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编者言

当前，世界正经历百年未有之大变局，国际局势出现深刻复杂变化，全球治理的不稳定不确定性也愈加凸显。在目前俄乌冲突持续升级、日本核污染水强排入海、全球发展鸿沟愈发突出、大国博弈竞争加速升级的大背景下，海洋经济、海洋技术实施等方面的发展面临着诸多不确定因素，其带来的新风险与新挑战日益受到关注。在积极响应中国自由贸易港建设、推进21世纪海上丝绸之路发展的号召下，《海洋法律与政策》（Marine Law and Policy），ISSN 2709-3948，ISSN 2710-1738（online）紧扣国际法、海洋法、海商法、海事行政法律及政策等主题，以期达到交流成果，启迪智慧，紧跟学术思潮，为广大读者服务的目的。

本期《海洋法律与政策》刊发的论文包含日本IAEA福岛ALPS处理水报告所具疑义、美国《2022 年航运改革法》的修订及其影响、海洋生物资源养护与海洋环境保护的法律关系等热点问题。

为处理福岛第一核电站的海量核污染水，日本政府专门设计研究ALPS对相关废水进行净化处理，并于2023年8月24日开始将稀释后的ALPS处理水倾倒入海。台湾中华战略学会资深研究员张竞注意到，IAEA从未“核准”日本的ALPS处理水排海计划，其协助评估ALPS处理水的管辖权也存在法理争议，而且日本政府和IAEA试图通过刻意使用“排放”（discharge）而非“倾倒”（dumping）的字词规避国际法理责任与义务，其选择和评估处置方案的过程也存在漏洞。事实上，ALPS处理水排海应定位为“倾倒”（dumping）而非“排放”（discharge），适用《联合国海洋法公约》第210条。未来可以列出可能受到日本倾倒核污染废水不利影响的国家名单，以便采取集体行动，也可以授权或是委托方式敦请IAEA协助，“适当”审议日本政府的处置方案。

美国《2022年航运改革法》于2022年6月正式成为法律并生效。中国政法大学国际法学院教授张丽英和国际经济法硕士研究生陈思卓注意到，该法案旨在应对全球供应链危机下美国面临的包括港口拥堵、费率上升等问题，能一定程度上缓解美国国内货主、消费者的不满情绪，但仍然具有局限性，可能引发世界范围内的保护主义立法潮。张丽英教授和陈思卓硕士还对该法案的颁布背景和主要内容和影响进行详细解读，建议我国在未来的立法工作中应注意明确监管机构，提高航运业的透明度，加强我国航运交易所与航运企业的权益维护与合规建设。

2023年3月《BBNJ协定》完成了文本谈判，该协定和海洋生物资源养护间的关系，特别是和《联合国鱼类种群协定》及区域渔业管理组织之间的关系，是该协定谈判过程以及未来条约解释中的争论焦点之一。对此，上海海洋大学教授唐建业回归《联合国海洋法公约》本源，从法律术语和权利义务角度以及勤勉义务视角考察海洋生物资源和海洋环境之间的细微差别及其复杂关系，发现虽然在自然科学上养护海洋生物多样性和发展可持续海洋渔业之间相互交

织，但在法律上两者属于两种不同的法律制度安排，并提出《BBNJ 协定》的未来解释与适用应切实反映条约术语通常意义，尊重《联合国海洋法公约》框架下各自权利义务关系，真正体现生态系统方法原则以及各种人类活动管理基本原则，并能体现各国对国际组织间融合或协调界限的关切。

另外，在本刊的“案例解析”栏目中，北京大成（广州）律师事务所合伙人任雁冰律师梳理了国际海洋法庭 28 号案海洋划界争议管辖权及可受理性问题的论证思路。该案中，特别法庭首先认为双方分歧的核心是毛里求斯是否享有查戈斯群岛主权，通过审查查戈斯裁决、查戈斯咨询意见、联合国大会 73/295 号决议及查戈斯群岛主权争议现状，毛里求斯与马尔代夫之间海洋划界争议是否真实存在以及毛里求斯是否履行《联合国海洋法公约》的相关义务等问题，驳回马尔代夫的五项先决异议，裁定特别法庭对本案争议具有管辖权，且此争议具有可受理性。

本期在“新发展与新文献”栏目呈现了四份相关文献，分别是《新闻稿：国际海洋法法庭特别分庭对“毛里求斯与马尔代夫在印度洋海域划界争端”作出判决》《联合国通过保护公海生物多样性的历史性协定》《中华人民共和国对外关系法》《最高人民法院发布 2022 年全国海事审判典型案例》。

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

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Editor's Note

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

In this issue of Marine Law and Policy, we have included articles on various hot topics such as doubts about IAEA report of ALPS-treated water at Fukushima, amendments to the Ocean Shipping Reform Act of 2022 and its impact, and legal relationship between marine living resources conservation and marine environmental protection.

To handle the large amount of nuclear-contaminated water at the Fukushima Daiichi nuclear power plant, the Japanese government developed ALPS to treat the relevant wastewater. On 24 August 2023, they began to dump the diluted ALPS-treated water into the ocean. Mr. ZHANG Jing, senior research fellow of China Institute of Strategic Studies, noticed that IAEA has never "approved" Japan's plan to dump the ALPS-treated water into the sea, and there are jurisprudential disputes over the IAEA's jurisdiction in assessing the ALPS-treated water. Furthermore, the Japanese government and ALPS have even attempted to evade international legal responsibilities and obligations by deliberately using the term "discharge" instead of "dumping", but in fact, releasing ALPS-treated water into the ocean should be regarded as "dumping" rather than "discharge" and is subject to article 210(5) of UNCLOS. Mr. ZHANG Jing also pointed out that there are loopholes in the selection and evaluation of disposal options. To address this issue in a correct way, countries that may be adversely affected by the dumping of nuclear-contaminated wastewater by Japan should be confirmed and listed so as to take collective action before urging IAEA, either by authorization or by commission, to provide professional assistance to review the Japanese Government's disposal plan.

The Ocean Shipping Reform Act of 2022 became a law and took effect on 16 June 2022. Ms.

ZHANG Liying, professor at the School of International Law, China University of Political Science and Law, and Ms. CHEN Sizhuo, master candidate of international economic law, China University of Political Science and Law, noticed that the Act was enacted to address issues such as port congestion, freight rate increases that the United States is facing amidst the global supply chain crisis. Despite the fact that the Act can alleviate the dissatisfaction of domestic shippers and consumers in the United States to some extent, it still has limitations, probably triggering a wave of protectionist legislation worldwide. They also provided a detailed interpretation of the background, key content, and impact of the Act, and suggested that China should pay attention to clearly defining regulatory agencies in future legislative work, improving transparency in the shipping industry, and strengthening the rights and compliance of China's shipping exchanges and shipping enterprises.

The text negotiation of the BBNJ Agreement was completed in March 2023. At the center of the dispute during the negotiation and in the future interpretation of the Agreement is the relationship between this agreement and the conservation of marine living resources, particularly with the United Nations Fish Stocks Agreement and regional fisheries management organizations. Mr. TANG Jianye, professor of Shanghai Ocean University, traced back to the time when UNCLOS was established and examined the intricate relationship between marine living resources and the marine environment from legal terms and rights and obligations, as well as from the perspective of due diligence. Mr. TANG Jianye found that the conservation of marine biodiversity cannot be separated from the sustainable development of marine fisheries, but actually they are different legal institutional arrangements. He also suggested that the future interpretation and application of the BBNJ Agreement should reflect the ordinary meaning of treaty terminology, respect the relationship of rights and obligations under the UNCLOS, and genuinely embody the principles of the ecosystem approach and the basic principles of management of human activities, and that it should reflect the concerns of States regarding the boundaries of convergence or harmonisation between international organisations.

In the column "Case Analysis", Mr. REN Yanbing, partner of Guangzhou Dentons Law Offices, analyzed the argumentation on the jurisdiction and admissibility issues of the Dispute Concerning Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean (Mauritius *v.* Maldives). In this case, the Special Chamber first identified the legal status of the Chagos Archipelago is at the core of the disagreement. After reviewing the Chagos Award, Chagos Advisory Opinion, UN General Assembly Resolution 73/295, and the current status of the sovereignty dispute over the Chagos Archipelago, as well as examining the existence of maritime delimitation disputes between Mauritius and Maldives and whether Mauritius has fulfilled its obligations under UNCLOS, the Special Chamber dismissed Maldives' five preliminary objections

and ruled that it has jurisdiction over the dispute in this case, and that the dispute is admissible.

This issue also provides our readers with easy access to four documents in the column of Recent Developments and Documents, including a press release about Dispute Concerning Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean (Mauritius *v.* Maldives); UN Delegates Reach Historic Agreement on Protecting Marine Biodiversity on the High Seas; Law on Foreign Relations of the People's Republic of China; Model Maritime Trial Cases across the Country in 2022 Published by the Supreme People's Court.

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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IAEA 福岛 ALPS 处理水报告所具疑义

张竞*

摘要：为处理福岛第一核电站的海量核污染水，日本政府专门设计研究 ALPS 对相关废水进行净化处理，并于 2023 年 8 月 24 日开始将稀释后的 ALPS 处理水倾倒入海。然而，IAEA 从未“核准”日本的 ALPS 处理水排海计划，其协助评估 ALPS 处理水的管辖权也存在法理争议，日本政府和 ALPS 甚至试图通过刻意使用“排放”（discharge）而非“倾倒”（dumping）的字词规避国际法理责任与义务。对此，首先应列出可能受到日本倾倒核污染废水不利影响的国家名单，然后以授权或是委托方式敦请 IAEA 提供专业协助，“适当”审议日本政府的处置方案，才是符合法理的正确出路。

关键词：IAEA；ALPS 处理水；《联合国海洋法公约》

一、IAEA 福岛 ALPS 处理水报告的缘起

2011 年 3 月 11 日，日本东北太平洋地区发生近海地震继而引发海啸，导致位于日本福岛县双叶郡大雄町的福岛第一核电厂冷却系统发生严重故障，甚至可能产生炉心熔毁状况。在应变处理过程中，日本政府大量灌注冷却水，残留了数量惊人的受到核放射物质污染的废水。

为处理和净化应变处理过程产生的污染水（机房滞留水），日本政府专为东京电力福岛第一核电站核反应炉机房设计研究“多核种除去设备”(ALPS：Advanced Liquid Processing System)，对相关废水进行净化处理作业。此项过程所产生的处理水，称为 ALPS 处理水（ALPS-treated water）。[1]

2021 年 4 月 13 日，日本发布以“Basic Policy on Handling of ALPS Treated Water at the Tokyo Electric Power Company Holdings’ Fukushima Daiichi Nuclear Power Station”为题的政策文件，正式决定将 120 万吨稀释后的 ALPS 处理水倾倒入海，并预计将在 2023 年开始实际执

* 张竞，台湾中华战略学会资深研究员。

[1] 《多核種除去設備等處理水（ALPS 處理水）海洋排放的輻射影響評估結果（建設階段）（2023 年 5 月修订）》，东京电力控股株式会社网页，https://www.tepco.co.jp/zh-tw/decommission/progress/watertreatment/images/ria_20220630tw.pdf，2023 年 8 月 25 日访问。

行。[1]

随后日本政府向国际原子能机构（International Atomic Energy Agency，简称 IAEA）提出申请，要求其协助评估前述储放于福岛第一核电厂内的 ALPS 处理水是否能够适用于相关国际安全标准。国际原子能机构秘书长拉斐尔·葛罗西（Rafael Grossi）依据该国际组织基本规约第 3 条第 A 款第 6 项，[2]同意接受日本政府申请的协助事项，并承诺将会参与 ALPS 处理水排放作业启动前、过程中以及排放后的相关作业。[3]双方在 2021 年 7 月签署《审查授权书》（Terms of Reference）后，开始执行相关审查作业。[4]

在此必须指出，国际原子能机构在 2023 年 7 月 4 日完成相关调查审查作业后，编纂了以“IAEA COMPREHENSIVE REPORT ON THE SAFETY REVIEW OF THE ALPS-TREATED WATER AT THE FUKUSHIMA DAIICHI NUCLEAR POWER STATION”为题的报告，并由该机构秘书长葛罗西递交给日本政府岸田文雄首相。报告针对其审视作业所依据的法源，仅撷取前述法条的下列特定文字：“To establish or adopt, in consultation and, where appropriate, in collaboration with the competent organs of the United Nations and with the specialized agencies concerned, standards of safety for protection of health and minimization of danger to life and property (including such standards for labour conditions), … and to provide for the application of these standards, … at the request of a State, to any of that State’s activities in the field of atomic energy.”因此，若要探讨国际原子能机构审视 ALPS 处理水作业的法理基础，毋庸置疑仅须检讨前述文字内容即可。[5]

二、IAEA 福岛 ALPS 处理水报告的法理疑义

日本政府在接获国际原子能机构前述报告后，已于 2023 年 8 月 24 日依据其在 2021 年 4

[1] IAEA, Executive Summary，IAEA COMPREHENSIVE REPORT ON THE SAFETY REVIEW OF THE ALPS-TREATED WATER AT THE FUKUSHIMA DAIICHI NUCLEAR POWER STATION, International Atomic Energy Agency 2023 report, (visited on August 25, 2023), https://www.iaea.org/sites/default/files/iaea_comprehensive_alps_report.pdf.

[2] 《国际原子能机构规约》第 3 条第 A 款第 6 项：“与联合国主管机构及有关专门机构协商，在适当领域与之合作，以制定或采取旨在保护健康及尽量减少对生命与财产的危险的安全标准(包括劳动条件的标准)，饼是此项标准适用于本身的工作及利用由机构本身、或经其请求、或在其管制和监督下供应的材料、服务、设备和情报所进行的工作；并使此项标准，于当事国请求时，适用于任何双边或多边协议所进行的工作，或于一国请求时，适用于该国在原子能方面的任何活动；”《国际原子能机构规约》，国际原子能机构官方网站，2023 年 8 月 25 日访问，https://www.iaea.org/sites/default/files/statute_ch.pdf

[3] 同前注。

[4] 同前注；并参见行政院原子能委员会（中国台湾）：《原能会针对国际原子能总署（IAEA）公布专家调查团就日本福岛核灾含氚废水排放计划审查总结报告之说明》，2023 年 7 月 4 日，行政院原子能委员会官方网页。

[5] IAEA, Executive Summary, IAEA COMPREHENSIVE REPORT ON THE SAFETY REVIEW OF THE ALPS-TREATED WATER AT THE FUKUSHIMA DAIICHI NUCLEAR POWER STATION, International Atomic Energy Agency 2023 report, (visited on August 25, 2023), https://www.iaea.org/sites/default/files/iaea_comprehensive_alps_report.pdf.

月 13 日所发布的基本方针，在国际原子能机构的见证与监督下开始执行作业。[1]尽管如此，下文仅就前述国际原子能机构所提出的 ALPS 处理水报告中所存在的数项疑义，提出分析与质疑，祈请法学界先进不吝指正。

1.IAEA 从未“核准”ALPS 处理水排海计划

首先必须指出，在许多媒体关于国际原子能机构递交日本政府 ALPS 处理水审查报告的报道中，虽然都提到该国际组织“核准”（approve）日本政府相关作业计划，[2]但此种论述确实是项严重的误解。国际原子能机构秘书长葛罗西本人在向日本政府所递交的审查报告的前言部分（Director General’s Foreword），曾明确表述过下列立场：“Finally, I would like to emphasise that the release of the treated water stored at Fukushima Daiichi Power Station is a national decision by the Government of Japan and that this report is neither a recommendation nor an endorsement of that policy. However, I hope that all who have an interest in this decision will welcome the IAEA’s independent and transparent review, and I give an assurance, as I said right at the start of this process, that the IAEA will be there before, during and after the discharge of ALPS treated water.”[3] 由此可见，国际原子能机构从未“核准”ALPS 处理水排海计划。

此外，在日本政府决定开始向太平洋倾倒 ALPS 处理水前，国际原子能机构秘书长葛罗西于 2023 年 8 月 22 日发表声明，以下述文字“The Government of Japan announced today that it requested Tokyo Electric Power Company Holdings (TEPCO) to promptly proceed with its preparations for the discharge into the sea of ALPS treated water stored at the Fukushima Daiichi Nuclear Power Station, in accordance with the implementation plan approved by Japan’s Nuclear Regulation Authority.”重申，日本政府此举系依据该国原子能管制委员会（Nuclear Regulation Authority）所核准之计划，再度撇清责任表明立场。[4]但平心而论，由于国际原子能机构将会继续参与后续作业，此种误解恐怕愈来愈难以澄清。

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[1] Sinead Harvey, IAEA Office of Public Information and Communication, *IAEA Presents Monitoring Data from Japan on Treated Water Release from Fukushima Daiichi*, International Atomic Energy Agency official website, August 24, 2023, https://www.iaea.org/newscenter/news/iaea-presents-monitoring-data-from-japan-on-treated-water-release-from-fukushima-daiichi. *Japan: IAEA monitoring treated water release from Fukushima nuclear plant*, UN News, August 24, 2023, United Nations official website, https://news.un.org/en/story/2023/08/1140037.

[2] *Fukushima: wastewater from ruined nuclear plant to be released from Thursday, Japan says - Release plans approved by UN nuclear authority have caused outcry in China and concern for the reputation of Japan’s seafood*, The Guardian, August 22, 2023, https://www.theguardian.com/environment/2023/aug/22/fukushima-wastewater-from-ruined-nuclear-plant-to-be-released-from-thursday-japan-says. *The U.N.’s nuclear watchdog says Japan can release nuclear waste water into the ocean*, NPR, July 4, 2023, https://www.npr.org/2023/07/04/1185971497/the-u-n-s-nuclear-watchdog-says-japan-can-release-nuclear-waste-water-into-the-o. *Japan gets UN nuclear watchdog’s approval to discharge water from Fukushima disaster*, Financial Times, July 4, 2023, https://www.ft.com/content/e5ac3483-cd26-4764-999e-76e5386890d8. SAYUMI TAKE & STEVEN BOROWIEC, *IAEA gives Japan approval to release Fukushima water into Pacific*, Nikkei Asia, July 4, 2023, https://asia.nikkei.com/Spotlight/Environment/IAEA-gives-Japan-approval-to-release-Fukushima-water-into-Pacific.

[3] IAEA, Director General’s Foreword, IAEA COMPREHENSIVE REPORT ON THE SAFETY REVIEW OF THE ALPS-TREATED WATER AT THE FUKUSHIMA DAIICHI NUCLEAR POWER STATION, International Atomic Energy Agency 2023 report, (visited on August 25, 2023), https://www.iaea.org/sites/default/files/iaea_comprehensive_alps_report.pdf.

[4] *IAEA Director General Statement on Discharge of Fukushima Daiichi ALPS Treated Water*, International Atomic Energy Agency official website, August 22, 2023, https://www.iaea.org/newscenter/pressreleases/iaea-director-general-statement-on-discharge-of-fukushima-daiichi-alps-treated-water.

2.IAEA 协助评估 ALPS 处理水的管辖权存在法理争议

其次就要回头检视前述国际原子能机构报告中所主张的，该机构对于依据日本政府所提申请，协助评估 ALPS 处理水倾倒入海具有管辖权的立场，是否存在任何法理争议。就国际原子能机构基本规程第 3 条第 A 款第 6 项全文内容来说，该国际组织对建立各种核能安全规范标准具有管辖权，将此可以适用于评估 ALPS 处理水释放入海，这点基本上并不存在争议。但该项最后一段也提到：“at the request of a State, to any of that State’s activities in the field of atomic energy”（于一国请求时，适用于该国在原子能方面的任何活动），显然在适用性与主张管辖权上存在争议。

ALPS 处理水倾倒入海议题系源自核电厂安全事故灾变所致，并非正常核能运转作业所产生的问题。ALPS 处理水不是核电厂正常运作下所产生的物质，亦与原子能或核能发电正常运转流程毫无关系。所以 ALPS 处理水是否能够归属在核能领域，列入原子能方面的活动范畴，确实存在争议空间。

因此未来其他国家可能依据《国际原子能机构规约》第 17 条，[1]进行谈判或甚至提交至国际法院加以澄清，这种可能性确实不能被完全排除或是否认。

此外更要注意到，《联合国海洋法公约》并未同意授予任何国际组织或机构，在物质排放或倾倒至海洋的议题上，进行安全性审查或者提供权威性认证的权限。尽管国际原子能机构确实具有权威性，但就法论法，其若欲对此提出任何认证或是裁决，其实必须获得适当的法理基础，否则其公信力与认证结果将无法被各个当事国（party concerned）或利害关系国（stakeholder）所接受。所以国际原子能机构宣称对此议题具有管辖权，确实应当受到挑战与质疑。

3.ALPS 处理水排海应定位为“倾倒”（dumping）而非“排放”（discharge），适用《联合国海洋法公约》第 210 条

再者就要谈到国际原子能机构将释放 ALPS 处理水进入海洋，定位成“排放”（discharge）而非“倾倒”（dumping），基本上就是严重误用法理用辞。

《联合国海洋法公约》（United Nations Convention on the Law of the Sea）[2]共计使用

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[1] 《国际原子能机构规约》第 17 条：“

争端的解决

A.与本规约的解释或实施有关的任何问题或争端，未能以谈判方式解决，有关各方又未商定其他解决方法，则应按照国际法院的规约，提交国际法院。

B.在联合国大会授权下，机构的大会及理事会都有权请求国际法院，就机构活动范围内的任何法律问题发表咨询意见。”

[2] 本文所有《联合国海洋法公约》的英文版本内容系援引自 United Nations Convention on the Law of the Sea，United Nations official website，https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf，而相关中文版本则援引自《联合国海洋法公约》，植根法律网，https://www.rootlaw.com.tw/LawArticle.aspx?LawID=A040050070011500-0711210，2023 年 8 月 10 日访问。

discharge 一词 15 处。在使用 discharge 一词的条款中，有关“排放”物质的内容共计 12 处，其他 3 处则是有关“免除”法律责任，与释放可能造成污染的物质进入海洋毫无关系。而有关“排放”物质的内容分别位于第 42 条（海峡沿岸国关于过境通行的法律和规章）、第 194 条（防止减少和控制海洋环境污染的措施）、第 207 条（陆地来源的污染）、第 211 条（来自船只的污染）、第 218 条（港口国的执行）以及第 220 条（沿海国的执行）。其中除第 207 条外，其余条款皆是针对来自船舶所排放的污染物以及相应的应对和管制规范。

对于《联合国海洋法公约》可能适用于 ALPS 处理水的相关条款，许多论者都会援引第 207 条“陆地来源的污染（Pollution from land-based sources）”。[1]由于日本政府目前打算采取倾倒的方式处理 ALPS 处理水，其本质远超过《联合国海洋法公约》第 207 条“陆地来源的污染”的内容，属于来自于陆地，经过河流、河口湾、管道和排水口，经常性流入海洋的经常性污染源。这种因为核安灾变处理过程所累积的污染物质，就算是经过某些处理过程，除去部分放射性污染物质后的所谓的 ALPS 处理水，仍应归类于第 210 条“倾倒造成的污染（Pollution by dumping）”所涵盖规范项目。

因此若要适切定位日本政府向海洋所释放的 ALPS 处理水，真正应当援引的是《联合国海洋法公约》第 210 条“倾倒造成的污染（Pollution by dumping）”。[2]

