, would be submitted to the MEPC 76th meeting in June 2021 for formal adoption.[1] It can be seen that under the continuous pressure of the EU, IMO's requirements for ship energy efficiency and management continue to increase. Based on the advancement of EU ship energy efficiency and MRV data, in the upcoming laws and regulations of IMO, the influence of EU laws and EU standards must exist. In other words, behind the international standards promoted by IMO are EU standards, and the EU indirectly implements global carbon emission regulations with its standards and technological advancement. It can be seen that the advancement of the EU's second path has achieved initial results. Standards are an important consideration of the scientific nature of legislation. The improvement of standards will also give rise to the process of IMO's policies and legislation on carbon governance. As the shipping industry is likely to be included in ETS control, it is only an adjustment in time and specific methods. In the field of global shipping industry carbon governance, a hybrid governance model of regional governance and global governance is about to take shape. Therefore, IMO's policy formulation should be based on CBDRP. In terms of specific control methods, for example, on issues such as whether the ship's country of nationality should be differentiated, or how the allowances are allocated, the balance of interests of all parties should be fully considered, and attention should be paid not only to formal fairness, but also to substantial fairness.

Due to the difficulty of advancing climate change negotiations, the Paris Agreement attempts to change the traditional top-down regulatory approach on climate issues and adopt the bottom-up governance model of independent contribution of nations. Against this background, the international opinion on whether a consensus can be reached on the issue of carbon emission reduction in the shipping industry is gradually becoming blurred. Due to the game and contradiction of the interests of various countries, each country may establish its own technical standards, carbon emission allowance system and other carbon policies for their own ships, which is not conducive to the distribution of total carbon emissions from the global shipping industry, nor

[1] *Marine Environment Protection Committee (MEPC) 75, 16-20 November (virtual session)*, https://www.imo.org/en/MediaCentre/MeetingSummaries/Pages/MEPC-75th-session.aspx.

is it conducive to the formation of a global carbon trading market. Trade barriers will inevitably form in the process of working independently, because shipping plays a pivotal role in trade. Therefore, the international community must find a mechanism to continuously lower trade barriers in order to reach an agreement on the issue of carbon governance in the shipping industry. Realizing that such see-saw negotiations are not conducive to the advancement of globalization negotiations, the EU has become aware of China's influence on the issue of carbon governance in the shipping industry, and attaches importance to the cooperation with China,[1] especially the use of the carbon trading system in shipping carbon governance. The EU also recognizes that in the process of cooperation, it should implement the CBDRP under the UNFCCC, and provide technical and financial support to developing countries. It can be seen that the EU's developing trend of future carbon policy will firmly choose the third path and strengthen its cooperation with China.

In summary, the EU MRV and ETS, the EU's main legal means for carbon emission control in the shipping industry, are both produced under the background of IMO regulatory inertia and the convention that excludes international shipping from the climate change agreement.[2] MRV has provided sufficient data support for the promotion of ETS. The EU tried early to promote the ETS model to the world, but it was not sure whether it would obtain the support and good results of the international community. In recent years, it has returned to the CBDRP and the multilateral cooperation model. The aim is to promote the EU's technology, standards and policies in the process of international multilateral cooperation in order to establish its leading position in dealing with international climate change issues. At the same time, the EU has set the continuous improvement of IMO efficiency as a strategic goal, and it will join IMO to implement global shipping carbon emission reduction laws and regulations and promote relevant projects in order to achieve the EU's emission reduction targets as soon as possible. In the context of a hybrid governance of regional governance and global governance in the global shipping industry, the EU's participation in global carbon emission governance presents a clear and complete logic, which provides a certain reference for China's participation in global shipping industry carbon governance.

IV. The Enlightenment of EU Carbon Governance Policy

[1] In the past five years, the 2015 China-EU Joint Statement on Climate Change, the 2016 China-EU Roadmap on Energy Cooperation and the 2018 China-EU Leaders' Statement on Climate Change and Clean Energy have been reached.

[2] Regulation 2015/757 of 29 April 2015 on the monitoring, reporting and verification of carbon dioxide emissions from maritime transport [2015] OJ L123/55.

1. The Establishment of the International Shipping Industry Carbon Emission Trading System

The establishment of a carbon emissions trading system for the international shipping industry is an effective mechanism to encourage emission countries and entities to choose emission reductions. So far, the creation of the EU ETS market is considered a relative success, despite the initial problems of over-allocation and unstable price signals during the first two trading stages from 2005 to 2012.[1] The complete data of the first and second phases of EU ETS have played a great role in the competitiveness of EU ETS in the field of global carbon emission reduction.[2] From an economic point of view, it is feasible and effective to link domestic or regional carbon emission trading systems around the world together, because this will bring in more participants, which can increase the diversification of reducing the emission cost and promote the liquidity of the market both from the perspective of technology and corporate diversity. From the perspective of reasonable allocation of allowances, the establishment of a carbon emissions trading system for the international shipping industry provides a comprehensive framework for coordinating carbon emissions allowances from a holistic perspective. In addition, as a major trading country and shipping country, China's participation is indispensable for the establishment of a carbon emissions trading system for the international shipping industry. The Measures for the Administration of Carbon Emissions Trading (for Trial Implementation), which came into effect on 1 February 2021, puts forward the concept of Chinese Certified Emission Reduction (hereinafter referred to as CCER). This mechanism has laid a good foundation for China to establish and improve the shipping industry carbon trading system. It will be an important attempt to achieve global emissions targets by taking this as an opportunity to link the carbon emissions of China's shipping industry with the carbon emissions of other existing or emerging domestic or regional carbon emissions trading systems (especially the EU carbon emissions trading system) and initiate negotiations on the carbon volume mutual recognition. This mutual recognition system can also avoid the difficulties caused by carbon taxes and exchange rate differences between countries. And the establishment of this connection will surely attract other countries and regions to join the development of the global carbon market.[3] In view of this, China should include the shipping industry in its CCER trading system or establish its own shipping carbon emissions trading system

[1] Dari-Amttiacci, G., & van Zeben, J., *Legal and market uncertainty in market-based instruments: The case of the eu ets,* New York University Environmental Law Journal*,* 19(3), p.415-453 (2012).

[2] Spinelli, C.,*The EU ETS and the European industry competitiveness: Working towards post 2020,* Renewable Energy Law and Policy Review (RELP*)*, 7(3), p.25-34 (2016).

[3] Shen, Y., & Feng, J., *Linking China's ETS with the EU ETS: Possibilities and institutional challenges*, Environmental Policy and Law*,* 47(3-4), p.127-133 (2017).

as soon as possible. The short-term effect is a protection for China's shipping industry from being subject to EU policy regulations; and the long-term effect is to enhance China's influence and voice in China-EU climate change cooperation and in the establishment of the international shipping industry carbon emission trading system. Specifically, first of all, in view of China's existing CCER trading mechanism, it is necessary to link up with EU ETS on carbon emission reductions and initiate consultations and negotiations based on carbon volume mutual recognition; the mechanism of mutual cooperation between EU ETS and MRV is worth learning for China as China should establish its own regulatory, reporting and certification mechanism. In this process, capturing and identifying carbon footprints is difficult. But applying blockchain technology in carbon footprint recording can be a contribution to this. Once CCER and ETS form mutual recognition and co-construction, China can promote its existing experience and the data obtained in the future establishment of the international shipping industry carbon emissions trading system.

2. The Internationalization of Carbon Trading Legal Rules

Legal norms are the guarantee for the healthy development of the market, and the establishment and sound operation of the international shipping industry's carbon emissions trading system are also inseparable from effective international legal rules. There are two premises for the internationalization of legal rules. One is the need to adjust the region-wide attributes of social relations, and the other is that the adjustment of social relations requires legal enforcement. The carbon governance issue of the shipping industry has the above two premises. The global attribute of the shipping industry is self-evident; the primary contradiction of the carbon trading rules is how carbon allowances should be allocated. The premise of the allocation of allowances is that there is a basis for total volume control. Both total volume control and distribution mechanisms need to be clarified and implemented by international legislation. Specifically, a bottom-up voluntary emission reduction mechanism can be used to achieve the short-term goal of global shipping industry carbon emissions. As the main body of the overall coordination of the carbon trading market in the shipping industry, IMO will prevent countries from doing their own things in order to achieve the effect of mutual recognition of emission reductions. The reason is that the shipping industry has a very strong global attribute. This global attribute determines that the allocation of total carbon emissions is a process of multi-party negotiation rather than being decided by a single country. Without global coordination, it is easy for the EU to move towards the second path to regulate global affairs through unilateral actions, which is a result that the entire international community does not want to see, and it is also not conducive to consolidating the existing treaties and achievements in comity of nations. In the initial allocation of international carbon emission

rights, CBDRP should be used as the basis for climate change negotiations. The respective obligations of countries will be determined in accordance with CBDRP. Developed countries should undertake emission reduction obligations that match their financial affordability and historical contributions.[1] The CBDRP is the earliest established principle of the Climate Change Convention. It can be seen that the social relations premise and legal norms for the internationalization of carbon trading legal rules in the international shipping industry already exist.

The issue of carbon emission reduction in the shipping industry falls within the scope of international environmental law adjustments. Environmental issues have the characteristics of homogeneity, and there will be a trend of convergence in the future development of international environmental law. The legal rules of carbon trading are part of international environmental law, and its internationalization is also a trend of future development. Therefore, the internationalization of carbon trading legal rules should be discussed from the three perspectives of the country, the European economy, and the world. The fundamental issue is the reconstruction of international power. Without the reconstruction of power, the internationalization of legal rules will become very weak, which threatens political balance. The EU's shipping industry carbon trading policy has more or less infiltrated and affected the formation and development of international carbon trading laws and regulations in terms of standard implementation, system setting and policy model promotion. The establishment of international carbon trading legal rules must be based on multilateral negotiations, and the process of negotiation is also a process of power reconstruction. On this basis, it may be a realistic and effective way to promote the formation of a new international convention on carbon emission reduction in the shipping industry by the IMO. The reason is that the optimization of rules and the implementation of supervision in the shipping industry are likely to be carried out through the IMO, which is also based on the experience and achievements of the IMO over the years of dedicating to marine environmental protection. The IMO itself has made considerable contributions to the adjustment of environmental issues in the shipping industry, such as Protocol of 1992 to Amend the International Convention on Civil Liability for Oil Pollution Damage, 1969 (1992CLC), which has become a formed convention and is widely applicable throughout the world; International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (HNS); International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001; International Convention for the Prevention of Pollution from Ships (MARPOL73/78), etc. Judging

[1] Dobson, N. L., & Ryngaert, C., *Provocative climate protection: Eu extraterritorial regulation of maritime emissions*, International and Comparative Law Quarterly, 66(2), p.295-334 (2017).

from the good legal regulatory effects of the above-mentioned international conventions on environmental issues, IMO will still make its due contributions to climate change issues. Moreover, in recent years, IMO's attention to environmental issues in the shipping industry has tilted towards climate change issues, and the possibility of reaching a new convention in the future is expected. As a major shipping country, China is also a Category A member of the IMO. In recent years, the number of China's proposals has increased significantly, ranking among the top five in IMO member states. It can be seen that the advantages of the proposals are very obvious.[1] It is foreseeable that in the future carbon emission reduction process of the shipping industry, China will make a great contribution from the data that can be provided by the number of Chinese ships or the number of ships with improved fuel. The life of the law lies in experience, and experience comes from the practice of legal practitioners. Therefore, in the context of carbon neutrality, China should take advantage of its own experience and advantages to contribute Chinese wisdom and Chinese experience to the formation of global shipping industry carbon trading norms. In summary, the CBDRP should be used as the cornerstone to strengthen the standardization of the international shipping industry's carbon trading laws and regulations so as to jointly build and manage the global integrated shipping carbon trading system.

V. Conclusion

Because of the direct connection between shipping and world trade, any carbon emission reduction plan must allow shipping to continue to meet the needs of world trade and maintain its important role.[2] According to data from IMO, more than 90% of global trade flows are related to international shipping. This shows that without the shipping industry, the current levels of global trade flows and global consumption are impossible to achieve. It is especially because of the shipping industry that freight prices are competitive, therefore the relationship between shipping industry and trade, and the economy are closely related.[3] Ideally, the international community should be committed to integrating carbon emissions trading mechanisms globally to avoid economic barriers and trade price fluctuations caused by countries' independent actions. Combining with its mid- and long-term goals of carbon neutrality, China should include the shipping industry into the CCER trading system or establish its own shipping industry carbon trading system as soon as possible so as to strengthen its position in climate change negotiations.

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[1] *Take the proposal as an example to explore countermeasures for China's maritime affairs to increase its international influence*, Bofeng Logistics, https://www.zhbfwl.com/17030.

[2] Nast, T., *The response of the international shipping industry to global climate change*, Journal of Maritime Law and Commerce, 44(1), p.29-46 (2013).

[3] Leal-Arcas, R., & Filis, A., *Legal Aspects of the Promotion of Renewable Energy within the eu and in Relation to the eu's Obligation in the WTO*, Renewable Energy Law and Policy Review (RELP), 5(1), p.3-25 (2014).

Also, China is supposed to strengthen the standardization of international carbon trading rules through legal internationalization so as to promote the early formation of a global shipping industry carbon emissions trading mechanism.

Translator: XU Yangdan

Editor (English): Godfred Sowah Khartey

运输合同下承运人查验提单真实的责任分析

魏长庚*

摘要：最近最高人民法院对“湖南华升工贸有限公司诉长荣海运股份有限公司”再审案件作出民事裁定书（2020 年最高法民申 6937 号），并对海上货物运输合同下承运人对提单承担的责任进一步作出了澄清。笔者试图对该案进行详细的分析，并比较承运人在中国法与英国法下对提单核查所承担的责任，然后为承运人提供一个可供参考的解决方法以便应对这种问题。

关键词：运输合同；背书；错误交货

一、案件事实背景

2016 年 1 月，湖南华升公司与土耳其 Mekik 签订一份 FOB 买卖合同。Mekik 约定向华升公司采购一批短裤。合同付款方式为“提单日期后 90 天付款(Payment by D/A 90 Days After Date of Bill of Lading)”。货物从蛇口港出发，由长荣公司安排船舶运输至希腊港口。提单正面记载的托运人（Shipper）是华升公司，收货人（Consignee）是“凭指示 to order”，通知方（Notify Party）是 Mekik 公司。船舶抵达希腊卸港后，长荣当地代理人收取“PENTRADE IKE”公司背书的正本提单后，将货物交给出示该提单的提货人。华升公司最后没有收到货款，以“承运人错误交付”为由向长荣公司和其代理人永航公司共同提起索赔诉讼。

二、法院判决

广州海事法院一审判决认为，华升公司作为托运人，委托代理人向长荣公司订舱，永航公司作为长荣公司的船务代理签发指示提单。据《中国海商法》第七十一条的规定,[1] 提单自身的流转情况并不妨碍认定承运人和托运人之间存在的运输合同关系。承运人签发的提单足以证明华升公司与长荣公司之间海上货物运输合同法律关系。永航公司在该案中作为长荣公司的代理人,代表长荣公司签发涉案提单,签单的责任应由承运人即长荣公司承担。根据《中

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[1] 《1993 年中国海商法》第 71 条：提单，是指用以证明海上货物运输合同和货物已经由承运人接收或者装船，以及承运人保证据以交付货物的单证。提单中载明的向记名人交付货物，或者按照指示人的指示交付货物，或者向提单持有人交付货物的条款，构成承运人据以交付货物的保证。

国海商法》第七十九条第二项规定，[1]长荣公司作为承运人签发了以华升公司为托运人的指示提单,这构成长荣公司向托运人作出必须凭托运人的背书方能交付货物的承诺，在货物运抵目的港交出货物时，应认真审查提货人是否具有合法资格，长荣公司没有尽到认真审查提货人是否合法持有提单的义务，没有提供其它充足的证据证明提货人是合法的正本提单持有人，其放货行为违反了海上货物运输合同的约定和指示提单应经托运人背书转让的法律规定。即使华升公司在管理提单过程中可能存在疏漏,但仍不能免除作为承运人的长荣公司审查提单,并将涉案货物交给合法的正本提单持有人的法定义务。因此长荣公司错误交付应承担货物灭失造成的损失。

该案后经广东高级人民法院二审和最高人民法院三审，[2]再次驳回长荣公司的上诉，维持一审判决，因此,长荣公司错误交付货物的行为违反了《中国海商法》运输合同的约定,也违反了指示提单应经托运人背书转让才能交付货物的法律规定。

三、案件分析

根据《1993 年中国海商法》第四十八条规定，承运人在货物运输期间，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。除非发生承运人举证第五十一条的免责事项，承运人应承担货物损失的赔偿责任。笔者认为，该案争论的焦点是没有背书的指示提单是否会发生提单权利转让。从审理该案的三级法院法官的判词中可以看出，法官倾向于认为未经背书的指示提单不符合正常的流转程序，即使取得提单，提单持有人也不是合法的提单持有人，因此长荣公司的交货行为违反了应将货物交给“经托运人进行背书转让的”指示提单合法持有人的法律规定。

我国海商法只是规定“记名提单不得转让，以及不记名提单无需背时即可转让”。[3]对于没有背书的指示提单如何转让，我国海商法也没有相关的规定。[4]法官认为承运人应“按照指示人的指示交付货物”，提单背面缺少托运人的背书，相当于托运人没有作出指示的意图，承运人在没有收到托运人指示的情况下交出货物，就是违反了运输合同下“错误交货”的责任。

在本案中，广州海事法院、广东高级人民法院和最高院三审判决书中也特别指出，托运

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[1] 《中国海商法》第 79 条：提单的转让，依照下列规定执行：（一）记名提单：不得转让；（二）指示提单：经过记名背书或者空白背书转让；（三）不记名提单：无需背书，即可转让。

[2] 广州海事法院（2017）粤-72 民初 412 号；广东省高级人民法院（2017）粤民终 3125 号；最高人民法院（2020）最高法民申 6937 号。

[3] 《1993 年海商法》第四章第四节第 79 条。

[4] 胡正良：《海运提单项下的提货权与承运人无单放货责任的认定》，载于《大连海事大学学报》2003 年第 2 期，第 4-8 页。

人没有将提单背书就委托代理人寄送给其收货人，托运人自己也违反了《1993 年海商法》和《1995 年票据法》（2014 年修订）关于背书的要求。[1]另根据《票据法》第三十一条，以背书转让的汇票，背书应当连续。根据《1997 年票据管理实施办法》（2011 修订）第十七条规定，出票人在票据上的签章不符合票据法和本办法规定的，票据无效。在该案，托运人没有在正本提单上背书，从提单字面看不出托运人有放弃货物控制权的意思。因此认为收货人持有的提单未经托运人背书，是不产生提货权利。在该案中，承运人最大的失误就是想当然地认为在交付货物时收到提单就算解除了运输合同下责任，没有仔细审核提单背书的连续性，构成错误交货的违约责任，承运人也没有证明提单持有人合法性，或提供其它文书证明提单持有人就是合法的正本持有人，导致败诉。

对于背书，我国最高人民法院曾经判决未经背书的票据，不产生票据权利。[2]司玉琢教授曾强调，承运人交货时必须要检查提单的背书。[3]因此，中国法律下，承运人有义务不但要核实提单持有人的合法身份，还需要认真检查提单背书的连续和合法性。

四、英国法下提单背书

如果该案在英国法下进行审理，将会严格按照《1992 年海上货物运输法》之成文法的规定进行审议。在英国法下，对承运人交货责任同样是非常严格的。在 Motis Export Ltd v Dampskibsselkabet AF 1912 Aktiesekkab 案，[4]Rix 法官说“承运人有权并有义务在出示提单情况下交付货物，这就是（提单）合同的本质。”[5]将货物交给出示虚假提单的持有人，即使承运人是无辜的，也构成侵占货物。

1.占有提单并不一定拥有提货的权利

The Future Express 案，[6]收货人凭借保函提货后，没有前往银行赎单。导致银行作为提单持有人向承运人起诉无单放货。当时在《1885 年提单法》背景下，诉权和货权要求同时转让才能有效。[7]银行虽然占有提单，但没有获得诉权的转让，也就无法获得要求承运人交出货物

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[1] 对于这一点背后的原因，在法院判词中没有加以说明，也没有在判决书中报导。

[2] 国有色金属建设股份有限公司恒丰银行股份有限公司宁波分行信用证开证纠纷追偿权纠纷案，最高人民法院（2019）最高法民申 6472 号再审审查与审判监督民事裁定书。

[3] 司玉琢《海商法专论（第二版）》，中国人民大学出版社 2010 年版，第 187 页。

[4] ［1999］1 Lloyd’s Rep. 837，上诉法院维持原判［2000］1 Lloyd’s Rep. 211。

[5] It is of the essence of [a bill of lading] contract that a shipowner is both entitled and bound to deliver the goods against production of an original bill of lading, provided that he has no notice of any other claim or better title.

[6] *The Future Exprtess*[1992] 2Lloyd’s Rep.542.

[7] Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading, to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

的权利。[1]

仅仅占有提单，并不能得出提单持有人作为提单受让人获得了提货的权利，也不一定拥有要求承运人交出货物的权利，只有在完成背书后才能真正拥有提单货物的权利。[2]为了保护融资银行，1992 年《英国海上货物运输法》将提单合同的权利和责任分别开来，[3]占有提单和要求提货的行为是两个截然不同法律概念。

新加坡 The Dolphina 案，[4]中国交通银行以提单持有人的名义在新加坡法院向承运人起诉无单放货。提单适用英国法。这时候货物早已经卸下，交通银行虽然占有提单，不符合《1992 年海上货物运输法》第 5 条 2 款 b 项下的提单持有人的规定，[5]也无法根据提单合同获得诉权，无法向承运人进行索赔。[6]

其它情况如货物中途灭失，或船货全损，持有提单也不会给予持有人提货的可能。[7]另外，代理办理报关，提前安排船舶靠泊，安排卸货等皆是正常的工作安排才需要持有提单，这种占有提单是暂时的，没有改变提单的合法属性，也是经过提单合法持有人的允许才做出的安排。[8]

2.背书的重要性

在英国法下，对于指示提单，法律同样要求背书才能转让。如果错误背书给买卖合同无关的第三人，对于该人而言不会赋予其提单合同的权利，也不会使其背负提单的责任。在 The Aegean Sea 案，[9]法官认为错误的背书等同于无效的背书。提单错误背书给无关第三方，不可能产生提单责任，其没有参与货物买卖，也不会接受错误背书的提单。法官还认为，转让不但需要转让人同意，也需要受让人的认可。

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1 *The Aliakmon* (1986) 2 Lloyd's Rep 1 也是类似的情况，收货人持有提单，却因为没有支付货款，货权仍然保留在托运人手中，因此实际承担货损的收货人却无法起诉承运人要求赔偿货物损失。

2 Michael Bridge, *Benjamin's sale of goods*(11th edn Sweet&Maxwell 2021) Para 15-047

3 1992 年《英国海上货物运输法》是《1885 年提单法》条文的重新修订和更改之后的版本，主要解决了《1885 年提单法》第 1 条诉权和物权没有同时转让产生的法律问题。

4 *The Dolphina* [2011] SGHC 273；[2012] 1 Lloyd's Rep. 304.

5 5(2)(b) of COGSA 1992：(2) References in this Act to the holder of a bill of lading are references to any of the following persons, that is to say—本法所称提单持有人是指下述任何人：

(a) A person with possession of the bill who, by virtue of being the person identified in the bill, is the consignee of the goods to which the bill relates；持有单证的人，因其名称在该单证中已予指明从而成为该单证项下货物的收货人；

(b) A person with possession of the bill as a result of the completion, by delivery of the bill, of any indorsement of the bill or , in the case of a bearer bill, of any other transfer of the bill；通过递交单证的方式完成任何单证背书，或在无记名单证情况下以任何其它方式转让单证，；因而成为持有单证的人；

6 在该案，交通银行提交的诉讼申请其中包含信用证欺诈。由于托运人知道无单放货的行为，在货物卸下（accomplished）提单已经作废（spent）的情况下仍然使用该套提单要求银行付款，这是经济侵权（econimic tort）下欺诈行为，最后交通银行侥幸以非法私谋（unlawful conspiracy）索赔成功。

7 *The Ythan* [2006] 1 Lloyd's Rep.457.

8 *The Aramis* [1989] 1 Lloyd's Rep 213.

9 *The Aegean Sea*[1998] 2 Lloyd's Rep 39.

在 East West Corp v. DKBS 1912 案，[1]托运人将提单背书给目的港银行要求托收货款。银行没有收到托收款项，应托运人的要求又将提单退回托运人。却疏忽没有回头背书给托运人。托运人试图以无单放货起诉承运人。根据《1992 年海上货物运输法》第 2（1）条规定，银行在获得正确背书的提单后成为提单合法持有人，提单合同下的诉讼权利也相应转让给银行，托运人作为提单合同一方的权利也随之废除，托运人没有合同权利起诉承运人。[2]即使托运人再次持有提单，没有经过正确背书，无法成为提单合法的持有人。

在 The Rafaela S 案，[3]最高院法官认为只有正确背书的提单才能提货。新加坡 The Dolphina 案，[4]法官认为，欺诈背书的提单无法获得合法的诉权。因此，指示提单在背书之前，合同诉权是无法转让的。在信用证案件中，未经背书的票据被视为伪造的，会被银行认为是不符点(Non-Compliance)，无法给予支付。[5]从以上案例可以看出，在提单流转过程中，特别是指示提单，转让提单权益的前提是背书，而且是正确背书，错误背书等同于无效的提单。

3.检查正确背书的责任

在散货、原油或化学品运输过程中，货物会发生多次转卖的情形，提单持有人需要呈上一份正确背书的提单才能提货，因此提单背面背书的印章或签字将会密密麻麻覆盖整个表面。船长不但需要核对签字人的名称，还需要检查签字人所作出的具体指示是否明确。从托运人开始，直到最后一个收货人，检查是否有中断。如果发现背书中断，或遗漏，将会被船长质疑提单的合法性或被拒绝交货。[6]同时，作为中间贸易商，也应有义务检查背书的连续性和正确性。如果疏忽背书，在价格下跌时，极有可能被懂业务的下一个买方拒单。[7]

在国际货物买卖合同中，往往是贸易商自己需要注意背书的连续性，无论是接受或转让提单都应认真检查背书的有效性，否则将来诉讼过程中有可能会被承运人质疑未能成为提单合同的当事方，没有获得提单诉权，既无法按照提单合同也无法按照托管关系提起诉讼，最后可能因为背书方面的疏忽无法起诉承运人而获得损害赔偿。同时，货物保险人在赔付货损货差时，也要考虑到将来会“代位”（subrogate）向承运人索赔时会面对这方面的抗辩。[8]

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1 East West Corp *v.* DKBS 1912 [2003] 1 Lloyd's Rep 239.
2 最后该案，托运人以侵权托管获得赔偿。
3 *The Rafaela S* [2005] UKHL 11; [2005] 2 A.C. 423.
4 *The Dolphina* [2011] SGHC 273；[2012] 1 Lloyd's Rep. 304.
5 *Imperial Bank of Canada v Bank of Hamilton* [1903] AC 49.
6 《1992 年海上货物运输法》第 5（2）条。
7 Charles Debattista，*The Sale of Goods Carried by Sea*（2nd edn LexisNexis UK 1998）Pare4-028.
8 *The Ythan* [2006] 1 Lloyd's Rep.457.

4.错误交货的后果

在 The Sormovskiy 3068 案，[1]在没有明示合同条文时，船长必须把货物交给出示提单的持有人。在 The Rafaela S 案，法官指出，无论是否有明示条款的规定，交货之前要求出示提单永远是承运人交货的前提条件。[2]在没有出示一份正确背书的正本提单情况下，如果承运人将货物交出，无疑是违反了提单运输合同，将会将自己置于非常危险的境地。一般情况下，承运人只认单不认人，也就是通常所称的“见单交货”。[3]在 The Ines 案，[4]法官指出：无论是故意或者有意识地无视原告（提单持有人）的权利错误交货，承运人都无法寻求任何提单的保护。在 Motis Exports v Dampskibsselskabet AF 1912 案，[5]即使是承运人被恶意欺诈而非故意导致的错误交货，也不能免除凭伪造提单错误交货产生的责任。

法院为了保护提单合法持有人的权益需要维护提单的权威，往往会严格要求船长交货时需要小心审慎，仔细核实提单的真实性。船长只有将货物交给有权提货的提单持有人才能受到运输合同下免责的保护。一旦船长错误放弃货物的控制，船长或承运人将会面临真正的合法提单持有人的索赔。[6]在《Voyage Charter-4th edn》书中第 18.164 段明确指出，即使承运人善意按照提单交货，但最后证明其合理却错误相信了事实上伪造的正本提单，他仍然需要承担责任。因此，在没有特殊规定的前提下，承运人错误交货的严格责任将会使其无法逃避货物损失的索赔。

五、承运人的抗辩

在海上货物运输过程中，货物买卖双方也没有义务将每次货物转售的情况通知承运人。承运人很少参与买卖合同的交易，不了解货物买卖的付款方式和安排，不知道货运交易过程中相关各方的财务状况。[7]因此，在没有事先获得任何索赔或更优货权的情况下，承运人有义务将货物交给出示正本提单的持有人。[8]在 Glyn, Mills, Currie & Co. v The East and West India Dock Co 案中，[9]托运人把“第一份”经背书的提单转让给原告伦敦银行。船舶抵达后，承运人把货物卸入被告的仓库。托运人出示了“第二份没有背书的”提单把货提走。原告向被告提起侵占货物的诉讼。上议院判决：原告银行虽然作为质押权人拥有货物特殊财产权，有权

[1] *The Sormovskiy 3068* [1994] 2 Lloyd’s Rep 266.
[2] *The Rafaela S* [2005] UKHL 11; [2005] 2 A.C. 423.
[3] Sze Hai Tong Bank Ltd *v.* Rambler Cycle Co Ltd [1959] A.C. 576.
[4] *The Ines* [1995] 2 Lloyd’s Rep. 144.
[5] Motis Exports *v.* Dampskibsselskabet AF 1912 [2000] 1 Lloyd’s Rep 211.
[6] *The Sormovskiy 3068* [1994] 2 Lloyd’s Rep 266.
[7] Evans & Reid *v.* Cournouaille (1921) 8 Ll. L. Rep. 76.
[8] David Foxton, *Scrutton on Charterparties and Bills of Lading* (24th Ed, Sweat & Maxwell 2020) Article167 Para 13-009；*Julian Cooke*, Voyage Charter（4th edn, Informa Law 2014）Para 18.162.
[9] Glyn, Mills & Co *v.* East and West India Dock Co (1882) 7 App. Cas. 591.