在此必须严肃质疑日本政府在释放 ALPS 处理水问题上刻意使用“排放”（discharge）而非“倾倒”（dumping）字词，基本上就是刻意在规避国际法理责任与义务。一方面，《联合国海洋法公约》各个条款使用“排放”（discharge）字辞时，完全与陆地污染物释放入海毫无关系；另一方面，日本政府更是在刻意规避前述《联合国海洋法公约》第 210 条第 5 款所明确规范的条约责任与义务，即“非经沿海国事前明示核准，不应在领海和专属经济区内或在大陆架上进行倾倒，沿海国经与由于地理处境可能受倾倒不利影响的其他国家适当审议此事后，

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[1] 《联合国海洋法公约》第 207 条：“陆地来源的污染

1.各国应制定法律和规章，以防止、减少和控制陆地来源，包括河流、河口湾、管道和排水口结构对海洋环境的污染，同时考虑到国际上议定的规则、标准和建议的办法及程序。

2.各国应采取其他可能必要的措施，以防止、减少和控制这种污染。

3.各国应尽力在适当的区域一级协调其在这方面的政策。

4.各国特别应通过主管国际组织或外交会议采取行动，尽力制订全球性和区域性规则、标准和建议的办法及程序，以防止、减少和控制这种污染，同时考虑到区域的特点，发展中国家的经济能力及其经济发展的需要。这种规则、标准和建议的办法及程序应根据需要随时重新审查。

5.第一、第二和第四款提及的法律、规章、措施、规则、标准和建议的办法及程序，应包括旨在在最大可能范围内尽量减少有毒、有害或有碍健康的物质，特别是持久不变的物质，排放到海洋环境的各种规定。”

[2] 《联合国海洋法公约》第 210 条：“倾倒造成的污染

1.各国应制定法律和规章，以防止、减少和控制倾倒对海洋环境的污染。

2.各国应采取其他可能必要的措施，以防止、减少和控制这种污染。

3.这种法律、规章和措施应确保非经各国主管当局准许，不进行倾倒。

4.各国特别应通过主管国际组织或外交会议采取行动，尽力制订全球性和区域性规则、标准和建议的办法及程序，以防止、减少和控制这种污染。这种规则、标准和建议的办法及程序应根据需要随时重新审查。

5.非经沿海国事前明示核准，不应在领海和专属经济区内或在大陆架上进行倾倒，沿海国经与由于地理处境可能受倾倒不利影响的其他国家适当审议此事后，有权准许、规定和控制这种倾倒。

6.国内法律、规章和措施在防止、减少和控制这种污染方面的效力应不低于全球性规则和标准。”

有权准许、规定和控制这种倾倒。”

在此基础上，由于 IAEA 在 ALPS 处理水审查报告中使用“排放”（discharge）而非“倾倒”（dumping），日本政府更是在对外机构网站中以下列答问方式，公然否认周边国家依据《联合国海洋法公约》所应享有权利：

问题（11）：若根据联合国海洋法公约等法规规定，在决定方针前，是否应先获得邻近各国的理解？

回答：

• ALPS 处理水的海洋排放与各国核电厂的排水相同，皆遵循《联合国海洋法公约》等国际法，及依据国际法和国际标准制定的国内管制标准，并在最大限度考量环境安全及人体健康的前提之下进行。目前并不存在任何条约或法规，规定进行海洋排放前必须事先取得他国理解。

• 尽管如此，日本政府至今已透过各种方式向国际社会提供资讯，除了向邻近各国驻日机构进行说明，也安排适当场合多次向各国进行个别说明。未来，日本政府仍将秉持资讯透明的原则，持续向外界传达具有科学根据的详尽资讯。

而其所依据的理由，就是将释放 ALPS 处理水进入海洋定位为“排放”（discharge）而非“倾倒”（dumping）。[1]

在此必须强调，日本政府也承认 ALPS 处理水并非任何核能电厂正常运转所产生的物质，其在前述问答集中亦坦承指出：

问题(15)：前述问答内容提及世界各国核电厂亦将处理水排放入海，那么其他国家的核电厂是否也采用与 ALPS 相同的处理方式（ALPS 处理）？

回答：

• 多核种除去设备（ALPS：Advanced Liquid Processing System）是专为东京电力福岛第一核电厂核反应炉机房内产生的污染水（机房滞留水）所开发的净化处理设备，因此其他国家或地区的核电厂并没有使用相同设备处理放射性液体废弃物的案例。不过，其他国家或地区亦会透过蒸馏等方式对核反应炉产生的放射性液体废弃物进行净化处理，并在处理后确认废弃物是否符合各国管制标准，再排放入海。

• IAEA 署长葛罗西亦在声明中表示“日本选择的海洋排放方式具有技术可行性，且符合国际惯例”、“经控管的海洋排放是世界各国核电厂日常性实施的方式”。

• 此外，即使是正常运作的核电厂，所排放的废水中亦含有氚以外的放射性物质。无论采用何种处理方式，关键应在于该方式是否具有科学根据，并遵循国际标准进行处理。

[1] 《常見問答集：東京電力福島第一核電廠的 ALPS 處理水》，公益财团法人日本台湾交流协会官方网页，https://www.koryu.or.jp/tw/publications/alps/qa/，2023 年 7 月 10 日访问。

由此更能证明，ALPS 处理水的基本属性为特例，而非核能设施正常运转下的经常性产品。[1]再加上 ALPS 处理水累积的惊人数量，从任何角度来看，将其释放入海都应定位成“倾倒”（dumping）而非“排放”（discharge）；并且受《联合国海洋法公约》第 210 条第 5 款的规范。而且前述第 11 题问答中，日本政府宣称“ALPS 处理水的海洋排放与各国核电厂的排水相同”，只要对照第 15 题问答所称“其他国家或地区的核电厂并没有使用相同设备处理放射性液体废弃物的案例”，就可以看出日本政府前后回答相互矛盾，存心以“排放”（discharge）取代“倾倒”（dumping）这一正确用辞，反应了其欲通过鱼目混珠欺瞒国际社会的意图。

而且从日本政府所公布的有关 ALPS 处理水释放入海的资讯以及国际原子能机构所提出的报告来看，前述曲解用辞导致相关用语更加充满争议。例如，对于东京电力所构筑的将 ALPS 处理水释放入海的管道，虽然日本政府以 tunnel 称之，而释放入海出口则以 outlet 命名，但就其作业本质来说，对比《联合国海洋法公约》的各项用语，应参照第 207 条“陆地来源的污染”（Pollution from land-based sources），将其称为“管道和排水口结构”（pipelines and outfall structures），这才是正确用辞。

4.日本政府和 IAEA 选择和评估处置方案的过程存在漏洞

最后还要质疑国际原子能机构与日本政府，除倾倒至海洋外，难道没有其他更理想的处置方式吗？特别是国际原子能机构未曾同时审视其他可能的处理方案，是否有亏于国际组织本身应维护的信誉？其实到目前为止，国际社会不乏提出其他替代方案者。[2]不论是国际原子能机构或是日本政府，都应当在检视过所有可能的处置方案后，依据各项利弊得失，选取出国际社会最能够接受的处置方案，而不是仅将视野聚焦在倾倒至海洋，还将其作为唯一选项，刻意无视其他处置方案。

尽管日本政府声称其曾经审视过五种处置方案，[3]然后才决心将核污染废水处理后倾倒至海洋，但其整个决策与评估过程并未对外公开，而且国际原子能机构也未对其他处置方案提出审查意见，因此笔者有充分理由合理怀疑整个评估处置方案作业是否完备周延。

三、未来应对法理争议的努力方向

日本政府不顾国际社会反对声浪，刻意规避《联合国海洋法公约》规范，与国际原子能

[1] 同前注。

[2] See Robert H. Richmond, *Alternatives to dumping Fukushima wastewater into the Pacific*, 360info, Monash University, April 14, 2023, https://360info.org/alternatives-to-dumping-fukushima-wastewater-into-the-pacific/. Ferenc Dalnoki-Veress. *Concrete Alternative: A Better Solution for Fukushima's Contaminated Water Than Ocean Dumping*, James Martin Center for Nonproliferation Studies, Middlebury Institute of International Studies at Monterey, June 16, 2023. Julian Ryall, *Did Japan ignore viable alternatives of dumping contaminated Fukushima water?*, South China Morning Post, April 15, 2021, https://www.scmp.com/week-asia/politics/article/3129641/did-japan-ignore-viable-alternatives-dumping-contaminated. Henry Puna, *Japan must work with the Pacific to find a solution to the Fukushima water release issue - otherwise we face disaster*, The Guardian, 4 Jane 2023, (visited on July 20, 2023), https://www.theguardian.com/commentisfree/2023/jan/04/japan-must-work-with-the-pacific-to-find-a-solution-to-the-fukushima-water-release-issue-otherwise-we-face-disaster.

[3] *Did Japan ignore viable alternatives of dumping contaminated Fukushima water?* Ibid.

机构私相授受下达成协议，最后造成国际社会对此相互对立。[1]对此，必须坚持依据《联合国海洋法公约》第 210 条第 5 款的规定，对于任何 311 地震福岛第一核电厂应变处置所产生的物质，不论经过任何处置过程再释放至海洋，都应视为向海洋倾倒（dumping）而非正常排放（discharge）。

同时基于《联合国海洋法公约》第 210 条第 5 款的规定，应当首先确认可能受到日本倾倒核污染废水不利影响的国家名单。尽管目前国际社会许多国家针对日本政府将所谓 ALPS 处理水倾倒海洋的问题都曾经公开表示疑虑，但到目前为止，并未针对这种倾倒物质的行为可能影响到的国家或是地区，甚至是地理涵盖范围，列出具体名单。因此也无法据此名单采取集体行动，要求日本政府回应此等国家或地区的共同期待。至于这份受到影响国家或地区的名单的确定，究竟是要采用较为狭义的倾倒物质可能扩散所及海域的沿海国，抑或是相对广义的定义方式，诸如从受影响国家进口海洋水产品，或是捞捕特定洄游至受影响海域鱼种的国家都要列入名单内，这就见仁见智，但都必须思考合理涵盖范围。

其次必须确认，日本政府在程序上是否依据《联合国海洋法公约》第 210 条第 5 款的规定，在“准许、规定和控制这种倾倒”之前，曾经过此等国家的“适当”审议。在此必须强调，日本政府必须先对如何“准许、规定和控制这种倾倒”提出完整规范方案，然后各个当事国或是利害相关国据此进行审议，否则在没有任何具体草案作为依据的状况下，根本就无法进行适当审议。所谓审议不是毫无具体依据就去开张空白支票给东京，然后日本政府就可以任意作为。日本政府与东京电力必须提出如何“准许、规定和控制这种倾倒”的相关细节与完整方案。

同时在审议阶段，假若各个当事国或是利害相关国以授权或是委托方式敦请国际原子能机构提供专业协助，此时该专业国际组织才算是对此项倾倒活动获得某种程度的管辖权，甚至在各个当事国或是利害相关国的同意与支持下，才能获得适当审议与同意日本政府相关倾倒措施与规范的权限。

最后需要指出的是，整个问题的关键在于日本政府必须承认，对于 311 震灾后福岛第一核电厂事故应变处置时所产生污染废水，东京电力株式会社不论经过何种方式处理和净化，甚或是处理水所含辐射物被稀释到达何种程度，也不管将此物质如何称呼，更不论整个作业期程有多长，只要是释放进入海洋，就不是核能电厂正常运作的“排放”（discharge）海洋作业，此种作业被承认为“倾倒”（dumping）可能产生污染的物质进入海洋，所以必须接受《联

[1] See *Discharge of radioactive water of the Fukushima Daiichi Nuclear Power Plant*, Wikipedia, https://en.wikipedia.org/wiki/Discharge_of_radioactive_water_of_the_Fukushima_Daiichi_Nuclear_Power_Plant；或是前述资料中文版本《福岛核废水排放问题》，维基百科，https://zh.wikipedia.org/wiki/%E7%A6%8F%E5%B3%B6%E6%A0%B8%E5%BB%A2%E6%B0%B4%E6%8E%92%E6%94%BE%E5%95%8F%E9%A1%8C，2023 年 7 月 23 日访问。

合国海洋法公约》第 210 条第 5 款的规范。

日本政府倾倒 ALPS 处理水进入海洋的作业期程预计将长达 30 年，未来究竟会产生多严重的后遗症，其实国际原子能机构对此也没有任何把握，所以才会与日本政府达成协议，继续派员进驻福岛第一核电厂。所以在此必须呼吁，此项争议绝对不能因为日本政府不顾反对开始作业，就放弃继续在法理战线上的据理力争。如果未来能证明日本政府与国际原子能机构未能周延考虑处理水倾倒议题，其实是很有机会将其翻案的。

Doubts about IAEA Report of ALPS-Treated Water at Fukushima

ZHANG Jing*

Abstract: To handle the large amount of nuclear-contaminated water at the Fukushima Daiichi nuclear power plant, the Japanese government developed ALPS to treat the relevant wastewater. On 24 August 2023, they began to dump the diluted ALPS-treated water into the ocean. IAEA, however, has never "approved" Japan's plan to dump the ALPS-treated water into the sea, and there are jurisprudential disputes over the IAEA's jurisdiction in assessing the ALPS-treated water. The Japanese government and ALPS have even attempted to evade international legal responsibilities and obligations by deliberately using the term "discharge" instead of "dumping". To address this issue in a correct way, countries that may be adversely affected by the dumping of nuclear-contaminated wastewater by Japan should be confirmed and listed before urging IAEA, either by authorization or by commission, to provide professional assistance to review the Japanese Government's disposal plan.

Keywords: IAEA; ALPS-treated water; UNCLOS

I. Origins of the IAEA Report of ALPS-Treated Water at Fukushima

On 11 March 2011, a near-sea earthquake occurred in the Tohoku Pacific region of Japan, triggering a tsunami that caused severe damage to the cooling system of the Fukushima Daiichi Nuclear Power Plant in Okuma, Futaba District, Fukushima Prefecture. It may even lead to a meltdown in the reactor cores. The Japanese government, while handling the crisis, injected a large amount of cooling water, resulting in a large amount of contaminated wastewater.

To deal with and purify the contaminated water generated from the crisis response process (stagnant water in the reactor building), the Japanese government developed a specially designed system called the Advanced Liquid Processing System (hereinafter ALPS) for the Tokyo Electric Fukushima Daiichi Nuclear Power Plant. This system is used for the purification treatment of the relevant wastewater. The treated water produced during this process is referred to as ALPS-treated water.[1]

On 13 April 2021, the Japanese government released a policy document titled "Basic Policy on Handling of ALPS Treated Water at the Tokyo Electric Power Company Holdings' Fukushima

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[1] *Results of the Radiological Impact Assessment of Marine Discharges of Treated Water from Multi-Nuclear Species Removal Facilities, etc. (ALPS Treated Water) (Construction Phase) (Revised May 2023)*, Tokyo Electric Power Holdings, Inc. website, (visited on 25 August 2023), https://www.tepco.co.jp/zh-tw/decommission/progress/watertreatment/images/ria_20220630tw.pdf.

Daiichi Nuclear Power Station". This document officially decided to dump 1.2 million tons of diluted ALPS-treated water into the ocean, expecting to begin in 2023.[1]

Subsequently, the Japanese government submitted an application to the International Atomic Energy Agency (hereinafter IAEA) requesting their assistance in evaluating whether the aforementioned ALPS-treated water stored at the Fukushima Daiichi Nuclear Power Station meets international safety standards. In accordance with ARTICLE III, Section A, Item 6 of the Statute of the IAEA,[2] IAEA Director General Rafael Grossi agreed to accept the Japanese government's request for assistance and pledged to be involved in the relevant operations before, during, and after the discharge of ALPS treated water.[3] The review process began after the Terms of Reference (ToR) was signed by both parties in July 2021.[4]

After completing the investigation and review on 4 July 2023, IAEA compiled a report titled "IAEA COMPREHENSIVE REPORT ON THE SAFETY REVIEW OF THE ALPS-TREATED WATER AT THE FUKUSHIMA DAIICHI NUCLEAR POWER STATION". The report was submitted to the Prime Minister of Japan, Fumio Kishida, by the Secretary-General of the IAEA, Rafael Grossi. The report focuses on the legal basis of the IAEA's review, quoting specific words from the mentioned provisions: "To establish or adopt, in consultation and, where appropriate, in collaboration with the competent organs of the United Nations and with the specialized agencies concerned, standards of safety for protection of health and minimization of danger to life and property (including such standards for labour conditions), … and to provide for the application of these standards, … at the request of a State, to any of that State's activities in the field of atomic energy." Therefore, undoubtedly, a simple examination of the aforementioned text will be able to find out whether IAEA's review of the ALPS water treatment operation has the legal basis.[5]

II. Jurisprudential Disputes About IAEA Report of ALPS-Treated Water at

[1] IAEA, Executive Summary， IAEA COMPREHENSIVE REPORT ON THE SAFETY REVIEW OF THE ALPS-TREATED WATER AT THE FUKUSHIMA DAIICHI NUCLEAR POWER STATION, International Atomic Energy Agency 2023 report, (visited on 25 August 2023), https://www.iaea.org/sites/default/files/iaea_comprehensive_alps_report.pdf.

[2] ARTICLE III, Section A, Item 6 of the Statute of the IAEA:"

The Agency is authorized:

...

6. To establish or adopt, in consultation and, where appropriate, in collaboration with the competent organs of the United Nations and with the specialized agencies concerned, standards of safety for protection of health and minimization of danger to life and property (including such standards for labour conditions), and to provide for the application of these standards to its own operations as well as to the operations making use of materials, services, equipment, facilities, and information made available by the Agency or at its request or under its control or supervision; and to provide for the application of these standards, at the request of the parties, to operations under any bilateral or multilateral arrangement, or, at the request of a State, to any of that State's activities in the field of atomic energy."

The Statute of the IAEA, International Atomic Energy Agency official website, (visited on 25 August 2023), https://www.iaea.org/about/statute.

[3] Ibid.

[4] Ibid. Also see the Atomic Energy Council (Taiwan, China), *Note by the Atomic Energy Council in response to the release by IAEA of the Summary Report of the Expert Mission on the Review of the Tritium Containing Wastewater Discharge Plan for the Fukushima Nuclear Disaster in Japan*, the Atomic Energy Council official website, 4 July 2023.

[5] IAEA, Executive Summary, IAEA COMPREHENSIVE REPORT ON THE SAFETY REVIEW OF THE ALPS-TREATED WATER AT THE FUKUSHIMA DAIICHI NUCLEAR POWER STATION, International Atomic Energy Agency 2023 report, (visited on 25 August 2023), https://www.iaea.org/sites/default/files/iaea_comprehensive_alps_report.pdf.

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After receiving the report from the IAEA, the Japanese government carried out the operation on 24 August 2023, under the supervision and monitoring of the agency, based on the basic policy it announced on 13 April 2021.[1] Nonetheless, the following is only an analysis questioning several points mentioned in the IAEA report of ALPS-treated water, and the author would like to hear different opinions from the legal community and embrace criticism.

1. IAEA Never "Approved" ALPS-Treated Water Dumping Plan

First, it must be pointed out that many news reports on the submission of the ALPS-treated water review report by IAEA to the Japanese government mention the organization "approving" Japan's related operational plans,[2] but this statement is indeed a serious misunderstanding. In the Director General's Foreword of the IAEA report submitted to the Japanese government, Rafael Grossi, the Director General of IAEA clearly stated the following position: "Finally, I would like to emphasise that the release of the treated water stored at Fukushima Daiichi Power Station is a national decision by the Government of Japan and that this report is neither a recommendation nor an endorsement of that policy. However, I hope that all who have an interest in this decision will welcome the IAEA's independent and transparent review, and I give an assurance, as I said right at the start of this process, that the IAEA will be there before, during and after the discharge of ALPS treated water."[3] The statement makes it clear that IAEA has never approved to discharge ALPS-treated water into the ocean.

In addition, prior to the Japanese government's decision to begin dumping ALPS-treated water in the Pacific Ocean, IAEA Secretary General Rafael issued a statement on 22 August 2023, reiterating that the Japanese Government's move was based on a plan approved by the Japanese Nuclear Regulation Authority, and once again disassociating itself from the responsibility for the decision, as described below: "The Government of Japan announced today that it requested Tokyo Electric Power Company Holdings (TEPCO) to promptly proceed with its preparations for the

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[1] Sinead Harvey, IAEA Office of Public Information and Communication, *IAEA Presents Monitoring Data from Japan on Treated Water Release from Fukushima Daiichi*, International Atomic Energy Agency official website, 24 August 2023, https://www.iaea.org/newscenter/news/iaea-presents-monitoring-data-from-japan-on-treated-water-release-from-fukushima-daiichi. *Japan: IAEA monitoring treated water release from Fukushima nuclear plant*, UN News, 24 August 2023, United Nations official website, https://news.un.org/en/story/2023/08/1140037.

[2] *Fukushima: wastewater from ruined nuclear plant to be released from Thursday, Japan says - Release plans approved by UN nuclear authority have caused outcry in China and concern for the reputation of Japan's seafood*, The Guardian, 22 August 2023, https://www.theguardian.com/environment/2023/aug/22/fukushima-wastewater-from-ruined-nuclear-plant-to-be-released-from-thursday-japan-says. *The U.N.'s nuclear watchdog says Japan can release nuclear waste water into the ocean*, NPR, 4 July 2023, https://www.npr.org/2023/07/04/1185971497/the-u-n-s-nuclear-watchdog-says-japan-can-release-nuclear-waste-water-into-the-o. *Japan gets UN nuclear watchdog's approval to discharge water from Fukushima disaster*, Financial Times, 4 July 2023, https://www.ft.com/content/e5ac3483-cd26-4764-999e-76e5386890d8. SAYUMI TAKE & STEVEN BOROWIEC, *IAEA gives Japan approval to release Fukushima water into Pacific*, Nikkei Asia, 4 July 2023, https://asia.nikkei.com/Spotlight/Environment/IAEA-gives-Japan-approval-to-release-Fukushima-water-into-Pacific.

[3] IAEA, Director General's Foreword, IAEA COMPREHENSIVE REPORT ON THE SAFETY REVIEW OF THE ALPS-TREATED WATER AT THE FUKUSHIMA DAIICHI NUCLEAR POWER STATION, International Atomic Energy Agency 2023 report, (visited on 25 August 2023), https://www.iaea.org/sites/default/files/iaea_comprehensive_alps_report.pdf.

discharge into the sea of ALPS treated water stored at the Fukushima Daiichi Nuclear Power Station, in accordance with the implementation plan approved by Japan's Nuclear Regulation Authority."[1] However, to be frank, due to the continued involvement of the IAEA in the subsequent operations, it may become increasingly difficult to correct this misunderstanding.

2. Disputes over Whether IAEA Has the Jurisdiction to Assess ALPS-treated Water

Second, we need to examine the position of IAEA as stated in the previous report, regarding their jurisdiction to assist in evaluating the dumping of ALPS-treated water into the ocean based on the application submitted by the Japanese government. We need to determine whether there are any jurisprudential disputes regarding this matter. According to ARTICLE III, Section A, Item 6 of the Statute of the IAEA, IAEA has jurisdiction over establishing various nuclear safety standards. This can be applied to the evaluation of releasing ALPS-treated water into the ocean, which is generally a common understanding. However, the last paragraph also mentions "at the request of a State, to any of that State's activities in the field of atomic energy", which clearly raises questions about the applicability and jurisdictional claims.