立即占有货物。然而，仓库相当于承运人的角色，一旦完成其中一份提单的交付，其它提单相应作废。货物在被告保存期间，并没有收到任何索赔、产权或权利的主张，也没有收到任何怀疑的信息。其处置货物的行为也没有违反运输合同规定，因此（仓库）无需承担错误交付的责任。目前这一案例还是有效。[1]

在“华升诉长荣”一案中，托运人指示其代理人将货物提单寄送给收货人，类似现代保理业务或托收的做法。虽然提单没有正确背书，但收货人收到提单并占有提单，收货人的角色就相当于《1889 年商业代理人法》规定的实际占有并控制提单的人（mercantile agent）。[2]买方作为商业代理人占有提单的同时可以对货物进行处置。[3]在《1979 年货物销售法》第 25 条（出售后占有货物的买方）[4]的规定同《1889 年商业代理人法》第 2 条（商业代理人处置货物的权利）[5]内容类似，都将占有货物物权凭证的买方视为商业代理人。商业代理人对货物买卖、质押或其它方式处分并交付或转移给善意的第三人，视为得到了货物所有人同意，产生的后果理应由货物的卖方承担。

针对卖方托收，国际商会（ICC）刊发了 Uniform Rules for Collections 1995 或 URC522 规则，规范和约束卖方和银行的托收行为。[6]这种托收的付款方式只限于具有良好信誉的国际大型贸易商、跨国公司、大型石油和粮食企业之间的交易。因双方之间彼此了解对方的背景，不存在货物交易中赖账或欺诈行为，为了节省信用证手续费，双方协商可以采用不需要银行参与的托收方式。

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[1] Aikens，2006 提单[M]. 魏长庚、李皓、纪贵智等译. 北京：法律出版社，2020，第 C 节，第 5. 52-5. 61；David Foxton, *Scrutton on Charterparties and Bills of Lading* (24th Ed, Sweat & Maxwell 2020) Article167 Para 13-012； Sir Guenter Treitel, *Carver on, bills of Lading 4th edn* (Sweet&Maxwell, 2017) Para 6-077。

[2] 《1889 年商业代理人法》第 1（2）条。

[3] 《1889 年商业代理人法》第 9 条：Disposition by buyer obtaining possession: Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

[4] 《1979 年货物销售法》第 25(1)条：Buyer in possession after sale: (1) Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, has the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

[5] 《1889 年商业代理人法》第 2(1)条：Powers of mercantile agent with respect to disposition of goods.：Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.

[6] 参见 ICC 网站：http://store.iccwbo.org/icc-uniform-rules-for-collections。

在“华升诉长荣”案中，承运人认为，托运人作为出口商收取货款的条件建立在收货人远期承兑汇票的基础上，托运人为了收取货款，不可避免地需要先将提单交给收货人，收不到货款的风险将由托运人（出口商）自己承担。[1]托运人自己疏忽没有背书提单，却利用承运人没有认真仔细审查提单背书为由，企图将未付款的责任转嫁给承运人。[2]

六、承运人的救济

承运人除了严格按照古老的原则坚持“见单交货”之外，还需要拒绝任何形式的不合法的卸货指令和不正确的交单。在 The Houda 案，[3]法院认为船方有足够合理的理由坚持“见单交货”的一般性原则，除非出示正本提单，否则拒绝卸货。在 The Lycaon 案，[4]船东无法确认货物归属，而是把货物原封不动地运回原装港，再卸下去仓库寄存，等待法院判决。虽然产生部分回程运费和仓储费，但避免了错误交付货物的风险。

另一种方法是要求试图提货的人提供银行担保，以防止后来真正的货主提出索赔时能够补偿错误交货产生的损失。[5]

还有一种方法是卸到目的港的仓库。除非承运人能够控制货物，即使在商业法律比较规范的发达国家也会出现货物因各种原因被莫名其妙提走或偷走的现象。[6]

七、结语

笔者认为，在“华升诉长荣”一案中承运人虽然提出诉权、运输合同关系，不正确背书等观点，但都无法推翻成文法律强加给承运人严格按照运输合同交付给正确出示提单合法持有人的责任。承运人唯一可以争论的观点就是在卸货港提货的人士是托运人同意或默认的提单合法持有人，提单持有人在目的港提货是买卖合同交易的一部分，是托运人商业托收既定的安排，无论承运人检查提单背书与否，都是无法避免提单持有人的提货行为。但承运人没有举证或者在希腊（或收货人所在地土耳其）当地寻求律师进一步证明托运人寄送提单的行为就等同于放弃了提单合同下货物的所有权利，或者为了履行合同托收的规定，托运人间接同意或默认提单持有人前去提货的行为，至少是托运人知悉收货人前去提货的情况，托运人

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[1] 参见赵明霄：《浅谈外贸企业国际结算方式的选择与综合运用》，载于《对外经贸实务》2010 年第 1 期，第 64-66 页；张荣茂：《托收方式与风险防范》，载于《商业经济》2004 年第 8 期，第 115-117 页；另请参看：https://kns.cnki.net/kns8/defaultresult/index。

[2] 杨大明：《国际货物买卖》法律出版社 2010 年版：第二章 第 7 节（卖方在哪里交出付运单证）第十章第 1.3 节（托收）。

[3] *The Houda* [1994] 2 Lloyd’s Rep 541.

[4] *The Lycaon* [1981] 1 Lloyd’s Rep 92, [1983] 2 Lloyd’s Rep 548.

[5] Trucks and Spares Ltd *v.* Maritime Agencies (Southampton) Ltd (1951) 2 Lloyd’s Rep 345.

[6] Glencore International AG *v.* MSC Mediterranean Shipping Co. SA [2015] EWHC 1989 (comm)案，货物在安特卫普港丢失。*The Rigoletto* [2000] 2 Lloyd’s Rep 532 案，一辆莲花公司的跑车在南安普顿丢失。在 *The New York Star* [1980] 2 Lloyd’s Rep 317 案，卸货至承运人在澳大利亚的仓库，货物在承运人的仓库丢失，最后承运人也难以免除错误交货的责任。

将提单寄送提单持有人的这种行为应视为将货权和诉权转让给收货人，或者收货人被视为托运人的商业代理人，收货人提货的行为应等同于《1889 年商业代理人法》中商业代理人出售、质押、处置货物的行为。

承运人也没有进一步挖掘或要求披露托运人指示其代理人寄送全套提单这一错误行为的原因和目的，让法院相信这不是承运人的原因所导致的货物灭失，而是托运人依赖收货人虚无缥缈的信誉，盲目相信收货人的一面之词而导致的严重后果。最好还应使法院相信这是托运人在收货人提取货物没有偿还货款的情形下，试图将托运人自己所托非人的过错转嫁给承运人。

在“华升诉长荣”案中，如果有可能，承运人应将托运人的代理人也列为合并诉讼的参与方之一，将涉案争论的提单合同问题转化成提单背书疏忽的问题，至少托运人代理人存在管理提单不当，在没有托运人作出明确指示或正确背书的情况下，放弃占有提单，最后导致货物控制权丧失的后果。即使承运人承担错误交货的责任，也可以向托运人的代理人寻求补偿。不知道是因为收货人提货不付款理亏还是故意逃避，也不知道承运人是否进一步前往希腊（或土耳其）调查具体原因，以及要求托运人披露整个交易的流程，承运人未能成功找出托运人寄送整套提单背后的原因和目的，举证托运人至少是托运人代理的过错。很遗憾从案例报道中也没有找到这方面的证据报道。

总之，笔者认为，最高院在“华升诉长荣”对承运人的交单责任再次加以强调，作为承运人应当引以为戒，在卸货港交货时需要特别警惕，不但需要认真检查提单的正确性，而且也需要检查提单背面背书的连续性，谨防此类事故的发生。

Analysis on the Responsibility of the Carrier to Check the Bill of Lading under the Carriage Contract

Capt . WEI Changgeng*

Abstract: Recently, the Supreme People's Court of the People's Republic of China issued a civil ruling on the retrial case of "Hunan Huasheng Industry and Trade Co., Ltd. (Huasheng) v. Evergreen Marine Co., Ltd. (Evergreen)" [(2020) Zui Gao Fa Min Shen 6937], and further clarified the carrier's liability to the bill of lading under the contract for the carriage of goods by sea. The author tries to analyze this case in detail, and compares the responsibilities of the carrier in checking bill of lading under PRC law and UK law so as to provide a reference solution for the carrier to deal with this kind of problem.

Keywords: Contract of Carriage; Endorsement; Mis-delivery

I. Case Facts and Background

Hunan Huasheng and Mekik of Turkey entered into an FOB Sales Contract in January 2016. Mekik shall purchase a batch of short pants from Huasheng pursuant to the contract. The contract payment method shall be "Payment by D/A 90 Days After Date of Bill of Lading". Evergreen Marine Corp arranged the ship transportation of the goods from Shekou Port, Shenzhen, China to a Greek port. As indicated on the front side of the bill of lading, Huasheng is the shipper, the consignee is made out "to order" and the notify party is Mekik. Upon arrival of the vessel at the discharge port of Greece, the local agent of Evergreen collected the original bill of lading endorsed by "PENTRADE IKE" Company and delivered the goods to the consignee who presented the said bill of lading. Huasheng, however, did not receive the payment for the goods and filed a joint lawsuit to claim for damages against Evergreen and its agent (Yonghang Company) on the ground of "Mis-delivery by the Carrier".

II. Court Judgment

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In the judgement of first-instance, Guangzhou Maritime Court held that Huasheng, as the shipper, entrusted an agent to book shipping space from Evergreen, and Yonghang, as the shipping agent of Evergreen, issued the order bill of lading. According to Article 71 of the Maritime Law of the People's Republic of China,[1] the circulation of the bill of lading itself shall not hinder the recognition of the carriage contract between the carrier and the shipper. The bill of lading issued by the carrier is sufficient to prove the legal relationship of the contract of carriage of goods by sea between Huasheng and Evergreen. Yonghang Company, as the agent of Evergreen in this case, issued the bills of lading involved, on behalf of Evergreen. Further, the responsibility for issuing bills should be borne by the carrier, i.e. Evergreen Company. In accordance with Article 79(2) of the Maritime Law of China,[2] Evergreen, as the carrier, issued an order bill of lading with Huasheng as the shipper, which constituted the undertaking of Evergreen to the shipper Huasheng that the goods shall be delivered against the endorsement of the shipper, and the carrier shall carefully examine the bill of lading when the goods are delivered at the port of destination. But Evergreen failed to fulfill its obligation of carefully examining whether the consignee legally held the bill of lading and was unable to provide sufficient evidence to prove that the consignee was the legal bearer of the original bill of lading. Its release of the goods, therefore, breached the provisions of the contract of carriage of goods by sea and the legal provision that an order bill of lading may be negotiated with endorsement by the shipper. Even though there might have been omissions in the management of bills of lading by Huasheng, Evergreen, as the carrier, should not be exempted from its legal obligation to review bills of lading and deliver the goods involved to the legitimate bearer of the original bills of lading. Therefore, Evergreen shall bear the losses caused by mis-delivery of the goods.

After the judgement of second instance by the Guangdong Higher People's Court and the retrial instance by the Supreme People's Court,[3] Evergreen's appeal was rejected again and the judgment of first instance was upheld. Instructively therefore, Evergreen's mis-delivery of goods breached the provisions of the Maritime Law of China on the carriage contract and the legal provisions instructing that an order bill of lading shall be negotiated with endorsement by the shipper before delivery of the goods.

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[1] Article 71 of the Maritime Law of the People's Republic of China: A bill of lading is a document which serves as an evidence of the contract of carriage of goods by sea and the taking over or loading of the goods by the carrier, and based on which the carrier undertakes to deliver the goods against surrendering the same. A provision in the document stating that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking.

[2] Article 79 of the Maritime Law of the People's Republic of China: The negotiability of a bill of lading shall be governed by the following provisions: (1) A straight bill of lading is not negotiable; (2) An order bill of lading may be negotiated with endorsement to order or endorsement in blank; (3) A bearer bill of lading is negotiable without endorsement.

[3] Guangzhou Maritime Court (2017) Yue - 72 Min Chu 412; Guangdong High People's Court (2017) Yue Min Zhong 3125; Supreme People's Court (2020) Zui Gao Fa Min Shen 6937.

III. Case Analysis

In accordance with Article 48 of the Maritime Law of the People's Republic of China 1993, a carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried during the carriage of goods. Except for the circumstances stipulated in Article 51, the carrier shall be responsible for the loss of the goods. The author believes that the focus of the dispute in this case is whether the rights of the order bill of lading without endorsement can be transferred. As can be seen from the judgments of all three-levels of instances of judgement, the reasoning of the judges was that the order bill of lading without endorsement did not comply with the normal circulation procedure and the bearer of the bill of lading was not the legal bearer of the bill of lading even if the order bill of lading was obtained. Therefore, the delivery of Evergreen breached the legal provision that the goods shall be delivered to the lawful bearer of the order bill of lading which has been endorsed and transferred by the shipper.

The Maritime Law of China only stipulates that "a straight bill of lading is not negotiable" and "a bearer bill of lading is negotiable without endorsement."[1] There is no relevant provision in the Maritime Law of China on how to transfer an order bill of lading without endorsement.[2] The judge held that the carrier should "deliver the goods to the order of a named person", and the lack of endorsement by the shipper on the back of the bill of lading amounted to no intention of the shipper to give instructions, but the carrier breached the contract of carriage by delivering the goods without instructions from the shipper, thereby resulting in mis-delivery of the goods.

In this case, the judgments of made by Guangzhou Maritime Court, Guangdong Higher People's Court and the Supreme People's Court specifically pointed out that the shipper himself also violated the requirements on endorsement in the Maritime Law of China 1993 and the Negotiable Instruments Law of the People's Republic of China (2004 Amendment) by entrusting an agent to send the bill of lading to the consignee without endorsing it.[3] In addition, pursuant to Article 31 of the Negotiable Instruments Law, in endorsing over a draft to others, the endorsement shall be in uninterrupted series. According to Article 17 of Implementation Measures for the Administration of Negotiable Instruments (2011Revision), the bills shall be null and void if the signature and seal of the maker on the bills are not in line with the provisions of the Negotiable Instruments Law and these Measures. In this case, the shipper did not endorse the original bill of lading, so it could not be seen from the words of the bill of lading that the shipper intended to give

[1] Article 79, Chapter 4, Section 4, Maritime Law of the People's Republic of China 1993.
[2] HU Zhengliang, *Right of taking delivery of cargo under bill of lading and determination of carrier's liability for delivery of cargo without its production* [J]. Journal of Dalian Maritime University, 2003, 2 (2)-Dalian: Dalian Maritime University, 2003.
[3] The reasons behind this are not stated in the court's judgement and are not reported in the judgement.

up the right of control of the goods. Therefore, the bill of lading held by the consignee without endorsement by the shipper does not give rise to the right to take delivery of the goods. In this case, the carrier's biggest mistake was taking for granted that the receipt of the bill of lading at the time of delivery of the goods, discharged its liability under the contract of carriage. And the carrier's failure to carefully examine the continuity of endorsements of the bill of lading constituted a breach of contract due to mis-delivery. The carrier also failed to prove the legality of the bearer of the bill of lading, or provided other documents to prove that the bearer of the bill of lading is the legal bearer of the original bill of lading, resulting in the loss of the lawsuit.

With regard to endorsement, the Supreme People's Court of China once ruled that unendorsed negotiable instruments do not create negotiable instrument rights.[1] Professor SI Yuzhuo once emphasized that the carrier must check the endorsement of the bill of lading at the time of delivery.[2] Therefore, under Chinese law, the carrier is obliged not only to verify the legal identity of the bill of lading bearer, but also to carefully check the continuity and legitimacy of the endorsement of the bill of lading.

IV. Endorsement of Bill of Lading under English law

If the case were tried under English law, it would be strictly in accordance with the statutory provisions of the Carriage of Goods by Sea Act 1992. The duty of the carrier to deliver the goods is also very strict under English law. In the Aktiesekkab case of Motis Export Ltd. v. Dampskibsselkabet AF in 1912,[3] Judge Rix said, "It is of the essence of (a bill of lading) contract that a shipowner is both entitled and bound to deliver the goods against production of an original bill of lading."[4] Delivery of the goods to the bearer who presents a false bill of lading, even if the carrier is innocent, constitutes encroachment on goods.

1. A Person in Possession of the Bill of Lading Does Not Necessarily Have the Right to Take Delivery of the Goods

In the Future Express case,[5] the consignee did not go to the bank to retire documents after taking delivery of the goods with the letter of guarantee, which led to the result that the bank, as the bearer of the bill of lading, filed a lawsuit against the carrier for release of goods without original bill of lading. At that time, under the Bills of Lading Act 1885, both the right of action and the right

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[1] (2019) Zui Gao Fa Min Shen 6472: Civil Ruling on the Review and Trial Supervision for the Retrial of the Dispute over the Right of Recourse between China Nonferrous Metal Industry's Foreign Engineering and Construction Co., Ltd. and Ningbo Branch of Hengfeng Bank Co., Ltd.

[2] SI Yuzhuo, *Maritime Law Monograph* [M]. Second Edition. Beijing. China Renmin University Press, 2010, p.187.

[3] [1999] 1 Lloyd's Rep. 837, The Court of Appeal upheld the judgment. [2000] 1 Lloyd's Rep. 211.

[4] It is of the essence of [a bill of lading] contract that a shipowner is both entitled and bound to deliver the goods against production of an original bill of lading, provided that he has no notice of any other claim or better title.

[5] *The Future Express* [1992] 2 Lloyd's Rep. 542.

of goods were required to be transferred simultaneously to be effective.[1] Although the bank is in possession of the bill of lading, it does not obtain the transfer of the right of action, thus not having the right to demand the carrier to surrender the goods.[2]

The mere possession of the bill of lading does not imply that the bearer has acquired the right to take delivery of the goods as the transferee of the bill of lading, nor does it necessarily have the right to demand the carrier to surrender the goods. The bearer can only possess the right to the goods of the bill of lading after the endorsement is made.[3] In order to protect the financing bank, pursuant to the Carriage of Goods by Sea Act 1992, the rights have been separated from the liabilities under the bill of lading,[4] and the act of possessing a bill of lading and the act of demanding delivery are of two distinct legal concepts.

In the Dolphina Case,[5] Bank of Communications of China, in the name of the bearer of the bill of lading, instituted an action against the carrier in a Singaporean court for delivery of goods without original bill of lading. Bills of lading is governed by English law. At this time, the goods have been unloaded, so Bank of Communications, although in possession of the bill of lading, does not meet the requirements of bearer of the bill of lading under Article 5(2) b of the Carriage of Goods by Sea Act 1992,[6] and cannot acquire any right of action according to the contract of bill of lading, nor can it make any claim against the carrier.[7]

In other cases, such as loss of the goods in transit, or total loss of the ship, the bearer holding the bill of lading is still unlikely to have the chance to pick up the goods.[8] In addition, it is not necessary to hold the bill of lading until the agent handles the customs declaration, arranges the ship berthing in advance, and arranges the unloading of the goods. Such possession is only

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[1] Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading, to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

[2] *The Aliakmon* (1986) 2 Lloyd's Rep 1 is a similar case, where the consignee bears the bill of lading, but the title to the goods remains in the shipper's hands because it has not made the payment for the goods. Therefore, the consignee, who has borne the loss, cannot sue the carrier for the damages.

[3] Michael Bridge, *Benjamin's sale of goods* (11Thedn Sweet & Maxwell 2021), Para 15-047.

[4] Carriage of Goods by Sea Act 1992 is a revised and modified version of the Bills of Lading Act 1885, which mainly solves the legal issue under Article 1 of the Bills of Lading Act 1885 that the right of action and the real right are not transferred simultaneously.

[5] *The Dolphina* [2011] SGHC 273; [2012] 1 Lloyd's Rep. 304.

[6] 5(2)(b) of COGSA 1992：(2) References in this Act to the bearer of a bill of lading are references to any of the following persons, that is to say—The bearer of a bill of lading referred to in this Law means any of the following persons:
(a) a person with possession of the bill who, by virtue of being the person identified in the bill, is the consignee of the goods to which the bill relates;
(b) a person with possession of the bill as a result of the completion, by delivery of the bill, of any endorsement of the bill or, in the case of a bearer bill, of any other transfer of the bill.

[7] In this case, the litigation application submitted by Bank of Communications included letter of credit fraud. As the shipper was aware of the delivery of goods without original BILL OF LADING and the BILL OF LADING was spent after the goods were unloaded, it was a fraudulent act under economic tort. Finally, Bank of Communications succeeded in claiming damages for unlawful conspiracy by good luck.

[8] *The Ythan* [2006] 1 Lloyd's Rep.457.

temporary and does not change the legal nature of bills of lading. Such possession is also an arrangement made with the permission of the lawful bearer of bills of lading.[1]

2. Importance of Endorsement

Under English law, an order bill of lading also requires endorsement before it can be negotiated. If a bill of lading is wrongly endorsed to a third party who is not a party to the contract of sale, the third party shall not be entitled to or liable for the bill of lading. In the case of Aegean Sea,[2] the judge held that an erroneous endorsement was equivalent to an invalid endorsement. A bill of lading wrongly endorsed to an unrelated third party cannot give rise to the liability of the bill of lading, and the third party has not participated in the sale of goods and will not accept a bill of lading wrongly endorsed. The judge also held that assignment required not only the consent of the assignor, but also the assent of the assignee.

In the 1912 case of "East West Corp v. DKBS",[3] the shipper endorsed the bill of lading to the bank at the destination port for collection. The bank did not receive the collection and returned the bill of lading to the shipper at his request. But it neglected to endorse it back to the shipper. The shipper attempted to sue the carrier for delivery of goods without original bill of lading. According to Article 2(1) of the Carriage of Goods by Sea Act 1992, the bank shall become the legal bearer of the bill of lading after obtaining the properly endorsed bill of lading, and the litigation right under the contract of bill of lading shall be transferred to the bank accordingly. Rights of the shipper as a party to the contract of bill of lading shall be terminated therewith, and the shipper has no contractual right to bring a suit against the carrier.[4] Even if the shipper is again in possession of the bill of lading, he cannot be the legal bearer of the bill of lading without proper endorsement.

In the Rafaela S case,[5] Lords of the Supreme Court of the United Kingdom held that goods can only be delivered with properly endorsed bills of lading. In the Dolphina case in Singapore,[6] the judge held that the bill of lading with fraudulent endorsement cannot obtain legal right of action. Therefore, before the order bill of lading is endorsed, the contract litigation right cannot be transferred. In the case of letter of credit, an unendorsed instrument is regarded as forged and considered as non-compliant by the bank, and the bank shall not be liable to pay such instrument.[7] It can be seen from the above cases that correct endorsement is the precondition for the transfer of rights and interests of bill of lading, especially order bill of lading, and wrongful endorsement

[1] *The Aramis* [1989] 1 Lloyd's Rep 213.
[2] *The Aegean Sea* [1998] 2 Lloyd's Rep 39.
[3] East West Corp *v.* DKBS 1912 [2003] 1 Lloyd's Rep 239.
[4] At last, in this case, the shipper was compensated for the tort of escrow.
[5] *The Rafaela S* [2005] UKHL 11; [2005] 2 A.C. 423.
[6] *The Dolphina* [2011] SGHC 273; [2012] 1 Lloyd's Rep. 304.
[7] Imperial Bank of Canada *v.* Bank of Hamilton [1903] AC 49.

amounts to an invalid bill of lading.

3. Responsibility to Check the Correctness of an Endorsement

Goods will be resold many times in the process of transporting bulk, crude oil or chemicals. The bearer of the bill of lading shall present a properly endorsed bill of lading in order to take delivery of the goods. Therefore, stamps or signatures endorsed on the back of the bill of lading will densely cover the entire surface of the bill of lading. The captain not only needs to check the name of the signatory, but also examine whether the specific instruction given by the signatory is explicit. He also needs to check whether there is an interruption in endorsement from the shipper to the last consignee. If an interruption or omission of endorsement is found, the validity of the bill of lading may be questioned or the request to take delivery may be refused by the captain.[1] At the same time, as intermediate traders, they shall also have the obligation to check the continuity and correctness of endorsements. If an endorsement is omitted, it is very likely that the order will be repudiated by the next buyer, who knows the business, when the price falls.[2]

In contracts for international sale of goods, it is the trader who should pay attention to the continuity of endorsement and strictly examine the validity of endorsement whether accepting or transferring the bill of lading. Otherwise, the trader may be questioned by the carrier and fails to be a party to the contract of bill of lading. In that case, the trader would have lost the right of action against the bill of lading or to sue the carrier either according to the contract of bill of lading or the trusteeship relationship. As a result, the trader may possibly fail to claim against the carrier for damages due to the negligence of endorsement. At the same time, when the cargo insurer pays for the damage or shortage of goods, it also has to consider how to defend itself as a subrogation in the future when it claims against the carrier.[3]

4. Consequences of Mis-delivery

In the case of Sormovskiy 3068,[4] in the absence of an express contract provision, the captain was bound to deliver the goods to the bearer who presented the bill of lading. In the case of Rafaela S, the judge noted that the requirement to produce the bill of lading prior to delivery was always a prerequisite for the carrier to deliver the goods, whether or not there was an express term to that effect.[5] The carrier will undoubtedly be in breach of the bill of lading contract of carriage and will place himself in great danger by delivering the goods without collection an original bill of lading properly endorsed. Under normal circumstances, the carrier only recognizes the bill of goods,

[1] Article 5 (2) of the Carriage of Goods by Sea Act 1992.
[2] Charles Debattista, *The Sale of Goods Carried by Sea* (2nd Edn LexisNexis UK 1998), Para 4-028.
[3] *The Ythan* [2006] 1 Lloyd's Rep.457.
[4] *The Sormovskiy 3068* [1994] 2 Lloyd's Rep 266.
[5] *The Rafaela S* [2005] UKHL 11; [2005] 2 A.C. 423.

which is usually called "Delivery at Sight of the Bill".[1] In the Ines case,[2] the Judge noted that the carrier could not seek the protection of any bill of lading for mis-delivery, whether with deliberate or conscious disregard of the rights of the plaintiff (the bearer of the bill of lading). In the case of "Motis Exports v. Dampskibsselskabet AF" in 1912,[3] the carrier shall not be exempted from liability arising from mis-delivery of goods on the strength of a forged bill of lading even if the mis-delivery was caused by malicious fraud rather than intention.

In order to protect the rights and interests of the lawful bearer of the bill of lading and maintain the authority of the bill of lading, the court tends to strictly require the captain to carefully verify the authenticity of the bill of lading when delivering the goods. The exemption under the contract of carriage protects the captain only when he delivers the goods to the bearer entitled to take delivery of them. Should the captain wrongfully give up the right to take control of the goods, the captain or the carrier will then be exposed to the claims of the true and lawful bearer of the bill of lading.[4] In Voyage Charter (4th edn, paragraph 18.164) makes it clear that even where the carrier, in good faith, has delivered the goods in accordance with a bill of lading, but in the end proved to be reasonably but mistakenly believed the original bill of lading which is in fact a forgery, he remains liable. Thus, in the absence of special provisions, the carrier's strict liability for mis-delivery will make it impossible to escape claims for loss of the goods.

V. Defense by the Carrier

During the carriage of goods by sea, neither the seller nor buyer of the goods is obliged to give notice to the carrier of each instance of resale of the goods. The carrier seldom partakes in the transactions under the contract of sale, unfamiliar with the terms and arrangements of payment for the sale of goods and not knowing the financial status of the parties involved in the transaction of carriage.[5] Consequently, the carrier is obliged, without having previously obtained any claim or a better right, to deliver the goods to the bearer of the original bill of lading.[6] In the case of "Glyn, Mills, Currie & Co. v. the East and West India Dock Co.",[7] the shipper transferred "first copy" of bill of lading endorsed to plaintiff (London Bank). After the arrival of the ship, the carrier discharged the goods into the defendant's warehouse. The shipper took delivery of the goods against "second unendorsed" bill of lading. The plaintiff brought an action against the defendant

[1] Sze Hai Tong Bank Ltd *v.* Rambler Cycle Co Ltd [1959] A.C. 576.
[2] *The Ines* [1995] 2 Lloyd's Rep. 144.
[3] Motis Exports *v.* Dampskibsselskabet AF 1912 [2000] 1 Lloyd's Rep 211.
[4] *The Sormovskiy 3068* [1994] 2 Lloyd's Rep 266.
[5] Evans & Reid *v.* Cournouaille(1921) 8 Ll. L. Rep. 76.
[6] David Foxton, *Scrutton on Charters and Bills of Lading* (24th Ed, Sweat & Maxwell 2020) Article 167 Para 13-009; Julian Cooke, *Voyage Charter* (4thEdn, Informa Law 2014), Para 18.162.
[7] Glyn, Mills & Co *v.* East and West India Dock Co (1882) 7 App. Cas. 591.

for encroachment on goods. The House of Lords held that as a pledgee the plaintiff had a special property right and was entitled to take immediate possession of the goods. However, the warehouse acts as the carrier. Once the delivery of one of the bills of lading is completed, other bills of lading are void. During the preservation of the goods by the defendant, there is not any claim, title, right or doubtful information received. Its disposal of goods does not breach the provisions of the transport contract, so it (the warehouse) is not liable for mis-delivery. And the case still stands.[1]

In the case of "Huasheng v. Evergreen", the shipper instructed its agent to send the bill of lading for the goods to the consignee, similar to modern factoring or collection. Where the bill of lading has not been properly endorsed, but the consignee receives and takes possession of it, and the consignee acts as a mercantile agent in actual possession and control of the bill of lading under the Commercial Agents Act 1889.[2] The buyer may dispose of the goods while in possession of the bill of lading as a commercial agent.[3] Article 25 (buyer in possession of goods after sale) of the Sale of Goods Act 1979[4] is analogous to Article 2 (Commercial Agents' Rights of Commercial Agent to Dispose of Goods) of the Commercial Agents Act 1889[5] in that a buyer who is in possession of a document of title to goods is treated as a commercial agent. Commercial agent's sale, pledge or other disposition of goods and delivery or transfer to the third party in good faith shall be deemed to have obtained the consent of goods owner, and the consequences arising therefrom shall be borne by the seller of goods.

For sellers' collections, the International Chamber of Commerce (ICC) published the Uniform Rules for Collections 1995 or URC522, which regulate and bind sellers and banks for collections.[6]

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[1] Aikens, *2006 Bill of Lading* [M]. Trans. Wei Changgeng, Li Hao, Ji Guizhi, etc. Beijing: Law Press, 2020, Section C, 5.52-5.61; David Foxton, *Scrutton on Charters and Bills of Lading* (24th Ed, Sweat & Maxwell 2020) Article 167 Para 13-012; Sir Guenter Treitel, *Carver on, Bills of Lading 4thEdn* (Sweet & Maxwell, 2017), Para 6-077.

[2] Article 1(2) of the Commercial Agents Act 1889.

[3] Article 9 of the Commercial Agents Act 1889: Disposition by buyer obtaining possession： Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

[4] Article 25(1) of the Sale of Goods Act 1979: Buyer in possession after sale.: (1) Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, has the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

[5] Article 2(1) of the Commercial Agents Act 1889: Powers of mercantile agent with respect to disposition of goods.： Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.

[6] Refer to ICC website: http://store.iccwbo.org/icc-uniform-rules-for-collections.

This collection method of payment is only limited to transactions between large international traders, multinational corporations and large petroleum and grain enterprises with good reputation. As the Parties are fully aware of the other Party's background, there is no repudiation of debts or fraud in cargo transaction. To save charges for L/C, the Parties may, through consultation, adopt a collection mode without the involvement of banks.

In the case of "Huasheng v. Evergreen", in the opinion of the carrier, the conditions for the shipper to collect the payment as the exporter were based on the consignee's forward acceptance draft. In order to collect the payment, the shipper inevitably had to hand over the bill of lading to the consignee first, and the risk of not collecting the payment would be borne by the shipper (exporter).[1] The shipper negligently failed to endorse the bill of lading but attempted to shift the blame for non-payment to the carrier by reason of the fact that the carrier had not carefully examined the endorsements.[2]

VI. Carrier's Remedies

In addition to adhering to the old principle of "Delivery at Sight of the Bill", the carrier also needs to object to unlawful unloading orders and incorrect presentations of documents in any form. In the case of Houda,[3] the court held that the ship had reasonable grounds for adhering to the general principle of "Delivery at Sight of the Bill" and refusing to discharge the cargo unless the original bill of lading was produced. In the case of Lycaon,[4] the shipowner could not confirm the ownership of the goods, so he shipped the goods back to the original port intact, and unloaded them in the warehouse, waiting for the court's decision. Although some return freight and storage costs were incurred, he avoided the risk of mis-delivery of the goods.

Another option is to require the person attempting to take delivery of the goods to provide a bank guarantee against a later claim by the true owner of the goods to compensate for the loss caused by the mis-delivery.[5]

The third way is to discharge the goods to the warehouse at the port of destination. Unless the carrier can control the goods, even in the developed countries with more normative commercial

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1 ZHAO Mingxiao, *Discussion on the Choice and Comprehensive Application of International Settlement for Foreign Trade Enterprises* [J]. Practice in Foreign Economic Relations and Trade, 2020.11 (19)-Wuhan: Wuhan Textile University, 2010; Zhang Rongmao, *Collection Mode and Risk Prevention* [J]. Business & Economy, 2004 (8) (No.257)-Heilongjiang: Heilongjiang Business & Economics Association; Please also refer to: https://kns.cnki.net/kns8/defaultresult/index.

2 YANG Daming, *International Sale of Goods* [M]. Beijing: Law Press, 2010: Chapter 2, Section 7 (Where do the seller hand over the shipping document) Chapter 10, Section 1.3 (Collection).

3 *The Houda* [1994] 2 Lloyd's Rep 541.

4 *The Lycaon* [1981] 1 Lloyd's Rep 92, [1983] 2 Lloyd's Rep 548 first.

5 Trucks and Spares Ltd. *v.* Maritime Agencies (Southampton) Ltd. (1951) 2 Lloyd's Rep 345.

laws, the goods would be inexplicably picked up or stolen for various reasons.[1]

VII. Conclusion

The author is of the opinion that in the case of "Huasheng v. Evergreen", although the carrier has raised such arguments as right of action, carriage contract relationship, incorrect endorsement, etc., none of these arguments can overturn the statutory law that imposes on the carrier the responsibility to deliver the bill of lading in strict accordance with the carriage contract to the lawful bearer who can correctly present the bill of lading. The carrier's only arguable point is that the person taking delivery of the goods at the port of discharge is the lawful bearer of the bill of lading with the consent or acquiescence of the shipper, and that taking delivery of the goods by the bearer of the bill of lading at the port of discharge is part of the transaction under the contract of sale, and is an agreed arrangement of the shipper's commercial collection, and that taking delivery of the goods by the bearer of the bill of lading cannot be avoided irrespective of whether the bill of lading endorsed is properly checked or not. However, the carrier failed to adduce evidence or to seek further evidence from a lawyer in Greece (or in Turkey, where the consignee was located) that the sending of the bill of lading by the shipper constituted a waiver by the shipper of all of his rights to the goods under the bill of lading. Alternatively, the act of the shipper, in order to perform the terms of the contract for collection, whether directly or indirectly consenting to the shipper's forwarding of the bill of lading to the bearer of the bill of lading to take delivery of the goods, at least where the shipper had knowledge of such forwarding by the consignee, shall be deemed as an assignment by the shipper of all rights and claims in the goods to the consignee, or the consignee shall be deemed as the commercial agent of the shipper, and the act of taking delivery of the goods by the consignee shall be equivalent to the act of selling, pledging or other disposing of goods by a commercial agent under the Factors Act 1889.

Nor did the carrier further inquire into or demand disclosure of the cause and purpose of the shipper's error in instructing its agent to send the full set of bills of lading, thereby leading the court to believe that the loss of the goods was not caused by the carrier, but was a serious consequence of the shipper's blind belief in the consignee's word in reliance on the fictitious reputation of him. It is also desirable to convince the court that the shipper attempted to shift to the carrier the fault of trusting the wrong person, when the consignee took delivery of the goods and failed to repay the price.

[1] Glencore International AG *v.* MSC Mediterranean Shipping Co. SA [2015] EWHC 1989 (comm) case, goods lost at the port of Antwerp. *The Rigoletto* [2000] 2 Lloyd's Rep 532 case, a Lotus sports car lost in Southampton. In *the New York Star* [1980] 2 Lloyd's Rep 317, when the goods were unloaded to the carrier's warehouse in Australia, the goods were lost in the carrier's warehouse, and it was difficult for the carrier to be exempted from liability for misdelivery in the end.

In the case of "Huasheng v. Evergreen", if possible, the carrier should include the shipper's agent as a participant in the consolidated action, converting the issue of the bill of lading contract at issue into one of negligent endorsement of the bill of lading. At a minimum, the shipper's agent mismanaged the bill of lading, abandoning possession of the bill of lading in the absence of express instructions or proper endorsement by the shipper, resulting in the loss of control of the goods. Even if the carrier bears responsibility for the mis-delivery, it may seek compensation from the agent of the shipper. It is unknown whether the consignee was in the wrong for non-payment of the goods or intentional evasion, and whether the carrier further went to Greece (or Turkey) to investigate the specific reasons and asked the shipper to disclose the process of the whole transaction. But the carrier did not succeed in finding out the reason and purpose behind the shipper sending the whole set of bills of lading and proving the fault of the shipper or at least of the shipper's agent. Unfortunately, there is no evidence in this respect from the case reports.

In a word, the author holds that the People's Supreme Court, in the case of "Huasheng v. Evergreen", emphasized once again the carrier's responsibility of presentation of bills: carriers should take a warning from this case and be particularly vigilant in delivering goods at the port of discharge by carefully checking not only the correctness of the bill of lading but also the continuity of the endorsement on the back of the bill of lading, so as to prevent the occurrence of such accidents.

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蓝碳保护体系构建研究

朱晖，李梦言*

摘要：自党的十九大报告以来，生态文明和绿色发展的新理念新战略日益深入人心，“碳中和”目标与生态保护价值以及应对全球气候变暖日益契合。海洋碳汇作为地球碳汇的重要组成部分，是实现“碳中和”目标的重要途径，对保护生物多样性和减少温室效应都具有积极作用。基于气候责任论、产权理论、生境服务付费理论的价值导向和理论思路，可以通过设计陆海统筹碳固存计划、建立蓝碳交易市场和构建生态补偿机制，建立一个蓝碳保护和发展的制度体系。

关键词：蓝碳；海洋碳汇；陆海一体化；生态补偿

一、问题陈述

2020 年 9 月，习近平总书记在第 75 届联合国大会上正式宣布，中国力争于 2030 年前二氧化碳排放达到峰值，努力争取 2060 年前实现碳中和，彰显了负责任大国的态度和决心。自十八大提出“美丽中国”概念以来，生态文明建设成为中国的主要发展目标。经过五年的发展和完善，十九大报告进一步深化了生态文明建设的实施战略。中国积极参与全球环境治理，为全球生态安全贡献力量，落实减排承诺，无疑是向世界展现了对全球环境治理的大国担当。与此同时，中国不仅致力于实现国内绿色发展目标，也为解决全球生态退化问题做出了中国贡献。“碳中和”目标既符合减缓全球变暖的时代主题，也符合中国新时代生态文明建设的核心价值观。

全球气候变化是 21 世纪人类面临的最重大挑战之一。气候变化引发的自然灾害不仅威胁着人类社会的环境安全，也带来了一系列社会问题。自工业时代以来，二氧化碳等温室气体不断被排放到空气中，破坏了大气中自然生态系统的碳平衡，温室气体浓度的不断累积，

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更是导致了全球气温的逐步上升。政府间气候变化专门委员会（IPCC）第五次评估报告显示，与工业化开始前的 1750 年相比，大气中的二氧化碳浓度增加了 40%。[1]为应对气候异常，延缓气温上升的速度，世界各国都在积极推动国际气候谈判与合作。

在应对全球气候变化和中国生态文明建设不断向前发展的背景下，实现“碳中和”目标，需要减少碳排放，增加碳固存。在碳排放方面，应该限制二氧化碳排放量，尽可能地减少化石燃料和其他燃料的使用，转向清洁的可再生能源，推进燃料的结构转型。在碳固存方面，应该充分关注天然碳汇中碳中和以及碳固存的作用。作为地球碳循环不可分割的一部分，海洋吸收了世界一半以上的二氧化碳排放。[2]中国拥有资源丰富且面积广泛的海岸带生态系统，也是世界上海藻养殖规模最大的国家。海洋碳汇的开发与保护对我国实现碳达峰和碳中和具有重要意义。

二、构建蓝碳保护体系的理论基础

1.蓝碳的定义

碳汇是自然界中各种元素相互作用以实现碳循环平衡的天然链。碳汇作为自然去除碳的主要方法，被认为是应对全球气候变化的最佳解决方案，也是实现碳中和目标最经济的方式之一。碳汇实际上是指森林、土壤和海洋等生态系统吸收二氧化碳的能力和效率。通过森林保育和海域修复等措施，我们可以利用生物从空气中吸收二氧化碳，从而减少大气中的二氧化碳含量。实际上，这一过程主要是通过光合作用来完成的，光合作用将二氧化碳固定在植被土壤或深海中。根据生物载体的具体类型，碳汇一般可以分为陆地碳汇系统和海洋碳汇系统。根据储碳材料的不同，陆地碳汇系统又可以细分为耕地碳汇、森林碳汇、草地碳汇等。海洋碳汇系统主要包含两类碳汇：海洋微生物和海洋植物，前者占海洋生物量的 90%以上。[3]

蓝碳，又称海洋碳汇，是地球碳汇系统的重要组成部分，它利用海洋生态系统中的生物和海洋活动，从大气中吸收二氧化碳进而对其固定和清除。从地理上看，蓝碳主要分布在海洋生态系统的深浅水域、海岸带和岛屿上。其中，海洋微生物碳泵可以制造惰性溶解有机碳，是海洋长期固碳的一种独特形式。而海洋微生物虽然非常微小，但种类丰富，分布广泛，生物量大，其光合作用每天固定的有机碳量就相当于陆地上所有植物固定的碳量。此外，海洋

[1] IPCC 第五次研究报告。
[2] Sabine C L, Feely R A& Gruber N, *The Oceanic Sink for Anthropogenic CO_2*, Science, Vol.21, p.367-368(2004).
[3] Bouillon S et al, *Mangrove production and carbon sinks:a revision of global budget estimates*, Global Biogeochemistry Cycles,Vol.22, p.1-12(2008).

中还生活着海洋浮游生物，可以从大气中吸收二氧化碳并合成有机物，通过海洋生物泵输送到海底成为海底沉积物并在此长期储存。由于靠近陆地，近海水域含有大量的来自陆地的颗粒性有机碳。不溶于海水也不被微生物分解的颗粒性有机碳将沉入海底，最终成为海底沉积物，而溶解性有机碳则会通过海洋微生物碳泵的作用形成惰性溶解有机碳，随着海水的流动转移到海洋中。[1]这些沉积的有机物的分解速度在很大程度上会因为受到海水冲刷而减慢。海水冲刷由海潮驱动，会将海洋植物的非原质体沉积到海床。随着海平面上升，海床上的沉积物被埋在更深的土壤层中，令有机物的降解更加困难，因此这些沉积物中的碳在数百年内不会释放回大气中，从而实现一种稳定的碳储存。[2]因此，海洋碳汇在保护生物多样性和和减少温室效应方面具有不可替代的作用。

2.蓝碳保护的意义

目前，世界各国都非常重视陆地碳汇系统，无论是在国际公约中，还是在各国国内法中，都有较为完善和全面的森林碳汇保护体系，而海洋碳汇保护仍处于初始阶段。据统计，陆地碳汇吸收的二氧化碳仅占全球生物碳汇的 45%，这意味着碳去除的大部分贡献都来自海洋碳汇系统。在此之中，虽然盐沼地、红树林、海草床和其他植物在整个海洋生态系统中的占比不到 0.5%，但它们在固碳方面起到的作用却占整个海洋生态系统的 70%以上。根据联合国环境署发布的一份报告，世界上一半以上的碳都被海洋生物捕获，而海岸带生态系统中的红树林和盐沼地比其他海洋动植物更能储存和消除碳。[3]海岸带生态系统以其高效的碳汇能力而被公认为最强的蓝碳。据估计，以每单位面积的碳螯合量而言，海洋植物的二氧化碳去除水平明显高于森林。而且海洋生态系统和海岸带生态系统在碳固存和碳储存方面都比陆地生态系统具有更高的容量，因为海洋吸收并固定大气中的二氧化碳后，会将那些未储存的残留物重新分配到海洋生态系统的内部循环中。[4]

由于超过 90%的温室气体都被储存在海洋中，蓝碳无疑是地球上最大的活性碳汇，不仅形式多样，而且价值丰富。海洋碳汇的碳储存量是陆地碳汇的 20 倍，是大气碳汇的 50 倍。[5]蓝碳有助于减缓全球变暖，因此充分发挥蓝碳的作用，以实现“碳中和”目标已经迫在眉睫。蓝碳作为一种典型的海洋生态产品，除了应对气候变化的价值外，还具有其他多种生态服务

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1 Macreadie P I, et al, *The future of Blue Carbon science. Nature Communications*, Vol.10:1, p. 1-13(2019).

2 McLeod E, et al., *A blueprint for blue carbon: Toward an improved understanding of the role of vegetated coastal habitats in sequestering CO_2*, Frontiers in Ecology and the Environment, Vol.9:10, p. 552-560(2011).

3 Blue Carbon: the Role of Healthy Oceans in Binding Carbon - A Rapid Response Assessment, 2009.

4 Blue Carbon: the Role of Healthy Oceans in Binding Carbon - A Rapid Response Assessment, 2009.

5 Howard J, et al, *Clarifying the role of coastal and marine systems in climate mitigation*, Frontiers in Ecology and the Environment, Vol.15:1, p.42-50(2017).

功能。海洋碳汇可以减少海岸带污染对海水的影响，形成海洋沉积物，进而稳定海岸线，并减少极端气候对生态的破坏，这些作用对维持健康的海洋环境至关重要。此外，蓝碳还与沿海地区的经济发展和生态保护息息相关。当海洋生态和蓝碳状况良好时，可以为人们提供日常生产生活所需的资源和食物，通过海洋自身的净化循环，还可以缓解人类开发活动对沿海地区造成的污染。总之，保护蓝碳不仅仅是为了应对气候变化，更是为了提高沿海自然生态系统的生产力和自身的恢复力，进而为沿海地区生态环境保护和经济生产活动高质量发展提供途径。

3.蓝碳系统的起源和发展

（1）蓝碳系统的起源

联合国教科文组织政府间海洋学委员会（Intergovernmental Oceanographic Commission of UNESCO，简称 IOC-UNESCO，后文简称为政府间海洋学委员会）成立于 1960 年，旨在探索海洋生态系统中的碳循环，并在 21 世纪初启动了国际海洋碳合协调计划，为国家和地区之间就海洋碳相关的实际研究项目提供沟通和协调的平台。[1]“蓝碳”一词出现于 2009 年，联合国环境规划署（UNEP）、联合国粮食及农业组织（FAO）和联合国教科文组织政府间海洋学委员会（IOC）联合发布的《蓝碳：健康海洋固碳作用的评估报告》（Assessment of the Ocean’s Capacity to Fix Carbon）首次使用和定义了“蓝碳”一词，报告还确认了海洋生态系统在碳循环中发挥的重要作用。

2010 年，政府间海洋学委员会（IOC）、国际自然保护联盟（International Union for Conservation of Nature，简称 IUCN）和保护国际基金会（Conservation International，简称 CI）联合发起了“蓝碳倡议”并成立了专门的科学和政策工作组，该倡议旨在通过恢复海洋生态和促进海洋动植物的可持续利用来减缓全球变暖的进程。[2]随后，“蓝碳倡议”工作组了第一版和第二版《蓝碳政策框架》，确定了蓝碳保护和发展的五个目标。3 2011 年 6 月，《联合国气候变化框架公约〈京都议定书〉》（UNFCCC）开始将红树林恢复纳入清洁发展机制。4同年，《联合国气候变化框架公约》第十七次缔约方会议将蓝碳作为主要议题之一，并联合发布了《海洋及沿海地区可持续发展蓝图》报告。报告规划了蓝碳保护和发展的具体路径，

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[1] Sabine C L, Ducklow H& Hood M, *International carbon coordination: Roger Revelle's legacy in the Intergovernmental Oceanographic Commission*, Oceanography, Vol.3, p.48-61(2010).

[2] The Blue Carbon Initiative, *About the Blue Carbon Initiative*, http://thebluecarboninitiative.org/about-theblue-carbon-initiative/2010-09-06.

[3] 《蓝碳政策框架报告 2.0》，2012 年。

[4] UNFCCC-CDMs. *AR-AM0014: Afforestation and reforestation of degraded mangrove habitats,* https://cdm.unfccc.int/methodologies/DB/KMH6O8T6R L3P5XKNBQE2N359QG7KOE,2013-10-04.

目标是建立全球蓝碳市场和蓝碳专项基金，制定统一的蓝碳评估和监测标准，并建立海上碳捕获的国际监管框架。但就目前而言，由于技术困难，上述制度仍处于筹备阶段，尚未在全球范围内实施。相关概念的实施多以项目的形式在经济和技术较为发达的国家和地区进行，例如阿联酋的蓝碳技术评估倡议（the Blue Carbon Technology Assessment Initiative，简称 AGEDI）。AGEDI 实际上扮演着促进者的角色，它组织和分析专业的环境数据以产生评估报告，并制定针对特定区域的补救措施和方案，其成果实际上是一份健全的环境管理和监测报告，为决策者提供了参考基础。同时，AGEDI 促进了国家和地区之间的协作参与，强化了信息交流和处理机制，从而有效促进知识共享，引导协作进程。[1]2013 年，红树林、海草床等“滨海湿地”被列入国家温室气体排放清单，这意味着蓝碳最终被纳入全球气候调节体系。2019 年，《联合国气候变化框架公约》（UNFCCC）第 25 次缔约方会议在马德里举行，会议重点关注了蓝碳，认为其是缓解气候变化的一个关键因素。

（2）国内发展

2013 年，国家海洋局发布《国家海洋事业发展“十二五”规划》，提出了红树林、滨海湿地等海洋生态系统的再生与保护，首次将海洋碳汇纳入规划。2015 年，蓝碳保护正式纳入国家战略，中共中央、国务院印发《关于加快推进生态文明建设的意见》，其指出需要发展海洋碳汇，以作为应对气候变化的途径之一。2016 年，国务院进一步提出积极开展海海洋碳汇试点工作，重点研发面向海洋领域的低碳技术。[2]2017 年初，中国向联合国提交了《中国气候变化第一次两年更新报告》，全面阐述了中国应对气候变化的政策和行动，其中包括保护海洋碳汇的努力。同年 6 月，中国政府倡议发起 21 世纪海上丝绸之路蓝碳计划，与沿线国建立蓝碳减排合作机制，推动国际社会在蓝色领域协同发展。[3]同年 8 月，中央提出探索建立蓝碳标准和交易体系。[4]自 2010 年以来，我国开展大规模海洋生态修复工作，恢复红树林、滨海湿地、盐沼地等具有碳汇功能的栖息地，以提高中国海洋生态系统的碳汇潜力。此外，我国的蓝碳保护工作也以地方试点的形式开展，例如在海南海口、三亚等地，由于其海洋生态环境和丰富的海洋资源，因而根据自身情况为发展蓝碳保护制定了自己的海洋生态系统试点计划。这些计划围绕海洋本底调查、修复与增汇、碳交易、碳普惠、碳定价等具体工作的各个方面展开，旨在有效扩大中国蓝碳规模，改善海洋健康，积极推进蓝碳交易市场建设。

通过分析蓝碳保护体系不难看出，得益于国际组织和相关国家的推动，世界各国已经深

[1] https://agedi.org.
[2] 参见国务院：《“十三五”控制温室气体排放工作方案》，国发〔2016〕61 号。
[3] 参见国家发展改革委、国家海洋局：《“一带一路”建设海上合作设想》。
[4] 参见中共中央、国务院：《关于完善主体功能区战略和制度的若干意见》。

刻认识到蓝碳在应对气候变化问题中不可替代的作用和巨大潜力，积极推动将发展海洋碳汇融入全球气候治理体系。因此，开展蓝碳保护及相关研究工作势在必行。

三、现有的蓝碳保护制度框架

1.国际法基础

虽然国际社会对低碳减排的关注日益增加，但温室气体排放量仍然较大，因而全球气温还在持续上升，这一问题已经成为人类社会可持续发展的一大威胁。在全球变暖的背景下，为应对气候变化，人们提出了构建蓝碳保护体系的构想。20 世纪 70 年代末，瑞士日内瓦举行的第一届联合国气候变化大会标志着全球变暖开始成为国际政治议程上的重要议题。经过多年的磋商和讨论，1993 年联合国环境与发展会议（United Nations Conference on Environment and Development，简称 UNCED）正式通过了《联合国气候变化框架公约》（United Nations Framework Convention on Climate Change，简称 UNFCCC，后文简称为《公约》）。《公约》的通过标志着二氧化碳这以典型的温室气体对气候变化和人类社会的负面影响被纳入国际法监管框架。1997 年《京都议定书》在日本京都通过，并于 2005 年生效，作为《公约》的具体执行方案，以法规形式限制各国温室气体排放总量。

显然，国际法领域已经存在与全球气候变化相关的法律法规，但其目前的重点仅仅是限制温室气体的排放。然而，要想减少大气中二氧化碳的含量和浓度，仅仅关注碳源是不够的，不但需要减少碳的排放量，还需要增加碳的储存和吸收量。在碳汇保护方面，现行适用的国际法主要强调对森林碳汇系统的保护：《联合国气候变化框架公约》第 4.1(d)条将“碳汇”规定为碳吸收的一种手段，初步确立了森林碳汇在减排中的的法律地位。[1]《京都议定书》附件一规定，植树造林和减少毁林活动可以抵消国家减排量，并要求报告林业恢复活动以供核查，还要求制定公开、透明的审查程序。[2]《巴厘行动计划》建立了减少发展中国家毁林和森林退化碳排放（REDD）机制，将森林碳汇的保护方向从植树造林和重新造林转向减少森林砍伐和发展可持续的林业管理。[3]关于保护海洋碳汇的具体立法虽然尚未出台，但已经有了国际公约和海洋环境保护的软法律法规。虽然保护海洋碳汇的具体立法尚未出现，但海洋环境保护的国际公约和条约对此也有一些相关规定。《联合国海洋法公约》是维持国际海洋秩序的最具权威性的公约，其第十二部分对海洋环境保护作出了具体规定。1973 年签署的《国际防止船舶造成污染公约》（International Convention for the Prevention of Pollution from Ships，

[1] fccc/informal/84.
[2] 参见《联合国气候变化框架公约〈京都议定书〉》。
[3] fccc/awglca/2009/15.