The issue of ALPS-treated water being dumped into the ocean stems from a nuclear power plant accident, rather than from normal operation of nuclear energy. ALPS-treated water is not a substance generated during the normal operation of a nuclear power plant, nor does it have to do with the regular processes of atomic energy or nuclear power generation. Therefore, there is indeed room for debate over whether ALPS-treated water should be classified within the field of nuclear energy and fall into the scope of activities related to atomic energy.

As a result, it is possible that other countries may negotiate or even submit the matter to the International Court of Justice for clarification, in accordance with Article 17 of the Statute of the IAEA.[2] This possibility cannot be completely ruled out or denied.

Furthermore, the United Nations Convention on the Law of the Sea does not agree to grant any international organization or institution the authority to conduct safety reviews or provide authoritative certification on the issue of material emissions or dumping into the ocean. IAEA is indeed trustworthy, but, according to legal doctrine, it must have a proper legal basis in order to present any certification or ruling on this matter. Otherwise, its credibility and certification results

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[1] *IAEA Director General Statement on Discharge of Fukushima Daiichi ALPS Treated Water*, International Atomic Energy Agency official website, 22 August 2023, https://www.iaea.org/newscenter/pressreleases/iaea-director-general-statement-on-discharge-of-fukushima-daiichi-alps-treated-water.

[2] ARTICLE XVII of the Statute of the IAEA:"

Settlement of disputes

Any question or dispute concerning the interpretation or application of this Statute which is not settled by negotiation shall be referred to the International Court of Justice in conformity with the Statute of the Court, unless the parties concerned agree on another mode of settlement.

B. The General Conference and the Board of Governors are separately empowered, subject to authorization from the General Assembly of the United Nations, to request the International Court of Justice to give an advisory opinion on any legal question arising within the scope of the Agency's activities."

will not be accepted by the parties concerned or stakeholders. Therefore, the claim by the International Atomic Energy Agency to have jurisdiction over this issue should indeed be challenged and questioned.

3. Release of ALPS-treated Water Should Be Regarded as "Dumping" Rather Than "Discharge", in Application of Article 210 of UNCLOS

IAEA viewed the release of ALPS-treated water into the ocean as "discharge" rather than "dumping", which is totally a misuse of legal terminology.

The term "discharge" is used 15 times in the United Nations Convention on the Law of the Sea (hereinafter UNCLOS)[1] Of the articles that include the term, 12 articles relate to the "discharge" of substances, while the remaining 3 articles relate to the "exemption" of legal liability, which are not relevant to the discharge of potentially polluting substances into the ocean. The issues about "discharge" of substances include Article 42 (Laws and regulations of States bordering straits relating to transit passage), Article 194 (Measures to prevent, reduce and control pollution of the marine environment), Article 207 (Pollution from land-based sources), Article 211 (Pollution from vessels), Article 218 (Enforcement by port States), Article 220 (Enforcement by coastal States). Except for Article 207, all of these articles are directly related to pollution caused by ships and the corresponding regulations and measures to reduce the pollution.

When discussing the possible application of the convention to the treatment of ALPS-treated water, many scholars often cite Article 207 (Pollution from land-based sources) of UNCLOS.[2] The Japanese government's current plan to dispose of the ALPS-treated water through dumping far exceeds the scope of Article 207, which specifically addresses pollution from land-based sources. This type of pollution, which originates from land and normally flows into the ocean through rivers, estuaries, pipelines, and outfalls, can be classified as persistent pollution covered by Article 210 of UNCLOS, which addresses pollution caused by dumping. Despite undergoing certain treatment

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[1] All references herein to the English version of the United Nations Convention on the Law of the Sea have been taken from United Nations Convention on the Law of the Sea , United Nations official website , https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf., and the relevant Chinese version is cited herein from the United Nations Convention on the Law of the Sea, Rooted in Law, (visited on 10 August 2023), https://www.rootlaw.com.tw/LawArticle.aspx?LawID=A040050070011500-0711210.

[2] Article 207 of the United Nations Convention on the Law of the Sea:"

Pollution from land-based sources

1. States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources, including rivers, estuaries, pipelines and outfall structures, taking into account internationally agreed rules, standards and recommended practices and procedures.

2. States shall take other measures as may be necessary to prevent, reduce and control such pollution.

3. States shall endeavour to harmonize their policies in this connection at the appropriate regional level.

4. States, acting especially through competent international organizations or diplomatic conference, shall endeavour to establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control pollution of the marine environment from land-based sources, taking into account characteristic regional features, the economic capacity of developing States and their need for economic development. Such rules, standards and recommended practices and procedures shall be re-examined from time to time as necessary.

5. Laws, regulations, measures, rules, standards and recommended practices and procedures referred to in paragraphs 1, 2 and 4 shall include those designed to minimize, to the fullest extent possible, the release of toxic, harmful or noxious substances, especially those which are persistent, into the marine environment."

processes to remove some radioactive pollutants, the so-called ALPS-treated water still falls under the category of pollution caused by dumping.

Therefore, if we want to see through the Japanese behavior of releasing ALPS-treated water into the ocean, Article 210 of the UNCLOS, "Pollution by dumping", should be cited.[1]

Here the author believes that the deliberate use of the word "discharge" instead of "dumping" by the Japanese government in the issue of releasing ALPS treated water is essentially an attempt to evade international legal responsibilities and obligations. The use of the word "discharge" in various provisions of the UNCLOS has no relation to the release of land-based pollutants into the ocean. The Japanese government is deliberately evading the treaty responsibilities and obligations explicitly regulated in Article 210, paragraph 5 of the aforementioned Convention, which says: "Dumping within the territorial sea and the exclusive economic zone or onto the continental shelf shall not be carried out without the express prior approval of the coastal State, which has the right to permit, regulate and control such dumping after due consideration of the matter with other States which by reason of their geographical situation may be adversely affected thereby."

On this basis, since the IAEA used the word "discharge" instead of "dumping" in IAEA Report of ALPS-Treated Water, the Japanese government openly denied the rights of the neighboring countries under UNCLOS in the question-and-answer session on the website of its external agencies:

> Question (11): Should Japan try to obtain understanding and support from neighboring countries before making the decision in accordance with UNCLOS and other regulations?
>
> Answer:
>
> ·The ocean discharge of ALPS-treated water is the same as the wastewater discharge from nuclear power plants in other countries. It follows international laws such as the United Nations Convention on the Law of the Sea and domestic regulatory standards developed based on international laws and standards, and this decision is based on considerations on environmental safety and human health to the maximum extent. There are currently no treaties or regulations stipulating that understanding from other countries shall be obtained before conducting ocean discharge.

[1] Article 207 of the United Nations Convention on the Law of the Sea:

Pollution by dumping

1. States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment by dumping.

2. States shall take other measures as may be necessary to prevent, reduce and control such pollution.

3. Such laws, regulations and measures shall ensure that dumping is not carried out without the permission of the competent authorities of States.

4. States, acting especially through competent international organizations or diplomatic conference, shall endeavour to establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control such pollution. Such rules, standards and recommended practices and procedures shall be re-examined from time to time as necessary.

5. Dumping within the territorial sea and the exclusive economic zone or onto the continental shelf shall not be carried out without the express prior approval of the coastal State, which has the right to permit, regulate and control such dumping after due consideration of the matter with other States which by reason of their geographical situation may be adversely affected thereby.

6. National laws, regulations and measures shall be no less effective in preventing, reducing and controlling such pollution than the global rules and standards.

·Despite this, the Japanese government has been providing information to the international community through various means. In addition to explaining to the diplomatic missions of neighboring countries in Japan, the Japan government has also explained to other countries in multiple occasions. In the future, the Japanese government will continue to uphold the principle of information transparency and disclose detailed information based on scientific evidence.

The underlying reason for their answer is that they regard the release of ALPS treated water into the ocean as "discharge" rather than "dumping".[1]

It must be emphasized that the Japanese government also acknowledges that the ALPS-treated water is not a substance generated by the normal operation of any nuclear power plant, as stated in the aforementioned question-and-answer session:

Question (15): Are other countries' nuclear power plants using the same treatment method as ALPS to discharge treated wastewater into the sea?

Answer:

·The ALPS (Advanced Liquid Processing System) is a purification treatment equipment developed specifically for the contaminated water (stagnant water in the reactor building) generated inside the reactor building of the Tokyo Electric Fukushima Daiichi Nuclear Power Plant. Therefore, there are no cases of other countries or regions' nuclear power plants using the same equipment to treat radioactive liquid waste. However, other countries or regions also purify the radioactive liquid waste generated by nuclear reactors through methods such as distillation, and then confirm whether the waste meets national regulatory standards before discharging it into the sea.

·In the statement, IAEA Director General Rafael Grossi expressed that "Japan's chosen method of ocean discharge is technically feasible and in line with international practices" and that "controlled ocean discharge is a routine practice in nuclear power plants worldwide."

·Additionally, even in normal operations, the wastewater from nuclear power plants contains radioactive substances other than tritium. The key consideration should be whether the chosen method is scientifically justified and follows international standards for treatment.

This further proves that ALPS-treated water is unusual, not the regular product under normal operation of nuclear facilities.[2] In addition, considering the enormous amount of accumulated water treated by ALPS, it can be seen from any perspective that its release into the sea should be viewed as "dumping" rather than "discharge", and should comply with Article 210(5) of UNCLOS. Furthermore, in the aforementioned question-and-answer session (question 11), the Japanese government claims that "the ocean discharge of ALPS-treated water is the same as the wastewater

[1] *Frequently Asked Questions: TEPCO Fukushima Daiichi ALPS Treated Water*, Japan-Taiwan Exchange Association Official Website, (visited on 10 July 2023), https://www.koryu.or.jp/tw/publications/alps/qa/.

[2] Ibid.

discharge from nuclear power plants in other countries," but comparing it with the statement in question 15 that "there are no cases of other countries or regions' nuclear power plants using the same equipment to treat radioactive liquid waste," it can be seen that the Japanese government's answers are contradictory to each other, intentionally replacing the correct term "dumping" with "discharge", reflecting its intention to deceive the international community by confusing the facts.

Furthermore, based on the information released by the Japanese government regarding the release of ALPS-treated water into the ocean and the reports presented by IAEA, the aforementioned misinterpretations have led to even more controversy over the terminology used. For instance, in regards to the pipeline constructed by Tokyo Electric Power Company to release ALPS-treated water into the ocean, the Japanese government refers to it as a "tunnel", and the outlet for the release into the ocean is named "outlet", but the correct term should be "pipelines and outfall structures" in accordance with Article 207 of UNCLOS "Pollution from land-based sources".

4. Loopholes in the Process of Selecting and Evaluating Disposal Options by the Japanese Government and IAEA

Finally, the author also questions IAEA and the Japanese government on this matter. Are there no other more ideal methods of disposal besides dumping into the ocean? In particular, since IAEA has not simultaneously considered other possible disposal methods, is it lacking in the credibility that international organizations should uphold? In fact, up to now, there have been alternative proposals from the international community.[1] Both IAEA and the Japanese government should examine all possible disposal methods and select the most acceptable one for the international community based on the pros and cons, rather than solely focusing on dumping into the ocean and deliberately ignoring other disposal methods.

Although the Japanese government claims to have examined five disposal options before deciding to dump the treated radioactive wastewater into the ocean,[2] the entire decision-making and assessment process has not been made public. Furthermore, IAEA has not provided any review comments on other disposal options. Therefore, the author has every good reason to cast doubts on the comprehensiveness of the entire assessment and disposal plan.

III. Future Efforts to Respond to Jurisprudential Disputes

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[1] See Robert H. Richmond, *Alternatives to dumping Fukushima wastewater into the Pacific*, 360info, Monash University, 14 April 2023, https://360info.org/alternatives-to-dumping-fukushima-wastewater-into-the-pacific/. Ferenc Dalnoki-Veress. *Concrete Alternative: A Better Solution for Fukushima's Contaminated Water Than Ocean Dumping*, James Martin Center for Nonproliferation Studies, Middlebury Institute of International Studies at Monterey, June 16, 2023. Julian Ryall, *Did Japan ignore viable alternatives of dumping contaminated Fukushima water?*, South China Morning Post, 15 April 2021, https://www.scmp.com/week-asia/politics/article/3129641/did-japan-ignore-viable-alternatives-dumping-contaminated. Henry Puna, *Japan must work with the Pacific to find a solution to the Fukushima water release issue - otherwise we face disaster*, The Guardian, 4 June 2023, (visited on 20 July 2023), https://www.theguardian.com/commentisfree/2023/jan/04/japan-must-work-with-the-pacific-to-find-a-solution-to-the-fukushima-water-release-issue-otherwise-we-face-disaster.

[2] *Did Japan ignore viable alternatives of dumping contaminated Fukushima water?* Ibid.

The Japanese government, ignoring the opposition from the international community, deliberately evaded the regulations of UNCLOS and reached an agreement with the International Atomic Energy Agency, resulting in a mutual confrontation in the international community.[1] In this regard, it is necessary to adhere to the provisions of Article 210, paragraph 5 of UNCLOS, and consider any material generated from the response and disposal of the Fukushima Daiichi Nuclear Power Plant after the 311 earthquake as dumping into the ocean rather than normal discharge, no matter what kind of disposal process the material has undergone.

Based on Article 210, paragraph 5 of UNCLOS, top priority should be given to making a list of countries that may be adversely affected by the disposal of nuclear contaminated wastewater by Japan. Although many countries in the international community have openly expressed concerns regarding the Japanese government's plan to dispose of the ALPS-treated water into the ocean, there has been no specific list of countries or regions, or even geographic coverage, that may be affected by the dumping. As a result, it is impossible for these countries or regions to take collective action based on this list to demand a response from the Japanese government regarding their concerns. As for how to nail down the list of affected countries or regions, it is a matter of perspective. A reasonable scope of coverage should be determined as to whether only coastal countries that are affected by the possible spread of dumped substances can be included, or, in a broader sense, countries that import marine products from affected countries and countries that fish for specific migratory fish species in affected areas can also be included.

Secondly, it is important to confirm whether the Japanese government, in accordance with Article 210, paragraph 5 of UNCLOS, has procedurally undergone due consideration by such States before "permitting, regulating and controlling such dumping". It is crucial to emphasize that the Japanese government must first propose a comprehensive regulatory plan on how to "permit, regulate and control such dumping". Then, all relevant countries or stakeholders can review and discuss based on this plan. Without any specific draft in advance, due consideration cannot be conducted. The due consideration does not mean giving Tokyo a blank check without any concrete basis, allowing the Japanese government to act arbitrarily. The Japanese government and Tokyo Electric Power Company must present the relevant details and complete plan on how to "permit, regulate and control such dumping".

At the same time, during the review stage, if each party or relevant country authorizes or delegates the IAEA to provide professional assistance, then this professional international

[1] See *Discharge of radioactive water of the Fukushima Daiichi Nuclear Power Plant*, Wikipedia, https://en.wikipedia.org/wiki/Discharge_of_radioactive_water_of_the_Fukushima_Daiichi_Nuclear_Power_Plant; or the Chinese version of the foregoing, *Fukushima Nuclear Wastewater Discharge Issues*, Wikipedia, (visited on 23 July 2023), https://zh.wikipedia.org/wiki/%E7%A6%8F%E5%B3%B6%E6%A0%B8%E5%BB%A2%E6%B0%B4%E6%8E%92%E6%94%BE%E5%95%8F%E9%A1%8C.

organization can be considered to have a certain degree of jurisdiction over this dumping activity. Only with the consent and support of each party or relevant country, can it obtain the authority to properly review and approve the measures and regulations related to the disposal actions of the Japanese government.

Finally, the key issue here is that the Japanese government must acknowledge that the response and disposal of contaminated wastewater from the Fukushima Daiichi nuclear power plant accident after the 311 earthquake cannot be considered as “discharging” into the ocean like normal nuclear plant operations, regardless of how Tokyo Electric Power Company (TEPCO) handles and purifies the water, or even how much the radioactive substances in the treated water are diluted. This type of operation, instead, should be recognized as “dumping” potentially polluting substances into the ocean. Therefore, the dumping is subject to compliance with Article 210, Paragraph 5 of UNCLOS.

The Japanese government plans to dispose of the ALPS-treated water into the ocean over a period of approximately 30 years. The long-term consequences of this action are uncertain, and even IAEA is unsure of the potential impacts. That’s why they have reached an agreement with the Japanese government to continue monitoring the situation by sending personnel to the Fukushima Daiichi Nuclear Power Plant. It is crucial to emphasize that the controversy over this issue should not be disregarded or ignored simply because the Japanese government has started to release the ALPS-treated water into the ocean, and we should continue to defend our position within the legal framework. If it is proven in the future that the Japanese government and IAEA did not thoroughly consider the disposal of the water, there is a possibility for the case to be reconsidered.

Translator: WANG Wenqi

美国《2022 年航运改革法》的修订及其影响与借鉴

张丽英、陈思卓*

摘要：《2022 年航运改革法》于 2022 年 6 月 16 日正式成为法律并生效。这份“两党联立”的法案为应对全球供应链危机下美国面临的包括港口拥堵、费率上升等问题而颁布，内容涉及了联邦海事委员会的管理权限、承运人责任和义务、航运业的报告制度等内容。法案的颁布与生效能够缓解美国国内货主、消费者不满情绪，但仍具有局限性，不能根本解决供应链问题，也可能引发世界范围内的保护主义立法潮。对于我国而言，尽管法案具有一定局限性，仍能为我国航运监管规则的完善提供借鉴。在未来的立法工作中，应注意明确监管机构。除此之外，我国还应该在航运业的透明度建设，以及中远海运等企业的竞争中性建设上进行一定的努力。

关键词：《2022 年航运改革法》；承运人；滞期费；滞箱费；航运监管

《2022 年航运改革法》（Ocean Shipping Reform Act of 2022）于 2022 年 2 月由美国参议院提出，6 月 13 日在众议院以 369：42 的绝对多数通过，6 月 16 日经美国总统拜登签署正式成为法律并生效，由于法案在众议院的民主、共和两党中均有较高的赞成率，故也被描述为一份“两党联立”（bipartisan）的法案。[1]此次修订是为缓解美国的国际航运业在疫情下面临的供应链失调困境，包括港口拥堵、费率上升等问题而颁布，涉及美国联邦海事委员会[2]的管理权限、承运人责任和义务、航运业的报告制度等多项内容。这是美国《1998 年航运改革法》实行 20 余年以来的首次航运法律修改，体现了美国当前在航运政策上的利益取向变化。在全球供应链失调的大环境下，法案的颁布与生效不仅起到了缓解美国国内货主、消费者不满情

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[1] See Remarks on Signing the Ocean Shipping Reform Act of 2022，DCPD Number: DCPD202200530. 笔者注：也有部分新闻评论在描述法案立场时使用了 “拜登及其民主党政府的产物”这一表述，但笔者认为“bipartisan”更加合适。一方面美国官方文件以及政府公开讲话基本都将该法案定性为“bipartisan”；另一方面，依据美国国会的记录，该次表决中动用了绝对多数通过的程序，众议院民主党议员赞成者 213 人，弃权者 6 人，无反对者；共和党议员赞成者 156 人，反对者 42 人，弃权者 10 人。即便是在野党派的共和党议员都有相当多数同意该法案，因此使用“两党联立”是恰当的。具体数据和议员投票情况见美国众议院网站：https://clerk.house.gov/Votes/2022256，最后访问时间 2022 年 11 月 16 日。

[2] 联邦海事委员会，即“Federal Maritime Commission”，是美国的国际航运监管机构，其主席和委员由总统提名、国会确认，再由总统任命。编制上隶属于国会，但独立于联邦政府，且五个委员（含主席）中，来自同一党派的不能超过三人。

绪的作用，也激起了欧洲托运人等群体对于欧洲航运规则改革的呼声。总体而言，作为一项缓解矛盾和货运压力的措施，在具有不可忽视的短板的同时，仍具有一定的借鉴意义。

一、法案颁布的背景：全球供应链危机下的美国

新冠大流行对全球贸易造成了持续的干扰，航运业也遭受了诸多冲击。各国被迫封锁并限制人员流动，大量航次被取消，从而造成了全世界的劳动力和运力短缺。同时，全球范围内的封控措施和医疗需求又导致了居家办公用品和医疗物资的销售量激增，远超过航运业对消费需求的承受能力。在运力的削减和快速增长的航运需求共同作用下，美国的港口、货主被迫面对一系列难题。

1.港口拥堵与各项费用飙升

在新冠病毒蔓延至全球后，各国均采取了封控措施以延缓传播速度，线下消费受阻，这些生活方式的转变刺激了个人防护用品、室内健身娱乐设施、家用医疗设备等需求上涨，主要购物方式也从线下商超转向了电商平台。2020 年美国的电商支出相较于 2019 年增加了近 32%；2021 年美国的纾困计划进一步刺激了消费需求，电商消费又有 14%的增长。[1]

这些商品在美国本土的生产十分有限，大多都需要在海外完成制造或组装然后运输至美国；而口罩等医疗物资对进口的依赖更是超过 95%。[2]大量进口商品、物资和零部件的到来也使得美国港口的吞吐量创下新高。2021 年，洛杉矶港和长滩港相较于 2019 年进口量分别上涨了 31%和 15%，远超码头承载能力。位于东海岸的萨瓦纳港在 2021 年的运送量也比疫情前上涨近 20%，而相对次要的芝加哥港的总进口量也有 50%左右的增长。

港口	2019.4.1-2020.3.31 进口货物量	2021.4.1-2022.3.31进口货物量	增加比例
长滩港	207万	271万	30.92%
洛杉矶港	249万	286万	14.86%
萨瓦纳港	98.152万	115万	17.17%
芝加哥港	0.408万	0.607万	48.77%

表 1-1　部分港口 2019 年与 2021 年进口货物量对比[3]

[1] See U.S. Senate Committee on Commerce, Science, and Transportation Hearing on the Ocean Shipping Reform Act, *U.S. Senator Maria Cantwell Opening Statement Transcript*, 3 March 2022. 另参见陈臻、王骏、李彦森：《全球集运市场“卖方”转为“买方”全年运费跌跌不休——全球集运市场 2022 年回顾与 2023 年展望》，方正中期期货研究院《2023 年读中国期货市场年度报告》，第 2 页。

[2] See Federal Maritime Commission, Fact Finding Report 29, p.10.

[3] See Trademo Trade Intelligence Report: Congestion in US ports 2022-Statistics & Trends, p.6-7, 15-16.

港口	2019.4.1-2020.3.31运量/TEU	2021.4.1-2023.3.31运量/TEU	增加比例
长滩港	424万	462万	8.96%
洛杉矶港	506万	552万	9.09%
萨瓦纳港	240万	280万	16.67%
芝加哥港	0.33万	0.561万	70%

表 1-2 部分港口 2019 年与 2021 年运量对比[1]

疫情下的美国港口很难应对如此快速增长的商品量的冲击：减少人员配备、保持社交距离等卫生措施限制了港口劳动力的数量，部分码头的拖车卡车等物流设施储备和供给不足，卸货转运效率难以提升，码头和仓库长期以超负荷的方式运作，近海船舶不断积压，港口拥堵严重，形成恶性循环，出现较为严重的货运延迟和流通不畅。2021 年冬季，美国西海岸的重要港口船只平均等待靠泊的时间达到了 18-24 天；[2]而 2022 年上半年，美国前十大港口船舶到达码头的平均延误时间仍在 5 天以上，奥克兰、芝加哥港的延误甚至超过了 20 天。[3]除了等待靠泊的时间大幅增加之外，船舶在泊停留时间也较疫情前增加了两倍以上。

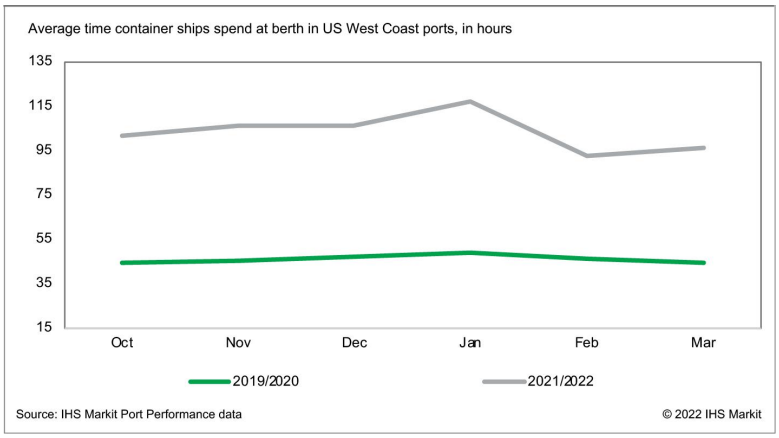

图 1 疫情前后美国西海岸集装箱船在泊位停留时间（单位：小时）的对比[4]

港口拥堵也影响到了船舶和集装箱的周转，班轮准班率创历史新低，码头卸货、提箱、拆箱和还箱等环节效率大幅下降，流通的航运集装箱数量严重不足，极度供需失衡下，集装箱运费迅速上涨。在新冠大流行之前，一个 40 英尺集装箱的运费约为 1300 美元，而到 2021 年，运费最高时可超过 10000 美元。[5]

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[1] Ibid.

[2] See Anna-Sophia Metzel & Curtis Doyle, *Transpacific Shipping Update: Long vessel waiting times and port congestions at major US ports*, Twill by Maersk, (3 December 2021), https://www.twill.net.cn/knowledge-hub/logistic-news/port-congestions.

[3] See Trademo Trade Intelligence Report: Congestion in US ports 2022-Statistics & Trends, p.4. 此外,根据 gocomet 的实时动态统计，2022 年 11 月，萨瓦纳港、新奥尔良港的平均延误时间均达到了 20 天上下，西海岸的西雅图、洛杉矶、长滩等重要港口也有 3 至 10 天等不同程度的延误。参见 https://www.gocomet.com/real-time-port-congestion/usa, (visited on 18 November 2022). 与疫情前期拥堵不同在于，此时的拥堵港逐渐转移到了美国东海岸，造成这种情况的原因之一是许多货主为了避免西海岸拥堵转移港口。因此尽管全球范围内疫情对经济的影响有所减弱，供应链问题的缓解仍需要很多的时间和投入。

[4] See Peter Tirschwell, *US port congestion will worsen through 2022 peak: industry leaders*, JOC Maritime News, (31 May 2022), https://www.joc.com/maritime-news/container-lines/us-port-congestion-will-worsen-through-2022-peak-industry-leaders_20220531.html

[5] See U.S. Senate Committee on Commerce, Science, and Transportation Hearing on the Ocean Shipping Reform Act, *U.S. Senator Maria Cantwell Opening Statement Transcript*, 3 March 2022.

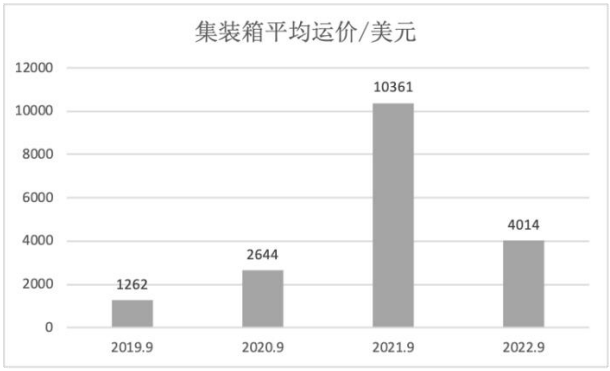

图 2 2019 年 9 月至 2022 年 9 月同期 40 英尺集装箱平均运价[1]

装卸货、进口清关以及集装箱提货等工作的迟滞，也使得美国货主在负担高额运费的同时还面临着相当高昂的滞箱费和滞期费等附加费用的支出。2020 年至 2021 年，洛杉矶港和长滩港的平均滞期费和滞箱费分别增加了 42%和 52%，马士基与达飞在洛杉矶港收取的滞期费和滞箱费增幅超过了 160%。[2]2022 年上半年，洛杉矶港和长滩港的滞期费较 2020、2021 年同期的数据仍有所上涨，滞箱费虽相较于 2021 年同期略有下降，但依旧远高于 2020 年的水平，美国也成为了当前滞期费和滞箱费最高的地区。[3]这些居高不下的附带支出都转化为了不断增长的居民消费价格，原本就较为严重的通货膨胀持续加剧，最终由处于供应链终端的消费者承担。

图 3：2020 年、2021 年、2022 年 5 月同期美国洛杉矶港和长滩港的滞期费与滞箱费均值[4]

2.承运力不足影响到美国出口商利益

港口拥堵引发的供需失衡让集运市场转变为“卖方市场”，承运人掌握了交易的主动权，能够在诸多航运需求中选择最有利可图的订单。出口商遭到拒运的情况开始增多，甚至出现

[1] See Global container freight rate index from January 2019 to November 2022 (in U.S dollars), (visited on 7 February 2023), https://www.statista.com/statistics/1250636/global-container-freight-index/#:~:text=In%20November%202022%2C%20the%20global%20freight%20rate%20index,function%20properly%20for%20the%20whole%20system%20to%20work.

[2] See Container Xchange Report: Demurrage & Detention Benchmark 2021, p.15-17.

[3] See Container XChange's Annual Benchmark Report on: Demurrage and Detention (2022 3rd edition), p.15.

[4] See Container xChange's Annual Benchmark Report on: Demurrage and Detention (2022 3rd edition), p.27.

了诸多承运人不通知货主而直接取消订单的情况。[1]

承运人拒运的行为严重影响了美国的农产品出口。运输农产品需花费时间清理集装箱并按照相应的保存需求进行装载，时间金钱成本较高，许多承运人宁可在进口订单卸货后尽快运输空箱回到其他国家的港口承运新的出口订单，也不愿接收美国的农产品；即便承运人表露交易意向，出口商也会被要求支付远高于此前价格的运费。[2]大范围的承运人拒运和歧视性措施导致美国的土豆、棉花、大豆、杏仁、奶制品、禽肉、柑橘以及纸制品等主要的出口农副产品被迫大量堆积在码头，无法正常运输和销售，造成了很大损失：在 2020 年 7 月至 12 月期间，承运人拒绝了至少价值 13 亿美元的美国农产品出口订单；2020 年至 2021 年，美国农业出口商共损失了 22%的销售额。[3]

总之，疫情下的航运业面临了严重的供应链失调，航运经济成本过高、出口受阻和通货膨胀等问题愈发严重，给美国的货主和消费者带来了巨大压力。而与之形成鲜明对比的是，2021 年，由于进口货物需求的增加和集装箱运输价格的上涨，全球范围内的承运人实现了创纪录的 1500 亿美元利润。[4]美国国会由此认为，造成美国货主以及消费者困境的主要原因是承运人在航运中的不当行为，从而决定推动相关修法。

二、美国《2022 年航运改革法》主要内容解读

1.立法的保护主义倾向更加明显

美国首部专门用于国际航运管理的法律规范是《1984 年航运法》，该法旨在为当时处于竞争弱势的美国的商船队创造更为有利的政策环境，以满足美国在国防和国际贸易中的需要；《1998 年航运改革法》则开始放松政府对航运市场的管理，强化公平竞争机制，注重打造开放和充分竞争的市场。[5]与前两者相比，《2022 年航运改革法》再次收紧了对航运市场的监管，“美国优先”的保护主义和货主国立场更加明显和突出。

在立法目的阐释上，《1984 年航运法》与《1998 年航运改革法》均指出要“为美国的远洋贸易提供一个高效且经济的运输系统，并且尽可能对国际航运惯例相协调和适应”[6]，体现了美国利益优先但兼顾与国际航运秩序平衡的价值取向。而 2022 年的修订中，该款被修改为

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[1] US Senate Committee on Commerce, Science and Transportation, *Cantwell Applauds unanimous Senate Passage of Ocean Shipping Reform Act*.

[2] Lori Ann LaRocco, *Carriers rejected at least $1.3 billion in potential U.S. agricultural exports from July to December*, CNBC News, (15 March 2021), https://www.cnbc.com/2021/03/15/carriers-rejected-at-least-1point3-billion-in-potential-us-agricultural-exports.html.

[3] Huileng Tan, *Shipping Crisis American Farm Export Hit Containers Leave California Empty*, Businessinsider, (14 November 2021), https://www.businessinsider.com/shipping-crisis-american-farm-exports-hit-containers-leave-california-empty-2021-%20%2011.

[4] US Congress, S. 3580 Ocean Shipping Reform Act of 2022 in One Page.

[5] 参见朱曾杰：令人遗憾的美国《1998 年远洋航运改革法案》，载《中国远洋航务公告》1998 年 11 月 1 日，第 13-14 页。

[6] 原文为：“to provide an efficient and economic transportation system in the ocean commerce of the United States that is, insofar as possible, in harmony with, and responsive to, international shipping practices”。

“为美国的远洋贸易确保一个高效、竞争且经济的运输系统”，特别强调了维持美国理想化运输系统的必要性，删去了与国际航运管理接轨的条款，美国的远洋贸易利益成为更核心的考量。

除此之外，原《1998 年航运改革法》在涉及航运市场竞争机制建设时，意图“通过具有竞争力和效率的远洋运输，并更加依赖市场机制促进美国出口产品的增长和发展”，而在 2022 年的修订中，“远洋运输”（ocean transportation）一词被替换为了更加具体的“美国对外贸易中的水路货物运输”（the carriage of goods by water in the foreign commerce of the United States），一方面扩大了法案适用的水域范围，不再局限于远洋运输，而是规制所有涉外贸易的水路运输；另一方面则通过从较为宽泛的“远洋运输”到具体的“美国对外贸易中的水路运输”这样语汇的调整，突出了美国自身货主国利益的核心地位，将法案的重点规制的矛头指向了承运人。

2.增设承运人义务，加重承运人的举证责任

（1）滞期费与滞箱费规则的改变

美国《1984 年航运法》和《1998 年航运改革法》均未对滞箱费和滞期费加以专门规制，如果存在不当的收费行为，当事方通常以承运人违反法案中“公正且合理地处置财产”的义务来寻求救济。联邦海事委员会曾通过发布联邦政府行政法规的方式对该义务在滞箱费和滞期费收取中的具体适用标准作了解释。[1]而《2022 年航运改革法》则将停留在联邦行政法规中的滞期费和滞箱费规则提升到了法律层面，并加大了承运人收取滞期费和滞箱费的难度。

首先，在滞期费和滞箱费的定义上，法案援引了联邦海事委员会的实质认定标准，费用不需要必须以“滞箱费”和“滞期费”的名义开出，任何承运人或码头运营商收取的因使用码头空间或者航运集装箱而产生的费用都可以认定为上述费用。[2]

其次，法案设定了滞期费和滞箱费发票所需满足的形式要件。修订后的条文要求承运人开具的滞期费和滞箱费发票不仅必须包含当事方、费用、航运信息等常规内容，还需包含卸货港、集装箱编号、免费用箱时长及起止时间、归还时间、收费规则与费率等收费的细节。此外，承运人需要在发票中声明费用收取符合联邦海事委员会的相关规定，且其自身行为没有导致或促成滞期费和滞箱费收取。[3]

第三，为不合规的发票设立了较为严重的法律后果。如果承运人未能按照要求开具带有必要信息的滞期费和滞箱费发票，将直接免除货主的支付义务。[4]法案还在发票合规性上赋予

[1] 85 FR 29665.
[2] 46 USCA § 41104(a)(15).
[3] 46 USCA § 41104(d).
[4] Ibid (f).

联邦海事委员会自主调查权，委员会若调查后认为发票所记载的费用合规性认定存在不准确或错误的情况，还可作出要求承运人退款或施加民事罚款等处罚。[1]

第四，为无船承运人设立了责任避风港。对于无船承运人仅经手转交于托运人的滞期费与滞箱费发票，若经联邦海事委员会认定该无船承运人不负责相关费用的收取，相关处罚将转移至开具发票的班轮公司等公共承运人承担。[2]

第五，法案建立了处罚公示机制，所有联邦海事委员会对承运人违规的处罚，包括不合规的滞期费和滞箱费在内，均将公示在联邦海事委员会的网站。[3]这在一定程度上也对承运人具有警示作用。

最后，《2022 年航运改革法》提高了滞箱费和滞期费投诉和救济程序的效率，设立了更有利于托运人的争议解决程序规则。联邦海事委员会下新设立了消费者事务和争议解决服务办公室，提供非裁决性的监察援助、调解、协助和仲裁来解决涉及货物运输、家庭货物运输等受委员会管辖的纠纷，[4]为纠纷的解决提供了专门的场所。法案还为托运人、收货人、货运公司和第三方提供了简化的费用申诉程序并分配了较轻的举证义务，改变了原先投诉者举证的模式，由承运人承担滞期费和滞箱费收费合理性的证明责任。[5]由此，从费用收取的形式要件，到争议程序等，承运人都被施加了更多的义务和责任。

（2）强化对报复、歧视与拒绝交易条款的禁止

《2022 年航运改革法》扩大了承运人禁止从事的行为的范围，明确要求禁止承运人、海运码头运营商或海洋运输中介机构单独或与任何其他人一起，直接或间接地对托运人、汽车承运人，或该托运人或承运人的代理人进行报复。[6]同时，为应对前述承运人拒运或是被收取不合理高价运费的问题，法案特别增添了承运人不得不合理地拒绝向托运人提供货位，或采用其他不公平或不公正的歧视性方法对待托运人的条款。[7]

值得注意的是本次修订出现的用语变化。报复行为和拒运与其他歧视性行为分别位于“禁止行为与处罚”一章下的“一般性禁止行为”和“承运人禁止行为”当中。针对禁止报复行为，法案保留了《1998 年航运改革法》在该节中所使用的“may not”一词；而对处于“承运人禁止行为”一节中的拒运与其他歧视性的行为，本次修订则将“may not”改为了“shall not”。在英文中，前者更强调对某种许可或权利[8]的取消或否认，近似于中文的“不可”；而后者则

[1] 46 USC §41310.
[2] 46 USCA § 41104(e).
[3] 46 USCA § 46106(d).
[4] Ocean Shipping Reform Act of 2022, Section 17.
[5] 46 USC §41310(b).
[6] 46 USCA §41102(d).
[7] 46 USCA §41104(a).
[8] 在政府部门等语境下也可能是对权力的取消和否认。

更强调行为是一种法定的禁止性义务，接近于中文法律法规中的“不应当”。这种用语的差异使得承运人拒运和歧视性交易行为在法律上的禁止性得到了更多的强化和突出，并且具有了类似于民法中“强制缔约义务”的色彩。

同时，本次修法还增加了从事禁止行为的法律责任形式，从原先的“遭受民事处罚（civil penalty）”一种模式变为三种程度不同的处罚，包括单处民事处罚、民事处罚并罚退还费用或者以退还费用代替民事处罚，本质上仍是加重了从事禁止行为的法律后果。[1]

（3）承运人报告制度的细化

与此前的报告义务相比，《2022 年航运改革法》在信息披露上也对承运人提出了更高要求。联邦海事委员会每季度需要在其网站上发布报告说明承运人所经营的进出口总吨位以及每艘船的总装载量和空载量。承运人具有向委员会提供所有必要信息的义务。[2]这一报告义务的设定将有助于联邦海事委员会掌握承运人的装载情况，提高行业运行的透明度，便于执法机构了解航运业的整体情况，并及时发现不合理的拒运等违法行为。

3.再度加强对受控承运人的监管

“受控承运人”（controlled carriers）这一概念是美苏冷战在航运规则层面的产物，《1984 年航运法》将其吸收，指其本身或其运营资产是由船旗国政府直接或间接所有或控制的远洋公共承运人。受控承运人规则有比较浓厚的所有制歧视色彩，联邦海事委员会有权对这类承运人的运价、收费等进行监督审查，被认定为低于合理水平的运价和费用将被认定无效。[3]

《1998 年航运改革法》延续并强化了受控承运人的监管制度，将定义中船旗国这一限定条件删去，修改为“其本身或其运营资产是由一个政府直接或间接的所有或控制的远洋公共承运人”，扩大了概念的范围，国有航运公司无法再通过方便旗规避受控承运人的不利地位。[4]此外，法案还缩减了受控承运人规则的例外条款，仅有享有国民待遇或最惠国待遇条款的承运人或者全部由受控承运人提供的贸易运输服务才能免受美国法律对其的监管控制。[5]

《2022 年航运改革法》则再次将受控承运人的定义更新，指国有或国家控制的企业，或者是由美国关税法第 771（18）条下定义的“非市场经济体”国家、美国贸易法案 182 条确定的重点国家或者 306 条监管国国内的企业所有、所控制的或者存在其他法律或财政上较紧密联系的企业。[6]相较于前两部法案的定义，本次修订在标准上借助了美国的国际贸易规则，本质上是继续扩大了受控承运人的认定范围。在保留了《1998 年航运改革法》对受控承运人

[1] 46 USCA §41107(a).
[2] 46 USCA §41110.
[3] Ocean Shipping Act of 1984, Section 3, 9.
[4] Ocean Shipping Reform Act of 1998, Section 102.
[5] Ibid, Section 108.
[6] 46 USCA §46106(b).

强势监管规则的同时，法案还在联邦海事委员会对国会的年度报告义务中加入了一项新内容，特别要求委员会对受控承运人的航运交易活动、市场竞争情况进行识别和报告，也给受控承运人的经营活动增加了更多的监管负担。[1]

通过与美国关税、贸易法规则的衔接，《2022 年航运改革法》将以规制竞争和供应链秩序为主的航运监管规则与美国当前的国际经贸政策衔接了起来，美国对于非市场经济体等的定性可以直接适用于航运业的监管当中，减轻了联邦海事委员会在履职时单独认定受控承运人的举证责任，也体现了近年来美国频繁呼吁的“市场导向政策”正在其国际经贸的各个环节全方位地落实。近年来中美贸易摩擦以及关于中国国有企业和市场经济体制的争议不断，这一规则的出现将对于我国中远海运等大型航运企业的经济活动产生一定的不利影响。

4.联邦海事委员会监管权力和范围的扩大

（1）航运交易所注册制的设立

《2022 年航运改革法》新设了航运交易所的注册制度。此处的航运交易所（shipping exchange）是指将托运人与公共承运人与普通承运人通过数字、柜台交易或其他方式联系起来的平台，从而帮助两者订立以船舶或其他运输方式运输货物的协议或合同，相较于具体的航运交易所等法人实体而言，法案采取的是广义的定义方式，更强调平台作为交易订立媒介的功能性。

《1984 年航运法》和《1998 年航运改革法》并未明确将航运交易的平台置于联邦海事委员会的管辖之下，而仅仅要求承运人和托运人将达成的服务合同向联邦海事委员会备案，并对合同所涉的起运和目的港口、货物种类、数量、运输期间几项基本条款按法定格式进行公布。[2]

《2022 年航运改革法》则将联邦海事委员会的权力从航运交易合同的备案扩大到了对航运交易场所的监督管理。法案规定，任何人都不得经营涉及美国对外商业海洋运输的航运交易所，除非该航运交易所依法注册为国家航运交易所，具体规则和标准由联邦海事委员会制定。如果想要免除注册的义务，需要联邦海事委员会认定该航运交易平台在其总部所在地能够受到与委员会相当的外国政府机构的全面监督和管理。[3]这一规定并没有限制交易平台所属的地域，因此严格来说，即便是驻地他国的航运交易所，只要其业务涉及美国对外贸易，都需要受到该注册规则的约束。这一条款将联邦海事委员会行政管辖权的范围扩大到了所有与美国具有贸易联系的地区。

航运交易所注册制度将与原服务合同的备案条款共同发挥作用，帮助联邦海事委员会实

[1] Ibid.
[2] 46 USCA §40502.
[3] 46 USCA § 40504.

现从交易起始的平台到最终的具体合同的全面监管。这一制度使得联邦海事委员会能够有效追溯托运人和承运人通过各种媒介和方式、在美国境内及境外达成的合同，从而更加全面地掌握涉及美国利益的国际航运交易情况，更好监控承运人拒运、单方面取消订单等不利于出口商的行为，继而规范航运交易秩序。

（2）赋予联邦海事委员会紧急情况下强制收集数据的权力

《2022 年航运改革法》规定，当委员会委员一致裁定，港口货物运输拥堵对国际航运供应系统的竞争力和可靠性产生了实质性的不利影响，与法案促进商业发展和市场导向的竞争机制目的有所违背时，即可构成“紧急情况”。[1]在这种情况下，联邦海事委员会有权下发紧急情况令，要求任何承运人或海运码头运营商直接与相关托运人、铁路承运人或汽车承运人共享有关货物吞吐量和可用性的信息，以确保货物能够在码头、船舶或者各目的地与原产地进行有效运输和装卸。[2]

这一权力的设置能够让联邦海事委员会在港口极端拥堵的情况下以行政权力强制干涉协调供应链中的各个环节，以便尽可能快地缓解港口拥堵，防止出现市场供需的失衡而引发供应链失调。但该权力仍仅停留在提升透明度的数据收集层面，对于高效缓解拥堵的作用仍相对有限。

（3）较高的法律解释权限

除了广泛的调查、处罚、监管权限之外，本次修法中联邦海事委员会权力的扩张还表现在其被赋予了较高的法律解释权限。一方面，服务合同“必要条款”部分相较于《1998 年航运改革法》增设了一项兜底性授权条款，联邦海事委员会有权通过规则制定程序，新增其认为服务合同必须包含的条款。[3]另一方面，委员会还被授权在法案生效后一段时期内制定滞箱费、滞期费合理性评估规则和不合理拒绝提供货位或采用其他不公平或不公正的歧视性方法等条款的解释细则，[4]当前部分规则提案已经在联邦海事委员会官网进入征求评论与意见的阶段。

5.行业评估工作安排

除对于原有法律的修订和补充之外，《2022 年航运改革法》还对缓解美国供应链失衡安排了一些政策评估工作，例如调用内陆港口和仓库储存运输货物集装箱的可行性评估、集装箱物流最佳实践的评估、美国与其他国家的港口技术能力的评估、联邦海事委员会的供应链的调查报告等。[5]相较于对法律修订内容的单一利益倾向，这些安排确实为采取缓解供应链问

[1] Ocean Shipping Reform Act of 2022, Section 18.
[2] Ibid.
[3] 46 USCA §40502(c)(9).
[4] Ocean Shipping Reform Act of 2022, Section 7(b)(c)(d).
[5] Ocean Shipping Reform Act of 2022, Section 19-25.