简称 MARPOL Convention）是最重要的国际海洋环境公约之一，其规定了向海洋大气排放有害物的强制性最低水平。1995 年，联合国环境规划署（United Nations Environment Programme，简称 UNEP）发表了《华盛顿宣言》，旨在避免陆地对海洋环境的污染。2001 年，UNEP 会议通过了《蒙特利尔宣言》，该宣言对沿海地区的生态管理具有重大贡献。蓝碳作为海洋生态系统的有机组成部分，虽然在海洋环境保护立法中有所涵盖，但蓝碳保护的制度体系缺乏结构性，也没有实质性内容，无法为蓝碳保护机制的发展提供切实可行的法律保障。

2.国内法基础

我国目前有关蓝碳保护的法律法规可以归纳为两类。一是海洋环境保护相关法律，以《中华人民共和国海洋环境保护法》为核心。二是渔业资源相关法律法规，以《中华人民共和国渔业法》及其实施细则为代表。1982 年出台的《海洋环境保护法》是我国海洋法律体系的主要内容之一，涵盖了海洋生态环境保护的方方面面，其中海岸带保护、滨海湿地保护、海岛保护等都与蓝碳保护息息相关。此外，中国有专门的海岛保护法，[1]对海岛的生态和资源保护作出了明确且详细的规定。正在制定和完善的《中华人民共和国湿地保护法》将红树林湿地的保护单独列为第三十一条。在污染防治方面，我国对沿海和海洋的工程建设污染、船舶污染、海洋倾倒污染等都有专门的规定，这些都与保护海洋环境有关。[2]这些法律法规不仅维护了良好的海洋环境，也为蓝碳资源的有效生存提供了稳定的基础。《中华人民共和国渔业法》第四章规定要加强和保护渔业资源。渔业碳汇是海洋生态系统碳汇能力的重要组成部分，海洋渔业资源保护也是海洋碳汇保护。促进渔业资源保护和管理，确保渔业资源持续增长，有助于增加碳吸收和碳固定，扩大蓝碳资源范围。

3.国家实践

目前，世界各国都在积极探索和推进与蓝碳保护相关的政策和举措，采取的措施主要包括保护湿地、恢复红树林、建立蓝碳交易市场等。

（1）沿海湿地保护

受海水周期性潮汐的影响，滨海湿地具有强大的碳汇能力，是海岸带蓝碳生态系统的主要组成部分。保护滨海湿地生态系统结构和功能的完整性，停止破坏性开发活动，可以增强滨海湿地蓝碳生态系统的服务功能。[3]

澳大利亚是南半球国家，拥有冗长的海岸线和丰富的海洋资源，也拥有世界上最丰富的

[1] 参见《中华人民共和国海岛保护法》。
[2] 参见《防治海洋工程建设项目污染损害海洋环境管理条例》，2006 年 9 月 19 日中华人民共和国国务院令第 475 号公布。
[3] 陈雪初、高如峰、黄晓琛、唐剑武：《欧美国家盐沼湿地生态恢复的基本观点、技术手段与工程实践进展》，载《海洋环境科学》2016 年第 3 期。

蓝碳资源。除了积极推动蓝碳开发和保护的国际合作外，澳大利亚政府还制定了一系列保护澳大利亚海洋蓝碳资源的政策法规。1992 年联邦政府、州和地方政府签署的《政府间环境协议》是澳大利亚最重要的环境法文件之一。该协议试图通过规定三级政府在环境管理中的不同角色和职责，缓解联邦体制下环境管理权责分离的矛盾关系，试图建立环保管理协同模式，减少各级政府和特别行政区在环境管理问题上的权力冲突，从而提高政府决策的准确性和稳定性，提高保护措施的执行效率。《政府间环境协议》本质上是一份政策文件，而不是法律规范，但其也规定任何违反协议中所规定的国家保护措施的行为都是违法行为。

随后，澳大利亚于 1997 年颁布了《国家湿地政策》，规定由环境署（Environment Agency）下属的生物多样性保护局（the Wetlands Division of the Biodiversity Conservation Authority）的湿地部门（the Wetlands Division）负责湿地保护的具体工作。在随后的环境保护过程中，该《国家湿地政策》成为滨海湿地保护相关管理的重要参考依据，相关省份制定的湿地保护战略和行动计划都必须与其规定相匹配。《国家湿地政策》第九部分规定了各级政府有义务保护动植物、尽最大努力保护物种多样性、保持陆地和水生生态系统处于良好平衡的状态。此外，澳大利亚还提出了六项沿海湿地保护战略，促进公众参与以及各级政府之间的合作。通过管理和保护滨海湿地，澳大利亚实现了海洋碳汇的良好向前发展。

（2）红树林恢复工程

作为海岸带生态系统的组成部分，红树林具有巨大的碳汇作用，有效保护和恢复红树林可以促进蓝碳的自然再生。此外，红树林的种植和修复成本不高，也不需要高水平的技术支持。因此，东南亚国家发展蓝碳保护的首要选择自然是大规模的红树林恢复项目，其中最成功和最具代表性的是印度孙德尔本斯红树林恢复项目。孙德尔本斯红树林是位于孟加拉国西南角的三角洲，拥有地球上最大的红树林，为大约 500 万人口的社区提供了重要的生态服务。然而在过去的 40 年里，由于气候变化导致的海平面上升，孙德尔本斯超过 28%的土地消失了，红树林生态系统也在迅速退化。除自然因素外，人为因素也是导致孙德尔本斯生态系统退化的原因，例如人口过度增长、红树林的过度开发以及不适当的捕虾等，这些都对生态系统造成重大破坏。[1]孙德尔本斯红树林恢复项目计划在 3 年内种植 6000 公顷的红树林，预计 20 年内将在其生物量和土壤中储存 70 万吨碳。该恢复项目的主要目标是减少碳排放、加强生态系统的气候适应能力和保护生物多样性。除此之外，红树林种植园的建立将为当地木材和水产养殖的发展提供机会。国际碳减排核证机构（Verified Carbon Standard）发起了覆盖孙

[1] Ajanta Dey&Animesh Kar, *Scaling of mangrove afforestation with carbon finance to create significant impact on the biodiversity - a new paradigm in biodiversity conservation models*, Field Action Science Reports (FACTS), p. 1-15(2012).

德尔本斯四个社区的红树林恢复项目，完成了碳标准适用性研究，发现建立碳融资机制是一个可行的选择。Verified Carbon Standard 通过融资获得的资金大部分分配给当地社区成员，作为他们的工作报酬，其余资金用于支付碳抵消认证所需的技术调查和科学监测费用。[1]

截至目前，该项目已取得显著成效。其累计种植和恢复的红树林面积达到 5600 公顷，由此产生的经济效益也达到了预期。最令人惊喜的是，红树林种植过程中的碳螯合量几乎是预期的三倍。除了预期的效益外，该项目还提供了一些生态效益，例如贝类富集等。在社会效益方面，当地社区的经济也因此而慢慢恢复。随着红树林种植园的建立，当地对劳动力的需求不断增加，当地社区能够在做有意义的工作的同时增加收入。迄今为止，印度孙德尔本斯红树林恢复项目是一个成功的大型风险投资项目，为蓝碳保护和发展项目的可融资性提供了证明。[2]

（3）建立蓝碳交易市场

目前，全球已经开始建立碳排放交易机制，将蓝碳市场纳入其中对蓝碳保护具有积极作用。虽然全球已经有 20 个国家和地区启动了强制性的碳排放交易市场，但其中都没有蓝碳交易。[3]2015 年，美国乔治亚州提出“蓝碳市场交易计划”，迈出了蓝碳交易市场建设的第一步。事实上，该计划的主要目标是保护沿海地区的红树林，并建立了一个三阶段战略作为参考和框架。在第一阶段，乔治亚州需要通过州立法，将红树林生态系统纳入该州的碳抵消登记册，并明确红树林生态系统的法律地位。第二阶段，州政府将会同科研机构，出台符合本州实际情况的红树林碳核算标准，并通过立法的方式赋予其强制力。第三阶段，确定蓝碳市场的未来卖家，红树林恢复与保护项目的投资者必须从本国以及其他国家和地区的卖家范围内进行资质筛选。[4]

此外，在收入分配方面，乔治亚州的蓝碳市场计划在一定程度上模仿了《联合国气候变化框架公约》下的清洁发展机制（Clean Development Mechanism，简称 CDM）。清洁发展机制规定，投资者在抵消信用中获得收入的一定比例必须上交该国政府，用于应对气候变化、开发和使用新能源技术，或者在该国投资气候适应项目，并为那些生活在气候变化影响下的人提供补贴。蓝碳抵消信用额度则将用于应对气候变化和新能源技术的开发和使用，或者投资于该州的气候适应项目，并为生活在气候变化影响下的州居民提供补贴。

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[1] Verified Carbon Standard (VCS): *India Sunderbans Mangrove Restoration*, India http://www.vcsprojectdatabase.org/#/project_details/1463, VCS, 2015.

[2] Livelihoods, *News-India,* http://www.livelihoods.eu/portfolio/news-india/Livelihoods, 2015.

[3] Constanze Haug, et al，Emissions Trading Worldwide, *International Carbon Action Partnership Status Report2017*, p.17-23.

[4] Catherine E Lovelock, et al., *Assessing the risk of carbon dioxide emissions from blue carbon ecosystems*, Ecology and the Environment, Vol.15:5, p.257-265(2017).

关于蓝色碳抵消信用额度的使用，该计划建议，可以用于美国未来将启动的一个统一的温室气体控制和交易计划，通过设立国内碳排放税的方式支持碳抵消。遗憾的是，由于缺乏相关技术手段，以及在保护海洋碳汇以应对气候变化方面的消极态度，蓝碳交易市场的构想并未付诸实践。然而，该概念为蓝碳交易在国家和区域层面的发展提供了一个有用的模式。

四、构建蓝碳保护体系的逻辑思路和具体路径

1.制度构建的价值观念与逻辑递进

（1）依托气候责任理论加强蓝碳保护

当代气候变化调控的两个核心概念是气候正义理论和气候责任理论。气候正义理论的主题是通过分担减少碳排放的责任，以支持代际和代内公平，而气候责任理论则侧重于概念识别和行动导向。随着全球气温升高和决策者对气候变化问题认识的提高，气候治理进程进入新阶段，适用概念的平衡逐渐从气候正义理论转向气候责任理论。[1]

气候责任是“应对全球气候变化的责任”的缩写，是针对气候变暖的国际环境保护责任的一部分。虽然气候责任的定义在某种程度上仍然受到气候正义理论的影响，但大多数学者肯定气候责任和国家责任的政治属性。总体而言，气候责任的概念可以从宏观和微观两个角度进行分析。广义的气候责任是指地球上所有主体，包括国家、社会团体和个人，共同承担的保护大气环境的道德和法律责任；狭义的气候责任仅仅指主权国家和地区在全球气候治理过程中应承担的国际环境保护的法律责任。

气候责任理论最初主要强调减缓温度变化责任的内在道德约束，随着国家实践的不断深入，逐渐发展为具有外部约束力的普遍义务。气候责任理论作为一种立法概念，在世界各国和地区应对气候变化的立法和司法活动中具有重要的指导作用。[2]在这一理论的影响下，海洋生态保护和资源利用的法律价值取向也逐渐向缓解全球变暖和保护大气环境的方向靠近。海洋是地球生态系统中最重要的大气调节剂，也是容量最大的碳库。因此，蓝碳体系的构建应当体现保护海洋生态系统在大气保护方面的重要价值，以及海洋碳库资源化的效率价值。同时，蓝碳体系的构建还需要考虑海洋生态学中的其他价值维度，平衡其他价值与减缓气候变化作用之间的关系。不难预见，基于气候责任理论，海洋碳汇保护体系将成为全球气候治理进程中不可替代的重要组成部分。

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[1] Caney S, *Cosmopolitan Justice, Responsibility, and Global Climate Change*, Leiden Journal of International Law.Vol.18:4, p.745-746(2005).

[2] Eric Brandstedt&Bengt Brülde, *Towards a Theory of Pure Procedural Climate Justice*, Journal of Applied Philosophy, Vol.36:5, p.785-799(2019).

（2）基于产权理论发展蓝色碳市场交易

产权是“物权”的别称，是与法律中的物权相对应的经济学术语。国内外学者从不同的角度对其进行了解读，并达成如下共识：产权是一种与财产相关的排他性权利。财产权的排他性可以理解为一项特定的权利只能由一个主体所有，多个主体不能在同一时间对同一事物享有相同的权利。产权排他性的形成，根本上是由于财产的稀缺性。首先，产权关系的建立是为了解决冲突，这种利益冲突是在占有财产和使用稀缺资源的过程中产生的。其次，产权作为一种行为权利，是规范人们日常行为的一种行为规则。财产权定义了什么可以做，什么不能做，如果违反规定，哪一方应该赔偿。这一行为规则通过财产权利表现出来，实际上规定的是主体之间的权利义务关系。第三，产权不是单一的权利，而是包括使用权、转让权、收益权在内的复合权利束。最后，产权是一种可以交易的权利，其排他性是交易的先决条件，特定的产权具有自己的边界，主体也具有独特性。产权还隐含着某种经济价值，即产权的对象是劳动或劳动成果，并在经济中具有潜在的价值。

构建蓝碳保护体系，除了要保留蓝碳资源外，还需要提高蓝碳合理利用的效率，这其中就包括发展蓝碳市场交易。界定蓝碳资源的产权，需要考虑包括但不限于产权归属、蓝碳流动方式和责任等各个方面。参照森林碳汇的交易模式，海洋碳汇可以和所有权分离，使其经过专门认证后作为商品在市场上得以独立转让。

（3）基于生境服务付费理论的蓝碳资源保护

生境服务付费理论（Payment for Ecosystem Services，简称 PES）产生于 20 世纪 90 年代，其核心理念是为生态环境的服务功能付费，环境服务的受益者应当支付相应的价格，以促进其生态保护意识以及更好的环境管理。[1]国际林业研究中心（The Center for International Forestry Research，简称 CIFOR）2005 年的报告对栖息地服务付费给出了最权威的定义，并将这种机制定义为一种有条件的协议，即在交易双方自愿条件下达成的涉及明确规定的环境服务或使用的协议。该定义首先强调交易的对象必须是明确的，被交易的生态系统所提供的环境服务的功能需要通过科学技术来识别，所提供的服务和生态系统之间应存在明确的因果关系。其次，交易必须至少有一个服务提供者和一个买家。第三，交易必须建立在双方自愿的基础上——即双方都能从交易中获益，从而实现环境效益和经济利益的优化配置。最后，生态服务的支付必须以特定的环境容量为前提，可以交易的生态服务应该是在基本产出水平

[1] Sven Wunder, *Payment for Environmental Services and the Poor: Concepts and Preliminary Evidence*, Environment and Development Economics, Vol.13:3, p.279-297(2008).

之外。[1]生境服务付费理论作为一种有效的激励机制，在促进生态意识、降低环境破坏程度方面具有诸多优势，其同时也是一种高效的筹资机制。将这一理论作为环境保护工作的价值指南，可以增加商品化生态服务的供给，不仅可以从生态补偿机制中获得经济效益，还可以更好地实现环境保护的目标。

作为世界上最大的生态系统和碳汇，海洋基于其生态环境的碳库功能在遏制气候变化方面表现出极其重要的生态价值。这种生态价值还可以转化为经济价值，满足市场机制下交易双方的需求，同时也对海洋碳汇项目的发展起到反向刺激作用，增加蓝碳的供给。在追求整体经济效益最大化的同时，将蓝碳的发展推向更高的水平，促进环境效益的产出。根据生境服务付费理论，海洋碳汇交易应满足以下条件：首先，交易的蓝碳是基于明确的海洋碳汇产生的，数量和质量是可以确定的。此外，蓝碳交易应具有成本效益和经济价值。除此之外，交易的蓝碳应具有吸收增加的温室气体的能力，否则该交易无法产生适当的环境效益。

2.制度构建的具体路径

（1）实施陆海统筹碳固存计划

1992 年，联合国环境与发展会议（UNCED）通过了《21 世纪议程》，指出解决海洋问题不能简单地采用单一的治理方式。相反，解决海洋问题应该从多个层面考虑，通过多部门的整合和协作，对陆地、空气和海洋生态系统实施综合措施。[2]中国最早在 1996 年《中国海洋 21 世纪议程》中提出陆海一体化战略，指出要统筹沿海陆地区域和海洋区域的国土开发规划，坚持区域经济协调发展的方针，从国家战略层面奠定了陆海一体化理论的基础。[3]经过几年的丰富和完善，陆海统筹一体化概念得到进一步发展，即在经济社会发展过程中，立足陆地、海洋资源环境特点，把发展和保护这两个问题放在全面宏观调控的范围内，协调一致，最大限度地提高陆地和海洋的经济、生态和社会效益，以促进社会的可持续发展和人与自然的和谐共存。由此可见，要想实现环境资源的有效保护，需要坚持陆海统筹一体化开发。

构建蓝碳保护机制，需要实施陆海统筹碳固存计划。从自然科学的角度来看，海洋碳汇和陆地碳汇之间有着密切的联系，不应将两者分开看待。如果只考虑陆地生态系统，增加土壤养分的供应是一种有利于陆地碳汇的做法。但是，一旦考虑到陆地和海洋的整体情况，陆源营养盐的过量输入会影响近海碳储存，最终导致整体碳汇能力下降。[4]国际社会也倾向于将蓝碳与其他类型的碳汇一起纳入气候协定，这有利于资源的统一整合和管理。从行政管理的

[1] Sven Wunder, *Payments for Environmental Services:Some Nuts and Bolts*, CIFOR Occasional Paper No.42, 2005.
[2] 参见《21 世纪议程》第 17 章。
[3] 参见《中国 21 世纪海洋议程》。
[4] 刘纪化、张飞、焦念志：《陆海统筹研发碳汇》，载《科学通报》，2015 年第 35 期。

角度看，蓝碳的红树林保护通常由林业部门负责，而滨海湿地保护由国家海洋主管部门负责，管理部门不尽相同。国务院印发的《全国主体功能区规划》确立了“陆海统筹”的发展原则，并提出在国家海陆空统一和海洋系统相对独立的基础上，促进国家海陆空协调发展。2018 年，国务院机构改革成立自然资源部（MNR），此举不是简单的各机构之间的合并和重组，而是旨在促进自然资源的综合规划。此种国际和国内背景下，实施陆海统筹碳固存计划有助于公平、高效地保护和利用蓝碳，同时也减少了对蓝碳非有效性利用。

（2）建立统一的蓝碳市场

有学者建议，为推进蓝碳交易，可以以国家林业局下设的中国绿色碳汇基金会为模板，设立专门针对海洋碳汇的蓝碳基金会。基金会业务可受国家海洋局监管，企业可以出资进行滨海湿地生态修复，以获得标准化的碳信用指数，计入企业社会责任账户。[1]在此基础上，有学者进一步提出有针对性地采取融合型、专项型和地方推进的多维立法模式。其中，融合型立法模式承认蓝色碳汇项目产生的碳抵消信用与碳配额一起在国家统一碳市场的履约作用和流通地位，并制定必要的比例限制规则。[2]全国碳排放权交易市场于 2021 年 6 月 25 日开启，这意味着碳排放交易从 7 个试点城市扩展到全国，7 月 16 日发电行业是第一个开始交易的行业，纳入重点排放单位超 2000 家。碳排放交易市场的启动为建立蓝碳市场提供了可能。此外，碳排放交易制度的法律框架已经构建，生态环境部已经审议通过了碳排放的相关监管措施。[3]虽然相关监管措施仍然处于试行阶段，但仍然可以为碳排放交易提供一定程度的保障。

此外，还可以从风险分担和税收优惠等方面进一步支持建立统一的蓝碳市场。在风险分担方面，中国人民银行等七部委于 2016 年联合印发了《关于构建绿色金融体系的指导意见》，提出地方发展绿色金融和基于碳排放权的融资工具。在保险措施方面，建立完善与气候变化相关的巨灾保险制度，鼓励保险机构研发海洋污染损害责任保险、森林保险等产品。[4]针对蓝碳交易过程中可能出现的排放价格波动、交割风险、CDM 项目风险、信用担保风险、损失风险，可以利用配额或碳信用估算保险标的，扩大保险范围。[5]2016 年 11 月，在湖北举办的长江论坛上，全国首单“碳保险”落地签约。碳金融产品的不断创新，进一步拓宽了节能减排的融资渠道，降低了融资成本，带动了企业投资节能减排的积极性。[6]全球环境基金（GEF）

[1] 邹丽梅、王跃先：《中国林业碳汇交易法律制度的构建》，载《安徽农业科学》，2010 年第 5 期

[2] 潘晓滨：《中国蓝碳市场建设的理论同构与法律路径》，载《湖南大学学报（社会科学版）》，2018 年第 1 期。

[3] 参见生态环境部《碳排放权交易管理办法（试行）》。

[4] 参见中国人民银行、财政部、发展改革委、环境保护部、银监会、证监会、保监会：《关于构建绿色金融体系的指导意见》。

[5] 李媛媛：《中国碳保险法律制度的构建》，载《中国人口、资源与环境》2015 年第 1 期。

[6] 《全国首单碳保险落地湖北》，http://www.pkulaw.cn/fulltext_form.aspx/pay/fulltext_form.aspx?Gid=1510234521。

也是中国可以考虑寻求支持以建立蓝色碳市场的对象之一。GEF 小额赠款计划的目标正是为国家环境战略的制定提供资金。

在财政税收方面，通过税收减免、激励补贴等优惠措施，吸引民间资本加入气候融资机制，使得政府对海洋牧场的蓝色碳汇补贴更有效率。[1]此外，还要考虑多元化主体参与蓝碳市场交易的可行性，特别是要关注已经有一定投资意愿、具有减排和生态保护理念、有强大资金支持的大型跨国公司，例如蓝碳世界资本集团。蓝碳世界资本集团成立于 2008 年，总部位于布鲁塞尔，成立仅三年就设立了中国办事处。该集团对中国清洁机制的发展潜力充满信心，并积极参与采购活动。

（3）探索构建生态补偿机制

在蓝碳保护的资金投入方面，除了应对气候变化的国际筹资机制外，还可以探索建立生态补偿机制，明确生境服务付费的概念。2014 年，我国修订环境保护法，首次将建立生态补偿制度纳入法律规定，为生态补偿制度的适用奠定了法律基础。2018 年，国家发改委等九部门联合印发了《建立市场化、多元化生态保护补偿机制行动计划》，[2]提出进一步完善海域有偿使用的制度建设的需要，虽然不涉及海洋碳汇，但也将林业温室气体自愿减排项目优先纳入全国碳排放权交易市场。[3]在海洋生态补偿方面，2016 年我国修订了《海洋环境保护法》，将海洋生态补偿纳入第二十四条，标志着中国正式开始建立海洋生态补偿制度。在地方层面，山东省和厦门市均出台了海洋生态补偿专项管理办法，明确生态补偿的范围涵盖海岸带、湿地等，和蓝碳保护密切相关。[4]在渔业资源保护方面，国务院发布的《中国水生生物资源养护行动纲要》第三部分规定渔业资源保护与增殖行动。宁波市、杭州市也颁布了保护渔业资源的地方性法规。

在实践中，生态补偿机制尚未系统化，现有海洋生态保护修复资金投入蓝碳保护的比例也比较小，可以考虑通过征收海洋生态补偿费用来作为补充。[5]一方面要加强海洋碳汇碳储量的评估和定量分析，提高技术能力，建立标准化体系。另一方面，要明确蓝碳生态补偿的对象、主体、补偿标准和方式，以蓝碳等碳汇为切入点，建立量化指标体系，以碳汇交易市场为试点，促进生态补偿市场化、多元化。

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[1] 沈金生、王泽鹏、王选奇：《海洋牧场蓝色碳汇激励性补贴研究》，载《中国海洋大学学报（社会科学版）》2018 年第 2 期。

[2] 《建立市场化、多元化生态保护补偿机制行动计划》，发改西部〔2018〕1960 号。

[3] 《关于印发〈建立市场化、多元化生态保护补偿机制行动计划〉的通知》，http://www.gov.cn/xinwen/2019-01/11/content_5357007.htm。

[4] 参见 2016 年《山东省海洋生态补偿管理办法》、2018 年《厦门市海洋生态补偿管理办法》。

[5] 陈克亮、张继伟、陈凤桂：《中国海洋生态补偿制度建设》，海洋出版社 2015 年版，第 9-10 页。

五、结论

蓝碳作为减缓气候变化的重要方式，日益受到国际社会的关注。各国都在努力通过国际合作促进海洋和沿海生态系统的保护和管理，为减缓气候变化努力提高碳吸收能力。中国漫长的海岸线拥有巨大的海洋生物多样性资源和碳储存能力，但与陆地碳汇相比，人们在海洋碳汇的储存能力、过程机制和功能等方面仍缺乏充分认识，也没有进行深入研究。只有充分认识海洋碳汇的价值和潜力，不断采取措施促进海洋生态系统的恢复，才能实现有效的碳汇，为中国履行碳中和承诺提供解决方案和坚实基础。

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Study on the Construction of Blue Carbon Protection System

ZHU Hui, LI Mengyan*

Abstract: Since the report by the 19th National Congress of the CPC put forward a new concept and strategy of ecological civilization and green development, the proposed target of "carbon neutrality" is aligned with the value of ecological protection and the trend of coping with global climate change. As an important part of the Earth's carbon sink, marine carbon sink is an important way to achieve the "carbon neutrality: goal, and it also has a positive effect on protecting biodiversity and reducing the greenhouse effect. Therefore, based on the value guidance and concepts of climate responsibility theory, property rights theory, and payment for ecosystem services, we can build an institutional system and find the path for blue carbon protection and development by implementing a land and sea carbon sequestration plan, establishing a blue carbon trading market, and building an ecological compensation mechanism.

Keywords: blue carbon; ocean carbon sink; land-sea integration; ecological compensation

I. Presentation of the Problem

In September 2020, General Secretary Xi Jinping announced at the 75th session of the United Nations that China would strive to peak its carbon emissions by 2030 and achieve carbon neutrality by 2060, demonstrating the determination of a responsible major country. Ever since the 18th National Congress put forward the vision of "Beautiful China", the construction of ecological civilization has become China's main development goal. After five years of development and improvement, the 19th National Congress report further deepened the implementation strategy of ecological civilization. Actively participating in global environmental governance, contributing to global ecological security, and honouring commitments to reduce emissions are undoubtedly expressing its promises to the world as a responsible major country to govern the ecological

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environment. It is not only committed to achieving its domestic green development goals, but also to making China's contribution towards solving the global problem of ecological degradation. The goal of "carbon neutrality" is not only in line with the current theme of slowing down global warming, but also consistent with the value of China's ecological civilization.

Global climate change is one of the most significant challenges facing humanity in the 21st century. Natural disasters caused by climate change not only threaten the environmental security of human society, but also cause a series of social problems. Since the industrial age, uncontrolled emission of greenhouse gases, such as carbon dioxide, into the air has broken the carbon balance of the natural ecosystem in the atmosphere, and the concentration of greenhouse gases has been accumulating, thus causing global temperature to increase. According to a recent report from the IPCC AR5, the concentration of carbon dioxide in the atmosphere has increased by 40% compared to 1750, the year before industrialization began.[1] In order to fight climate anomalies and reduce the rate of temperature increase, countries around the world are actively promoting international cooperation and negotiations regarding the climate.

In the context of the global response to climate change and the development of China's ecological civilization concept, we need to reduce carbon emissions and increase carbon sequestration so as to achieve the goal of "carbon neutrality". On the emissions side, we should limit the emission of carbon dioxide into the atmosphere, reduce the use of fossil fuels and other fuels as much as possible, shift to cleaner renewable energy, and promote the structural transformation of fuels; on the sequestration side, we should give full attention to the benefits of neutralizing and sequestering carbon in natural carbon sinks. As an integral part of the Earth's carbon cycle, the ocean absorbs more than half of the world's carbon dioxide emissions.[2] China has a rich and comprehensive coastal zone ecosystem, and it is also the country with the largest scale of seaweed farming in the world. The development and protection of ocean carbon sinks is of great significance for China to achieve its objectives for carbon peaking and carbon neutrality.

II.Theoretical Basis for the Construction of Blue Carbon Protection System

1. Definition of Blue Carbon

A carbon sink is a natural chain in which various elements of nature interact with each other to achieve balance in the carbon cycle. As the primary method of carbon removal by nature itself, carbon sinks are viewed as the best solution to address global climate change and one of the most economical ways to achieve carbon neutrality goals. A carbon sink actually describes the capacity

[1] See *IPCC Fifth Assessment Report*.
[2] See Sabine C L, Feely R A& Gruber N, *The Oceanic Sink for Anthropogenic CO_2*, Science, Vol.21, p.367-368(2004).

and efficiency of ecosystems, like forests, soil, and oceans, to absorb carbon dioxide. Through measures like forest conservation and sea restoration, we can reduce the amount of carbon dioxide in the atmosphere by using organisms to absorb carbon dioxide from the air. They accomplish this through processes like photosynthesis, which leave carbon dioxide fixed in vegetated soil or in the deep sea. Depending on the specific type of biological carriers, carbon sinks are generally divided into terrestrial carbon sink systems and marine carbon sink systems. According to the different materials that store carbon, the terrestrial carbon sink system can be subdivided into arable carbon sinks, forest carbon sinks, grassland carbon sinks, etc. The marine carbon sink system mainly contains two types of carbon sequestration: marine microorganisms, which account for more than 90% of marine biomass, and marine plants.[1]

Blue carbon, or marine carbon sinks, uses the biological and marine activities in the marine ecosystem to absorb carbon dioxide from the atmosphere, and then fix and remove it, which is an important part of Earth's carbon sink system. From a geographical perspective, blue carbon is mainly distributed in deep and shallow waters, coastal zones, and islands in marine ecosystems. Among them, marine microbial carbon pumps produce inert dissolved organic carbon, which is a unique form of long-term carbon sequestration in the ocean. Although marine microorganisms are extremely small, they are rich in diversity, widespread in distribution, and large in biomass. The daily amount of organic carbon fixed, just by the photosynthesis of marine microorganisms, is comparable to the amount of carbon fixed by all plants on land. In addition, the marine plankton that photosynthesize in the vast ocean absorb carbon dioxide from the atmosphere and combine it into organic matter, which is then transported from the atmosphere to the seabed sediment by the marine biological pump and stored there. Because of its proximity to land, offshore waters have a large amount of particulate organic carbon from land. The particulate organic carbon that is insoluble in seawater and not decomposed by microorganisms will sink to the seafloor, turning into seafloor sediments in the end. The dissolved organic carbon will form an inert dissolved organic carbon through the action of marine microbial carbon pump, which will be transferred to the ocean with the flow of seawater.[2] The decomposition rate of these deposited organic materials is slowed to a large extent by seawater scouring, which is driven by ocean tides and deposits apoplast material from marine plants into the sea bed. As the sea level rises, the sediments in the sea bed are buried in deeper layers of soil, making the decomposition of organic matter even more difficult, so the carbon in these sediments will not be released back to the atmosphere for hundreds of years,

[1] Bouillon S et al, *Mangrove production and carbon sinks:a revision of global budget estimates*, Global Biogeochemistry Cycles, Vol.22, p.1-12(2008).

[2] See Macreadie P I, et al, *The future of Blue Carbon science. Nature Communications*, Vol.10:1, p.1-13(2019).

thus achieving stable carbon storage.[1] Therefore, marine carbon sinks play an irreplaceable role in protecting biodiversity and reducing the greenhouse effect.