题的措施作出了一定的准备，但由于大多属于为相关政策变化所做的前期评估，具体措施以及未来实施的效果还尚不明确。

三、《2022 年航运改革法》的评价及影响

《2022 年航运改革法》相较于之前的规则收紧了对航运业尤其是承运人的管制，价值取向再次发生了变化，但仍是以缓解矛盾为主的较为温和的变革。然而，其依旧引发了欧洲托运人对欧洲航运监管规则变化的呼吁，并可能影响到世界航运监管的趋势。

1.缓解国内矛盾的工具：温和但具有局限性

在推动修法的过程中，美国出现过比当前方案更加激进的呼声，甚至有议员要求直接取消实施多年的对承运人的反垄断豁免制度。[1]2021 年众议院提案的保护主义倾向和托运人立场也比当前版本更加明显，例如为承运人设置服务合同的最低标准、将联邦海事委员会签发的证书作为所有滞期费和滞箱费收取的前置条件，对承运人的要求非常严苛。[2]但上述提案最终均未能成为法律。相较而言，此次修订所采取的措施仍然是温和与谨慎的，并没有根本性地撼动航运公司所享有的特殊豁免，也没有强行干涉交易的组成，而是在交易各环节的透明度、争议的解决等方面进行了细化，侧重加强事中事后的监管和新义务的设定，而非对既有权利的剥夺。

但仍需要注意到，法案仅是对新冠大流行背景下的社会矛盾进行了一定的制度性回应，其措施停留在特定的时代需求上，普适性有限。截至 2022 年年底，全球已经有超过 120 个国家和地区宣布解除与新冠疫情相关的出入境限制，各国进入了放松新冠管控措施的“后疫情”状态，大范围封控的减少、出行限制措施的取消、消费量趋稳和航运秩序的逐渐恢复使全球供应链的压力显著缓和，[3]情势的变化使得新规则在适用中可能表现出迟滞性。

此外，从价值取向的角度，法案也具有一定的局限性。此次改革的重点仅集中在了大流行下的获利方——承运人的权利义务变动上，所有的措施几乎都是为了解决承运人和货主在新冠大流行时期利益失衡的问题，而鲜少触及更深层的供应链失调问题。

供应链的参与者包括生产商、港口、承运人、劳工、海运码头运营商、铁路、卡车司机、集装箱底盘供应商和托运人以及消费者等多个环节，其失调并非承运人单方面作用的结果，而是消费需求暴涨、劳动市场低迷、内陆仓储有限等多方面因素共同导致的。与其说法案意在解决供应链失调问题，不如说其仅是一定程度上为美国货主扭转了供应链失调下极为不利的交易局面，因而此次法案更接近于美国缓解当前国内矛盾的工具。法案实施的效果也印证

[1] John Gallagher, *New legislation would strip ocean carrier antitrust protections*, Freightwaves (1 March 2022) , https://www.freightwaves.com/news/new-legislation-would-strip-ocean-carrier-antitrust-protections.

[2] US Congress, H. R. 4996 (Ocean Shipping Reform Act of 2021).

[3] 参见高聪、蔡劭立、孙玉龙:《集运市场疲软未改，贸易量增加阶段性支撑散货运价》，在《华泰期货研究院航运专题报告》（2023 年 3 月 5 日），第 6 页。

了这点：自 2022 年 6 月该法实施以来，联邦海事委员会受理了诸多承运人收取不合理费用的申诉，承运人退款已超过 100 万美元。[1]在肯定法案在维护美国国内稳定的作用的同时，也应该注意到为根本性地解决问题，美国必须将重点放在投资其陆上物流基础设施、解决劳工争议等方面以提高港口的周转效率，从而提升未来应对大量贸易的能力。[2]这些措施是需要依靠后续的法律法规细化、执法、行业建设与投资配合共同完成的。

2.法案的辐射效应：欧洲十大组织联名信

新冠疫情带来的影响不仅仅局限在美国，全球航运业都处在供应链危机中，欧洲的集装箱货物运输也面临了极大挑战，例如航次取消、大面积跳港以及运费的大幅上涨至疫情前的三至四倍等。[3]在这一背景下，美国《2022 年航运改革法》的发布也激发了欧洲托运人、码头工作者等对欧盟规则的不满情绪。2022 年 7 月，包括欧洲托运人联盟在内的十大组织[4]发表了联名信，认为在新冠大流行下，船运公司享有的一般竞争法豁免所带来的利益并没有在船运公司和其他海运经济部门之间公平分享，而疫情造成的行业负面影响却主要由托运人、港口作业者及消费者承担。[5]十大组织认为导致这种利益失衡的原因是规定了航运联盟反垄断豁免权的欧盟第 906/2009 号条例，并要求欧盟追随美国的脚步，重新审查条例的相关规定，并为条例增设新的措施和机制，保障市场公平和透明，解决托运人群体的担忧。

然而，欧盟会采取多大程度的改革还是一个未知数。首先，欧洲作为传统航运强企聚集地，其利益倾向与处于货主国地位的美国有所不同，必定不能完全倒向托运人的利益诉求而一味向承运人施加压力；其次，欧盟历来的航运规则均对当前的航运联盟等联营体模式在经济上的作用采取肯定的态度，[6]因此，在作为货主国地位的美国尚未松动承运人反垄断豁免制度的情况下，欧盟的改革也更不可能直接触及反垄断豁免权这一根本制度。在全球航运秩序逐渐恢复的当下，欧盟很可能采取比美国更加温和的方式，甚至是一些非法律性的措施，例如发放行业补贴、颁布支持性政策等来缓解托运人和承运人在当前全球供应链问题下的矛盾。

3.可能引发航运监管保护主义潮流

供应链危机并非仅局限于美国，而是在全球范围内普遍存在的，除新冠长期流行的影响

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[1] Federal Maritime Commission, *Charge Complaint Refunds Hit $1 Million*, FEDERAL MARITTIME COMMISSION News & Events (3 May 2023), https://www.fmc.gov/charge-complaint-refunds-hit-1-million/.

[2] World Shipping Council, *WSC Statement on Enactment of the Ocean Shipping Reform Act*, World Shipping Council News Room（16 June 2022）, https://www.worldshipping.org/news/wsc-statement-on-enactment-of-the-ocean-shipping-reform-act.

[3] CLECAT, FEPORT, et al., *Container shipping customers and service suppliers call for immediate start to review of competition rules*, CLECAT News (22 July 2022), https://www.clecat.org/news/press-releases/container-shipping-customers-and-service-suppliers.

[4] 联名的十大组织包括：欧洲货运、物流及海关服务协会（CLECAT），欧洲私营港口和码头联盟（FEPORT），欧洲托运人委员会（ESC），欧洲驳船联盟（EBU），全球托运人论坛（GSF），欧洲拖轮船东协会（ETA），国际公路、铁路联合运输联盟（UIRR），国际货运代理协会联合会（FIATA），国际搬家协会（IAM），国际搬家联合会（FIDI）。

[5] CLECAT, FEPORT, et al., *Container shipping customers and service suppliers call for immediate start to review of competition rules*, CLECAT News (22 July 2022), https://www.clecat.org/news/press-releases/container-shipping-customers-and-service-suppliers.

[6] 欧盟一直对航运联盟的经济效益持肯定态度，2020 年将航运联盟反垄断豁免权延续至 2024 年。

外，俄乌冲突、港口罢工潮和劳工谈判等因素也在不断地影响着供应链的稳定性。近年来世界范围内逆全球化的贸易保护主义开始回归，美国在本次修法表现出的非常强烈的“本国优先”保护主义倾向可能引发各国在国际航运监管中的保护主义竞赛。

不同国家在航运业中所具有的主要利益往往有所差别，美国货主利益立场的《2022 年航运改革法》获得通过，意味着与其具有不同贸易利益的国家可能会面临国际经贸中的不利局面，从而刺激其他国家也在本国制定类似的保护性立法和监管框架，以法律的对抗实现对自身经济利益的维护。对全球经济来说，这种保护主义潮流有可能影响到合同自由和交易的效率，从而成为对供应链稳定的不利因素。

四、《2022 年航运改革法》对中国航运监管规则与航运业的借鉴

尽管美国在本次法案的修订存在一定的局限性，但我们仍应该注意到其仍具有相对完善和稳定的航运管理规则体系，为应对当前的全球供应链失调问题，我国也应当在法律法规、行业监管和建设方面采取更加全面的应对措施。

1.完善航运监管规则、加速航运专门法的制定

在航运监管领域，我国目前并未出现较高法律位阶的规则，对国际航运业的市场监管主要依靠国务院发布的《中华人民共和国国际海运条例》和交通运输部发布的《中华人民共和国国际海运条例实施细则》，两者分别属于行政法规和部门规章。在美国《2022 年航运改革法》正式生效前不久发布的《国务院办公厅关于推动外贸保稳提质的意见》中提到“依法依规加强对国际海运领域的市场监管”，这对我们航运监管规则建构提出了更高的要求。因此，逐步完善监管规则，并抬高其法律层级也是中国将来必然面临的问题。从美国《2022 年航运改革法》当中，我们可以窥见一些经验。

（1）明确航运监管的主体，促进航运监管流程一体化

目前我国航运业存在监管部门不清的问题。例如《国际海运条例》中的执法机构主要是国务院交通主管部门及其授权的地方交通主管部门；在涉及航运业反垄断问题时，《国际海运条例实施细则》设置了交通运输部的前置评估程序，但这又和《反垄断法》当中反垄断机构的独立调查执法权缺乏衔接。在相关问题出现时，反垄断执法机构需不需要以交通部门的调查评估为前提，并没有得到系统的安排，监管的主体部门不够明确。

相比之下，美国的航运监管权力基本集中于联邦海事委员会，且通过不断的法律修订，确立了该机构的独立性，不仅赋予其监管和调查权能，还授予其制定部分法律的实施细则的权力。《2022 年航运改革法》更是实现了在政策制定、执行、案件调查和争端解决中主体的一致性，极大提高了行政效率。在反垄断监管层面，联邦海事委员会也具有执法权限，并和

美国司法部反垄断部门通过备忘录模式建立了较好的航运反垄断合作机制。[1]作为借鉴，在后续航运监管规则的制定和完善中，我国也应该明确监管主体，或新设专门的监管机构负责航运监管事项，或如美国司法部与联邦海事委员会一样，完善不同机构和部门之间的合作执法机制，[2]去除现有制度中的监管空白，来实现对航运业的有序、健康监管。

（2）完善对交易主体的事中事后监管制度，加强对航运交易平台的监督

我国现行《国际海运条例》中的规则有较多经营资格、许可手续等准入性规定。国际船舶运输业务、无船承运业务、国际班轮运输业务等经营资质的申请有不同的程序和要求。[3]相比较之下，美国的《2022 年航运改革法》则弱化了对航运业经营者准入的规则，侧重于对市场主体进行事中、事后的监管。对违法行为均设置了较为明确的处罚机制。这样的制度设计能够尽可能地构建一个开放的市场环境。因此，我国在未来国际航运监管制度，乃至航运专门法的制定上，也可以参考美国的模式，将对国际航运市场监管的重点从市场准入转换为对于市场公平竞争秩序的维护。具体而言，首先，要尽可能简化主体在市场准入时的程序；第二，完善航运交易的备案制度，明确备案的信息类型、尽量简化审查期限和形式，为事后监管提供充足的信息储备的同时尽可能释放市场主体的活力；[4]第三，为交易主体设立细化的行为规范，明确禁止从事的行为，并为违法后的执法和责任承担设置明确的指导。

与放松航运经营准入不同，美国《2022 年航运改革法》对于交易平台的监督提前到了准入阶段，要求所有提供交易平台均应完成审查和注册程序。这种方式有助于从宏观监测航运交易的情况，并确保交易的安全性与可信度，相较于限制航运业从业者的准入而言，为交易平台的准入设置门槛能实现活跃市场与交易安全的平衡，具有一定借鉴意义。但是当前美国的制度设计存在主权过度扩张之嫌，我国在进行制度设计时，应该审慎设定对域外交易平台实施监管的连结因素，保证相关规则的域外效力在国际法允许的范围内开展，为涉外交易的监管提供法律依据的同时遵守国际互利礼让的原则。

（3）完善违法救济的责任和程序

我国现行的监管规则为违法行为设置了部分程序性规定，但总体而言较为概括，也没有处理各监管部门之间的程序衔接问题。在法律责任方面，责任性质以行政处罚和刑事处罚为主，并没有纳入民事性的责任，将受到损害的消费者、托运人等的救济交由其他法律处理。

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[1] Federal Maritime Commission, *New FMC and DoJ MOU Supports Interagency Collaboration on Antitrust Issues*, FEDERAL MARITTIME COMMISSION News & Events, (12 July 2021), https://www.fmc.gov/new-fmc-and-doj-mou-supports-interagency-collaboration-on-antitrust-issues/.

[2] 参见徐峰、刘洋：《中国航运市场竞争规则存在的问题与美国航运法的借鉴》，载《大连海事大学学报（社会科学版）》2022 年 21 卷第 2 期，25-34 页。

[3] 参见《中华人民共和国国际海运条例》第 5-12 条。

[4] 参见彭阳：《论欧美航运反垄断豁免制度的改革与我国航运法制的走向》，载《中国海洋法学评论》2015 年卷第 1 期（总第 21 期），第 426 页。

而美国本次航运法的修订为争议的解决设立了专门的程序和环节，除公权力性质的处罚外，一并授权联邦海事委员会在调查后对违法违约的行为人处以损害赔偿和退款等民事性的责任。[1]这种一体化的处理方式有助于纠纷的高效解决。在未来的航运规则制定与改革中，我国也应对于违反法律的行为实施调查的条件、机构、程序，以及对违法者实施处罚的种类和程度等作出更加具体规定，[2]并考虑实行行政处罚与民事赔偿相结合的处罚机制，避免为受损方增添不必要的救济负担，实现多方的利益保障。[3]

2.提高航运业透明度、改善供应链结构

美国《2022 年航运改革法》采取的法律措施在解决供应链问题上仍具有局限性，但不可否认的是，其在航运业透明度方面的努力能够帮助供应链上的各方及时评估港口码头等的情况，从而作出调整，一定程度上缓解港口的拥堵问题。

当前的供应链情况正处于不断的波动状态，俄乌冲突、通货膨胀、货币政策的波动、制裁与反制裁等问题都可能影响到供应链的稳定性。为了应对不断变化的供应链状态，我国也应当致力于提升航运业的透明度。首先，可以参考美国《2022 年航运改革法》中不断细化的承运人报告义务，对于港口拥堵情况、各航次的运输情况以及空满载数据等进行及时的收集和公示，也可以建立航运业一体化信息平台，除行政监测外，也鼓励航运公司对其在不同航线、港口所面临的航行不畅或拥堵情况进行实时通报，引入数字化的管理方式，将产业链各个环节的数据信息互联互通，从而尽可能减少承运人、托运人、码头工作者之间的信息差，防止信息孤岛的出现。其次，可以仿效《2022 年航运改革法》设立必要的应急机制，赋予行政监管机关在港口大范围拥堵等严重威胁供应链稳定性的情况出现时调配设备信息与仓储设施的权力。此外，要注意供应链结构的改善，优化资源配置，打破单一化的供应链结构，更好地搭建内陆铁路运输、仓储与海运港口之间的合作，缓解港口压力；并在部分航线过于拥堵甚至中断时，通过多式联运等方式保证供应链的畅通。[4]

3.加强我国航运交易所与航运企业的权益维护与合规建设

美国《2022 年航运改革法》的实施对我国的航运交易所和航运企业的权益维护与合规建设提出了挑战。

新设立的“航运交易所登记制度”实质上给予了美国行政机关在航运交易平台监管中的先发优势，为了防止在航运交易中受到不当限制，我国应当积极利用《2022 年航运改革法》中的豁免机制，加强双边谈判与沟通，使我国航运交易平台能够尽可能免受美国的行政监管。

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[1] 46 USCA §41107.

[2] 参见胡正良、郑丙贵：《中国<航运法>制定中几个基本理论问题之研究》，载《中国海商法研究》2012 年第 1 期，第 70 页。

[3] 参见彭阳：《论欧美航运反垄断豁免制度的改革与我国航运法制的走向》，载《中国海洋法学评论》2015 年卷第 1 期（总第 21 期），第 465 页。

[4] 参见栾宇：《后疫情时代国际航运供应链中断应对分析》，载《中国海事》2022 年第 4 期，第 66 页。

当美国航运交易所登记具体监管规则制定完成后，也应注意相应的合规建设，以保障交易秩序的稳定。

《2022 年航运改革法》新加入的市场经济体识别和对国有航运企业特殊监管的政策，给中国国有企业的权益维护和合规建设带来了新问题。中国是美国“非市场经济体”名单中的一员，我国的中远海运集团、东方海外货柜航运有限公司两家国有航运企业均因其所有权结构以及我国的经济体制而被列入了当前美国联邦海事委员会“受控承运人”名单中，[1]面临着更严苛的受监管义务，可能对其经营活动产生不利影响。数据显示，中国是美国新冠疫情下最主要的贸易国，中远海运集团在美国各大港口所占的份额也一直位于前十位。[2]因此，面对如此大的交易量，我国的国有企业承运人应当加强对美国当前航运监管规则的把握，在涉及美国港口的航线上注重行为的合规性，并注意积极维护自身权益。

首先，应做好滞期费、滞箱费的发票形式要件的审查工作，避免违规带来不必要的损失；其次，应当为“受控承运人”监管可能带来的损失制定法律救济的方案，要充分利用国际经贸规则，包括过往较为有利的 WTO 案件中对我国国有企业的定性等来维护我国航运企业的利益；最后，应该加强自身改革，强化对航运国有企业“竞争中性”的建设，创设合理的政府和市场边界，在一般商贸活动中做到“政企分离”，减少政府对正常的航运经营活动的干预，避免因企业的国有性质而给予不当的经济或监管上的优惠措施而损害公平市场竞争。[3]通过自由竞争的市场表现，逐步提升国际航运市场对于中国国有航运企业的信赖度。

[1] Federal Maritime Commission: Controlled Carrier List, https://www.fmc.gov/about-the-fmc/controlled-carrier-list/.
[2] Trademo Trade Intelligence Report: Congestion in US ports 2022-Statistics & Trends, p.20-21.
[3] 参见沈伟：《“竞争中性”原则下的国有企业竞争中性偏离和竞争中性化之困》，载《上海经济研究》2019 年 05 期，第 23-24 页。

Amendments to the Ocean Shipping Reform Act of 2022 and its Impact and Enlightenment

ZHANG Liying, CHEN Sizhuo*

Abstract: The Ocean Shipping Reform Act of 2022 became a law and took effect on 16 June 2022. This bipartisan bill was enacted to address issues such as port congestion, freight rate increases that the United States is facing amidst the global supply chain crisis. It covers topics such as the regulatory authority of FMC, carrier responsibilities and obligations, and the shipping industry reporting systems. The U.S. domestic shippers and consumers did become less dissatisfied after the Act was enacted and went into effect, but limitations still exist. The Act cannot fundamentally solve the supply chain problems, and may potentially trigger a wave of protectionist legislations worldwide. For China, despite the limitations, the Amendments can serve as a reference to improve Chinese shipping regulatory rules. In future legislative work, it is important to focus on clearly defining regulatory agencies. In addition, China should also make efforts in enhancing transparency in the shipping industry and promoting fair competition among companies like COSCO Shipping and other state-owned enterprises.

Keywords: carrier; demurrage; detention; shipping regulation

The Ocean Shipping Reform Act of 2022 (hereinafter the 2022 Act) was proposed by the United States Senate in February 2022. It was passed by an overwhelming majority of 369 to 42 in the House of Representatives on 13 June, and officially signed into law by President Biden on 16 June. The Act has also been described as a bipartisan bill because it has high approval ratings among both Democrats and Republicans in the House of Representatives.[1] It aims to address the

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[1] See Remarks on Signing the Ocean Shipping Reform Act of 2022， DCPD Number: DCPD202200530. Note: Some news comments have used the term “product of the Biden administration” to describe the stance of the bill, but I believe “bipartisan” is more appropriate. On one hand, official documents and government speeches in the United States generally classify the bill as “bipartisan”. On the other hand, according to the records of the U.S. Congress, the vote on this bill was passed by an absolute majority. In the House of Representatives, there were 213 Democratic supporters, 6 abstentions, and no opposition, and there were 156 Republican supporters, 42 opponents, and 10 abstentions. Even Republican members of the opposition party largely agreed with the bill, so it is appropriate to use the term “bipartisan”. For specific data and voting information, please refer to the website of the U.S. House of Representatives: https://clerk.house.gov/Votes/2022256, 16 November 2022.

supply chain disruptions faced by the international shipping industry in the midst of the pandemic, including port congestion and rising rates. It covers various aspects such as the regulatory authority of Federal Maritime Commission (hereinafter FMC),[1] carrier responsibilities and obligations, and the shipping industry reporting systems. This has been the first legal amendment to Ocean Shipping Reform Act of 1998 (hereinafter the 1998 Act) in over 20 years, reflecting a change in the United States' current interests in shipping policy. In the context of global supply chain disruptions, the enactment and implementation of this law not only helps stem discontent among the U.S. domestic shippers and consumers, but also sparks calls for reform of European shipping regulations from groups such as European consignors. Overall, this amendment, as a measure to resolve conflicts and reduce freight pressures, has certain merits despite its undeniable shortcomings.

I. Background of The Act's Enactment: The United States in the Context of the Global Supply Chain Crisis

The COVID-19 pandemic has caused constant disruptions to global trade, including significant impacts on the shipping industry. Countries have been forced to lock down areas and prevent people from hanging out, leading to numerous canceled voyages and a shortage of both labor and shipping capacity worldwide. At the same time, the lockdown measures and increased medical demand globally have led to a surge in sales of home office supplies and medical equipment, far exceeding the shipping industry's capacity to meet consumer demand. Due to a combination of reduced capacity and a rapid increase in shipping demand, ports and shippers in the United States are forced to face a series of challenges.

1. Port Congestion and Soaring Costs

After the global spread of the COVID-19 virus, countries have implemented containment measures to slow down the spread. This has hindered offline consumption and stimulated an increase in demand for personal protective equipment, indoor fitness, entertainment facilities, and home medical equipment. The primary shopping method has also shifted from offline supermarkets to e-commerce platforms. In 2020, e-commerce spending in the United States increased by nearly 32% compared to 2019, and the bail-out packages in 2021 further stimulated consumer demand, leading to a 14% growth in e-commerce consumption.[2]

The production of these products within the United States is very limited, and most of them need to be manufactured or assembled overseas before being transported to the United States. The

[1] Federal Maritime Commission is the United States' international shipping regulatory agency. Its chairman and commissioners are nominated by the president, confirmed by Congress, and appointed by the president. While it is under the jurisdiction of Congress, it operates independently from the federal government, and no more than three of the five commissioners (including the chairman) can be from the same political party.

[2] See U.S. Senator Maria Cantwell Opening Statement Transcript, and Transportation Hearing on the Ocean Shipping Reform Act, *U.S. Senate Committee on Commerce, Science*, 3 March 2022. See Chen Zhen, Wang Jun & Li Yansen, *Global Container Market "Sellers" Turned "Buyers", Freight Rates Tumbled Throughout the Year - Global Container Market 2022 Review and 2023 Outlook*, Founder Medium Term Futures Research Institute, 2023 Reading China's Futures Market Annual Report, p. 2.

dependency on imports for medical supplies such as masks exceeds 95%.[1] The arrival of a large number of imported goods, supplies, and components also contributes to the country's record high throughput at U.S. ports. In 2021, the import volume of the ports of Los Angeles and Long Beach increased by 31% and 15% respectively compared to 2019, far exceeding the capacity of the ports. The port of Savannah on the East Coast also saw a nearly 20% increase in shipment volume in 2021 compared to pre-pandemic levels, while the relatively minor port of Chicago experienced a growth of around 50% in total import volume.

Ports	Import Volumes between 1 April 2019-31 March 2020	Import Volumes between 1 April 2021-31 March 2022	Proportion of Increase
Long Beach	2.07 million	2.71 million	30.92%
Los Angeles	2.49 million	2.86 million	14.86%
Savannah	0.98152 million	1.15 million	17.17%
Chicago	4.08 thousand	6.07 thousand	48.77%

Table 1-1: Comparison of Import Volumes at Selected Ports in 2019 and 2021[2]

Ports	TEU Volumes between 1 April 2019-31 March 2020	TEU Volumes between 1 April 2021-31 March 2022	Proportion of Increase
Long Beach	4.24 million	4.62 million	8.96%
Los Angeles	5.06 million	5.52 million	9.09%
Savannah	2.40 million	2.80 million	16.67%
Chicago	3.30 thousand	5.61 thousand	70%

Table 1-2: Comparison of TEU Volume at Selected Ports in 2019 and 2021[3]

Under the impact of the epidemic, American ports are struggling to cope with the rapid growth of commodity volume: epidemic prevention measures such as reducing personnel and maintaining social distance have limited the number of port labor force; the inadequate supply and reserve of logistics facilities such as trailers and trucks in some terminals have hindered the efficiency of unloading and transfer; the ports and warehouses have been operating in an overloaded manner for a long time, resulting in severe congestion and a vicious cycle. As a result, there are significant freight delays and poor circulation. In the winter of 2021, the average waiting time for ships to berth

[1] See Federal Maritime Commission, Fact Finding Report 29, p.10.
[2] See Trademo Trade Intelligence Report: Congestion in US ports 2022-Statistics & Trends, p.6-7, 15-16.
[3] Ibid.

at major ports on the US West Coast reached 18-24 days.[1] In the first half of 2022, the average delay time for ships arriving at the top ten ports in the United States was still over 5 days. The delays at Oakland and Chicago ports even exceeded 20 days.[2] In addition to the increased waiting time for berthing, the time ships spend at the port is twice higher than that required before the pandemic.

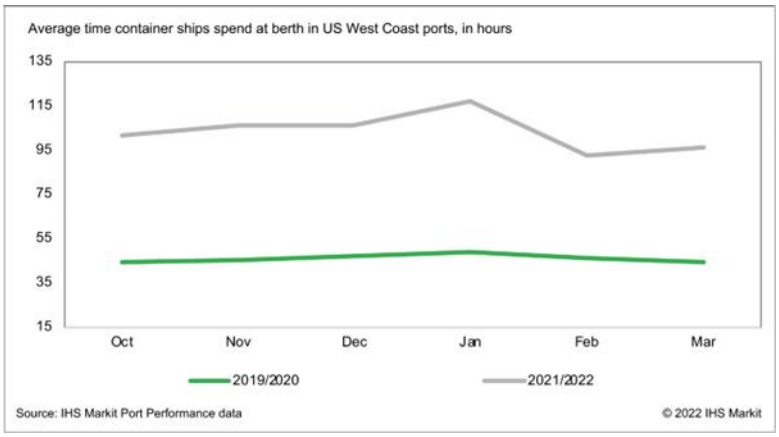

Figure 1, Average time container ships spend at berth in US West Coast ports, in hours[3]

Port congestion has also affected the turnover of ships and containers. The liner punctuality rate has reached a historic low, and the efficiency of processes such as unloading, container handling, and container return has significantly decreased. There is a severe shortage of circulating shipping containers, leading to a drastic imbalance in supply and demand, and as a result, container freight rates have rapidly increased. Prior to the COVID-19 pandemic, the freight cost for a 40-foot container was just around $1,300, but by 2021, it could reach over $10,000 at its peak.[4]

[1] See Anna-Sophia Metzel & Curtis Doyle, *Transpacific Shipping Update: Long vessel waiting times and port congestions at major US ports*, Twill by Maersk, (3 December 2021), https://www.twill.net.cn/knowledge-hub/logistic-news/port-congestions.

[2] See Trademo Trade Intelligence Report: Congestion in US ports 2022-Statistics & Trends, p.4. In addition, according to real-time statistics from gocomet, the average delay time of Savannah Port and New Orleans Port in November 2022 was around 20 days. Important ports on the West Coast, such as Seattle, Los Angeles, and Long Beach, also experienced delays ranging from 3 to 10 days. See https://www.gocomet.com/real-time-port-congestion/usa, (visited on 18 November 2022). Unlike the congestion in the early stages of the pandemic, the congested ports have gradually shifted to the East Coast of the United States. One of the reasons for this situation is that many shippers have been diverting their shipments to avoid congestion on the West Coast. Therefore, despite the reduced impact of the global pandemic on the economy, it will still take a significant amount of time and investment to alleviate supply chain issues.

[3] See Peter Tirschwell, *US port congestion will worsen through 2022 peak: industry leaders*, JOC Maritime News, (31 May 2022), https://www.joc.com/maritime-news/container-lines/us-port-congestion-will-worsen-through-2022-peak-industry-leaders_20220531.html

[4] See U.S. Senate Committee on Commerce, Science, and Transportation Hearing on the Ocean Shipping Reform Act, *U.S. Senator Maria Cantwell Opening Statement Transcript*, 3 March 2022.

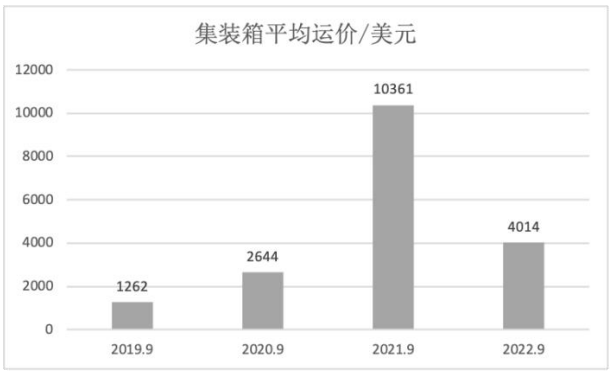

Figure 2 Average 40-foot container tariffs for the same period, September 2019-September 2022[1]

The delays in cargo handling, import customs clearance, and container pick-up have resulted in high shipping costs for American shippers, along with considerable extra expenses for demurrage and detention charges. From 2020 to 2021, the average demurrage and detention charges at the ports of Los Angeles and Long Beach increased by 42% and 52% respectively. Maersk and CMA CGM's demurrage and detention charges at the Port of Los Angeles increased by over 160%.[2] In the first half of 2022, the demurrage charges at the ports of Los Angeles and Long Beach kept rising compared to the same period in 2020 and 2021. The detention charges were still much higher than those in 2020 though slightly decreased compared to those in 2021. The United States has become the region whose demurrage and detention charges are the highest at present.[3] These persistently high ancillary expenses, in turn, have transformed into continuously rising consumer prices, exacerbating the already severe inflationary pressures. Ultimately, it is the consumers at the end of the supply chain who bear the burden.

Figure 3: Demurrage vs detention charges across shipping lines and container types for both import and export shipments for Los Angeles and Long Beach: 2020-2022[4]

[1] See Global container freight rate index from January 2019 to November 2022 (in U.S dollars), (visited on 7 February 2023), https://www.statista.com/statistics/1250636/global-container-freight-index/#:~:text=In%20November%202022%2C%20the%20global%20freight%20rate%20index,function%20properly%20for%20the%20whole%20system%20to%20work.

[2] See Container Xchange Report: Demurrage & Detention Benchmark 2021, p.15-17.

[3] See Container Xchange's Annual Benchmark Report on: Demurrage and Detention(2022 3rd edition), p.15.

[4] See Container xChange's Annual Benchmark Report on: Demurrage and Detention(2022 3rd edition), p.27.

2. Limited Carrying Capacity Affects the Interests of U.S. Exporters

The supply-demand imbalance caused by port congestion has turned the shipping market into a "seller's market," with carriers holding the upper hand in transactions and being able to choose the most profitable orders among various shipping demands. There is an increasing number of cases where carriers refuse to transport goods from exporters or where carriers cancel orders even without notifying the shippers in advance.[1]

The refusal of carriers has had a significant impact on the export of American agricultural products. Transporting agricultural products requires much time to clean the containers and load them according to the required preservation requirements, which incurs high costs and wastes a lot of time. Many carriers would rather quickly transport empty containers back to other countries' ports for new export orders after unloading import orders, rather than accepting American agricultural products. Even if carriers express their intention to trade, exporters are required to pay shipping fees much higher than before.[2] The widespread refusal of carriers and discriminatory measures have resulted in a large accumulation of major export agricultural products at the port, such as potatoes, cotton, soybeans, almonds, dairy products, poultry, citrus fruits and paper products, making it impossible to transport and sell them normally. This accumulation has resulted in significant losses: During the period from July to December 2020, carriers rejected export orders of US agricultural products worth at least $1.3 billion. From 2020 to 2021, American agricultural exporters experienced a total loss of 22% in sales revenue.[3]

In summary, the shipping industry faced significant supply chain disruptions during the pandemic, leading to high shipping costs, export barriers, and increased inflation, which has put enormous pressure on US shippers and consumers. In contrast, in 2021, carriers worldwide achieved a record-breaking profit of $150 billion due to increased demand for imported goods and rising container shipping prices.[4] The United States Congress believes that the main reason for the difficulties faced by American shippers and consumers is the improper behavior of carriers in shipping, and therefore has decided to promote relevant legislative amendments.

II. Interpretations of the Key Content of the Ocean Shipping Reform Act of 2022

1. Lean towards Protectionism in Legislation

The first legal code dedicated to the regulation of international shipping management in the

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[1] US Senate Committee on Commerce, Science and Transportation, *Cantwell Applauds unanimous Senate Passage of Ocean Shipping Reform Act*.

[2] Lori Ann LaRocco, *Carriers rejected at least $1.3 billion in potential U.S. agricultural exports from July to December*, CNBC News (15 March 2021), https://www.cnbc.com/2021/03/15/carriers-rejected-at-least-1point3-billion-in-potential-us-agricultural-exports.html.

[3] Huileng Tan, *Shipping Crisis American Farm Export Hit Containers Leave California Empty*, Businessinsider (14 November 2021), https://www.businessinsider.com/shipping-crisis-american-farm-exports-hit-containers-leave-california-empty-2021-%20%2011.

[4] US Congress, S. 3580 Ocean Shipping Reform Act of 2022 in One Page.

United States was The Shipping Act of 1984 (hereinafter the 1984 Act), aiming to create a more favorable policy environment for the US merchant fleet, which was at a competitive disadvantage at the time, in order to meet US needs in national defense and international trade. The Ocean Shipping Reform Act of 1998 (hereinafter the 1998 Act), in contrast, began to relax government control over the shipping market, strengthen fair competition mechanisms, and focus on creating an open and fully competitive market.[1] Compared to the previous two laws, the Ocean Shipping Reform Act of 2022 further tightened regulations on the shipping market, highlighting the protectionist stance of "America First" and the position of the shipping nation even more.

In terms of legislative purpose, both the 1984 Act and the 1998 Act stated it was "to provide an efficient and economic transportation system in the ocean commerce of the United States that is, insofar as possible, in harmony with, and responsive to, international shipping practices",[2] which made it clear to prioritize US interests while keeping in line with the international shipping order. However, in the 2022 Act, this provision was modified to "ensure an efficient, competitive, and economical transportation system in the ocean commerce of the United States," placing special emphasis on the necessity of maintaining an idealized transportation system for the United States. Such a modification specifically emphasized the need to maintain an idealized US transportation system, making US interests in international trade more central.

In addition, the 1998 Act aimed to "promote the growth and development of United States exports through competitive and efficient ocean transportation and by placing a greater reliance on the marketplace" when it comes to the construction of the shipping market competition mechanism. In the 2022 Act, however, the term "ocean transportation" has been replaced with the more specific "the carriage of goods by water in the foreign commerce of the United States". This expands the scope of the law to cover all waterborne transportation related to foreign trade, not just ocean transportation. Meanwhile, by adjusting the wording from the broader "ocean transportation" to the specific "the carriage of goods by water in the foreign commerce of the United States", it highlights the core position of the US as a shipping nation and redirects the focus of the law towards the carriers.

2. Additional Obligations of the Carrier and Increased Burden of Proof for Carriers

A. Changes to the Rules of Demurrage and Detention

Neither the 1984 Act nor the 1998 Act specifically regulated demurrage and detention charges. If there were improper charging practices, parties would typically seek remedies by alleging that carriers have violated their obligation to "maintain rates or charges in a level that is

[1] See Zhu Zengjie, *Regrettable the US Ocean Shipping Reform Act of 1998*, China Ocean Shipping Bulletin, 1 November 1998, pages 13-14.

[2] The original text is: "to provide an efficient and economic transportation system in the ocean commerce of the United States that is, insofar as possible, in harmony with, and responsive to, international shipping practices."

just and reasonable". FMC has previously provided specific application standards for this obligation in the collection of demurrage and detention charges through the issuance of federal administrative regulations.[1] However, the 2022 Act elevates the rules for demurrage and detention charges from federal administrative regulations to a legal level, causing difficulties for carriers to charge these rates.

Firstly, the 2022 Act refers to the substantive criteria established by FMC in defining demurrage and detention charges. The fees do not necessarily have to be labeled as "demurrage charges" or "detention charges," and any fees charged by carriers or terminal operators for the use of terminal space or shipping containers can be considered as the aforementioned fees.[2]

Secondly, the 2022 Act sets forth the formal requirements for invoices of demurrage and detention charges. The 2022 Act stipulates that invoices for demurrage and detention charges issued by carriers shall include not only standard information such as the parties involved, charges, and shipping details, but also details regarding the discharge port, container number, free time for container usage and its start and end times, return time, charging rules, and rates for the fees. Furthermore, the carrier is required to declare in the invoice that the charges comply with the relevant regulations of FMC, and that their own actions have not caused or facilitated the collection of demurrage and detention charges.[3]

Thirdly, there are serious legal consequences for non-compliant invoices. If the carrier fails to issue demurrage and detention charges invoices with the necessary information as required, the shipper's obligation to pay will be directly waived.[4] The 2022 Act also grants FMC the authority to independently investigate the compliance of invoices. If the Commission determines that the charges recorded on the invoice are inaccurately or incorrectly classified as compliant, it can demand refunds from the carrier or impose civil fines as penalties.[5]

In addition, the law establishes a safe haven for non-vessel operating common carriers. If FMC determines that a non-vessel operating common carrier is not responsible for the collection of demurrage and detention charges, the penalties will be shifted to the ocean carriers or other common carriers that issue the invoices.[6]

Furthermore, the law introduces a mechanism to publicize penalties. All penalties issued by FMC for carrier violations, including improper demurrage and detention charges, will be made public on the Commission's website.[7] This serves as a warning to carriers to comply with

1 85 FR 29665.
2 46 USCA § 41104(a)(15).
3 46 USCA § 41104(d).
4 Ibid (f).
5 46 USC §41310.
6 46 USCA § 41104(e).
7 46 USCA § 46106(d).

regulations.

Finally, the 2022 Act has improved the efficiency of the complaint and relief procedures for demurrage and detention charges, and established more favorable dispute resolution procedures for shippers. The newly authorized Office of Consumer Affairs and Dispute Resolution Services provides nonadjudicative ombuds assistance, mediation, facilitation, and arbitration to resolve challenges and disputes involving cargo shipments, household good shipments, and cruises subject to the jurisdiction of the Commission,[1] providing a dedicated venue for dispute resolution. The 2022 Act also simplifies the charge complaints process for shippers, consignees, freight corporation, and third parties, and assigns a lighter burden of proof, shifting the burden of establishing the reasonableness of any demurrage or detention charges from the complainant to the common carrier.[2] As a result, more obligations and responsibilities are imposed on the carrier, from the formal elements of collection of charges, to dispute resolution procedures.

B. Strengthening the Prohibition on Retaliation, Discrimination and Refusal-to-trade Clauses

The 2022 Act enhances the prohibition on retaliation, discrimination, and refusal-to-trade clauses. It states that a common carrier, marine terminal operator, or ocean transportation intermediary, acting alone or in conjunction with any other person, directly or indirectly, may not retaliate against a shipper, an agent of a shipper, an ocean transportation intermediary, or a motor carrier.[3] Furthermore, in response to the foregoing problem of carriers refusing to ship or being charged unreasonably high freight rates, the 2022 Act specifically adds a provision that common carriers shall not unreasonably refuse cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods.[4]

Changes in the terminology used in this revision should be noticed with great attention. Retaliation, refusal cargo space and other discriminatory acts are included in the “General Prohibitions” and “Common Carriers” section under the chapter “Prohibitions and Penalties”, respectively. Regarding the prohibition of retaliation, the 2022 Act still uses the term “may not” as used in the relevant section of the 1998 Act. However, regarding the prohibition of refusal cargo space and other discriminatory acts in the “Common Carriers” section, this revision changes “may not” to “shall not”. In English, the former emphasizes the cancellation or denial of a certain permission or right.[5] It is similar to the Chinese term “不可” (not permissible). On the other hand, the latter emphasizes that the action is a statutory prohibition, similar to the Chinese term “不应当”

[1] Ocean Shipping Reform Act of 2022, Section 17.
[2] 46 USC §41310(b).
[3] 46 USCA §41102(d).
[4] 46 USCA §41104(a).
[5] It can also be the cancellation and denial of power in the context of government departments.

(should not) stipulated in legal regulations. This difference in language usage further strengthens and highlights the prohibitive nature of carrier refusal and discriminatory transaction behaviors in legal terms, similar to the concept of "compulsory contracting system" in civil law.

Additionally, this amendment also introduces different forms of legal liability for engaging in prohibited activities. Instead of the previous model of only facing civil penalties, there are now three different levels of punishment: a civil penalty; in addition to or in lieu of assessing a civil penalty, order a refund of money. This, in fact, increases the legal consequences for engaging in prohibited behaviors.[1]

C. Refinement of the Carrier Reporting System

Compared to the previous reporting obligations, the 2022 Act also sets higher requirements for common carrier in terms of information disclosure. FMC shall publish on its website a calendar quarterly report that describes the total import and export tonnage and the total loaded and empty 20-foot equivalent units per vessel. Ocean common carriers shall provide to the Commission all necessary information, as determined by the Commission.[2] Setting this reporting obligation will help FMC understand the carrier's loading situation, increase transparency in the industry's operations, and enable law enforcement agencies to understand the overall situation of the shipping industry and promptly detect illegal practices such as unjustified refusal transaction behaviors.

3. Re-enforcement of the Regulation of Controlled Carriers

The concept of "controlled carriers" originated from the US-Soviet Cold War in terms of shipping rules. It was incorporated into the 1984 Act, referring to an ocean common carrier that is, or whose operating assets are, directly or indirectly, owned or controlled by the government under whose registry the vessels of the carrier operate. The Controlled Carrier Rules have a strong bias towards ownership discrimination. FMC has the authority to oversee and review the rates and charges of such carriers, and any rates and fees deemed below a reasonable level will be considered invalid.[3]

The 1998 Act continues and strengthens the regulatory system for controlled carriers. It removes the requirement for a vessel's flag State in the definition and replaces it with "an ocean common carrier that is, or whose operating assets are, directly or indirectly, owned or controlled by a government," expanding the scope of the concept. State-owned shipping companies can no longer evade the disadvantages of being a controlled carrier by using convenient flags.[4] Furthermore, the 1998 Act also narrows down the exceptions to the controlled carrier rules, only exempting carriers who enjoy national treatment or most-favored-nation treatment, or carriers that provide trade

[1] 46 USCA §41107(a).
[2] 46 USCA §41110.
[3] Ocean Shipping Act of 1984, Section 3, 9.
[4] Ocean Shipping Reform Act of 1998, Section 102.

transport services exclusively by controlled carriers, from being regulated and controlled by US laws.[1]

The 2022 Act updates the definition of controlled carriers once again, referring to State-owned or State-controlled enterprises, or owned or controlled by, a subsidiary of, or other wise related legally or financially to a corporation based in a country identified as a non-market economy country as defined in section 771(18) of the Tariff Act of 1930 (19 U.S.C. 1677(18)), or identified by the United States Trade Representative in the most recent report required by Section 182 of the Trade Act of 1974 (19 U.S.C. 2242) as a priority foreign country under subsection (a)(2) of that section, or subject to monitoring by the United States Trade Representative under section 306 of the Trade Act of 1974 (19 U.S.C. 2416).[2] Compared to the definition of previous two Acts, this revision relies on international trade rules of the United States and essentially expands the scope of identified controlled carriers. While retaining the strong regulatory rules for controlled carriers under the 1998 Act, the 2022 Act also adds a new requirement to FMC's annual reporting obligation to Congress. Specifically, the Commission is now required to identify and report on the shipping transaction activities and market competition situation of controlled carriers, thereby increasing the regulatory burden on their operations.[3]

The 2022 Act aligns the regulatory rules of shipping supervision, which focus on regulating competition and supply chain order, with the current international economic and trade policies of the United States. The qualification of non-market economies, among others, can be directly applied to the regulation of the shipping industry. This reduces the burden of proof for FMC in determining controlled carriers and reflects the implementation of the "market-oriented policies" that the United States has been advocating in all aspects of its international economic and trade activities. In recent years, there have been ongoing trade frictions between China and the United States, as well as controversies surrounding China's State-owned enterprises and market economy system. The emergence of this rule will have certain adverse effects on the economic activities of large shipping companies in China, such as China COSCO Shipping.

4. Expansion of the Regulatory Authority and Scope of FMC

A. The Establishment of the Shipping Exchange Registry System

The newly enacted 2022 Act establishes a registration system for shipping exchanges. The term "shipping exchange" means a platform (digital, over-the- counter, or otherwise) that connects shippers with common carriers for the purpose of entering into underlying agreements or contracts for the transport of cargo, by vessel or other modes of transportation. Unlike specific legal entities

[1] Ibid, Section 108.
[2] 46 USCA §46106(b).
[3] Ibid.

such as corporate shipping exchanges, the 2022 Act adopts a broader definition approach, emphasizing the functional role of the platform as a medium for transaction facilitation.

The 1984 Act and the 1998 Act of did not clearly place the platform for shipping transactions under the jurisdiction of FMC. They only required that each service contract shall be filed confidentially with FMC and several basic terms of the contract, such as the origin and destination port ranges, the minimum volume or portion, the commodities involved, and the duration, shall be published in essential terms.[1]

However, the 2022 Act expands the authority of FMC from recording shipping contracts to overseeing and managing shipping exchange platforms. According to the Act, no person may operate a shipping exchange involving ocean transportation in the foreign commerce of the United States unless the shipping exchange is registered as a national shipping exchange under the terms and conditions provided in this section and the regulations issued pursuant to this section set by FMC. Besides, the Commission may exempt, conditionally or unconditionally, a shipping exchange from registration under this section if the Commission finds that the shipping exchange is subject to comparable, comprehensive supervision and regulation by the appropriate governmental authorities in a foreign country where the shipping exchange is headquartered.[2] This clause does not limit the jurisdiction of the trading platform, so strictly speaking, even if it is a shipping exchange located in another country, but as long as its business involves US foreign trade, it must comply with the shipping exchange registry rules, which expands the scope of the jurisdiction of FMC to all regions that have trade links with the United States.