2. The Significance of Blue Carbon Conservation

At present, countries all over the world have attached great importance to terrestrial carbon sink systems, both in the international conventions and in the domestic laws of each country that has more perfect and comprehensive protection systems for forest carbon sink. In terms of marine carbon sinks, it is still in the initial stage. According to statistics, the uptake of carbon dioxide by terrestrial carbon sinks accounts for only 45% of global biogenic carbon sequestration. This means that most of the carbon removal contribution is made by marine carbon sink systems. Although salt marshes, mangroves, seagrass beds, and other plants account for less than 0.5% of the total marine ecosystem, they contribute more than 70% of the total marine ecology in terms of carbon sequestration. According to a report released by the United Nations Environment Programme, more than half of the world's carbon is captured by marine organisms, and the mangroves and coastal salt marshes in coastal zone systems are far more capable of storing and eliminating carbon than other marine flora and fauna.[2] Coastal zone ecology has been recognized as the strongest blue carbon sink because of its efficient carbon sink capacity. The level of carbon dioxide removal by marine plants is significantly higher than that of forests, as estimated by the amount of carbon sequestered per unit of area. Both marine and coastal zone ecosystems have a higher capacity than terrestrial ecosystems, both in terms of carbon sequestration and carbon storage. After the ocean absorbs and fixes carbon dioxide in the atmosphere, it redistributes the unstored remnants into the internal cycle of the marine ecosystem.[3]

With over 90% of greenhouse gases stored in the ocean, the blue carbon sink is undoubtedly the largest active carbon sink on the planet, not only in its diverse forms but also in its rich value. The ocean carbon sink has a capacity to store 20 times more carbon than the terrestrial carbon sink and 50 times more than the atmospheric carbon pool.[4] Blue carbon sinks can help mitigate global warming, so it is now urgent to give full play to the role of blue carbon to support the goal of "carbon neutrality". Blue carbon, as a typical marine ecological product, also has other multiple ecological services in addition to its value in combating climate change. Marine carbon sinks, for example, can reduce the impact of coastal zone pollution on seawater and form marine sediments,

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[1] See McLeod E, et al., *A blueprint for blue carbon: Toward an improved understanding of the role of vegetated coastal habitats in sequestering CO_2*, Frontiers in Ecology and the Environment, Vol.9:10, p.552-560(2011).

[2] See *Blue Carbon: the Role of Healthy Oceans in Binding Carbon - A Rapid Response Assessment*, 2009.

[3] *Blue Carbon: the Role of Healthy Oceans in Binding Carbon - A Rapid Response Assessment*, 2009.

[4] See Howard J, et al, *Clarifying the role of coastal and marine systems in climate mitigation*., Frontiers in Ecology and the Environment, Vol.15:1, p.42-50(2017).

thus stabilizing coastlines. They can also reduce the extent of ecological damage caused by climate extremes, which are also essential for maintaining a healthy marine environment. In addition, blue carbon is also closely related to the economic development and ecological protection of coastal areas. When marine ecology and blue carbon are in good condition, it can provide people with the resources and food needed for daily production and life, and it can also alleviate pollution in coastal areas, caused by development activities, through the ocean's own purification cycle. In short, the purpose of protecting blue carbon is not simply to cope with climate change, but also to improve the productivity of the natural ecosystems in offshore areas, to increase the resilience of its own recovery capacity, and to provide a pathway for ecological environmental protection and high-quality development of economic production activities in coastal areas.

3. Origin and Development of the Blue Carbon System

A. Origin of the System

The Intergovernmental Oceanographic Commission of UNESCO was founded in 1960 to explore the carbon cycle in marine ecosystems and launched the International Ocean Carbon Coordination Project (IOCCP) in the early 21st century to provide a platform for communication and coordination about practical ocean carbon related research projects between countries and regions.[1] The term "blue carbon: appeared in 2009, when it was used and defined for the first time in the "Assessment of the Ocean's Capacity to Fix Carbon" report, which was jointly published by the United Nations Environment Programme (UNEP), the Food and Agriculture Organization of the United Nations (FAO), and the Intergovernmental Oceanographic Commission (IOC), which recognizes the important role played by marine ecosystems in the carbon cycle.

In 2010, the Intergovernmental Oceanographic Commission (IOC), International Union for Conservation of Nature (IUCN) and Conservation International (CI) jointly launched the Blue Carbon Initiative, which established a dedicated Science and Policy Working Group. The initiative aims to slow the process of global warming through marine ecological restoration and the sustainable use of marine plants and animals.[2] Subsequently, the Blue Initiative Policy Working Group released the first and second editions of the Blue Carbon Policy Framework, which established five objectives for the conservation and development of blue carbon.[3] In June 2011, the Kyoto Protocol to the United Nations Framework Convention on Climate Change (UNFCCC)

[1] See Sabine C L, *Ducklow H& Hood M, International carbon coordination: Roger Revelle's legacy in the Intergovernme -ntal Oceanographic Commission*, Oceanography, Vol.3, p.48-61(2010).

[2] The Blue Carbon Initiative, *about the Blue Carbon Initiative*, http://thebluecarboninitiative.org/about-theblue-carbon-initiative, 2010-09-06.

[3] See *Blue Carbon Policy Framework 2.0* 2012.

began to include mangrove restoration in its Clean Development Mechanism.[1] In the same year, the 17th Conference of the Parties to the UNFCCC discussed blue carbon as one of the main topics and jointly released the report "Blueprint for Ocean and Coastal Sustainability". The report paved the path for blue carbon protection and development with the goal of establishing a global blue carbon market and a special fund for blue carbon, developing unified blue carbon assessment and monitoring standards, and entering the international regulatory framework for ocean carbon capture. At present, the above-mentioned systems are still in the preparatory stages due to technical difficulties and have not been implemented on a global scale. The implementation of related concepts is mainly shown in the form of projects in countries and regions with more developed economies and technologies, such as the Blue Carbon Technology Assessment Initiative (AGEDI) in the UAE. AGEDI actually plays the role of a facilitator, which organizes and analyzes professional environmental data to produce assessment reports and develop and apply region-specific remedial measures. The results of this wealth of information are translated into sound environmental management and monitoring, which provides an intelligence base for decision makers. At the same time, AGEDI promotes collaborative participation among countries and regions to strengthen information exchange and processing mechanisms, thereby effectively facilitating knowledge-sharing and guiding the collaborative process.[2] In 2013, "coastal wetlands", including mangroves and seagrass beds, were singled out in the National Greenhouse Gas Emissions Inventory, which means that blue carbon is finally included in the global climate regulation system. The 25th Conference of the Parties to the United Nations Framework Convention on Climate Change (UNFCCC) was held in Madrid in 2019, and it focused on the mitigation potential of blue carbon in the oceans as a key element of reducing climate change.

B. Domestic Development

In 2013, the State Oceanic Administration released the "12th Five-Year Plan for the Development of China's Marine Industry", advocating for the regeneration and protection of marine ecosystems, such as mangroves and coastal wetlands, and it was actually the first time that marine carbon sinks were mentioned. 2015 was the year when blue carbon protection was formally incorporated into the national strategy, and the Central Committee of the Communist Party of China and the State Council issued the "Opinions on Accelerating the Construction of Ecological Civilization". The Opinions pointed out the need to prioritize ocean carbon sinks as one of the ways to address climate change issues. In 2016, the State Council further proposed to actively carry

[1] UNFCCC-CDMs. AR-AM0014: *Afforestation and reforestation of degraded mangrove habitats*, https://cdm.unfccc.int/methodologies/DB/KMH6O8T6R L3P5XKNBQE2N359QG7KOE, 2013-10-04.

[2] https://agedi.org.

out pilot work on ocean carbon sinks and focus on research and development of low-carbon technologies targeting the marine sector.[1] In early 2017, China submitted its First Biennial Update on Climate Change to the United Nations, which comprehensively explained China's policies and actions to address climate change, including its efforts to protect ocean carbon sinks. In June of the same year, China launched the "Blue Carbon Plan" initiative to collaborate with countries along the 21st Century Maritime Silk Road to establish a cooperation mechanism for blue carbon conservation and promote the synergistic development of the international community in the area of blue carbon.[2] In August, the central government proposed to explore how can a blue carbon standard and trading system be established.[3] Since 2010, China has carried out large-scale marine ecological restoration work to restore habitats with carbon sink functions, including mangroves, coastal wetlands, and salt marshlands, in order to enhance the carbon sink potential of China's marine ecosystems. In addition, China's blue carbon protection work is also carried out in the form of local pilot projects, as in Haikou and Sanya of Hainan Province, which have better marine ecological conditions and rich marine resources, and have developed their own pilot programs for marine ecosystem carbon sinks according to their own conditions. The program is centered on marine background survey, restoration and sink enhancement, carbon trading, carbon inclusion, carbon pricing, and other aspects of the specific work plan, with the aim of effectively expanding the scale of blue carbon in China, improving the health of the ocean, and actively promoting the construction of a blue carbon trading market.

Through the analysis of the blue carbon system, it is easy to find that through the promotion of international organizations and related countries, countries around the world have deeply realized the irreplaceable role and the great potential of blue carbon in addressing climate change issues, and they have taken a positive attitude towards promotion of the integration of ocean carbon sinks into the global climate governance system. Thus, it is imperative to carry out blue carbon conservation and related research work.

III. Existing Institutional Framework for Blue Carbon Protection

1. Foundations of International Law

The concern regarding low carbon emission reduction is on the rise in the international community, as is the uncontrolled emission of greenhouse gases into the atmosphere. These have triggered the problem of continuous global temperature rise, which has become a great threat to the

[1] See the State Council's "13th Five-Year Plan" for controlling greenhouse gas emissions.
[2] See National Development and Reform Commission, State Oceanic Administration, Vision of Maritime Cooperation in Building "Belt and Road".
[3] See "Several Opinions on Improving the Strategy and System of the Main Functional Area".

sustainable development of human society. The idea of building a blue carbon protection system was proposed to cope with climate change against the background of global warming. The first United Nations Conference on climate change, held in Geneva, Switzerland in the late 1970s, marked the beginning of global warming as a topic of importance on the international political agenda. After years of consultation and discussion, the United Nations Framework Convention on Climate Change (hereinafter referred to as "the Convention") was formally adopted by the United Nations Conference on Environment and Development (UNCED) in 1993. The establishment of the Convention signified that the negative impact of carbon dioxide, a typical greenhouse gas, on climate change and human society was incorporated into the regulatory framework of international law. In 1997, the Kyoto Protocol, which is a specific implementation mechanism of the Convention and exists in the form of regulations to limit the greenhouse gas emission targets of all countries, was completed and entered into force in 2005.

It is clear that legal policies related to global climate change are already in place in the field of international law, but the focus is currently on the regulation of greenhouse gas emissions. If we want to reduce the concentration of carbon dioxide in the atmosphere, it is not enough to focus on carbon sources alone. It is necessary to reduce carbon emissions as well as to increase carbon storage and absorption. In terms of carbon sink protection, existing international laws that are in force and applicable emphasize the protection of forest carbon sink systems: Article 4.1(d) of the UNFCCC specifies "sinks" as a means of carbon absorption, initially establishing the legal status of forest carbon sinks for emission reduction.[1] The Kyoto Protocol provides for afforestation and deforestation reduction activities to be used to meet the commitments on national emission reductions under Annex I, and it requires reporting on forestry restoration activities for verification purposes, as well as open, transparent, and procedural review to form the basic framework for forest emission reduction.[2] The Bali Action Plan establishes a REDD mechanism that shifts the direction of conservation surrounding forest carbon sinks from afforestation and reforestation to reduced deforestation and sustainable forestry management.[3] Specific legislation regarding the protection of marine carbon sinks has not yet emerged, but there are already international conventions and soft law regulations for marine environmental protection. Part XII of the United Nations Convention on the Law of the Sea, the most authoritative convention regarding the maintenance of the international maritime order, specifically regulates the protection of the marine environment. The MARPOL Convention, signed in 1973, is one of the most important international

[1] fccc/informal/84.
[2] Kyoto Protocol-UNFCC.
[3] fccc/awglca/2009/15.

maritime environmental conventions, which establishes mandatory minimum levels of harmful emissions into the ocean atmosphere. In 1995, the United Nations Environment Programme (UNEP) issued the Washington Declaration, which aims at preventing the degradation of the marine environment from land-based activities. In 2001, the UNEP Conference adopted the Montreal Declaration on the Protection of the Marine Environment from Land-based Activities, which is recognized as a contribution to the effective ecological management of coastal zones. Although blue carbon, as an organic part of marine ecosystem, is covered in the legislation of marine environmental protection, the institutional system of blue carbon protection is not structured and lacks substantial laws and regulations to provide practical legal guarantee for the development of blue carbon mechanisms.

2. Domestic Law Basis

The existing laws and regulations related to blue carbon protection in China can be summarized into two categories. First are the laws related to marine environmental protection, with the Marine Environmental Protection Law of the People's Republic of China being the core. Second are the laws related to fisheries resources and the regulations represented by the Fisheries Law of the People's Republic of China and its implementation rules. The Marine Environmental Protection Law, which was introduced in 1982, is one of the main elements of China's marine legal system and covers the protection of marine ecological environments in all aspects. The coastal zone protection, coastal wetland protection, and island protection are all related to blue carbon resources. In addition, China has a special island protection law,[1] which makes clear and detailed provisions for the protection of the ecology and resources of islands. The Wetlands Conservation Law of the People's Republic of China, which is in the process of being formulated and perfected, lists the protection of mangrove wetlands as a separate article – Article 31. In terms of pollution prevention and control, China has special regulations for coastal and marine engineering construction pollution, ship pollution, and marine dumping pollution, all of which are related to the protection of the marine environment without exception.[2] These laws and regulations not only maintain a good marine environment, but also provide a stable foundation for the effective survival of blue carbon resources. Chapter 4 of the Fisheries Law of the People's Republic of China provides for the enhancement and protection of fishery resources. Fisheries' carbon sinks are an important part of the carbon sink capacity of marine ecosystems, and the protection of marine fisheries resources is also the protection of marine carbon sinks. Promoting the conservation and

[1] See the Law of the People's Republic of China on the Protection of Sea Islands.
[2] See Regulations on the Prevention and Control of Pollution and Damage to the Marine Environment from Marine Engineering Construction Projects.

management of fishery resources and ensuring the increase of fishery resources can help increase carbon absorption and fixation and expand the scope of blue carbon resources.

3. National Practices

Currently, countries are actively exploring and promoting policies and initiatives related to blue carbon protection, and the main measures being taken include protecting wetlands, restoring mangroves, and building a blue carbon trading market.

A. Coastal Wetland Protection

Owning to the influence of periodic tidal inundation of seawater, coastal wetlands have powerful carbon sinks and are the main body of blue carbon ecosystems in the coastal zone. Protecting the structural and functional integrity of coastal wetland ecosystems and stopping destructive development activities can enhance their blue carbon ecosystem service functions.[1] As a southern hemisphere country with a long coastline and abundant marine resources, Australia has the richest blue carbon resources in the world. In addition to actively promoting international cooperation in the development and conservation of blue carbon, the Australian government has also enacted a series of policies and regulations for the protection of marine blue carbon resources in its country. Notably, the 1992 Intergovernmental Agreement on the Environment, signed by the federal government and state and local governments, is one of the most important environmental law documents in Australia. The agreement attempts to alleviate the contradictory relationship of separate environmental management authority and responsibility under the federal system by setting out the different roles and responsibilities of each of the three levels of government in environmental management. It attempts to establish a collaborative model of environmental protection management to reduce conflicts between different levels of government and special administrative regions over environmental management issues, thereby enhancing the accuracy and stability of governmental decisions and the efficiency of implementation of protection measures. The Intergovernmental Agreement on the Environment is, by nature, a policy document rather than a legal norm, but it makes it illegal to violate any of the national protection measures set forth in the agreement.

Subsequently, Australia promulgated the National Wetlands Policy in 1997, which stipulates that the Wetlands Division of the Biodiversity Conservation Authority under the Environment Agency is responsible for the specific work of wetland conservation. In the subsequent environmental protection process, the policy became an important reference standard for

[1] CHEN Xuechu, et al, *Basic views, technical means and progress of engineering practice in ecological restoration of salt marsh wetlands in Europe and America*, Marine Environmental Science, Vol. 3:3, p. 467-472(2016).

management related to coastal wetland conservation, and the development of wetland conservation strategies and action plans in relevant provinces is required to align with the provisions in the policy. Part IX of the National Wetlands Policy sets out the responsibilities of all levels of government to protect flora and fauna, to do their utmost to ensure that species diversity is maintained, and to keep terrestrial and aquatic ecosystems in good balance. In addition, Australia has proposed six strategies for the conservation of coastal wetlands, thereby promoting public participation and cooperation between different levels of government. Through the management and protection of coastal wetlands, the development of marine carbon sinks has been achieved in Australia.

B. Mangrove Restoration Project

As a component of the coastal zone ecosystem that plays a huge role as a carbon sink, effective protection and restoration of mangroves can promote the natural regeneration of blue carbon. Moreover, mangrove planting and restoration is not costly, nor does it require a high level of technical support. Therefore, the primary choice of Southeast Asian countries for blue carbon conservation is large-scale mangrove restoration projects. Among the most successful and representative of these projects is in India's Sundarbans – a group of islands stretching from western Bengal to the south – which is home to the largest estuarine mangrove forest on the earth and provides an important ecological service to a community of about 5 million people. Over the past 40 years, however, more than 28% of its land has been lost due to climate change-induced sea level rise, and the mangrove ecosystem is degrading rapidly. In addition to natural factors, there are also causes of human-induced degradation, such as excessive population growth, over-claiming of mangroves, and inappropriate shrimp fishing practices, all of which have consequently led to ecosystem disruption.[1] The mangrove restoration project plans to plant 6,000 hectares of mangroves over three years and expects to store 700,000 tons of carbon in their biomass and soil over a period of 20 years. The main objectives of the restoration project are to reduce carbon emissions, enhance climate adaptation, and conserve biodiversity. In addition to this, the establishment of mangrove plantations will provide local opportunities for timber and aquaculture development. The mangrove restoration project covering four Sundarbans communities has been initiated by Verified Carbon Standard, which completed a study on the applicability of the carbon standard and found that the establishment of a carbon financing mechanism was a viable option.

[1] See Ajanta Dey&Animesh Kar, *Scaling of mangrove afforestation with carbon finance to create significant impact on the biodiversity -a new paradigm in biodiversity conservation models*, Field Action Science Reports (FACTS), p.1-15 (2012).

Most of the funds received through the financing were distributed to local community members as remuneration for their work, with the remainder being used to cover the costs of technical surveys and scientific monitoring required for carbon offset certification.[1]

So far, the project has been implemented with remarkable results, with the total amount of mangroves planted and restored reaching 5,600 hectares; furthermore, the economic benefits it has generated have met expectations. One of the most pleasant surprises is that the carbon sequestration from the mangrove planting process is nearly three times higher than expected. In addition to the expected benefits, the project also provided a number of ecological benefits, such as shellfish enrichment. In terms of social benefits, the local community's economy is also slowly benefiting from the mangrove habitat restoration. With the establishment of mangrove plantations, the demand for labor has increased and the local community has been able to increase their income while doing meaningful work. To date, the Sundarbans mangrove restoration in India is an example of a successful, large-scale VCS project that has also demonstrated the feasibility of financing blue carbon conservation and development projects.[2]

C. Building a Blue Carbon Trading Market

At present, the world has begun to establish a carbon emission trading mechanism, and the inclusion of the blue carbon market is a good way to protect the blue carbon. There are twenty countries and regions in the world that have launched mandatory carbon emission trading markets, but there is no blue carbon trading among them.[3] In 2015, the American state of Georgia took the first step in the global attempt to establish a blue carbon trading market by proposing a "Blue Carbon Market Trading Plan". The main objective of the program is, in fact, to conserve mangrove forests in the coastal zone, and it establishes a three-stage strategy that serves as a reference and framework. In the first stage, Georgia needs to adopt state legislation to include mangrove ecosystems in the state's carbon offset registry and clarify the legal status of mangrove ecosystems. In the second stage, the state government, in collaboration with scientific research institutions, will introduce mangrove carbon accounting standards that are in line with the actual situation in the state, and it will give them mandatory power by means of legislation. In the third stage, the future sellers of the blue carbon market will be identified, and the investors of mangrove restoration and conservation projects will need to be qualified and screened within the scope of sellers from their

[1] Verified Carbon Standard (VCS), *India Sunderbans Mangrove Restoration*, India, http://www.vcsprojectdatabase.org/#/project_details/1463, VCS, 2015.
[2] Livelihoods. *News-India*. http://www.livelihoods.eu/portfolio/news-india/Livelihoods, 2015.
[3] See Constanze Haug, et al. *Emissions Trading Worldwide, International Carbon Action Partnership Status Report2017*, p.17-23.

own countries, as well as other countries and regions that meet the requirements.[1]

In addition, in terms of revenue distribution, Georgia's Blue Carbon Market Trading Plane, to some extent, the CDM (Clean Development Mechanism) under the United Nations Framework Convention on Climate Change in that a percentage of the investor's revenue from offset credits is required to go to the state to be used to combat climate change and develop and use new energy technologies, or to invest in climate adaptation projects in the state and subsidize the lives of those affected by climate change. The Blue Carbon Offset Credits will be used to address climate change issues, and to develop and apply new energy technologies, or to invest in climate adaptation projects in the state and to subsidize state residents living with climate change impacts. With respect to the use of blue carbon offset credits, the plan suggests that they could be used in the future in a unified greenhouse gas control and trading program that may be initiated in the U.S., and where sources could be provided to support offsets through domestic carbon taxes. Unfortunately, the idea of a blue carbon trading market was not put into practice due to the lack of technical approaches, as well as the negative attitude in the U.S. regarding the protection of ocean carbon sinks to combat climate change. However, the concept does provide a useful model for the development of blue carbon trading at the national and regional levels.

Ⅳ. The Logical Approach and Path for the Construction of Blue Carbon Protection System

1. The Value Concept and Logical Progression of System Construction

A. Relying on Climate Responsibility Theory to Strengthen Blue Carbon Protection

The two core concepts of contemporary climate change regulation are the climate justice theory and the climate responsibility theory. The core of climate justice theory is the sharing of responsibility for reducing carbon emissions to support inter and intra-generational equity, while climate responsibility theory focuses on conceptual recognition and action orientation. As global temperatures increase and policy makers become more aware of climate change issues, the process of climate governance is moving to a new stage, and the balance of applicable concepts has gradually shifted from climate justice theory to climate responsibility theory.[2]

Climate responsibility is an abbreviation for responsibility to address global climate change and is part of the international responsibility for environmental protection that is specific to climate

[1] See Catherine E Lovelock, et al., *Assessing the risk of carbon dioxide emissions from blue carbon ecosystems*, Ecology and the Environment, Vol.15:5, p.257-265(2017).

[2] See Caney S, Cosmopolitan Justice, *Responsibility, and Global Climate Change*, Leiden Journal of International Law, Vol.18:4, p.745-746(2005).

warming. The definition of climate responsibility is still influenced by climate justice theories at different levels, but most scholars affirm the political nature of climate responsibility and state responsibility. The concept of climate responsibility, in general, can be analyzed from two perspectives: macro and micro. In a broad sense, climate responsibility refers to the moral and legal responsibility to protect the atmospheric environment that should be shared by all subjects on Earth, including states, social groups, and individuals; in a narrow sense, climate responsibility refers only to the legal responsibility for international environmental protection that sovereign states and regional groups should bear in the process of global climate governance.

Initially, the theory of climate responsibility mainly emphasized the intrinsic moral constraint of the responsibility to mitigate temperature change, and it gradually developed into an externally binding universal obligation, along with the deepening of national practices. As a kind of legislative concept, the theory of climate responsibility plays a leading role in providing a code of conduct for the legislation and related legal activities of countries and regions around the world in response to climate change.[1] Under the influence of this theory, the legal value orientation of marine ecological protection and resource utilization is gradually approaching the mitigation of global warming and the protection of the atmospheric environment. The ocean is the most important atmospheric regulator in the earth's ecosystem and the carbon bank with the largest capacity. Therefore, the construction of the blue carbon system should reflect the ocean's ecological value in protecting the atmosphere and highlight the value of efficiency in the resourceization of the ocean carbon bank. At the same time, it is also necessary to consider other value dimensions in marine ecology and balance the relationship between other values and the role of climate change mitigation. It is not difficult to foresee that, based on the climate responsibility theory, the system of ocean carbon sink protection will become an irreplaceable and important part of the global climate governance process.

B. Developing Blue Carbon Market Transactions Based on Property Rights Theory

Property right is another name of "right in rem", which is an economic term corresponding to the property right in law. Different scholars at home and abroad have interpreted it from different perspectives and reached the following consensus: Property right is an exclusive right related to property. The exclusivity of property rights can be understood as that a specific right may only be owned by a sole subject, and multiple subjects cannot enjoy the same right over the same thing at the same time. The formation of such exclusivity of property rights is fundamentally due to the

[1] See Eric Brandstedt&Bengt Brülde, *Towards a Theory of Pure Procedural Climate Justice*, Journal of Applied Philosophy, Vol.36:5, p.785-799(2019).

scarcity of property. First, property rights relations are established for the purpose of resolving conflicts, and such conflicts of interest arising in the process of possessing property and using scarce resources. Second, property rights, as a kind of behavioral right, are regarded as norms that define people's daily behavior. Property rights define what can be done, what cannot be done, and which party should then compensate if the regulation is violated. This behavior rule expressed through property rights is actually a relationship between rights and obligations among subjects. Third, property rights are not a single right, but a composite bundle of rights, including the right to use, the right to transfer, and the right to gain. Finally, property right is a right that can be traded, and its exclusivity is a prerequisite for the transaction, and the specific property right has a boundary and the subject is unique. Property rights also imply some economic value – that is, the property rights involve labor or results of labor that have potential value in the economy.

If we want to build a blue carbon protection system, in addition to retaining blue carbon resources, we also need to improve the efficiency of reasonable use of blue carbon, which includes the development of blue carbon market trading. To properly define the property rights of blue carbon resources, it is necessary to consider all aspects related, including but not limited to the property rights ownership, the way of blue carbon flow and responsibility, etc. Referring to the trading mode of forestry carbon sinks, marine carbon sinks can be separated from the ownership, which allow being transferred as commodities in the market independently after special certification.

C. Protecting Blue Carbon Resources Based on the Theory of Payment for Ecosystem Services

Payment for Ecosystem Services (PES) is a theory that emerged in the 1990s. The core idea is to pay for the service function of habitats, and the beneficiaries of environmental services pay the corresponding price in order to raise the awareness of ecological conservation and better environmental management.[1] The most authoritative definition of payment for habitat services is given in the 2005 report by the Center for International Forestry Research (CIFOR), which defines the mechanism as a conditional agreement, regarding a clearly specified environmental service or use, that is reached under voluntary conditions between the two parties to the transaction. The definition first emphasizes that the object of the transaction is clear, that the function of the environmental service provided by the ecosystem traded needs to be identified by science and technology, and that there should be a clear causal relationship between the service provided by the

[1] Sven Wunder, *Payment for Environmental Services and the Poor: Concepts and Preliminary Evidence*, Environment and Development Economics, Vol.13:3, p.279-297(2008.)

ecosystem and the output. Secondly, there must be at least one service provider and one buyer in the transaction. Thirdly, the transaction must be based on the voluntariness of both parties – that is, both parties can benefit from the transaction, thus achieving the optimal allocation of environmental benefits and economic interests. Finally, the payment for ecological services must be predicated on a specific environmental capacity, and the ecological services that can be traded should be additional to the basic level of output.[1] The PES theory has many advantages as an effective incentive mechanism to promote ecological awareness and reduce the level of environmental damage, and it is also an efficient fund-raising mechanism. Using this theory as a value guide for environmental protection efforts can increase the supply of ecological services that are commoditized, not only so that economic benefits can be gained from ecological compensation mechanisms, but also so that the goal of environmental protection can be better achieved.

As the world's largest ecosystem and carbon sink, the ocean shows extremely important ecological value in curbing climate change based on its ecological carbon pool function. This ecological value can also be transformed into economic value to meet the needs of both sides of the transaction under the market mechanism, while also acting as a reverse stimulus to the development of ocean carbon sink projects and increasing the supply of blue carbon. While pursuing the maximization of overall economic benefits, the development of blue carbon will be pushed to a higher level to promote the output of environmental benefits. According to the theory of payment for habitat services, the following conditions should be fulfilled when trading marine carbon sinks: Above all, the blue carbon to be traded is generated based on clear marine carbon sinks, and the quantity and quality can be identified. Furthermore, the blue carbon trading should be cost-effective and have economic value. Last but not least, the blue carbon to be traded should have the ability to absorb the incremental amount of absorbed greenhouse gases; otherwise, the trade cannot yield appropriate environmental benefits.

2. Specific Path of System Construction

A. Implementation of Land and Sea Carbon Sequestration Plan

In 1992, Agenda 21 was adopted by the United Nations Conference on Environment and Development (UNCED), which noted that the solution to ocean problems could not just be adopting a single governance approach. Instead, it should be the one that requires joint efforts from all levels, it should include multi-sectoral integration and collaboration, and it should integrate land, air, and marine ecological and natural systems to implement comprehensive measures.[2] China first

[1] Sven Wunder, *Payments for Environmental Services:Some Nuts and Bolts*, CIFOR Occasional Paper No.42, 2005.
[2] See Chapter 17 of Agenda 21.

proposed the integration of land and sea strategy in 1996 in the "China Ocean Agenda 21", which pointed out that the development planning of the sea and land should be coordinated, adhere to the synergistic development, and come from the level of national strategy to lay the foundation for land and sea integration theory.[1] After several years of enriching and improving these practices, a consensus has been reached regarding the integration of land and sea – that is, in the process of economic and social development, both the development and protection should be subject to micro-control, with different environmental and resource characteristics of land and sea being considered. In this way, we could maximize the economic, ecological, and social benefits of land and sea so as to promote the sustainable development of society and the harmonious coexistence of man and nature. It can be seen that fruitful environmental resource protection requires integrated development of land and sea.

Building a blue carbon protection mechanism requires the implementation of a land-sea carbon sequestration plan. From the perspective of natural science, there is a close connection between marine carbon sinks and terrestrial carbon sinks, and the two should not be viewed separately from each other. If only terrestrial ecosystems are considered, increasing the supply of soil nutrients will be a practice that is beneficial to terrestrial carbon sinks. However, considering the whole situation of land and sea, excessive input of nutrient salts from terrestrial sources will affect the storage of offshore carbon and eventually lead to a decrease in the overall carbon sink capacity.[2] The international community also tends to include blue carbon in climate agreements together with other types of carbon sinks, which is conducive to the unified integration and management of resources. From the administrative point of view, the mangrove protection involved in blue carbon is usually under the responsibility of the forestry department, while the coastal wetland protection is under the responsibility of the national marine administration department, and the management departments are actually not the same. The National Plan of Main Function Zones issued by the State Council establishes the development principle of "land and sea integration" and proposes to promote the coordinated development of national land and sea spaces based on the unity of national land and sea spaces and the relative independence of marine systems. In 2018, the State Council established the Ministry of Natural Resources (MNR) as a result of its institutional reform. The move is not a simple merger and reorganization between agencies, but rather a desire to promote the integrated planning of natural resources. In such an international and domestic context, the implementation of an integrated carbon sequestration plan for land and sea can help

[1] See China Ocean Agenda 21.

[2] LIU Jihua, ZHANG Fei, and JIAO Nianzhi, *Land and Sea Integrated Research and Development of Carbon Sinks*, Science Bulletin, Vol. 35, p.3399-3405(2015).

protect and use blue carbon in a fair and efficient manner, while also reducing unnecessary interference with the effectiveness of blue carbon.

B. Establishing a Unified Blue Carbon Market

For the promotion of blue carbon trading, some scholars propose following the example of the China Green Carbon Sink Foundation, established under the State Forestry Administration, and setting up a blue carbon foundation exclusively for marine carbon sinks. The business of the foundation can be supervised by the State Ocean Administration, and the enterprises can fund the ecological restoration of coastal wetlands to obtain the standardized carbon credit index, which will be credited to the social responsibility account of the enterprises.[1] On the basis of this, some scholars further propose choosing the integrated type and special type of trading mode by local pilot promotion. Among them, the convergence legislative model recognizes the compliance role and circulation status of carbon offset credits generated by blue carbon sink projects together with carbon allowances in the national unified carbon market, and establishes the necessary proportional limitation rules.[2]The national carbon emissions trading market was opened on June 25, 2021, which means that carbon emissions trading has expanded from 7 pilot cities to the whole country. On July 16, the power generation industry was the first industry to start trading, including key emission units exceeding 2000. The launch of the carbon emissions trading market provides the possibility of the establishment of a blue carbon market. At the same time, the legal framework of the carbon emissions trading system has been constructed, and the Ministry of Ecology and Environment has considered and adopted the relevant regulatory measures for carbon emissions.[3] Although the regulatory measures are only on a trial basis, they can still provide a certain degree of protection for the trading of carbon emissions.

In addition, the establishment of a unified blue carbon sink market can be further supported in terms of risk sharing and tax incentives. In terms of risk sharing, the People's Bank of China and seven other ministries and commissions jointly issued the "Guiding Opinions on Building a Green Financial System" in 2016, which proposes to support the development of local green finance and develop financial instruments based on carbon emissions. In terms of insurance measures, the insurance system for catastrophes arising from climate change will be improved, and insurance institutions will be encouraged to develop products such as marine pollution damage liability and

[1] ZOU Limei, WANG Yuexian, *Construction of the Legal System of China's Forestry Carbon Sink Trading*, Anhui Agricultural Science Vol.38:5, p.2646-2648, 2667(2010).

[2] PAN Xiaobin, *The theoretical isomorphism and legal path for the construction of China's blue carbon market*, Journal of Hunan University (Social Science Edition), Vol. 1, p.158-159(2018).

[3] See Carbon Emissions Trading Management Measures (Trial Implementation).

forest insurance.[1] For problems like the emission price fluctuation, delivery risk, CDM project risk, credit guarantee risk, and loss risk that may arise in the process of blue carbon trading, we could seek carbon credit or carbon allowance methods to estimate the insurance subject matter and expand the insurance coverage within a moderate scope.[2] In November 2016, the first national carbon insurance policy was completed and signed at the Yangtze River Forum, held in Hubei province. The continuous innovation of carbon finance products has further expanded the financing channels for energy saving and emission reduction, reduced financing costs, and driven the enthusiasm of enterprises to invest in energy saving and reduce carbon emissions.[3] The Global Environment Facility (GEF) is also one of the organizations that China can consider seeking support in establishing the blue carbon market. The objective of the small grants program in GEF is precisely to finance the development of national environmental strategies. In terms of fiscal policy and taxation, private capital can be attracted to join the climate finance mechanism through tax breaks, incentive subsidies, or other preferential measures, and the study of government support strategies for blue carbon trading can be accelerated.[4] We should also consider the feasibility of diversified entities participating in blue carbon market transactions, and we should give particular attention to large, multinational companies that already have a certain willingness to invest, that possess the concept of emission reduction and ecological protection, and that have strong financial support. The Brussels-based Blue Carbon World Capital Group, founded in 2008, has set up a China office just three years after its establishment. The organization is confident in the development potential of China's clean mechanism and is actively engaged in purchasing activities.

C. Exploring the Construction of Ecological Compensation Mechanism

In terms of fund investment for blue carbon protection, in addition to the international funding mechanism for addressing climate change, the establishment of an ecological compensation mechanism can be explored to pinpoint the concept of payment for habitat services. In 2014, China revised the Environmental Protection Law to include the establishment of an ecological compensation system in the legal provisions for the first time, laying a legal foundation for the application of the ecological compensation mechanism. Nine departments, including the National Development and Reform Commission, jointly issued a plan for the establishment of ecological

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1 *Seven ministries issue guidelines on Building A Green Financial system*, http://www.scio.gov.cn/32344/32345/35889/36819/xgzc36825/Document/1555348/1555348.htm.

2 LI Yuanyuan, *The Construction of China's Carbon Insurance Legal System*, China Population - Resources and Environment, Vol. 2, p.144-151(2015).

3 *China's first carbon insurance appeared in Hubei*, http://www.pkulaw.cn/fulltext_form.aspx/pay/fulltext_form.aspx?Gid=1510234521.

4 SHEN Jinsheng et al, *Study on incentive subsidies for blue carbon sinks in marine pastures*, Journal of Ocean University of China (Social Science Edition), Vol.2, p.16-21(2018).

protection compensation mechanisms in 2018.[1] It highlights the need to further improve the paid use of sea areas. However, the action plan does not involve marine carbon sinks, and it only involves the priority inclusion of forest greenhouse gas emissions in the carbon trading market.[2] In terms of marine ecological compensation, China's Marine Environmental Protection Law was amended in 2016 to include marine ecological compensation in Article 24, meaning that China officially began to establish a marine ecological compensation system. At the local level, Shandong Province and the city of Xiamen both issued special marine ecological compensation management measures, and the scope of ecological compensation was defined to cover coastal zone habitats, wetlands, and so on, which are closely related to the protection of blue carbon.[3] In terms of fisheries resources conservation, the third part of the "Aquatic Life Resources Conservation Outline" issued by the State Council provides for actions to protect and increase fisheries resources. The cities of Ningbo and Hangzhou have also issued special local regulations for the protection of fishery resources.

In practice, the ecological compensation mechanism has not yet been systematized, and the current proportion of the money invested in blue carbon protection is relatively small compared with that of the money used in the whole sea. But this can be solved by levying marine ecological compensation as a supplementary way.[4] For one thing, we should strengthen the assessment and quantitative analysis of the carbon stock of marine carbon sinks, improve technical capabilities, and establish a standardized system. For another, we should clarify the objects, subjects, compensation standards, and ways of ecological compensation for blue carbon. We could begin with the carbon sink such as blue carbon, and establish the quantitative index system, and then take the carbon sink trading market as a pilot, so as to promote the marketization and diversification of ecological compensation.

V. Concluding Remarks

Blue carbon is increasingly attracting the attention of the international community as an important approach to mitigating climate change. All countries are trying to promote the conservation and management of marine and coastal ecosystems through international cooperation and maintain the carbon absorption function for climate change mitigation. The long coastline of China has huge marine biodiversity resources and carbon storage capacity, but compared with

[1] See *the Action Plan for the Establishment of a Market-based*, Diversified Ecological Protection Compensation Mechanism.
[2] http://www.gov.cn/xinwen/2019-01/11/content_5357007.htm.
[3] See *2016 Shandong Province Marine Ecological Compensation Management Measures*, 2018 Xiamen City Marine Ecological Compensation Management Measures.
[4] CHEN Ke-Liang et al, *The Construction of China's Marine Ecological Compensation System*, Beijing: Ocean Press, 2015, p.9-10.

terrestrial carbon sinks, there is still a lack of sufficient understanding and in-depth research on the storage capacity, process mechanisms, and functions of marine carbon sinks. Only by fully recognizing the value and potential of marine carbon sinks, and continuously taking measures to boost the restoration of marine ecosystems, can we achieve effective carbon sequestration to provide a solution and a solid foundation for fulfilling China's carbon neutrality commitments.

Editor (English): John Martin

会议综述(Summaries of Meetings)

海上加油法律问题专题学术研讨会会议综述

摘要：2021 年 7 月 22 日，海上加油法律问题专题学术研讨会在海南大学国际交流中心成功召开。来自海南海事局、海口市中级人民法院、海南省高级人民法院、海口海事法院、漳州市中级人民法院、上海海关学院、环球（上海）律所、福建世礼律师事务所、广东金地律师事务所、北京大成（广州）律师事务所、海南大学法学院的专家和代表 20 余人与会。与会学者针对海上加油在立法、司法及实务层面存在的法律问题进行深入的交流和探讨，并提出许多独到的见解，取得了丰硕的学术交流成果。

关键词：海上加油；法律问题；学术交流

2021 年 7 月 22 日，海上加油法律问题专题学术研讨会在海南大学国际交流中心成功召开。会议由海南大学法学院、海南大学国际海洋法与争端解决中心主办。来自海南海事局、海口市中级人民法院、海南省高级人民法院、海口海事法院、漳州市中级人民法院、上海海关学院、环球（上海）律所、福建世礼律师事务所、广东金地律师事务所、北京大成（广州）律师事务所、海南大学法学院的专家和代表 20 余人与会。会议期间，共有九位专家学者进行大会主旨发言，会议设立了三个单元的专题研讨。会议围绕“关注海上加油法律问题，探究海域性质差异造成的影响，加强对违法行为的监管、提倡海上加油法律化”的主题展开，旨在探析海上加油在立法、司法及实务层面存在的法律问题，并由此提出相应的对策，以期能解决海上成品油走私、船舶保税油监管不足、公海加油管辖问题等实际难题。

开幕式

大会开幕式由海南大学法学院傅崐成教授主持，在致辞中他表达了对百忙之中莅临此次学术研讨会的与会专家们的衷心感谢，并表明此次研讨会之目的是通过开展关于海上加油法律问题学术交流活动，达到思想碰撞、开阔视野、启迪智慧的效果，探索学术问题的同时营造浓厚的学术氛围。开幕嘉宾海南大学法学院刘政副院长在致辞中表达了对各位专家学者们的欢迎，并介绍了海南大学法学院在科研工作中的发展和现状，他希望藉此会议探索海上加

油存在的法律问题并寻求解决方案，以科研的力量支持未来国家战略的发展，满足国际形势下对此方面的研究的迫切需求。随后，刘副院长预祝此次学术研讨会圆满成功，傅教授宣布会议正式开始。

第一单元

会议首先由来自福建世礼律师事务所的高级顾问黄木荣先生引题，作了题为《海上加油的法律性质及法律对策》的主题发言。黄木荣先生的发言分为三个部分：不同海域的法律地位及利用规则、海上加油产生的背景及其目的动机、领海以外加油的行为性质及执法机关的管辖问题。在第一部分的论述中，发言人简要说明了《联合国海洋法公约》及我国相关法律的规定中海域的划分类别和法律地位的差异，并指出内海、临海和毗连区之间的海上走私行为与其他违法行为之间具有关联性。在第二部分的论述中，发言人阐述了上个世纪 80 年代海关及其他执法部门查处与海上加油相关的走私行为的历史背景和发生原因，结合自身的办案经历，指出公海上违法行为的频繁发生主要缘于人们对沿海国或沿岸地区的税收或禁止性规定的逃避。在最后部分的论述中，发言人着重强调了以下四点：一是领海以外加油是不合法的。第二，走私行为与非走私行为的一大界限是有没有进出境，具体的以海关法的规定为主。第三，走私行为与准走私行为应该区分开，走私行为必须进出，准走私行为是在领海运输，没有合法证件。第四，对于渔船海上加油后在海上耗完油的行为，从刑法层面论，法无明文规定不为罪，如果实体法没有规定，就不存在违法的问题；从程序法角度看，此问题涉及管辖权和紧追权；从海关法的相关规定上看，海关的活动范围大多在领海、毗连区，专属经济区比较少，判断是否为走私行为，要对行为的发生过程、危害结果进行调查。

原漳州市中级人民法院副院长王文平作了题为《浅析海上走私成品油幕后主犯到案难的原因及对策——以福建省漳州中级法院近年相关案件为分析样本》的主题发言。王院长以漳州中院 2011 年至 2020 年走私成品油案件为样本，通过分析罪犯的犯罪情况，探索幕后主犯到案难的主要原因，提出了建立打击走私专项数据平台、建立打击走私区域联席会议机制、建立海上巡逻制度、建立内地与香港联络协助机制、调整办案思路等对策。王院长的发言内容主要涉及三个方面。首先，漳州中院审结的走私成品油犯罪案件存在“案值普遍较小”、“司法成本高”、“幕后主犯难到案”的特点。其次，走私成品油案件幕后主犯难到案的主要原因是：到案人员的口供难以突破、犯罪线索难以深挖、幕后主犯背景隐秘。最后，王院长提出了打击走私成品油幕后主犯的对策建议：建立国家打击走私专项数据平台；建立沿海区域打击走私联席会议制度；探索与香港相关执法部门建立打击走私联络协助机制；开展海

上联合打击走私的净海行动；调整打击走私成品油的办案思路，一是擒贼先擒王，重点瞄准策划、组织、遥控指挥的领导者，二是欲擒故纵,经营有价值的线索。

来自海南海事局的张向迎调研员在《海南辖区船舶保税油监管情况报告》的主题报告中从海事角度切入，探索了海南辖区船舶保税油监管中存在的法律问题并提出了相应的对策。在报告之初，发言人介绍了船舶保税油的概念和特征、海南自贸港保税油供应市场的机遇以及洋浦地区从事保税油加工的企业的基本数据，让大家对保税油的相关事项有了基本的认识。在第二部分，发言人详细阐述了海事监管的现状，其中包括与船舶保税油加注海事监管相关的国外公约及国内法律法规、相关部门在海事监管上的法定职责、促进船舶保税油便利化的海事监管措施。在第三部分，发言人指出海南辖区船舶保税油监管中存在监管能力不足、安全风险增加、应急处置能力不足等问题。针对上述问题，可以采取以下的措施解决：进一步规范辖区船舶保税油供受作业行为，建立健全标准规范体系；积极发挥海事作用，推动划定与港口发展相适应、布局科学合理船舶保税油供受作业锚地；推动地方政府建设保税油供应综合监控信息系统，提高监管效率；推动地方政府针对保税油制定当地保税油供油项目事故应急预案，配备应急器材和人员队伍，进一步完善船舶锚地供油应急保障能力。

第二单元

在会议第二单元，来自广东金地律师事务所的祝凤瑞律师首先作了题为《对专属经济区和公海的海上加油问题》的主题发言。祝凤瑞律师分三部分对涉及专属经济区和公海领域的海上加油问题进行了阐述。在第一部分，祝律师对《海警法》中登临、检查权的规定进行说明，并以中国籍船舶与非中国籍船舶为对象，对两类船舶进行登临检查的规定的差异做了详细的介绍。在第二部分，祝律师以案说法，在刑事管辖权方面将人员区分为中国籍和非中国籍，对中国籍人员采取属人管辖，对非中国籍人员根据不同情况采取不同的管辖方式。在第三部分，祝律师提出了对外国船舶海上加油牵连行为的对策建议。首先，沿海国行使其勘探、开发、养护和管理在专属经济区内的生物资源的主权权利时，可采取为确保其依照《联合国海洋法公约》制定的法律和规章得到遵守所必要的措施，包括登临、检查、逮捕和进行司法程序；其次，中华人民共和国渔政渔港监督管理机构及其检查人员在必要时，可以对外国船舶采取登临、检查、驱逐、扣留等必要措施，并可行使紧追权。

来自福建世礼律师事务所的黄志勇律师在《刍议渔船海上加油的走私认定问题——以在毗连区及专属经济区的行为为例》中，指出了渔船海上加油行为的刑事法律问题。首先，黄律师简要介绍了我国渔船海上加油的概况，指出我国海上加油产业发展状况。其次，黄律师

对我国海关监管区域及海关监管权相关问题进行了详细阐述：一是领海之外的毗连区和专属经济区是否属于我国关境范围。黄律师指出我国海关法的空间效力范围是我国的关境，国境以外的毗连区和专属经济区，不属于我国关境范围，不适用海关法。其次，黄律师探讨了“在毗连区内，海关是否具有完全的监管权”的问题。黄律师认为海关在毗连区内享有的管制权重在“防止和惩处”，而非与领海内一样对走私行为具有完全的监管权毗连区上的部分行为可以受海关监管，但此类行为仅限于“在领土范围内违反海关管理法律法规”的行为。除此之外，海关在毗连区范围内无监管权。再者，在“海关在专属经济区的海域内是否具备监管权”的问题上，黄律师指出走私犯罪成立应以违反海关监管法规为前提。海关部门对毗连区和专属经济区的渔船海上加油行为不具有监管权，海警部门的执法权同样应当以《海关法》《领海及毗连区法》《专属经济区和大陆架法》等法律法规赋予的监管权为基础。最后，黄律师对外籍船舶在毗连区与专属经济区从事加油活动的行为的定性问题给出了确切的结论：行为人与他人事先通谋或者明知他人从事走私成品油犯罪活动，而在我国专属经济区或者公海向其贩卖、过驳成品油的，应当按照走私犯罪共犯追究刑事责任。

来自环球（上海）律师事务所的周和敏律师在《远洋作业渔船海上加油行为走私犯罪属性探析》中通过列举领海和毗连区相关法律，对涉及境内的走私违法行为进行了释明。周律师指出，在专属经济区内，沿海国对其自然资源享有管辖权，对渔业享有专属管辖权。通过引用国际、国内案例的对比分析，周律师认为专属经济区内存在两种权利：对于沿海国而言，享有自然资源管辖权；对于其他国家的船舶来讲，享有通行权。在国际海洋法法庭的审判中主要也是围绕此两种权利进行博弈。周律师将船舶区分为中国籍船舶与非中国籍船舶，指明中国籍船舶在我国专属经济区内加油行为的合法性的判定标准之一就是船舶本身具有一定的资质。对于非中国籍船舶的海上加油行为，在我国专属经济区内、毗连区内是否构成走私犯罪，前提是其有入境的情况。

第三单元

在会议第三单元，首先由来自海南大学法学院的段文博士作了题为《从 Norstar 案谈公海加油与公海自由》的主题发言。段博士从“Norstar”号案着手，指出该案的核心法律争议与实体问题所在。在对 Norstar 案进行分析的基础上，段博士明确了公海自由原则与公海加油之间的关系。段博士指出，Norstar 案的判决对“公海自由”原则和“船旗国专属管辖”作了涵盖范围更广的解释，即便在一国的领海或港口范围内，也不能针对他国船舶在公海上的合法活动进行立法或执法上的管辖。同时，该判决也对公海自由原则下的公海加油活动加以

规制。段博士认为，联合国海洋法法庭在“Norstar”案中的判决显示联合国海洋法法庭的多数法官对公海自由和船旗国专属管辖的理解更有利于行使公海自由的一方，即船旗国一方，对不利于沿岸国或者港口国就公海上的活动包括公海上的加油活动，主张行使其管辖权。且这一态度可能会在相当的一段时间内影响联合国海洋法法庭涉及公海自由和船旗国专属管辖争议的裁决。但考虑到在该案判决受到部分法官提出反对意见以及在学术界仍存在较大争议，该案判决对“公海自由”和“船旗国专属管辖”所作出的分析与解释不一定会被其他国际司法/仲裁机构在审理相关的案件或仲裁时所适用。

来自海南大学法学院的魏德才副教授在《水上加油站（船）的我国国内法探析——以广东省为例》中指出，对于水上加油法律行为，需要从中央和地方两方面加以分析。在中央层面，存在着《危险化学品安全管理条例》（2002 年）、《危险化学品经营许可证管理办法》（2012 年）等规定对加油行为进行规范。《商务部关于废止部分规章的决定》（2020 年）废止了《成品油市场管理办法》、同时废止《原油市场管理办法》，意味着政府对部分加油行为的许可。在地方层面，魏德才副教授首先介绍了广东省关于水上加油行为的法律规定，指出广东省的法律规定主要是针对内河港口或河口上。其次，魏德才副教授介绍了厦门关于水上加油行为的地方规定，重点讲解了厦门关于水上加油站的管理规定。最后，魏德才副教授对不同地区在加油行为的法律规定上做出总结。

来自北京大成（广州）律师事务所的任雁冰律师在《船舶燃油供应非典型案例建模游戏》中从六个角度出发对海上加油行为进行了解读：第一部分介绍了海上加油的历史；第二部分介绍了海上加油的海法学框架；第三部分对当下海上加油所存在的问题进行了分析；第四部分厘清了海上加油与海商法与民法典的关系；第五部分讲解了海上加油最新的民商事案例；第六部分从康德的法哲学角度看待海上加油问题。任律师指出，海上加油行为与涉海商事法、涉海行政法、涉海刑事法、涉海权益法、涉海军事法、涉海武装冲突法有着密切联系，在不同条件下存在相应的法律问题，导致行使海上加油权利义务时的条件有所区别。任律师认为，随着民法典的施行，应当重点厘清民法典与海商法、海上加油行为的关系，准确地将海上加油行为的权利义务关系应用于海商法与民法典之中。最后，任律师提出，从康德法哲学和仿真程序结合的角度出发，法律和程序可以进行超越和对接。

在傅老师的主持下，参会学者在每一单元结束后围绕各单元里大家感兴趣的学术问题进行了交流，对研究方法、数据获取、策略可行性等也进行了探讨。

闭幕式

闭幕式上，傅崐成教授对此次会议进行了总结，并对与会专家的分享表示了衷心的感谢。这次会议的成果表明，学术界在海上加油法律问题上的研究正在取得重要的进步，在理论研究和实践探讨方面都有所创新，各位专家学者们宝贵的学术观点将为海上加油法律问题的学术研究带来了新的学术活力。至此，此次会议圆满结束。

记录者：罗月琪、李庆霖

“2021 海南潜水运动法律与政策问题研讨会”会议综述

为支持海南建设大政方针，推展海南最适合的海上运动，海南大学国际海法与争端解决研究中心（HNU-CISLDS）与海南多个潜水运动相关单位合作主办的“2021 海南潜水运动法律与政策问题研讨会”于 2021 年 9 月 26 日在中国（海南）南海博物馆华光厅顺利召开。

本次研讨会由海南大学国际海法与争端解决研究中心主任傅崐成教授召集，海南大学赵振华教授主持，与会者有海南省博物馆南海水下考古研究中心主任李钊、海南省贝类与珊瑚保护学会会长姚宏朝、原三亚潜水企业联合会秘书长刘立民、原三亚西岛景区总经理姚松波、海南海大平正律师事务所陈洪德律师及大中小型潜水运动经营者等。与会各方从实际出发，提出了海南潜水运动经营管理存在的法律问题，并给出了相应的对策建议。

一、海南潜水运动经营管理存在的法律问题

1.相关法律法规繁多且实行存在现实障碍

我国潜水运动现行的法律规范包括《中华人民共和国旅游法》、《全民健身条例》以及其他地方性法规和部门规章等。具体而言，按照法律效力层级从高到低的顺序，我国潜水运动现行的法律规范主要有：

（1）《中华人民共和国旅游法》，其第四十七条规定：“经营潜水应当按照国家有关规定取得经营许可。”

（2）国务院颁发的《全民健身条例》，其第三十二条规定：“经营高危险性体育项目的应当符合下列条件，并向县级以上人民政府体育主管部门提出申请：①相关体育设施符合国家标准；②具有达到规定数量的取得国家职业资格证书的社会体育指导人员和救助人员；③具有相应的安全保障制度和措施。”

（3）国家体育总局 2013 年发布的《经营高危险性体育项目许可管理办法》，办法实施当日国家体育总局、人力资源社会保障部等共计五个部门联合发布了《第一批高危险性体育项目目录公告》，将潜水运动囊括在高危险性体育项目中。

（4）海南省人民政府颁布的《海南省潜水经营管理办法》（海南省人民政府令第 258 号），该办法规定了潜水经营的条件和经营行为的具体要求。海南省人大及其常委会还颁布了《海

南经济特区安全生产条例》、《海南经济特区旅游价格管理规定》、《海南经济特区安全生产条例》等法规，对潜水运动设施设备、项目价格等事项进一步规定。

（5）此外以三亚市为主，海南许多城市进一步颁布了地方性规范性文件。在三亚市，经营潜水运动管理的规定有《三亚市潜水行业管理办法》、《三亚市潜水旅游服务标准》、《三亚市潜水旅游活动用海管理规定》、《三亚市潜水活动珊瑚礁生态损失补偿办法》等，这些规范性文件对可供潜水的区域、潜水从业人员资质、潜水旅游的服务标准等事项进一步细化规定，内容也存在重合。海南其他城市颁布的主要是具体潜水区域等事项的管理办法，例如三沙市颁布的《三沙市西沙群岛水资源节约与保护规定》就对严禁在在海水淡化水源保护区潜水作出规定。

然而如此繁多的法律规范所起的作用却十分有限。首先，我国没有自己的潜水培训体系和潜水考核制度，根据《三亚市潜水行业管理办法》第七条之规定，通过认证国际潜水资格证书的方式认定潜水从业人员的资质。然而《三亚市潜水旅游服务标准》却对潜水培训标准和内容进行了详细规定，许多条款理论价值大于实践价值，甚至专业性有待商榷。其次，海南潜水已经不限于三亚一个城市，逐渐遍地开花。虽然三亚已经有较为完备的潜水产业管理规范，但这些规范不能直接在其他地区适用。因此海南省关于潜水运动经营管理的规定开始逐渐不能满足产业发展的需要，是时候作出新的规定。

2.取得潜水经营资格之规定不够合理

与会者接下来讨论了《海南省潜水经营管理办法》第七条关于潜水经营资格的规定。该条具体为：“申请潜水经营应当具备下列条件：①有符合全省潜水经营场所布局的固定场所；②有 20 名以上取得国家职业资格证书的潜水技术指导人员和 6 名以上救助人员；③有配套完善且符合国家标准的潜水设施；④具有相应的安全保障制度和措施；⑤法律、法规规定的其他条件。”

与会者认为，目前取得潜水经营资格的难点在于能否成功办理高危险性体育项目经营许可证（后文简称为“高危证”），而办理高危证的难点又在于能否取得海域使用权以及是否具备一定数量的社会指导员。

在海域使用权问题上，目前在海南购买海域使用权的价格非常昂贵，一般只有较大规模的地产商或酒店才有足够的经济实力得以负担，普通的中小型潜水俱乐部根本无力交纳。即使向具有海域使用权的地产商或酒店租赁部分海域，其价格对中小型潜水俱乐部来说仍然难以承担。另外，办理高危证时需要地产商或酒店出具规划设计图，地产商或酒店基于股价或

安全责任等因素考虑对此往往拒绝配合或推诿，最终导致高危证办理受挫。

在社会指导员问题上，大多数与会者认为社会指导员证的考核内容与是否具备潜水专业技能联系不大，甚至一些不会潜水的人也可以考取社会指导员证。而且实践中我国潜水行业往往适用国际上或外国的潜水专业证书考核制度，也没有自己的潜水培训体系和潜水职业资格证书考核制度。因此，与会者对取得潜水经营资格需要一定数量的社会指导员之规定报以怀疑态度，同时也希望我国能建立一个中国自己的能够真正反应潜水员潜水技能的职业资格证书考核制度。

除此之外，由于潜水经营资格与海域使用权绑定在一起，取得高危证的潜水经营者如果组织前往海域使用权之外的其他水域潜水，仍然是不合法的。部分与会者认为，企业取得潜水经营资格证书已经可以反映其经营潜水运动的专业资质，这种限制经营区域之规定只会阻碍潜水行业的发展，必要性有待商榷。

部分与会者还认为我国目前的潜水经营资格设置标准倾向于规范景区、酒店等潜点经营场所的经营行为，而中小潜水俱乐部的经营更偏向于潜水训练或提供潜水中介服务，即带领顾客前往各具有潜水经营资格的场所潜水并提供潜水指导。将两类经营企业按照一个标准管理显然是不合适的，但两类企业如何区分以及如何管理都有待进一步讨论。