The shipping exchange registry system will work together with the provisions of the original service contract to facilitate comprehensive regulation by FMC from the platform of the transaction initiation to the final specific contract. This system enables FMC to effectively trace contracts signed by shippers and carriers through various media and methods, both within and outside the United States, in order to have a more comprehensive understanding of international maritime transactions that involve U.S. interests. It also helps to monitor carrier actions that are detrimental to exporters, such as refusal of shipment or unilateral cancellation of orders, and thereby regulate the order of maritime transactions.

B. Authorizing the FMC to Require Information Sharing in Temporary Emergency

According to the 2022 Act, an emergency situation occurs when the Commission unanimously determines that congestion of carriage of goods has created an emergency situation of a magnitude such that there exists a substantial, adverse effect on the competitiveness and reliability of the international ocean transportation supply system, which contradicts the purpose of the act to

[1] 46 USCA §40502.
[2] 46 USCA §40504.

promote commercial development and market-oriented competition mechanisms.[1] In such cases, FMC may issue an emergency order requiring any common carrier or marine terminal operator to share directly with relevant shippers, rail carriers, or motor carriers information relating to cargo throughput and availability, in order to ensure the efficient transportation, loading, and unloading of cargo to or from any point, vessel or inland destination or point of origin.[2]

Granting FMC this power allows them to intervene and coordinate various aspects of the supply chain using administrative authority, particularly during extreme congestion at ports. This helps alleviate port congestion as quickly as possible and prevents imbalances in market supply and demand that can disrupt the supply chain. However, this power only remains at the level of improving transparency through data collection and its effectiveness in efficiently relieving congestion is still relatively limited.

C. Higher Level of Legal Interpretation Power

In addition to its extensive investigative, punitive, and regulatory powers, the expansion of the authority of FMC in this amendment is also evident in its higher level of legal interpretation power. A fallback authorization clause has been added to the "Essential Terms" in the section Service Contracts compared to the 1998 Act, which grants FMC the authority to establish rules and procedures to include additional provisions that it deems necessary in service contracts.[3] Besides, FMC is also authorized to develop interpretive guidelines for reasonable assessments of demurrage charges, detention charges, and other provisions such as undue or unreasonable refusal and discriminatory transaction , within a certain period after the enactment of the law.[4] The current set of proposed regulations is now in the stage of soliciting comments and opinions on the official website of FMC.

5. Industry Assessment Arrangements

In addition to revising and supplementing existing laws, the 2022 Act also includes some policy assessment work to alleviate the imbalance in the US supply chain. For example, feasibility assessments of using inland ports and warehouse storage for transporting shipping containers, assessments of best practices in container logistics, assessments of the port technology capabilities of the US and other countries, and investigation reports on the supply chain of FMC.[5] Compared to a single interest in revising the law, these arrangements have indeed made some preparations for taking measures to settle supply chain issues. However, as most of them are preliminary assessments for policy changes, the specific measures and the future implementation effects are still

[1] Ocean Shipping Reform Act of 2022, Section 18.
[2] Ibid.
[3] 46 USCA §40502(c)(9).
[4] Ocean Shipping Reform Act of 2022, Section 7(b)(c)(d).
[5] Ocean Shipping Reform Act of 2022, Section 19-25.

unclear.

III. The Evaluation and Impact of the Ocean Shipping Reform Act of 2022

Compared to previous regulations, the Ocean Shipping Reform Act of 2022 tightened control over the shipping industry, especially carriers, and the value orientation has changed again. However, it is still a relatively moderate reform focused on alleviating conflicts. Nevertheless, it has still prompted European shippers to call for changes in European shipping regulations and may influence the global trend of shipping regulation.

1.Tools for Mitigating Domestic Conflicts: Moderate but with Limitations

During the process of promoting legislative changes, there have been more radical voices in the United States than the current proposal, with some senators even calling for the direct abolition of the long-standing antitrust immunity system for carriers.[1] The protectionist tendencies and shipper stance in the 2021 House proposal are also more apparent than in the current version, such as setting minimum standards for service contracts for carriers and making certificates issued by FMC a prerequisite for collecting demurrage and detention charges, imposing strict requirements on carriers.[2] However, none of the above proposals ultimately became a law. Compared to previous revisions, the measures taken in this amendment are still moderate and cautious. They do not fundamentally shake the special exemptions enjoyed by shipping companies or forcibly interfere with the composition of transactions. Instead, they focus on enhancing transparency in all aspects of transactions and resolving disputes. The emphasis is on strengthening regulatory oversight during and after the transaction process, as well as establishing new obligations, rather than depriving existing rights.

However, it is important to note that this legislation only provides a certain institutional response to the social conflicts arising from the COVID-19 pandemic. The measures are tailored to meet specific temporal needs and have limited universality. By the end of 2022, more than 120 countries and regions around the world have lifted travel restrictions related to the COVID-19 pandemic. This has led to a transition into a “post-pandemic” phase where countries have relaxed their COVID-19 control measures. The reduction in widespread lockdowns, lifting of travel restrictions, stabilization of consumption, and gradual recovery of shipping order have significantly eased the pressure on the global supply chain.[3] These changes in the situation may result in a delay in the implementation of new rules.

Furthermore, from a value-oriented perspective, the 2022 Act also has certain limitations. The

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[1] John Gallagher, *New legislation would strip ocean carrier antitrust protections*, Freightwaves (1 March 2022), https://www.freightwaves.com/news/new-legislation-would-strip-ocean-carrier-antitrust-protections.

[2] US Congress, H. R. 4996 (Ocean Shipping Reform Act of 2021).

[3] See Gao Cong, Cai Shaoli & Sun Yulong, *Soft Shipping Market Continues, Increased Trade Provides Temporary Support for Bulk Shipping Rates*, Huatai Futures Research Institute Shipping Special Report, 5 March 2023, page 6.

focus of this reform is only on the rights and obligations of carriers under the pandemic, and almost all measures are aimed at addressing the issue of unbalanced interests between carriers and shippers during the COVID-19 pandemic, leaving deeper problems concerning supply chain disruptions untouched.

Supply chain participants include manufacturers, ports, ocean carriers, workforce, port operators, railways, trucking companies, container chassis suppliers, consignors, and consumers, among others. The supply chain disruptions are not caused by the actions of carriers alone, but a combination of factors such as surging consumer demand, a sluggish labor market, and limited inland storage. Redressing the balance in relation to the supply chain was not the primary objective of the legislation, for it was to, to some extent, reverse the extremely unfavorable trading situation for American shippers caused by supply chain disruptions. Therefore, this legislation is more like a tool for the United States to alleviate current domestic conflicts. The implementation of the legislation also confirms this point: ever since the law came into effect in June 2022, FMC has received numerous complaints about carriers charging unreasonable fees, resulting in carrier refunds exceeding $1 million.[1] Despite the role of the bill in maintaining domestic stability in the United States, it is important to recognize that in order to fundamentally address the problem, attention should be given to investing in the country's land logistics infrastructure and resolving labor disputes to improve the efficiency of ports and enhance the ability to handle a large volume of trade in the future.[2] These measures will require further refinement of laws and regulations, enforcement, industry development, and investment coordination.

2. Radiation Effects of the 2022 Act: Joint letter from the Top Ten Organizations in Europe

The impact of the COVID-19 pandemic is not limited to the United States alone. The global shipping industry is also facing a supply chain crisis. In Europe, the container freight transportation is facing significant challenges such as cancelled voyages, widespread port skipping, and a significant increase in freight rates up to three to four times of the pre-COVID levels.[3] In this context, the release of the 2022 Act in the United States has also sparked dissatisfaction among European shippers, port workers, and others with EU regulations. In July 2022, a joint letter was

[1] Federal Maritime Commission, *Charge Complaint Refunds Hit $1 Million*, FEDERAL MARITTIME COMMISSION News & Events (3 May 2023), https://www.fmc.gov/charge-complaint-refunds-hit-1-million/.

[2] World Shipping Council, *WSC Statement on Enactment of the Ocean Shipping Reform Act*, World Shipping Council News Room（16 June 2022）, https://www.worldshipping.org/news/wsc-statement-on-enactment-of-the-ocean-shipping-reform-act.

[3] CLECAT, FEPORT, et al., *Container shipping customers and service suppliers call for immediate start to review of competition rules*, CLECAT News (22 July 2022), https://www.clecat.org/news/press-releases/container-shipping-customers-and-service-suppliers.

published by the top ten organizations.[1] They believe that the benefits derived from the general competition law exemption enjoyed by shipping companies during the COVID-19 pandemic have not been fairly shared between shipping companies and other maritime sectors, while the negative impact caused by the pandemic is mainly borne by shippers, port operators, and consumers.[2] The top ten organizations also believe that the reason for this imbalance is the European Union's Regulation No. 906/2009, which grants antitrust immunity to shipping alliances. They are calling for the EU to follow the footsteps of the United States and review the relevant provisions of the regulation, and to introduce new measures and mechanisms to ensure market fairness and transparency, addressing the concerns of shippers.

However, the extent of the reforms that the European Union will adopt remains uncertain. Firstly, as a traditional hub for shipping giants, Europe's interest tendency is different from that of the United States, which is a shipping country. Europe cannot completely tilt towards the demands of shippers and blindly exert pressure on carriers. Secondly, the European Union has always taken a positive stance on the economic role of current shipping alliances and joint ventures,[3] which means that EU reforms are unlikely to directly affect the fundamental system of carrier antitrust exemptions until the United States, as a shipping country, relaxes its carrier anti-monopoly exemption system. In the current gradual recovery of the global shipping order, the European Union is likely to adopt a more moderate approach than the United States, even taking some non-legal measures such as providing industry subsidies and issuing supportive policies to resolve the conflicts between shippers and carriers in the current global supply chain issues.

3. Potential for Triggering Protectionist Currents in Shipping Regulatory

The supply chain crisis is affecting the United States as well as the whole world. In addition to the long-lasting impact of the COVID-19 pandemic, factors such as the Russia-Ukraine conflict, port strikes, and labor negotiations are also constantly affecting the stability of the supply chain. In recent years, there has been a resurgence of trade protectionism and anti-globalization trends worldwide. The strong "national priority" protectionism shown in the recent legislation in the United States may lead to a competition among countries in international shipping regulation.

Different countries often have different main interests in the shipping industry. The adoption of the 2022 Act in the United States, which represents the interests of American shippers, may lead to

[1] The top ten organizations that are part of the alliance include the European Freight Forwarders Association (CLECAT), the Federation of European Private Port and Terminal Operators (FEPORT), the European Shippers' Council (ESC), the European Barge Union (EBU), the Global Shippers' Forum (GSF), the European Tugowners Association (ETA), the International Union for Road-Rail Combined Transport (UIRR), the International Federation of Freight Forwarders Associations (FIATA), the International Association of Movers (IAM), and the International Federation of International Movers (FIDI).

[2] CLECAT, FEPORT, et al., *Container shipping customers and service suppliers call for immediate start to review of competition rules*, CLECAT News (22 July 2022), https://www.clecat.org/news/press-releases/container-shipping-customers-and-service-suppliers.

[3] The European Union has consistently recognized the economic benefits of the shipping alliance and has extended the exemption from antitrust rules for the alliance until 2024.

unfavorable situations in international trade for countries with different trade interests. This may stimulate other countries to develop similar protective legislation and regulatory frameworks to protect their own economic interests through legal confrontation. For the global economy, this wave of protectionism could potentially impact contract freedom and the efficiency of transactions, thus becoming a detrimental factor to supply chain stability.

IV. Enlightenment from the Ocean Shipping Reform Act of 2022 on China's Shipping Regulatory and the Shipping Industry

Despite certain limitations in the revision of the US legislation, we should still acknowledge its relatively comprehensive and stable system of shipping management rules. To handle the current global supply chain disruptions, China should also take more comprehensive measures in terms of laws, regulations, industry supervision, and infrastructure development.

1. Improve Shipping Regulatory and Expedite the Formulation of Specialized Shipping Laws

In the field of shipping regulation, there is currently no high-level legal framework in China. The market regulation of the international shipping industry mainly relies on the Regulations of the People's Republic of China on International Ocean Shipping (hereinafter International Ocean Shipping Regulations) issued by the State Council and the Implementing Rules of the Regulations of the People's Republic of China on International Maritime Transportation (hereinafter Implementing Rules of International Maritime Transportation) issued by the Ministry of Transportation. These two regulations are classified as administrative regulations and departmental rules, respectively. However, the recently issued Opinions of the General Office of the State Council on Facilitating Stability and Quality Improvement of Foreign Trade mentioned the need to "strengthen market regulatory in the field of international maritime transportation in accordance with laws and regulations" before the official implementation of the US 2022 Act. This raises higher requirements for the construction of China's shipping regulatory framework. Therefore, it is inevitable that China will face the problem of gradually improving regulatory rules and elevating their legal status. From the 2022 Act of the United States, we can gain some insights.

A. Clarify the Subjects of Shipping Regulatory and Promote the Integration of Shipping Regulatory Processes

One of the issues in China's shipping industry is the lack of clarity in regulatory authorities. For example, the enforcement agencies in the International Ocean Shipping Regulations are mainly the transportation authorities of the State Council and their authorized local transportation authorities. When it comes to anti-monopoly issues in the shipping industry, the Implementing Rules of International Maritime Transportation have established a pre-assessment procedure by the

Ministry of Transportation. However, there is a lack of connection with the independent investigation and enforcement power of the anti-monopoly agencies in the Anti-monopoly Law of the People's Republic of China (hereinafter Anti-monopoly Law). In contrast, in cases of relevant issues, the requirement for anti-monopoly law enforcement agencies to rely on the investigation and assessment of the transportation department has not been systematically arranged, and the regulatory body is not clearly defined.

In contrast, the shipping regulatory authority in the United States is basically centralized in the FMC, and through continuous legal amendments, the independence of the agency has been established, not only by giving it regulatory and investigative powers, but also by granting it the power to formulate regulations for the implementation of some laws. The 2022 Act has achieved consistency in policy formulation, implementation, case investigation, and dispute resolution, greatly improving administrative efficiency. In terms of antitrust regulation, FMC has enforcement authority and has established a good cooperation mechanism with the antitrust department of the U.S. Department of Justice through memorandum.[1] As a reference, in the formulation and improvement of subsequent shipping regulatory rules, China should also clarify the regulatory body, either by establishing a dedicated regulatory agency responsible for shipping regulatory or by improving the cooperative law enforcement mechanism between different institutions and departments, similar to the U.S. Department of Justice and FMC,[2] to narrow down regulatory gaps in the existing system and achieve orderly and healthy regulation of the shipping industry.

B. Improve the System of Supervision of Trading Entities During and After the Transaction, and Strengthen the Supervision of Shipping Exchange Platforms

In the current "International Maritime Regulations" in China, there are various requirements for qualifications and licensing procedures for international shipping, non-vessel operating common carrier (NVOCC) business, and international liner shipping.[3] In contrast, the US 2022 Act in the United States weakens the rules for admission of shipping industry operators and focuses on the mid-term and post-event supervision of market entities. Clear penalty mechanisms are established for illegal activities. This type of regulatory framework aims to create an open market environment as much as possible. Therefore, in the future development of international maritime regulatory systems, as well as the formulation of specialized maritime laws, China can refer to the model used by the United States. This will involve shifting the focus of maritime market regulation from market access to maintaining a fair competitive order in the market. Specifically, the first step is to simplify

[1] Federal Maritime Commission, *New FMC and DoJ MOU Supports Interagency Collaboration on Antitrust Issues*, FEDERAL MARITTIME COMMISSION News & Events (12 July 2021), https://www.fmc.gov/new-fmc-and-doj-mou-supports-interagency-collaboration-on-antitrust-issues/.

[2] See Xu Feng & Liu Yang, *Problems of Chinese rules on shipping market competition and enlightenment of America shipping legislation*, Dalian Maritime University Journal (Social Sciences Edition), Vol. 21, No. 2, 2022, pp. 25-34.

[3] International Ocean Shipping Regulations, Articles 5-12.

the procedures for market access as much as possible. Secondly, it is important to improve the filing system for maritime transactions, clearly defining the types of information to be filed and simplifying the review process and time frame, in order to provide sufficient information for post-transaction supervision while also unleashing the vitality of market entities.[1] Finally, it is necessary to establish detailed behavioral norms for market participants, clearly defining prohibited activities and providing clear guidance on law enforcement and responsibility in case of violations.

In contrast to the relaxed entry requirements for shipping operations, the US 2022 Act has advanced the supervision of trading platforms to the entry stage, requiring all trading platforms to undergo review and registration procedures. This approach helps to monitor shipping transactions at a macro level and ensure the security and credibility of transactions. Setting entry barriers for trading platforms, as opposed to restricting the entry of shipping industry practitioners, can strike a balance between an active market and transaction security, which has certain reference significance. However, the current design of the American system shows signs of excessive expansion of sovereignty. When designing our own system, we should carefully establish the connecting factors for regulating foreign trading platforms, ensuring that the extraterritorial effect of relevant rules is carried out within the limits permitted by international law, and providing legal basis for the regulation of foreign transactions while adhering to the principle of international reciprocity and courtesy.

C. Improve Responsibilities and Procedures for Remedies for Violations of the Law

The current regulatory rules in China have established some procedural provisions for illegal activities, but overall, they are relatively general and do not address the procedural coordination issues between regulatory departments. In terms of legal liability, the main forms of liability are administrative penalties and criminal penalties, without incorporating civil liability. The recourse for consumers and shippers who have suffered from losses is entrusted to other legal processes. However, the US 2022 Act establishes a specialized procedure and process for resolving disputes, authorizing FMC to impose civil liability such as compensation for damages and refunds in addition to punitive measures of a public nature.[2] The integrated approach facilitates efficient resolution of disputes. In the future formulation and reform of shipping regulatory, China should also provide more specific provisions regarding the conditions, institutions, procedures for investigating violations of the law, as well as the types and severity of penalties imposed on offenders.[3] It is also necessary to consider implementing a punishment mechanism that combines administrative

[1] See Peng Yang, *The Reform of EU and US Antitrust Exemption Regimes and China's Shipping Legislation Tendency*, China Oceans Law Review, Volume 1, Issue 21, 2015, p. 426.

[2] 46 USCA §41107.

[3] Hu Zhengliang & Jia Binggui, *On several basic theoretical issues in the drafting of Chinese Shipping Law*, Chinese Journal of Maritime Law, Volume 1, 2012, p. 70.

penalties with civil compensation, in order to avoid adding unnecessary burdens to the aggrieved party and protect interests for all parties involved.[1]

2. Enhance Transparency in the Shipping Industry and Improve Supply Chain Structure

The legal measures stipulated in the US 2022 Act have certain limitations in addressing supply chain issues. However, it is undeniable that the efforts to improve transparency in the shipping industry can help all parties involved in the supply chain to timely assess the situation of ports and make adjustments accordingly, which to some extent alleviates port congestion problems.

The current state of the supply chain is in constant fluctuation, with issues such as the Russia-Ukraine conflict, inflation, currency policy volatility, sanctions and counter-sanctions all potentially impacting the stability of the supply chain. In order to cope with the ever-changing state of the supply chain, China should also strive to enhance transparency in the shipping industry. Firstly, we can refer to the continuous refinement of the carrier reporting obligations in the US 2022 Act to collect and disclose timely information on port congestion, transportation conditions of each voyage, and data carrier's loading situation.

Additionally, we can establish an integrated information platform for the shipping industry. In addition to administrative monitoring, we can also encourage shipping companies to provide real-time notifications on the navigation difficulties or congestion they face in different routes and ports. By introducing digital management methods, we can ensure the interconnection of data and information across various stages of the supply chain, thereby minimizing information gaps between carriers, shippers, and dock workers and preventing the occurrence of information silos. Furthermore, it is possible to establish necessary emergency mechanisms, similar to the 2022 Act, to empower administrative regulatory agencies with the authority to allocate equipment information and storage facilities in the event of serious threats to supply chain stability such as widespread congestion at ports. In addition, attention should be paid to improving the structure of the supply chain, optimizing resource allocation, breaking down the singular nature of the supply chain structure, and better facilitating cooperation between inland railway transportation, warehousing, and seaports to alleviate port pressure. Furthermore, in cases of excessive congestion or even interruption on certain routes, ensuring the smooth operation of the supply chain can be achieved through multimodal transportation and other methods.[2]

3. Strengthen the Rights and Compliance of China's Shipping Exchanges and Shipping Enterprises

The implementation of the US 2022 Act poses challenges to the protection of the rights and

[1] Peng Yang, *The Reform of EU and US Antitrust Exemption Regimes and China's Shipping Legislation Tendency*, China Oceans Law Review, Volume 1, Issue 21, 2015, p. 465.

[2] Luan Yu, *Analysis of Response to the Disruption of the International Shipping Supply Chain in the Post-Pandemic Era*, China Maritime Safety, Volume 4, 2022, p. 66.

compliance construction of China's shipping exchanges and shipping enterprises.

The newly establishment of the shipping exchange registry system essentially gives the US administrative authorities a first-mover advantage in regulating shipping trading platforms. To prevent undue restrictions in shipping transactions, China should actively utilize the exemption mechanisms in the 2022 Act, strengthen bilateral negotiations and communications, and minimize the impact of US administrative supervision on its shipping trading platforms. Once the specific regulatory rules for registration in US shipping exchanges are finalized, it is also important to pay attention to corresponding compliance construction to ensure the stability of trading order.

The inclusion of the new policies on market economy recognition and special regulation of State-owned or State-controlled shipping enterprises in the 2022 Act has brought about new challenges for the protection of the rights and compliance of Chinese State-owned enterprises.

China is a member of the United States' "non-market economy country" list, and both China COSCO Shipping and Orient Overseas Container Line Limited, two State-owned shipping enterprises in China, have been included in the current FMC's "Controlled Carrier" list due to their ownership structure and China's economic system.[1]

This places them under stricter regulatory obligations and may have adverse effects on their business operations. The data shows China is the primary trading partner for the United States during the COVID-19 pandemic. The China COSCO Shipping has consistently ranked among the top ten in terms of market share in major US ports.[2] Therefore, given the large volume of transactions, Chinese State-owned carriers should enhance their understanding of the current shipping regulatory in the United States. They should focus on ensuring compliance with these regulations on routes involving US ports, and actively protect their own interests.