3.潜水经营管理规定的缺漏

与会者提出，我国潜水使用船只和装备的管理目前处于空白地带，相关法律法规对此没有具体规定，行政部门或行业协会也没有对此进行指导和管理。我国目前将潜水使用船只按照普通船舶进行管理和登记，许多船舶甚至兼具潜水使用和其他功能，船长和船员也不具备潜水知识与技能，有的与会者甚至遭遇潜水使用船只不看水下人员具体位置而直接下锚，险些砸伤潜水人员的惊险事故。在潜水装备问题上，参会的潜水从业人员普遍反应，除氧气瓶外目前国内的潜水装备使用感较差，性能有待提高，因而其一般使用国外进口潜水装备。但国外进口装备价格较高，质量检测证明也有国内认证困难等问题，因此潜水使用装备的质量认证等事项急需政府干预和指导。

4.潜水事故处理中的司法困境

与会者认为，潜水经营者在处理潜水事故中主要面临两大困境，分别是保险赔付困境和装备检测困境。关于保险赔付困境，由于我国商业保险针对潜水运动的保额较低，经营者一般选择购买国外保险，但是保险报销困难。例如在不久前发生的一次潜水事故中，外国保险公司以当事人双方达成和解而“没有法院判决”等事项为借口拒绝支付保险金，当事人历经

一年维权才终于获得保险赔付。关于装备检测困境，我国目前没有专门的检测机构检测潜水装备是否合格，这对于潜水事故责任认定是非常不利的。例如上例潜水事故中，当事人就将涉案的潜水装备送往海南多个司法鉴定机构和市场监管机构对装备安全性能进行检测，各机构均表示没有检测能力和检测经验。因此，潜水经营者遭遇潜水事故时是极其被动的，这也极大打击了潜水从业者的经营信心。

二、海南潜水经营管理模式的修改建议

与会者认为，以上问题的产生主要是我国潜水经营管理模式不够规范导致的。

首先，与会者介绍了菲律宾潜水经营的管理模式。菲律宾由众多岛屿组成，近年来潜水产业得到突破式发展。该国将大海视为一种公共资源，游客上岛时需要缴纳上岛费，缴纳上岛费后潜水爱好者只要拥有专业的潜水资格证书即可下海潜水，甚至在珊瑚保护区潜水不需要额外缴费，潜水俱乐部经营者更多适用约定俗称的行业规范来自我约束，对于保险政府也只是建议购买。此外菲律宾政府主要对潜水使用船只进行管理，运营潜水的航运公司和船只需要办理专门的许可证，这些航运公司和船只都有固定的潜水点，各俱乐部只需提前一天上报前往潜水点的人数，航运公司就负责解决交通问题。

在我国，可供潜水的海域则是交由企业承包，没有划定公共海域，潜水经营资格证的办理实际上针对的也是此类企业。从这个角度来看，要求配备一定数量的潜水技术指导人员和救助人员、配套完善且符合国家标准的潜水设施和安全保障措施的规定也是合理的，只是在基础上应当增加关于潜水使用船只的管理规范，要求船长具备一定的潜水使用船只运营技能，并将潜水使用船只和普通船只分开登记和管理，禁止混同。

现有的具备高危证的潜水经营者大多为景点和酒店，潜水经营只占其经营内容的一小部分，因而重视程度也不高，并且大多只经营体验潜水活动。而经营休闲潜水和潜水培训活动的经营者主要是中小型潜水俱乐部，他们很少能顺利取得潜水经营资格，往往都在打法律的“擦边球”。然而这些中小型潜水俱乐部却是我国潜水行业的中坚力量，很多潜水俱乐部从业人员都曾前往国外学习先进的潜水技术，有的甚至曾为我国水下考古团队和国家海军提供过潜水技术培训，在现有的法律规定下却举步维艰。

与会者认为，我国可以潜水经营划分为潜点经营和潜水中介两部分，分别实施不同的管理模式。

潜点经营者即为上段所述的海域承包者，主要经营内容是提供必要的安全救助和潜水交通服务以及潜点管理服务，从而向潜水爱好者和潜水中介收取合理的费用。其办理许可证的

要求可以是具备一定数量的救助船只、人员和安全保障措施等。

潜水中介则是提供潜水培训和潜水指导服务的“潜水俱乐部”，主要经营内容是为潜水爱好者提供潜水技术培训和潜水指导，组织潜水爱好者参与各潜点、行业协会和政府开展的各类潜水和海洋环保公益活动等，可以通过提前向各潜点经营者上报每日参与潜水的人数的方式前往各潜点潜水。其办理许可证的内容是具有一定数量的潜水从业人员，该潜水从业人员需持有国际潜水指导员、潜水员的职业资格证书或潜水救援证书。

这种并行的管理道路一方面可以对潜水经营活动进一步细分，分门别类地规范经营者行为，提高管理效率，另一方面也可以让专业的人做专业的事，降低经营者的经营成本，进而促进潜水产业发展。

除此之外，与会者还建议相关政府部门联合行业协会、潜水从业者等群策群力，尽快建立适合我国国情的潜水装备生产和检验标准，在发展潜水周边装备制造业的同时保障潜水人员的生命健康和安全，化解相关纠纷。

三、海南潜水产业发展之倡议

水下文物考古和海上军事能力提高都离不开潜水，随着世界各国对海域问题的越发重视，发展潜水运动也是大势所趋。海南岛地理位置优越，海洋资源丰富，海岸线蜿蜒绵长，珊瑚礁生态系统发育完好，拥有全国分布最广、品种最全、发育最好的珊瑚礁，更是发展潜水产业的得天独厚的优势。在发展海南特色潜水产业方面，与会者们也都各抒己见。

有的与会者提出，发展海南特色潜水产业可以通过开发人造景点的方式。在特定区域内因地制宜地按照特定主题布置具有中国特色的沉船、村庄、雕塑等海底人造景观，都是吸引游客的绝佳方法。

也有与会者提出，潜水运动与破坏海洋生态环境、破坏珊瑚礁之间并没有必然联系，有的潜水活动甚至对海洋有利。海洋污染的主要原因在于生产、生活垃圾、污水的排放，其次就是渔网挂连的破坏等，而珊瑚礁遭到破坏的原因除了海洋污染外则是船只错误的抛锚走锚。而绝大多数潜水爱好者们都热爱大海，潜水活动中都会尽力避免破坏海洋环境，甚至自发在海底捡垃圾。在珊瑚礁保护方面，条件允许的情况下如果能在海南的珊瑚礁保护区开放潜点并参照国际惯例划分核心区、旅游区、锚点锚地，规定开放季节和破坏珊瑚礁的行为后果等，最终对珊瑚礁生态区的破坏也是很有限的。而且潜水员们在经过简单训练后能迅速掌握珊瑚种植的技能，收取到的珊瑚礁潜点的费用还可以重新投入到海洋保护和珊瑚保护中来，所以在海南开放珊瑚礁保护区潜点实际上具有一定的可行性。在此基础上，与会者们就

成立海南省潜水与珊瑚保护协会达成初步意向，希望以协会的方式参与到海南省潜水经营管理办法的修改以及海南省珊瑚礁保护区开放潜点的政策研究中来。

顺应海南自贸港发展“三区一中心”的战略定位，尤其是建立国际旅游消费中心和国家生态文明试验区的期望，与会者共同倡议——打出“来海南，玩潜水，种珊瑚”的口号，把海南打造成“潜水爱好者的天堂”。一方面将发展潜水产业作为海南自贸港建设的一大重点和亮点，另一方面把“种珊瑚”开发成独具海南特色的潜水活动项目，并且以此吸引游客每年来海南观察自己种下的小珊瑚的生长状况，促进海南旅游业的发展，获得旅游业与生态保护的双丰收。

傅崐成教授和赵振华教授在会议总结中感叹，潜水爱好者和从业者都是可爱和可敬的，他们在潜水运动过程中总是保持小心谨慎的态度，在保证自身安全的情况下随时准备好为其他潜水员提供帮助，而且潜水的同时也都时刻注意海洋生态环境保护，积极回馈海洋、回馈自然。虽然按照目前的法律法规潜水运动经营者面临着诸多法律困境，但是随着海南自贸港建设的不断推进和潜水从业者和爱好者的共同努力，海南潜水产业也将迎来新的明天。

记录者：王雯琪、符丽勤、林鹏举

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

THE SECRETARY-GENERAL

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REMARKS TO THE SECOND GLOBAL SUSTAINABLE TRANSPORT CONFERENCE

Beijing/Online, 14 October 2021, 8;00 am

Your Excellency President Xi Jinping,

Excellencies, distinguished delegates,

Ladies and gentlemen,

Welcome to the Second United Nations Global Sustainable Transport Conference.

I express my profound gratitude to President Xi and the Government of the People's Republic of China for their generosity in hosting this Conference.

We are meeting in Beijing – and globally - five years after the first Global Sustainable Transport Conference was held in Ashgabat, Turkmenistan.

Since that time, and especially over the last eighteen months, the critical role of transport in growth, sustainable development and securing the health of our planet has only become clearer.

When economies were brought to a standstill at the start of the COVID-19 pandemic, some of the most dramatic impacts were felt in the transport sector – starting with job losses.

Global road transport activity went down by half. Air traffic demand in 2020 was just one third of the previous year.

While this translated into fewer traffic accidents, improved air quality and a rapid drop in greenhouse gas emissions, those temporary gains have not been sustained.

Massive declines in the use of public transit – a lifeline that enables essential workers and those living in poverty to earn a living – threatened its financial viability.

Some essential transport workers in cities, and seafarers trapped on ships, were forced to work in unsafe and inhumane conditions.

Communities, economic sectors and even entire countries that depend on tourism faced enormous losses in revenue. In some Small Island Developing States, tourism represents as much as 80 percent of exports – which disappeared overnight.

And as a deeply uneven recovery gets underway, we are seeing further disruption to global supply chains. The interconnected nature of transport, global consumption, trade and the economy is clear; but our response lacks the solidarity needed for an inclusive global recovery.

Excellencies, ladies and gentlemen,

The COVID-19 pandemic has made it clear that transport is far more than a means of getting people and goods from A to B.

It is fundamental to implementing the 2030 Agenda for Sustainable Development and the Paris Agreement – which were badly off-track even before the pandemic hit.

COVID-19 has pushed an estimated 120 million people into extreme poverty, 160 million into hunger, and set back education for around 100 million children.

We are further from realizing the Sustainable Development Goals on climate, ocean, and biodiversity than we were when they were agreed six years ago.

We are already close to the 1.5 degrees Celsius upper limit agreed in Paris. The door is closing for action on climate, nature and pollution.

We must act together, smartly, and quickly, to make the next nine years count.

Transport, which accounts for more than one quarter of global greenhouse gases, is key to getting on track.

We must decarbonize all means of transport, in order to get to net-zero emissions by 2050.

Excellencies, ladies and gentlemen,

We know how to make this happen.

First, we must accelerate the decarbonization of the entire transport sector.

Let's be honest. While member states have made some initial steps through the International Civil Aviation Organization and the International Maritime Organization to address emissions from shipping and aviation, current commitments are not aligned with the 1.5-degree goal of the Paris Agreement.

In fact, they are more consistent with warming way above 3 degrees.

Adopting a new set of more ambitious and credible targets that are truly consistent with the goals of the Paris Agreement must be an urgent priority for both these bodies in the months and years ahead.

The priorities are clear:

- Phase out the production of internal combustion engine vehicles by 2035 for leading manufacturing countries, and by 2040 for developing countries.

- Zero emission ships must be the default choice, and commercially available for all by 2030, in order to achieve zero emissions in the shipping sector by 2050.

- Companies must start using sustainable aviation fuels now, in order to cut carbon emissions per passenger by 65 per cent by 2050.

All stakeholders have a role to play, from individuals changing their travel habits, to businesses transforming their carbon footprint. Governments must incentivize clean transport options, including through standards and taxation, and impose stricter regulation of infrastructure and procurement.

In developed countries, transport policies that encourage cycling and walking in urban areas, rather than driving short distances, can contribute to progress across the SDGs: on climate, health, pollution and more.

Sustainable railway systems should be upgraded and expanded for medium and long-distance travel for people and goods, to increase efficiency and encourage shifts in behaviour.

Second, we must close access and safety gaps.

This means helping more than one billion people to access paved roads, with designated space for pedestrians and bicycles, and providing convenient public transit options.

It means providing safe conditions for all on public transport by ending harassment and violence against women and girls, and reducing deaths and injuries from road traffic accidents.

Ladies and gentlemen,

Third, we must build resilience into transport systems.

Investments in the recovery from COVID-19 must target sustainable transport, generating decent jobs and opportunities for isolated communities. Public transport should be the foundation for urban mobility. Per dollar invested, it creates three times more jobs than building new highways.

Decarbonization must go hand in hand with a just and inclusive transition that reduces inequalities and supports the poorest communities.

Much existing infrastructure, from ports to public transit, is vulnerable to extreme climate events which are happening with greater frequency and severity.

We need better risk analysis and disaster planning, even as we scale up solutions.

Increased finance for climate adaptation is essential for investment in sustainable, resilient transport systems. The recent IPCC report underscored that the target of $100 billion in climate financing from the developed to the developing world is an under-estimate – but even this is far from being reached.

I reiterate my call for half of all climate finance to be allocated to adaptation.

We must funnel both public and private resources towards sustainable infrastructure in developing countries, to drive a recovery from the pandemic that accelerates progress across the Sustainable Development Goals.

Ladies and gentlemen,

Fourth, and finally, we must work together more coherently.

We need effective partnerships, including with the private sector, that help to share knowledge, bridge silos, and direct finance and technological capacity towards our common goals.

The transformative potential of sustainable transport can only be unleashed if improvements translate into poverty eradication, decent jobs better health and education, and increased opportunities for women and girls.

Countries have much to learn from each other.

Ladies and gentlemen,

The next nine years must see a global shift towards renewable energy. Sustainable transport is central to that transformation.

There is still a long way to go, but I am encouraged by some of the commitments made by governments, local authorities and the private sector, in the context of this Conference and in the lead-up to COP26.

I look forward to seeing them implemented.

This Conference is an important opportunity to galvanize action by all, to build the sustainable transport systems we need for a green, inclusive and equitable future.

Let’s get to work.

Thank you.

中华人民共和国海事局关于外国籍船舶进入中华人民共和国领海报告要求的公告

根据《中华人民共和国海上交通安全法》规定，外国籍船舶进入中华人民共和国领海应当向海事管理机构报告。现将有关要求公告如下：

一、适用范围

适用于下列进入中华人民共和国领海的外国籍船舶:

（一）潜水器；

（二）核动力船舶；

（三）载运放射性物质的船舶；

（四）载运散装的油类、化学品、液化气体等有毒、有害物质的船舶；

（五）法律、行政法规或国务院规定的可能危及中华人民共和国海上交通安全的其他船舶。

二、报告方式

船舶或其代理可以通过下列任一方式报告：

网 站：https://www.sh.msa.gov.cn/chnshiprep；

电子邮箱：chnshiprep@shmsa.gov.cn；

传 真：+86-21-66072764；

电 话：+86-21-65089469。

三、报告要求

（一）船舶进入中华人民共和国领海时，应当报告以下内容：

1.船名、呼号、国际海事组织编号和水上移动通信业务标识码，格式范例：SPRING/DFPH2/9365788/218846000//；

2.报告日期、时间和当前船位,格式范例：202108/211450UTC/2933N/12312E//；

3.上一港名称、离港日期和时间,格式范例：SINGAPORE/202108/112150UTC//；

4.下一港名称、预抵日期和时间,格式范例：SHANGHAI/202108/251830UTC//；

5.船载卫星电话号码，格式范例：00870773156389//；

6.所载危险货物的正式名称、联合国编号（如无联合国编号，标注 NA）、污染类别（如不适用，标注 NA）、装载量（吨），格式范例：BENZENE/1114/Y/50000//。

（二）船舶进入中华人民共和国领海后，船舶自动识别系统设备处于良好使用状态时，无需后续报告。如船舶自动识别系统设备无法正常使用，除上述报告外，其后每 2 小时应报告以下内容，直到本航次最终驶离中华人民共和国领海：

1.船名、呼号、国际海事组织编号和水上移动通信业务标识码，格式范例：SPRING/DFPH2/9365788/218846000//；

2.报告日期、时间和当前船位,格式范例：202108/221108UTC/3016N/12303E//；

3.预计航向和平均航速，格式范例：COG296/SOG125//。

（三）船舶未按要求报告的，海事管理机构将按有关法律、法规、规章和规定予以处理。

本公告自 2021 年 9 月 1 日起施行。

中华人民共和国海事局

2021 年 8 月 27 日

Announcement by Maritime Safety Administration of the People’s Republic of China on Reporting Requirements for Vessels of Foreign Nationality Entering the Territorial Sea of the People’s Republic of China

According to Maritime Traffic Safety Law of the People’s Republic of China,vessels of foreign nationality entering the territorial sea of the P.R.China shall report to the maritime administrations of the P. R.China.

PART 1 Application

The reporting requirements apply to the following vessels of foreign nationality entering the territorial sea of the P.R.China:

1. Submersibles;

2. Nuclear vessels;

3. ships carrying radioactive materials；

4. ships carrying bulk oil, chemicals, liquefied gas and other toxic and harmful substances;

5. Other vessels that may endanger the maritime traffic safety of the P.R.China prescribed by laws, administrative regulations or provisions of the State Council.

PART 2 Reporting channels

Vessels or their agents can report through any of the following channels:

Website: https://www.sh.msa.gov.cn/chnshiprep

E-mail: chnshiprep@shmsa.gov.cn

Fax: +86-21-66072764；

Telephone: +86-21-65089469。

PART 3 Reporting requirements

1 When entering the territorial sea of the P.R.China, the vessel shall report:

1.1 ship’s name, call sign, IMO Number, MMSI (format example: SPRING/DFPH2/9365788/218846000//);

1.2 report date and time, ship’s current position (format example: 202108/211450UTC/2933N/12312E//);

1.3 last port of call and departure time (format example: SINGAPORE/202108/112150UTC//);

1.4 next port of call and estimated time of arrival (format example: SHANGHAI/202108/251830UTC//);

1.5 satellite telephone number (format example: 00870773156389//);

1.6 name of shipborne dangerous goods, UN number (if none, mark with NA), category of noxious substance(if non-applicable, mark with NA), cargo dead weight(ton) (format example: BENZENE/1114/Y/50000//).

2 After entering the territorial sea of the P.R.China, follow-up report is not required, if the vessel automatic identification system is in good condition. But if the automatic identification system does not work properly, in addition to above-mentioned reporting requirements, the following information shall be reported every two hours until the vessel leaves China’s territorial sea:

2.1 ship’s name, call sign, IMO Number, MMSI (format example: SPRING/DFPH2/9365788/218846000//);

2.2 report date and time, ship’s current position (format example: 202108/221108UTC/3016N/12303E//);

2.3 estimated course and average speed (format example: COG296/SOG125//).

3 In case the vessel fails to report as required, the maritime administration will deal with it according to relevant laws, regulations, rules and provisions.

This Notice will come into effect on September 1, 2021.

《三亚市冲浪旅游服务规范》

前　　言

本规范依据 GB/T 1.1-2020《标准化工作导则 第 1 部分：标准化文件的结构和起草规则》》给出的规则起草。

本规范由三亚市旅游和文化广电体育局归口，以三亚市体育旅游协会名义印发。

本规范主要起草单位：三亚市体育旅游协会、三亚理工职业学院、三亚学院。

本规范主要起草人：张振祥、潘虹、张令俊、鲍永洲、王林云、吴开壮、沈建勇、亓元、齐琳、罗伟福。

三亚市冲浪旅游服务规范

第一章　范围

本规范规定了冲浪旅游的术语和定义、服务细则、风险管理、质量管理与投诉处理服务及准入与退出机制等要求。

本规范适用于三亚市管辖范围内从事任何形式的冲浪旅游经营活动，海南省其他市县可参照执行。

第二章　规范性引用文件

下列文件对于本文件的应用是必不可少的。凡是注日期的引用文件，仅注日期的版本适用于本文件。凡是不注日期的引用文件，其最新版本（包括所有的修改单）适用于本文件。

GB/T 1.1-2020　《标准化工作导则 第 1 部分：标准化文件的结构和起草规则》

GB/T 19000　质量管理体系：基础和术语

GB/T 10001.1　标志用公共信息图形符号　第 1 部分：通用符号

GB/T17242　　投诉处理指南

DB46/T 167　　旅游投诉服务规范

第三章　术语和定义

第一条　本定义规则适用于体验者站立在冲浪板上，或利用腹板、跪板、充气的橡皮垫、划艇、皮艇等驾驭海浪的一项水上体验运动，短板冲浪、长板冲浪、风筝冲浪、桨板竞速、桨板瑜伽、桨板冲浪、桨板球、桨板马拉松、桨板花式、白水桨板等。

第二条　本规范所称“体验冲浪”，是指未取得任何国际或国内冲浪组织颁发的冲浪人员资格证书，在冲浪教练带领下进行抓浪起乘的冲浪体验活动。

本规范所称“持证冲浪”，是指取得国际或国内冲浪组织颁发的冲浪人员资格证书，具备自主进行抓浪起乘能力的冲浪活动。

本规范所称“冲浪培训”，是指以取得冲浪人员资格证书为目的，由冲浪教练带领下进行的冲浪培训活动。

本规范所称“冲浪教练”，是指取得国际或国内冲浪组织所认可教练等级的从业人员。

本规范所称“冲浪旅游服务从业者”，是指持有国际或

国内冲浪组织颁发的教练等级资格证书，须为正式冲浪旅游行业企业员工，拥有冲浪保险和有效健康证，向三亚市体育旅游协会冲浪旅游专业委员会（以下简称“冲浪专委会”）申领《三亚市冲浪旅游服务人员从业资格证书》，并由冲浪专委会统一在三亚市旅游和文化广电体育局备案的冲浪从业人员。

本规范所称“冲浪旅游服务企业”，是指具有独立法人资格，拥有固定实际经营场所，已投保公众责任险，由三亚市体育旅游协会冲浪旅游专业委员会核准，在三亚市旅游和文化广电体育局备案的冲浪从业企业。

第四章　服务细则

第三条　适用于所有冲浪旅游活动接待

（一）在接待处醒目位置公示冲浪价目表（包括：内容、价格、时长等）、冲浪器材价目表（如冲浪板等）、无人机航拍等延伸服务的价目表以及当日海况（包括：风力、风向、气温、水温、海浪预报等）。

（二）经营场所必须提供寄存柜、冲淡房、更衣室、洗手间，冲浪培训类必须有固定教室。

（三）工作人员必须持健康证上岗，仪表端庄、整洁大方。

（四）询问体验者身体状况，告知禁忌冲浪症状，让体验者填写《健康声明书》（见附件 1）。

（五）参与冲浪活动人员必须购买相关冲浪保险。

第四条　体验冲浪旅游服务细则

（一）年龄要求：最低年龄 5 岁，最高年龄 55 岁。

（二）身体要求：依照《健康声明》要求执行。

（三）人数比例：教练对学员人数最大比例 1:3。

（四）操作规范

1.向体验者清晰介绍冲浪产品内容、海洋知识、安全常识、注意事项和环保要求。

2.概述冲浪点海况、水面环境和深度。

3.冲浪礼仪介绍

（1）划水出去前，须先观察海浪状况，判定是否适合冲浪。

（2）尽量从浪区旁边划出，不能直接穿越浪区。

（3）应远离人群，观察海浪，抓白浪起乘。

（4）当划水的人和已经起乘的人快相撞时，起乘的人应主动避开，划水的人应继续向前划。

（5）要谦让，轮流下浪，并避免其他人从后方抢浪。

（6）除危急情况下，轻易不丢冲浪板，而且要避免板的破损和板对别人造成的误伤。

（7）除已达成共识外，一道浪只能下一人，但三角浪

（同时可以左右跑的浪），则允许 2 个人往不同方向下浪。

（8）离浪头最近的人有优先下浪权。

（9）第一个抓浪起乘的人有优先下浪权，旁边人应谦让。同时还要注意身后，如果浪还没到，但身后已有人乘上这个浪，应主动收板等下一个浪。

（10）禁止插队抓浪，若遇抢浪，应快速安全离开。

（11）冲浪体验结束，应随手带走垃圾。

4.陆上模拟冲浪技巧，包括趴板、划水、撑板、站立等。

5.讲解安全下板及自我保护知识。

6.给体验者提供合适、干净、消毒、运作正常的冲浪装备，并讲解各装备使用方法。

7.冲浪教练陪同体验者进行海中练习，在辅助冲浪过程中应时刻关注体验者身体状况，运用良好的判断力谨慎带领体验者冲浪，切勿让体验者离开视线。

8.体验结束后询问体验者身体状况和体验感，总结冲浪表现，纠正错误动作。

第五条　持证冲浪旅游服务细则

（一）身体要求：依照《健康声明》要求执行。

（二）操作规范

1.核查持证者冲浪证书，确认持证者最近一次冲浪时间和累计冲浪次数。

2.检查冲浪装备运作正常。

3.概述冲浪点海况、水面环境和深度。

4.陆上复习冲浪技巧，包括趴板、划水、撑板、站立等。

5.讲解安全下板及自我保护知识，明确突发情况处理方式。

6.给体验者提供合适、干净、消毒、运作正常的冲浪装备，并讲解各装备使用方法。

7.遇新手违反冲浪规则，应主动告知并给予帮助。

8.冲浪体验结束，应随手带走垃圾。

9.冲浪开始和结束时分别清点持证者人数，确认无误后，开始或结束冲浪。

10.冲浪结束后，进行冲浪总结，清点冲浪装备。

第六条　冲浪培训服务细则

（一）年龄要求：依照国际或国内冲浪组织颁发的冲浪人员资格证书等级的年龄要求执行。

（二）身体要求：依照国际或国内冲浪组织颁发的冲浪人员资格证书等级的身体要求执行。

（三）人数比例：依照国际或国内冲浪组织颁发的冲浪人员资格证书等级的比例要求执行。

（四）操作规范：依照国际或国内冲浪组织颁发的冲浪人员资格证书等级的执教要求执行。

第五章　风险管理

第七条　冲浪环境评估

（一）冲浪场所需设定具有救护员资格证书的专职人员负责各个冲浪点的环境条件进行风险评估，评估内容包括：天气、海流、水面条件。若评估显示不能正常冲浪，则应立即暂停冲浪安排。冲浪场所内下海场地应配备急救氧气瓶、担架、救生杆、救生圈、急救药箱等，具有稳定的通讯系统和急救船只。

（二）冲浪场所要对冲浪区域进行标识，禁止其他移动船只进入该区域。

（三）冲浪场所要有健全的突发事件应急预案，并定期进行演练。

第八条　冲浪实施设备

（一）每次入水前都需检查冲浪装备正常运作情况。

（二）每季度或节假日前定期对装备进行一次保养。

第九条　冲浪操作规范

（一） 冲浪企业、冲浪教练要严格按照操作规范执行，不得违规操作。

（二）冲浪企业、冲浪教练不得强迫游客意志或者威胁游客完成冲浪活动。

（三）冲浪企业、冲浪教练不得安排或隐瞒身体状况不

适冲浪的游客完成冲浪活动。

（四）冲浪教练根据实际情况有权终止可能发生潜在危险的冲浪活动。

第六章　质量管理与投诉处理服务

第十条　冲浪企业应在项目位置处张贴投诉联系方式。

第十一条　冲浪企业向游客提供的服务信息和广告宣传应当客观真实，不得虚假宣传、误导消费者。

第十二条　冲浪企业制定投诉处理机制，对游客投诉情况进行立案调查，给游客及时反馈，并同步报备至三亚市体育旅游协会冲浪旅游专业委员会。

第十三条　冲浪企业应定期开展技术大练兵和大比武，优化完善服务操作规范。

第十四条　鼓励冲浪企业积极加入三亚市体育旅游协会冲浪旅游专业委员会。三亚市体育旅游协会冲浪旅游专业委员会每年将定期开展冲浪旅游服务等级评定，发挥行业协会监管和自律作用。

第七章　准入与退出机制

第十五条　准入机制

（一）实行“双材料报备”。从业人员向三亚市体育旅游协会冲浪旅游专业委员会材料备案（免费备案），向冲浪旅游专委会提交营业执照、固定经营场所证明、从业人员花名册（包含从业人员资质证明）、计划冲浪经营区域、冲浪旅游专委会现场调查、初审加入意见；最后，由协会统一向市旅文局材料备案。

（二）冲浪旅游专委会每月固定培训时间，对新进人员进行培训，技能抽查等。

（三）从业人员离职和入职，企业要及时更新报备冲浪旅游专委会，以统计人员流失比。

（四）被辞职人员要及时通报，情节严重拉入黑名单，企业通报，建议行业谨慎录用。

（五）离职 3 个月人员，三亚相关从业证件注销，入职时需纳入程序执行。

（六）健康证或保险等资质过期，从业资格证也将失效，续签材料提交后，方可有效。

（七）对于被投诉企业或员工经冲浪旅游专委会审定责任后，视情况给予通告，可采取暂停资格证有效性等措施，情节特别严重的列入黑名单，建议行业不再予以录用。

（八）所有在三亚从事冲浪旅游经营项目的企业应全部纳入材料备案，不备案列入诚信监管系统，确保安全责任的落实。备案入会后的企业和个人，经查处违法行为 3 次整改

仍不到位，将列入黑名单，并将 5 年内不能在三亚从事冲浪旅游服务行业。

（九）个体教练不能独立经营，必须通过办理商事登记或入职企业开展相关工作。

第十六条　退出机制

有下列情形之一的，将被退出冲浪旅游专业委员会，取消材料备案资质：

（一）违反法律法规，依法被行政机关查处的冲浪旅游服务企业或冲浪旅游从业人员。

（二）两年之内评选结果均为一星俱乐部或拒不整改的冲浪旅游服务企业；违反职业操作规范的冲浪旅游从业人员。

（三）未按时参加协会冲浪旅游专委会年审进行身份更新的冲浪旅游服务企业或冲浪旅游从业人员。

（四）违反冲浪旅游专委会章程的冲浪旅游服务企业或冲浪旅游从业人员。

（五）递交退出申请，主动申请退出的的冲浪旅游服务企业或冲浪旅游从业人员。

第八章　附则

第十七条　本规范由三亚市体育旅游协会负责解释，自 2021 年__月__日起施行，有效期截止 2026 年__月__日。

附 录 A
（资料性附录）
冲浪旅游服务健康声明

表 A.1 给出了冲浪旅游服务健康声明书。

完成《健康声明书》是参加体验冲浪和持证冲浪的先决条件。
女性请注意：如果你已怀孕或计划怀孕，请不要冲浪。

表 A.1 冲浪旅游服务健康声明书

个人信息			
姓名		性别： 男 女	
电话		邮箱	
出生日期		居住城市	

您是否曾经或现在有以下任何一种情况：

	是	无
哮喘		
大脑、脊髓或神经紊乱		
胸部手术		
慢性支气管炎或持续性胸痛		
慢性窦性疾病		
肺萎陷（气胸）		
糖尿病（糖尿病人）		
耳手术		
癫痫病		
曾昏厥、癫痫或昏迷		
任何类型心脏病		
飞行时常出现耳部问题		
肺结核或其他长期肺部疾病		
曾被确诊感染过新冠病毒（COVID-19）		

您目前是否患有：

	是	无
呼吸急促		
慢性耳分泌物或感染		
高血压		
最近一个月内有其他疾病或进行过手术		
鼓膜穿孔		
冲浪前 8 小时内是否摄入酒精		
是否明白隐瞒与安全冲浪不符情况可能会危及您的生命或健康		

参加者签名

如果对以上问题回答都是“无”，则不需要进行医疗评估，请阅读以下参加者声明，并签字和填写日期，以表示你同意。

参加者声明：我如实回答了所有问题，并确认我愿意承担因我回答问题不准确或隐瞒回答健康状况而导致的任何后果。

签名： 日期：

监护人： 日期：

冲浪企业： 日期：

附 录 B
（规范性附录）
冲浪旅游服务规范评分表

表 B.1 给出了冲浪旅游服务规范评分表。

说明：

1. 本评分表共计 1000 分，共分为 8 个大项，各大项分值为：市场主体运营基本情况 190 分；从业人员资质 150 分；接待基本规范 130 分；服务细则（三选一）120 分；冲浪环境评估 120 分；冲浪设备 120 分；冲浪操作规范 90 分；质量管理 80 分。

2. 5 星级冲浪俱乐部需达到 950 分，4 星级冲浪俱乐部需达到 850 分，3 星级冲浪俱乐部需达到 750 分，2 星级冲浪俱乐部需达到 600 分，1 星级冲浪俱乐部需达到 500 分。

表 B.1 冲浪旅游服务规范评分计分总表

项 目 单 位	分值情况	负责人签字	评定日期
自检计分			
推荐单位计分			
评定单位计分			

表 B.2 给出了冲浪旅游服务规范评分表。

表 B.2　冲浪旅游服务规范评分表

序号	评定项目	检查评定方法与说明	大项分值栏	分项分值栏	自检计分栏	推荐单位计分栏	评定单位计分栏
			1000				
1	市场主体运营基本情况		190				
1.1	具有独立法人资格	提供营业执照		50			
1.2	拥有固定实际经营场所	经营场所图片及场地合同		30			
1.3	已投保公众责任险	保险单		30			
1.4	由三亚市体育旅游协会冲浪旅游专业委员会核准	协会核准名单		30			
1.5	在三亚市旅游和文化广电体育局备案的冲浪从业企业	备案		50			
2	从业人员资质		150				
2.1	持有国际或国内冲浪组织颁发的教练等级资格证书	冲浪等级证书		50			
2.2	须为正式冲浪旅游行业企业员工	劳动合同		20			
2.3	拥有冲浪保险和有效健康证	保单和健康证		30			
2.4	三亚市冲浪旅游服务人员从业资格证书	向三亚市体育旅游协会冲浪旅游专业委员会（以下简称“冲浪专委会”）申领《三亚市冲浪旅游服务人员从业资格证书》，并由冲浪专委会统一在三亚市旅游和文化广电体育局备案的冲浪从业人员		50			
3	接待基本规范		130				
3.1	明码标价	在接待处醒目位置张贴冲浪价目表		30			
3.2	具有基本接待设施	经营场所必须提供寄存柜、冲淡房、更衣室、洗手间，冲浪培训类必须有固定教室		30			

3.3	工作人员服务规范	工作人员必须持健康证上岗，仪表端庄、整洁大方。		20			
3.4	健康状况咨询	询问体验者身体状况，告知禁忌冲浪症状，让体验者填写《健康声明书》		20			
3.5	保险	参与冲浪活动人员必须购买相关冲浪保险		30			
4	**服务细则（三选一）**		**120**				
体验冲浪旅游服务细则							
4.1	身体要求	《健康声明表》		20			
4.2	带客比例	教练 1:3		30			
4.3	操作规范	是否将“操作规范”内要求落实		70			
持证冲浪旅游服务细则							
4.1	身体要求	《健康声明表》		20			
4.2	操作规范	是否将“操作规范”内要求落实		100			
冲浪培训服务细则							
4.1	身体要求	依照参加相应国际或国内冲浪组织颁发的冲浪员资格证书等级的身体要求执行		20			
4.2	操作规范	依照参加相应国际或国内冲浪组织颁发的冲浪员资格证书等级的执教规范执行		100			
5	**冲浪环境评估**		**140**				
5.1	冲浪场所人员配置	具有救护员资格证书的专职人员		20			
5.2	冲浪场所急救设施配置	配备急救氧气瓶、担架、救生杆、救生圈、急救药箱等，具有稳定的通讯系统和急救船只		40			
5.3	冲浪区域标识	对冲浪区域进行标识，禁止其他移动船只进入该区域		20			
5.4	环境评估	评估天气、海流、水面条件等是否适合冲浪		30			
5.5	应急处置流程	应急预案及演练记录		30			
6	**冲浪设备**		**100**				
6.1	冲浪装备检查	下水前是否检查冲浪装备正常运作情况		50			
6.2	冲浪装备保养	保养记录		50			

7	**冲浪操作规范**		**90**				
7.1	规范执行	是否按照操作规范执行		30			
7.2	尊重游客意愿	是否强迫游客意志或者威胁游客完成冲浪活动		20			
7.3	考虑游客身体状况	是否安排或隐瞒身体状况不适冲浪的游客完成冲浪活动		20			
7.4	危险判断	教练是否根据实际情况终止可能发生潜在危险的冲浪活动		20			
8	**质量管理**		**80**				
8.1	公示投诉渠道	在项目位置处张贴投诉联系方式		20			
8.2	游客投诉及意见处理	制定投诉处理机制，对游客投诉情况进行立案调查，给游客及时反馈，并同步报备至三亚市体育旅游协会冲浪旅游专业委员会。		30			
8.3	技能提升	定期开展技术大练兵和大比武，优化完善服务操作规范		30			
总分							

《三亚市潜水旅游服务规范》

前　　言

本规范依据 GB/T 1.1-2020《标准化工作导则 第 1 部分：标准化文件的结构和起草规则》给出的规则起草。

本规范由三亚市旅游和文化广电体育局归口，以三亚市体育旅游协会名义印发。

本规范主要起草单位：三亚市体育旅游协会、三亚理工职业学院、三亚学院。

本规范主要起草人：张振祥、潘虹、张令俊、鲍永洲、吴开壮、沈建勇、亓元、段恋、高环宇。

三亚市潜水旅游服务规范

第一章　范围

本规范规定了潜水旅游的术语和定义、服务细则、风险管理、质量管理与投诉处理服务及准入与退出机制等要求。

本规范适用于三亚市管辖范围内从事任何形式的潜水旅游经营活动，全国其他市县可参照执行。

第二章　规范性引用文件

下列文件对于本文件的应用是必不可少的。凡是注日期的引用文件，仅注日期的版本适用于本文件。凡是不注日期的引用文件，其最新版本（包括所有的修改单）适用于本文件。

GB/T 1.1-2020　《标准化工作导则 第 1 部分：标准化文件的结构和起草规则》

GB/T 19000　质量管理体系：基础和术语

GB/T 10001.1　标志用公共信息图形符号　第 1 部分：通用符号

GB 19079.10　体育场所开放条件与技术要求　第 10 部分：潜水场所

GB 18435　潜水呼吸气体及检测方法

GB/T17242　投诉处理指南

DB46/T 167　旅游投诉服务规范

第三章　术语和定义

第一条　本定义规则适用于包含且不限于水肺潜水（在水底用压缩空气呼吸）、自由潜水、美人鱼潜水、浮潜等潜水深度不超过 40 米的水底或水上活动以及延伸服务的水下拍摄等。

第二条　本规范所称“体验潜水”，是指未取得任何国际或国内潜水组织颁发的潜水员资格证书，在潜水教练或助教带领下进行水底探索的潜水体验活动。

本规范所称“持证潜水”，是指取得国际或国内潜水组织颁发的潜水员资格证书，具备自主进行水底潜水能力的潜水活动。

本规范所称“潜水培训”，是指以取得潜水资格证书为目的，由潜水教练带领下进行的潜水培训活动。

本规范所称“潜水教练”，是指取得国际或国内潜水组织所认可教练等级的从业人员。

本规范所称“潜水助教（也称‘潜水向导’）”，是指取得国际或国内潜水组织所认可助教等级的从业人员，如：助理教练、水肺潜水长、水肺四星潜水员、名仕自由潜水员、四星自由潜水员、Level3 自由潜水员、基础美人鱼教练等。

本规范所称“潜水旅游服务从业者”，是指持有（潜水）社会体育指导员证书和国际或国内潜水组织颁发的教练、助教等级资格证书，须为正式潜水旅游行业企业员工，拥有潜水保险和有效健康证，向三亚市体育旅游协会潜水旅游专业委员会（以下简称“潜水旅游专委会”）申领《三亚市潜水旅游服务人员从业资格证书》，并由潜水旅游专委会统一在三亚市旅游和文化广电体育局备案的潜水从业人员。

本规范所称“潜水旅游服务企业”，是指具有独立法人资格，拥有固定实际经营场所，已投保公众责任险，由三亚市体育旅游协会潜水旅游专业委员会核准，在三亚市旅游和文化广电体育局备案的潜水从业企业。

本规范所称“潜水旅游服务场所”，是指在三亚所开展的潜水活动必须由符合本规范的潜水企业的教练或助教组织前往拥有高危性体育项目经营许可证（潜水）的场所。

第四章　服务细则

第三条　适用于所有潜水旅游活动接待

（一）在接待处醒目位置公示潜水价目表（包括：内容、价格、时长等）、潜水器材价目表（如一次性咬嘴等）、水下拍摄等延伸服务的价目表以及当日海况（包括：风力、风向、气温、水温、海面能见度、海浪预报等）。

（二）经营场所必须提供寄存柜、冲淡房、更衣室、洗手间，潜水培训类必须有固定教室。

（三）工作人员必须持健康证上岗，仪表端庄、整洁大方。

（四）询问体验者身体状况，告知禁忌潜水症状，让体验者填写《健康声明书》（见附件 1）。

（五）参与潜水活动人员必须购买相关潜水保险。

第四条　体验潜水旅游服务细则

（一）体验潜水：包含体验水肺潜水，体验自由潜水（含浮潜），体验美人鱼等潜水活动。

（二）年龄要求：最低年龄 6 岁，最高年龄 60 岁。

（三）身体要求：依照《健康声明》要求执行。

（四）人数比例：教练对学员人数最大比例 1:2，助教最大比例 1:1。

（五） 潜水深度：不超过 12 米。体验美人鱼潜水最大深度 1.5 米（或满足可站立浅水区要求）。

（六）操作规范

1. 向体验者清晰介绍潜水产品内容（水下时长以及明确

套餐是否包含：咬嘴、鱼食、照相等）、安全常识、注意事项和环保要求（严禁破坏珊瑚礁的行为）。

2.对照《潜水常用手势图形符号》教授潜水手势，必须让体验者牢记上升、下潜、OK、耳朵疼四种手势，了解空气耗尽、停止等其他手势（见附件 2）。

3.概述潜点海况、水下环境和深度。

4.给体验者提供合适、干净、消毒、运作正常的潜水装备，并讲解各装备使用方法。水肺体验潜水时非紧急情况潜水教练或潜水助教和体验者不得使用同一套调节器。

5.在水面入水前潜水教练或潜水助教再次告知体验者潜水时长、开始时间、结束表现、下水操作安排、水下深度，复习潜水手势和装备使用方法。

6.潜水教练或潜水助教在水下应时刻关注体验者身体状况，运用良好的判断力谨慎带领体验者潜水，切勿让体验者离开视线。

7.体验结束后询问体验者身体状况和体验感，总结下潜深度，称赞客人表现。若发现身体不适者，尽快安排送医。

第五条　持证潜水旅游服务细则

（一）持证潜水：包含持证水肺潜水，持证自由潜水（含浮潜），持证美人鱼等潜水活动。

（二）身体要求：依照《健康声明》要求执行。

（三）人数比例：最大比例 1:4。

（四）潜水深度：根据所持潜水证等级确定，水肺最大深度 40 米，浮潜深度最大深度 3 米，自由潜最大深度 40 米，美人鱼潜水最大深度 10 米。

（五）操作规范

1.核查持证者潜水证书，确认持证者最近一次潜水时间和累计潜水次数。

2.检查潜水装备运作正常，气瓶内气量。

3.下水前简介，统一潜水手势，告知水下环境、注意事项、潜水计划，明确突发情况处理方式。

4.潜水开始和结束时分别清点持证者人数，确认无误后，开始或结束潜水。

5.潜水结束后，进行潜水总结，清点潜水装备，填写潜水日志。

第六条　潜水培训服务细则

（一）潜水培训：包含水肺潜水培训，自由潜水（含浮潜）培训，美人鱼培训等潜水活动。

（二）年龄要求：依照国际或国内潜水组织颁发的潜水员资格证书等级的年龄要求执行。

（三）身体要求：依照国际或国内潜水组织颁发的潜水员资格证书等级的身体要求执行。

（四）人数比例：平静水域依照国际或国内潜水组织颁发的潜水员资格证书等级的比例要求执行，开放水域执教比

例 1:4，最多可增加 1 名助教，学员则最多再增加 2 名。

（五）潜水深度：依照国际或国内潜水组织颁发的潜水员资格证书等级的深度要求执行。

（六）操作规范：依照国际或国内潜水组织颁发的潜水员资格证书等级的执教要求执行（开放水域执教比例按上述第四条人数比例执行）。

第五章　风险管理

第七条　潜水环境评估

（一）潜水场所需设定具有救护员资格证书的专职人员负责各个潜点的环境条件进行风险评估，评估内容包括：天气、海流、水面条件、能见度。若评估显示不能正常潜水，则应立即暂停潜水安排。潜水场所内下海场地应配备急救氧气瓶、担架、救生杆、救生圈、急救药箱等，具有稳定的通讯系统和急救船只。

（二）潜水场所要对潜水区域进行标识，禁止其他移动船只进入该区域。

（三）潜水场所要有健全的突发事件应急预案，并定期进行演练。

第八条　潜水实施设备

（一）每次入水前都需检查潜水装备正常运作情况。

（二）每季度或节假日前定期对装备进行一次保养。

（三 ）使用气瓶要在检查有效期内，并定期及时清洗。

（四）按照空压机操作手册定期进行保养和更换滤芯，确保气味正常。

第九条　潜水操作规范

（一）潜水企业、潜水教练或潜水助教要严格按照操作规范执行，不得违规操作。

（二）潜水企业、潜水教练或潜水助教不得强迫游客意志或者威胁游客完成潜水活动。

（三）潜水企业、潜水教练或潜水助教不得安排或隐瞒身体状况不适潜水的游客完成潜水活动。

（四）潜水教练或潜水助教根据实际情况有权终止可能发生潜在危险的潜水活动。

第六章　质量管理与投诉处理服务

第十条　潜水企业应在项目位置处张贴投诉联系方式。

第十一条　潜水企业向游客提供的服务信息和广告宣传应当客观真实，不得虚假宣传、误导消费者。

第十二条　潜水企业制定投诉处理机制，对游客投诉情况进行立案调查，给游客及时反馈，并同步报备至三亚市体育旅游协会潜水旅游专业委员会。

第十三条 潜水企业应定期开展技术大练兵和大比武，优化完善服务操作规范。

第十四条 鼓励潜水企业积极加入三亚市体育旅游协会潜水旅游专业委员会。三亚市体育旅游协会潜水旅游专业委员会每年将定期开展潜水旅游服务等级评定，发挥行业协会监管和自律作用。

第七章 准入与退出机制

第十五条 准入机制

（一）实行“双材料报备”。从业企业向三亚市体育旅游协会潜水旅游专业委员会材料备案（免费备案），向潜水旅游专委会提交营业执照、固定经营场所证明、从业人员花名册（包含从业人员资质证明）、计划潜水经营区域、潜水旅游专委会现场调查、初审加入意见；最后，由协会统一向市旅文局材料备案。

（二）潜水旅游专委会每月固定培训时间，对新进人员进行培训，技能抽查等。

（三）从业人员离职和入职，企业要及时更新报备潜水旅游专委会，以统计人员流失比。

（四）被辞职人员要及时通报，情节严重拉入黑名单，企业通报，建议行业谨慎录用。

（五）离职 3 个月人员，三亚相关从业证件注销，入职时需纳入程序执行。

（六）健康证或保险等资质过期，从业资格证也将失效，续签材料提交后，方可有效。

（七）对于被投诉企业或员工经潜水旅游专委会审定责任后，视情况给予通告，可采取暂停资格证有效性等措施，情节特别严重的列入黑名单，建议行业不再予以录用。

（八）所有在三亚从事潜水旅游经营项目的企业应全部纳入材料备案，不备案列入诚信监管系统，确保安全责任的落实。备案入会后的企业和个人，经查处违法行为 3 次整改仍不到位，将列入黑名单，并将 5 年内不能在三亚从事潜水旅游服务行业。

（九）个体教练不能独立经营，必须通过办理商事登记或入职企业开展相关工作。

第十六条　退出机制

有下列情形之一的，将被退出潜水旅游专业委员会，取消材料备案资质：

（一）违反法律法规，依法被行政机关查处的潜水旅游服务企业或潜水旅游从业人员。

（二）两年之内评选结果均为一星俱乐部或拒不整改的潜水旅游服务企业；违反职业操作规范的潜水旅游从业人员。

（三）未按时参加协会潜水旅游专委会年审进行身份更新的潜水旅游服务企业或潜水旅游从业人员。

（四）违反潜水旅游专委会章程的潜水旅游服务企业或潜水旅游从业人员。

（五）递交退出申请，主动申请退出的的潜水旅游服务企业或潜水旅游从业人员。

第八章　附则

第十七条　本规范由三亚市体育旅游协会负责解释，自2021 年__月__日起施行，有效期截止 2026 年__月__日。

附 录 A
（资料性附录）
潜水旅游服务健康声明

表 A.1 给出了潜水旅游服务健康声明书。

完成《健康声明书》是参加体验潜水和持证潜水的先决条件。
女性请注意：如果你已怀孕或计划怀孕，请不要潜水。

表 A.1 潜水旅游服务健康声明书

个人信息			
姓名		性别： 男 女	
电话		邮箱	
出生日期		居住城市	

您是否曾经或现在有以下任何一种情况：

	是	无
哮喘		
大脑、脊髓或神经紊乱		
胸部手术		
慢性支气管炎或持续性胸痛		
慢性窦性疾病		
肺萎陷（气胸）		
糖尿病（糖尿病人）		
耳手术		
癫痫病		
曾昏厥、癫痫或昏迷		
任何类型心脏病		
飞行时常出现耳部问题		
肺结核或其他长期肺部疾病		
曾被确诊感染过新冠病毒（COVID-19）		

您目前是否患有：

	是	无
呼吸急促		
慢性耳分泌物或感染		
高血压		
最近一个月内有其他疾病或进行过手术		
鼓膜穿孔		
潜水前 8 小时内是否摄入酒精		
是否明白隐瞒与安全潜水不符情况可能会危及您的生命或健康		

参加者签名

如果对以上问题回答都是“无”，则不需要进行医疗评估，请阅读以下参加者声明，并签字和填写日期，以表示你同意。

参加者声明：我如实回答了所有问题，并确认我愿意承担因我回答问题不准确或隐瞒回答健康状况而导致的任何后果。

签名： 日期：

监护人： 日期：

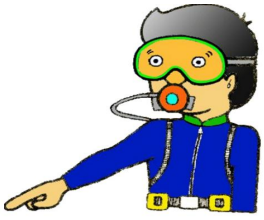
潜水企业： 日期：

附 录 B
（资料性附录）
潜水常用手势图形符号

表 B.1 给出了潜水常用手势图形符号。

表 B.1 潜水常用手势图形符号

图形符号	含 义	说 明
	上升	大拇指向上竖起，上下移动
	下降	大拇指倒竖，上下移动
	好吗? 好!	用大拇指和食指作一环状
	不明白?	手掌向外摊开
	时间?深度?	指着手腕
	停止!	手张开向前推出

	空气很少	用拳头在胸前做上下滑动
	空气中断	手作刀状切颈部
	给我空气	用手指在调节器的前面
	好冷！	两手在胸前交叉
	耳朵痛	用手指指着耳朵
	救命！	挥手
	指示方向	指着某个方向

附 录 C
（规范性附录）
潜水旅游服务规范评分表

表 C.1 给出了潜水旅游服务规范评分表。

说明：

1. 本评分表共计 1000 分，共分为 8 个大项，各大项分值为：市场主体运营基本情况 190 分；从业人员资质 150 分；接待基本规范 130 分；服务细则（三选一）120 分；潜水环境评估 120 分；潜水设备 120 分；潜水操作规范 90 分；质量管理 80 分。

2. 5 星级潜水俱乐部需达到 950 分，4 星级潜水俱乐部需达到 850 分，3 星级潜水俱乐部需达到 750 分，2 星级潜水俱乐部需达到 600 分，1 星级潜水俱乐部需达到 500 分。

表 C.1 潜水旅游服务规范评分计分总表

项 目 单 位	分值情况	负责人签字	评定日期
自检计分			
推荐单位计分			
评定单位计分			

表 C.2 给出了潜水旅游服务规范评分表。

表 C.2　潜水旅游服务规范评分表

序号	评定项目	检查评定方法与说明	大项分值栏	分项分值栏	自检计分栏	推荐单位计分栏	评定单位计分栏
			1000				
1	市场主体运营基本情况		190				
1.1	具有独立法人资格	提供营业执照		50			
1.2	拥有固定实际经营场所	经营场所图片及场地合同		30			
1.3	已投保公众责任险	保险单		30			
1.4	由三亚市体育旅游协会潜水旅游专业委员会核准	协会核准名单		30			
1.5	在三亚市旅游和文化广电体育局备案的潜水从业企业	备案		50			
2	从业人员资质		150				
2.1	持有（潜水）社会体育指导员证书和国际或国内潜水组织颁发的教练、助教等级资格证书	潜水等级证书		50			
2.2	须为正式潜水旅游行业企业员工	劳动合同		20			
2.3	拥有潜水保险和有效健康证	保单和健康证		30			
2.4	三亚市潜水旅游服务人员从业资格证书	向三亚市体育旅游协会潜水旅游专业委员会（以下简称“潜水旅游专委会”）申领《三亚市潜水旅游服务人员从业资格证书》，并由潜水旅游专委会统一在三亚市旅游和文化广电体育局备案的潜水从业人员		50			
3	接待基本规范		130				
3.1	明码标价	在接待处醒目位置张贴潜水价目表		30			
3.2	具有基本接待设施	经营场所必须提供寄存柜、冲淡房、更衣室、洗手间，潜水培训类必须有固定教室		30			

3.3	工作人员服务规范	工作人员必须持健康证上岗，仪表端庄、整洁大方。		20			
3.4	健康状况咨询	询问体验者身体状况，告知禁忌潜水症状，让体验者填写《健康声明书》		20			
3.5	保险	参与潜水活动人员必须购买相关潜水保险		30			
4	**服务细则（三选一）**		**120**				
体验潜水旅游服务细则							
4.1	身体要求	《潜水旅游服务健康声明表》		20			
4.2	带客比例	教练 1:2，助教 1:1		30			
4.3	潜水深度	海域最深 12 米		20			
4.4	操作规范	是否将“操作规范”内要求落实		50			
持证潜水旅游服务细则							
4.1	身体要求	《潜水旅游服务健康声明表》		20			
4.2	带客比例	最高 1:4		30			
4.3	潜水深度：	根据所持潜水证等级确定，水肺最大深度 40 米，浮潜深度最大深度 3 米，自由潜最大深度 40 米，美人鱼潜水最大深度 10 米		20			
4.4	操作规范	是否将“操作规范”内要求落实		50			
潜水培训服务细则							
4.1	身体要求	依照参加相应国际或国内潜水组织颁发的潜水员资格证书等级的身体要求执行		20			
4.2	执教比例	依照参加相应国际或国内潜水组织颁发的潜水员资格证书等级的执教比例要求执行，开放水域执教比例 1:4，最多可增加 1 名助教，学员则最多再增加 2 名		30			
4.3	潜水深度	依照参加相应国际或国内潜水组织颁发的潜水员资格证书等级的潜水深度要求执行		20			
4.4	操作规范	依照参加相应国际或国内潜水组织颁发的潜水员资格证书等级的执教规范执行		50			
5	**潜水环境评估**		**120**				

5.1	潜水场所人员配置	具有救护员资格证书的专职人员		20			
5.2	潜水场所急救设施配置	配备急救氧气瓶、担架、救生杆、救生圈、急救药箱等，具有稳定的通讯系统和急救船只		30			
5.3	潜水区域标识	对潜水区域进行标识，禁止其他移动船只进入该区域		20			
5.4	环境评估	评估天气、海流、水面条件、能见度是否适合潜水		20			
5.5	应急处置流程	应急预案及演练记录		30			
6	**潜水设备**		**120**				
6.1	潜水装备检查	下水前是否检查潜水装备正常运作情况		30			
6.2	潜水装备保养	保养记录		30			
6.3	气瓶检查	检测合格证、清洗和检查记录		30			
6.4	空压机	保养和更换滤芯记录，气味正常		30			
7	**潜水操作规范**		**90**				
7.1	规范执行	是否按照操作规范执行		30			
7.2	尊重游客意愿	是否强迫游客意志或者威胁游客完成潜水活动		20			
7.3	考虑游客身体状况	是否安排或隐瞒身体状况不适潜水的游客完成潜水活动		20			
7.4	危险判断	教练是否根据实际情况终止可能发生潜在危险的潜水活动		20			
8	**质量管理**		**80**				
8.1	公示投诉渠道	在项目位置处张贴投诉联系方式		20			
8.2	游客投诉及意见处理	制定投诉处理机制，对游客投诉情况进行立案调查，给游客及时反馈，并同步报备至三亚市体育旅游协会潜水旅游专业委员会。		30			
8.3	技能提升	定期开展技术大练兵和大比武，优化完善服务操作规范		30			
总分							

《海洋法律与政策》稿约

《海洋法律与政策》(Marine Law and Policy)，国际刊号：2709-3948,电子刊号：2710-1738，是大海法领域中英双语对照的优秀国际学术期刊。本刊秉承实事求是的精神，力求刊发海内外与海洋法律、海洋政策相关的一切优秀研究成果，热忱欢迎广大专家、学者不吝赐稿，兹立稿约如下:

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（二） 引用已刊发文章的基本格式为：

〔1〕 季卫东：《法律程序的意义：对中国法制建设的另一种思考》，载《中国社会科学》 1993 年第 1 期。

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〔1〕 汪波：《哈尔滨市政法机关正对“ 宝马案” 认真调查复查》，载人民网 2004 年 1 月 10 日。http://www.people.com.cn/GB/shehui/1062/2289764.html。

〔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。

微信公众号的链接过长时，不标注链接。

（四） 引用学位论文的基本格式为：

〔1〕李松锋:《游走在上帝与凯撒之间:美国宪法第一修正案中的政教关系研究》,中国政法大学 2015 年博士学位论文。

（五） 引用法律文件的基本格式为：

〔1〕《民法总则》第 27 条第 2 款第 3 项

〔2〕《国务院关于在全国建立农村最低生活保障制度的通知》，国发〔 2007〕19 号，2007 年 7 月 11 日发布。

（六） 引用司法案例的基本格式为：

〔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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摘要应客观反映文章核心内容，言之有物、连贯顺畅、 独立成篇。 摘要可以摘录文中字句，但不宜大段重复论文段落。摘要不使用第一人称 （如“ 我认为”），忌带主观评价（如“具有开创意义”）。学术论文的摘要，以 200-300 字为宜，不分段；论文篇幅较长的，摘要字数 可以稍多。硕士学位论文的摘要可以稍长，一般不超过 800 字 （以一页 A4 纸 为宜），建议分段；

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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

英文案例的引用方式， 因不同国家、不同法院、不同案例报告系统而有所区别。基本格式为

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).

*详细可请参考中国法学会法学期刊研究会出版的《法学引注手册 2019》。

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