Firstly, it is important to conduct a thorough review of the necessary invoice requirements for demurrage charges and container detention fees to avoid any unnecessary losses due to non-compliance. Secondly, it is necessary to establish legal remedies to address any potential losses resulting from the supervision of controlled carriers, and to fully utilize international trade rules, including the favorable qualification of Chinese State-owned enterprises in previous WTO cases, to protect the interests of our shipping companies. Finally, it is necessary to enhance self-reform and strengthen the construction of "competitive neutrality" in State-owned shipping enterprises. This involves establishing reasonable boundaries between the government and the market, achieving "separation of government and enterprise" in general trade activities, reducing government intervention in normal shipping operations, and avoiding granting inappropriate economic or

[1] Federal Maritime Commission: Controlled Carrier List, https://www.fmc.gov/about-the-fmc/controlled-carrier-list/.
[2] Trademo Trade Intelligence Report: Congestion in US ports 2022-Statistics & Trends, p.20-21.

regulatory advantages to state-owned enterprises that may do harm to fair market competition.1 By demonstrating market performance through free competition, we can gradually build trust in Chinese state-owned shipping enterprises in the international shipping market.

Translator: WANG Wenqi

[1] See Shen Wei, *SOEs' Competition Neutrality Deviation and Neutralizing Routes in the Context of Principle of Competition Neutrality*, Shanghai Journal of Economics, May 2019, p. 23-24.

海洋生物资源养护与海洋环境保护法律关系辨析

唐建业*

摘要：生物多样性主流化，可促进和提升人类对海洋生物多样性和海洋环境保护的意识，但也易造成对既有条约中不同法律术语和权利义务的误解或过度解释。2023 年 3 月，《国家管辖范围外区域海洋生物多样性养护与可持续利用协定》完成了文本谈判；该协定和相关法律文书、相关机制之间的关系，特别是和渔业条约和机构的关系，是该协定谈判过程以及未来条约解释中的争论焦点之一。为此，本文回归《联合国海洋法公约》本源，从法律术语和权利义务角度考察海洋生物资源和海洋环境之间的细微差别及其错综复杂的关系，包括勤勉义务视角，以厘清《联合国海洋法公约》框架下海洋生物资源养护和海洋环境保护之间的法律关系，为未来解释《国家管辖范围外区域海洋生物多样性养护与可持续利用协定》和渔业类条约与机构相互间关系提供参考。

关键词：海洋生物资源；海洋生物多样性；海洋环境；《联合国海洋法公约》

《2030 年可持续发展议程》目标 14 包括了海洋可持续发展的几个核心要素：海洋环境污染、海洋与沿海生态系统及其生物多样性、海洋生物资源养护等。海洋渔业活动，被认为是影响海洋生物多样性与海洋环境保护原因之一。[1]2015 年 6 月，联合国大会通过第 69/292 号决议，决定根据《联合国海洋法公约》就国家管辖范围以外区域海洋生物多样性的养护和可持续利用问题拟订一份具有法律约束力的国际文书，[2]以执行《联合国海洋法公约》第十二部分。2017 年 12 月，联合国大会通过第 72/249 号决议，决定召开政府间磋商会议，以尽早制定一份具有法律约束力的协定；[3]该协定将成为《联合国海洋法公约》第三个执行协定，被寄

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[1] See IPBES, The Global Assessment Report on Biodiversity and Ecosystem Services: Summary for Policymakers, IPBES Secretariat, 2019, p. 28-29; Laurent Lebreton, Sarah-Jeanne Royer, Axel Peytavin, et al., *Industrialised Fishing Nations largely Contribute to Floating Plastic Pollution in the North Pacific Subtropical Gyre*, Scientific Reports 12, 12666 (2022).

[2] UN, General Assembly Resolution on Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, A/RES/69/292, 19 June 2015.

[3] UN, General Assembly Resolution on Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, A/RES/72/249, 24 December 2017, paragraph 1.

予为未来公海综合治理制度提供法律依据的厚望。[1]由此产生一个关键问题，即《国家管辖范围外区域海洋生物多样性养护与可持续利用协定》（以下简称《BBNJ 协定》）和海洋生物资源养护间的关系；或者更直接地，《BBNJ 协定》和《联合国鱼类种群协定》及区域渔业管理组织之间的关系。

尽管 2015 年联合国大会决议明确《BBNJ 协定》应“不损害”（not undermine）相关协定或机制，[2]但是各方曾对《BBNJ 协定》的适用范围以及关于“不损害”原则的解释存在明显分歧。[3]有研究认为，《BBNJ 协定》既不可能“损害”现有国际条约，但也不可能不触及；综合治理的原则，将至少在两个方面影响未来海洋渔业管理：划区管理工具（如海洋保护区）和环境影响评价。[4]2023 年 3 月通过的《BBNJ 协定》一方面保留了“不损害”或者明确了“应尊重有关法律文件和框架以及有关全球、区域、分区域和部门机构的职责”，另一方面要求“加强合作与协调”“制定一个关于现有划区管理工具的机制，包括有关法律文件和框架以及有关全球、区域、分区域和部门机构通过的海洋保护区”以及“除非法律文件和框架以及有关全球、区域、分区域和部门机构监测和评估的活动满足《BBNJ 协定》规定的标准，否则《BBNJ 协定》缔约方应监测和评估这些活动”等。[5]这些条款，既是谈判妥协的产物，也为未来条约解释与适用留下了很大的不确定性。为准确厘清《BBNJ 协定》与渔业类条约之间关系，应回归《联合国海洋法公约》，从条约术语与权利义务角度去考察海洋生物资源养护和海洋生物多样性与海洋环境保护等之间的细微差别及其错综复杂的关系。

一、海洋生物资源与海洋环境：条约术语的通常意义

根据 1969 年《维也纳条约法公约》第 31 条（1），条约术语应“按其上下文并参照条约之目的及宗旨所具有之通常意义”进行善意解释。可见，不同条约中的术语其通常意义不尽相同；一个条约中的不同术语因其上下文不同，其通常意义也应有所不同。生物资源、生物多样性、海洋环境等术语，尽管从自然科学上看它们密切关联，但是作为不同条约中术语应认真甄别它们各自的通常意义，不能混同使用。考虑到不同的英文术语会被翻成相同中文术语，如果条约的中文文本也是作准文本时，在解释这些术语时应更加谨慎。《BBNJ 协定》序

[1] See Rosemary Rayfuse & Robin Warner, *Securing a Sustainable Future for the Oceans Beyond National Jurisdiction: The Legal Basis for an Integrated Cross-Sectoral Regime for High Seas Governance for the 21st Century*, International Journal of Marine and Coastal Law 23(3), September 2008, p.399-421.

[2] UN, General Assembly Resolution on Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, 19 June 2015, paragraph 3.

[3] See Zoe Scanlon, *The Art of “not Undermining”: Possibilities within Existing Architecture to Improve Environmental Protections in Areas beyond National Jurisdiction*, ICES Journal of Marine Science, Volume 75, Issue 1, January/February 2018, Pages 405–416; Ethan Beringen, Nengye Liu & Michelle Lim, *Australian and the Pursuit of “not Undermining” Regional Bodies at the Biodiversity beyond National Jurisdiction Negotiation*, Marine Policy, Volume 136, February 2022, 104929.

[4] Richard Barnes, *The Proposed LOSC Implementation Agreement on Areas Beyond National Jurisdiction and Its Impact on International Fisheries Law*, The International Journal of Marine and Coastal Law 31(4), September 2016.

[5] Draft Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction, 4 March 2023, Articles 14 (b), 19 (2)-(4) and 23 (6).

言第 1 段明确，该协定是为执行《联合国海洋法公约》第十二部分保护和保全海洋环境；海洋生物多样性，是一个从属于海洋环境的概念，故本节先分析生物资源和海洋环境的关系，再分析生物资源和生物多样性的关系。

1.海洋生物资源和海洋环境

海洋环境（marine environment）和海洋生物资源（marine living resources）密切相关。从自然科学上看，生物资源是海洋环境要素之一，也是海洋生态系统的组成部分；健康海洋环境，有利于海洋生物资源的生长与繁殖。养护海洋生物资源，能在一定程度上促进海洋环境及生态系统的保护与保全。[1]反之，则会产生争议。也就是，能否可将生物资源养护纳入环境保护范畴，或者国际环境法的相关规定能否直接适用于海洋生物资源养护与可持续利用？《南极海洋生物资源养护公约》和《关于环境保护的南极条约议定书》相互之间的关系可能是这样一个典型的例子。

从条约术语上看，《联合国海洋法公约》没有定义“海洋环境”。《联合国海洋法公约》第 1 条（4）仅定义了“海洋环境的污染”，指“人类直接或间接把物质或能量引入海洋环境”，造成对海洋生物资源（living resources）和海洋生物（marine life）的损害，进而妨碍包括捕鱼（fishing）在内的海洋活动。该定义从侧面确认了海洋环境的损害或破坏会影响海洋生物资源及其利用。

国际海底管理局（ISA）的《“区域”内多金属结核探矿和勘探规章》将“海洋环境”定义为“海洋中的物理、化学、地质和生物组成部分、条件和因素。”[2]该定义区分了生物和非生物组成部分，类似于“生态系统”的定义方法。根据《生物多样性公约》第 2 条，“生态系统是指植物、动物和微生物及其非生物环境作为一个功能单位相互作用而构成的动态复合体。”联合国粮农组织（FAO）认为，生态系统应包括动植物及非生物组成；可在不同层次上进行定义，从小生境到整体生态系统。尽管大多数生态系统没有固定的边界，但为了管理的目的还是需要确定其管理范围，并有一个具体的定义。[3]《南极海洋生物资源养护公约》将“南极海洋生态系统”定义为南极幅合带以南的“南极海洋生物资源相互间以及其与自然环境之间的复合关系”。[4]《南极海洋生物资源养护公约》，既符合了《生物多样性公约》第 2 条规定生态系统的组成，即生物与非生物组成；也较好地体现了 FAO 的指导意见，即为管理目的而划定的具体管理范围——南极幅合带以南的海洋生态系统。

《21 世纪议程》强调“海洋环境”是一个整体，“大洋和各种海洋以及邻接的沿海区域”

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1 See *The Reykjavik Declaration on Responsible Fisheries in the Marine Ecosystem*, 1-4 October 2001, paragraphs 3-5.
2 Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (2013), Regulation 1 (3)(c).
3 FAO, *Fisheries Management 2: The ecosystem approach to fisheries*, FAO Technical Guidelines for Responsible Fisheries No. 4 Suppl. 2, FAO, 2003, p. 18-19.
4 Convention on Conservation of Antarctic Marine Living Resources, Article 1(3).

是海洋环境的组成部分；海洋和沿海环境及其资源应作为一个整体进行保护和可持续发展；保护和保全海洋环境的目标是为“保持和加强其生命支持和生产能力”。[1]也就是，保护和保全海洋环境不是最终目标，而只是维护和保持海洋生态服务与产品的手段；或者说，环境保护是为社会经济发展服务，但社会经济发展不能损害环境提供生态服务或产品的能力。这种解释符合联合国大会关于“可持续发展”原则中社会、经济和环境三位一体的认知。[2]

如此，从生态系统的角度则可更好地厘清海洋环境与海洋生物资源之间的关系。海洋生态系统中的非生物组成部分，如海洋中的物理、化学和地质等条件，是其生物组成的生存环境，构成生物物种的生境或生态进程外部条件。非生物组成，受气候变化、污染（陆源污染、船源污染、海底活动污染与破坏和大气传送的污染）、生境破坏等外部因素的影响，如气候变化导致海洋酸化和海水温度升高进而影响海洋生物洄游分布范围的迁移以及珊瑚礁的白化。当然，渔业活动也可能破坏海洋地质生境，如底拖网作业。生物组成比较复杂，一般可包括：初级生产者、次级消费者、海洋鱼类与无脊椎动物（海底、底层与中上层等群落）、海鸟、海洋哺乳动物、海龟等捕食者。一般而言，生产力高的生态系统往往有更多的鱼类和无脊椎动物以及更多的生物。[3]这些生物组成，则可称之为“海洋生物资源”。[4]即使是海鸟，个别区域渔业条约也将其视为是海洋生物资源，例如《南极海洋生物资源养护公约》和《东南大西洋渔业资源养护和管理公约》。[5]那些能够为渔业目的而利用的生物组成，则可称之为“海洋渔业资源”，主要是海洋鱼类与无脊椎动物。FAO《世界渔业与养殖业状况报告》所统计的“鱼类”，是指“鱼、甲壳类、软体动物和其他水生动物，但不包括水生哺乳动物、爬行动物、海藻和其他水生植物”。[6]

2.生物资源和生物多样性

中文术语“生物资源”，对应两个英文术语：一个是 living resources，另一个是 biological resources。《联合国海洋法公约》《联合国鱼类种群协定》和区域渔业条约，都采取第一个术语；《生物多样性公约》则采取了第二个术语。《联合国海洋法公约》和《联合国鱼类种群协定》没有定义“生物资源”；区域渔业条约，如《西北大西洋渔业合作公约》则将“生物资源”

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1 《21 世纪议程》，第 17.1 段和第 17.22 段。

2 See UN, General Assembly Resolution on Transforming our world: the 2030 Agenda for Sustainable Development, A/RES/70/1, 25 December 2015, preamble. 2019 年 5 月 10 日，时任 IUCN 主席和“生态文明贵阳国际论坛”执行主席章新胜先生在“北极圈论坛中国分论坛”的主旨演讲中提出，中国的“五位一体”理念比联合国关于可持续发展的三位一体认知更先进，增加了政治和文明；章新胜认为“文明”对于可持续发展更为重要，或者说，可持续发展需要文明支撑才能更为持续或长久。

3 United Nations, *Ecosystem approaches to the management of ocean-related activities: Training manual*, United Nations, 2010, p. 80-93.

4 《西北大西洋渔业合作公约》将“生物资源”定义为“海洋生态系统中所有生物组成部分”。See Convention on Cooperation in the Northwest Atlantic Fisheries (2017), Article 1 (k).

5 Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean, Article 1 (n).

6 FAO, The State of World Fisheries and Aquaculture, 2018, p. 2.

定义为“海洋生态系统中所有生物组成部分”（living components）。[1]《南极海洋生物资源养护公约》将“南极海洋生物资源”定义为“鱼类、软体动物、甲壳动物和包括鸟类在内的所有其他生物种类（living organisms）”。[2]

《生物多样性公约》第 2 条将“生物资源”（biological resources）定义为“对人类具有实际或潜在用途或价值的遗传资源（genetic resources）、生物体或其部分、生物群体或生态系统中任何其它生物组成部分（biotic component）。”此定义，涵盖了生物多样性的三个层次，即遗传资源、物种资源和生态系统。[3]生物资源（biological resources）是遗传资源的载体，遗传多样性是生物多样性的重要组成部分；生态系统的多样性离不开物种的多样性，也就离不开物种所具有的遗传多样性。[4]

由此可见，从条约术语角度看，《生物多样性公约》语境下的生物资源（biological resources）不同于国际海洋法和国际渔业法语境下的生物资源（living resources）；前者更侧重生物的遗传性以及生态系统性，后者强调的是“物种”（species）层次的可以为人类所开发利用的资源。再进一步而言，“物种”既能体现遗传多样性，它们本身也是生态系统的生物组成部分，因此“物种”也是《生物多样性公约》的核心。[5]生物多样性的养护关键在于物种养护；不是关注某个物种本身，而是关注该物种的遗传基因以及该物种在生态系统结构与功能中的作用。这种关注重点对应着《生物多样性公约》语境下物种养护措施，例如《生物多样性公约》第 7 条要求“查明对养护和可持续利用生物多样性至关重要的组成部分”，包括附件 I 所列的“生态系统与生境”、“物种和群落”和“基因组与基因”。

从上述“生物资源”的两种英文术语的差异可以看出，《联合国海洋法公约》《联合国鱼类种群协定》及相关区域渔业条约强调的是“物种”的养护与可持续利用，这是海洋渔业资源养护治理的逻辑起点。《生物多样性公约》强调的是包含“物种”在内的三个层次，重点是遗传资源和生态系统，物种是它们的载体，养护物种是实现遗传资源和生态系统多样性的根本途径，这也是海洋生物多样性养护的逻辑起点。这两种治理体系逻辑起点的不同，反映了养护工具选择上的差异，即划区管理工具（ABMT）和其它有效养护工具。

《BBNJ 协定》谈判过程中，一个重要的争议点在于海洋遗传资源（MGR）是否应包括鱼

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[1] Convention on Cooperation in the Northwest Atlantic Fisheries (2017), Article 1 (f) and (k).
[2] Convention on the Conservation of Antarctic Marine Living Resources, Article I (2).
[3] Lyle Glowka, Françoise Burhenne-Guilmin & Hugh Synge, *A Guide to the Convention on Biological Diversity*, Environmental Policy and Law Paper No. 30, IUCN, 1994, p. 16-17.
[4] 刘惠荣，刘秀：《南极生物遗传资源利用与保护的国际法研究》，中国政法大学出版社 2013 年，第 33-34 页。
[5] Lyle Glowka, Françoise Burhenne-Guilmin & Hugh Synge, *A Guide to the Convention on Biological Diversity*, Environmental Policy and Law Paper No. 30, IUCN, 1994, p. 16.

类（fish）。[1]事实上，海洋遗传资源和通常意义上鱼类的区别在于人类利用这些生物的侧重点不同。海洋遗传资源侧重于利用其储藏的遗传信息，这种信息可复制并用于多种途径；鱼类侧重于食物供给。无论是海洋遗传资源还是鱼类，它们都携带有遗传基因，是海洋生物资源（biological resources）。在此意义上，所有传统概念中鱼类的遗传基因都可作为一种开发的资源；但是，相对于海洋遗传资源，传统概念中鱼类的遗传基因资源的价值在当前科技水平条件下不如海洋遗传资源。深海的微生物，是当前国际社会重点关注的遗传资源。这些微生物在极端环境下生存适应，形成了独特的遗传基因信息，可用于生物技术领域，如药物、酶、生物燃料、化妆品、农药和环境补救等。鉴于药物或工业用酶所用各种微生物样品来源很难确定，国际社会难以评估国家管辖范围外区域海洋遗传资源的实际或潜在的总经济价值。[2]相反，从粮食角度看，传统概念中鱼类是当前人类社会重要的优质动物蛋白来源，更是确保世界人口增长背景下粮食安全的重要途径。[3]通过研究鱼类遗传基因，可以保护海洋自然生境中基因独立种群免受外来物种影响以及改善水产养殖鱼类种苗，提高鱼类生产效率和提升鱼类的健康状况，[4]增进鱼类对粮食安全的贡献。

根据《生物多样性公约》第 2 条的定义，生物多样性是指“所有来源的形形色色生物体”（living organisms），包括“物种内部、物种之间和生态系统的多样性”。如上所述，在生物多样性的养护过程中，物种多样性是核心。物种，既可能由于人类捕捞活动而减少，或直至濒危或灭绝，影响了物种的遗传基因和该物种所在生态系统的结构与功能。例如，南极磷虾在南极海洋生态系统占据核心位置，促使了《南极海洋生物资源养护公约》开创性引入生态系统方法。物种，也可能因生态系统或生境的变化，而发生迁移或受到损害。例如，气候变化导致海洋酸化和海水温度升高，就会导致一些生物向两极洄游迁移；海洋污染或海底开发活动，也会使海洋生物资源失去适宜的生长环境而遭受损害，导致生物资源量降低或消失。2001 年《关于海洋生态系统负责任渔业的雷克雅未克宣言》（以下简称《雷克雅未克宣言》）指出，“需要考虑到渔业对海洋生态系统的影响及海洋生态系统对渔业的影响”以及“某些非渔业活动对海洋生态系统产生影响及对管理产生影响。”[5]因此，养护生物多样性核心是，维护或保持物种整个生命史的关键生境及其生态进程，保护和保全稀有或脆弱的生态系统，如珊瑚礁、海底山脉、热液喷口和冷水珊瑚等。

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[1] 2023 年 3 月通过的《BBNJ 协定》（提前未编辑稿）进一步明确，国际法规制的捕捞及其相关活动；或者在国家管辖范围外海域的捕捞及其相关活动所获得的鱼类或其它海洋生物资源（living marine resources），除非这些鱼类或其它海洋生物资源已经为《BBNJ 协定》第二部分所规制。See Draft Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction, 4 March 2023, Article 8 (2).

[2] UN, Report of the Secretary-General on Ocean and the Law of the Sea, A/64/66/Add.2, 19 October 2009, paragraphs 103-104.

[3] Christopher Costello, Ling Cao, Stefan Gelcich, *et al*., The Future of Food from the Sea, 588 *Nature* 95 (2020).

[4] FAO, The State of World Fisheries and Aquaculture, FAO, 2018, p.78-79.

[5] *The Reykjavik Declaration on Responsible Fisheries in the Marine Ecosystem*, 1-4 October 2001, Preamble.

物种、生境及其生态进程和生态系统，三者既是《联合国海洋法公约》第 194 条（5）要求保护和保全的对象，也是相关国际或区域组织采取划区管理工具养护生物多样性的核心要素，如设立《国际防止船舶造成污染公约》特殊区域（special areas）的生态标准、[1]东北大西洋海洋环境保护委员会建立海洋保护区的目标、[2]南极海洋生物资源养护委员会海洋保护区的目标[3]等。也就是，这些国际或区域组织都基本围绕上述三个要素，采取措施以管制其职责范围内影响上述三个要素的人类活动，如船舶排污、海洋污染、捕捞及其相关活动等，从不同方面来共同实现养护生物多样性的目标。因此，有学者认为，“生物多样性”实际上是一种组织性（organizing）或至少是整合性（integrating）的概念，用以组织或整合其它既有协定。[4]

根据联合国大会决议提出的“生态系统方法应以管理人类行为为重点”的方针，[5]上述从生态系统角度区分非生物组成和生物组成，将有助于正确处理海洋环境和海洋生物资源之间整体与组成的关系，从各个领域分别落实生态系统方法。这也能更好地理解国际海事组织（IMO）、ISA、FAO 及区域渔业管理组织在养护海洋生物多样性过程中都把物种、生境及其生态进程和生态系统作为其目标或关键因素，但是各自关注点不一样。IMO 是关注船源污染对海洋生态系统中非生物组成的影响，进而影响物种生存或发展的外部条件；ISA 是关注海底开发活动可能对海洋生态系统中非生物组成的影响与破坏；FAO 及区域渔业管理组织既关注底层作业可能对海底生境的破坏，更关注对生物组成的利用可能造成的目标生物以及目标生物与其它生物间相互关系的影响。如《西北大西洋渔业合作公约》第二条将其目标分两个层次：第一层次是，长期养护和可持续利用渔业资源；第二层次是， 通过养护渔业资源以保护这些资源所处的海洋生态系统。《联合国鱼类种群协定》第 6 条也规定，通过适用预防性做法，“保护海洋生物资源和保全海洋环境”。相对于《联合国鱼类种群协定》第 2 条规定的目标而言，“保全海洋环境”是其第二层次的目标。

二、海洋生物资源和海洋环境：条约术语解释

有关国际司法和仲裁实践似乎有意积极将海洋环境保护与保全的义务引入海洋生物资源养护中。1999 年，国际海洋法法庭（ITLOS）在“南方蓝鳍金枪鱼案”中提出，“养护海洋生物资源是保护和保全海洋环境中的一个要素”。[6]2015 年，“查戈斯群岛海洋保护区案”仲裁法

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[1] Guidelines for the Designation of Special Areas under MARPOL 73/78, IMO Resolution A. 927 (22), 2001, paragraph 2.5.

[2] OSPAR Recommendation 2003/3 on a Network of Marine Protected Areas, 2003, paragraph 2.1. 2010 年 OSPAR 修订了该建议，但第 2.1 段所规定的海洋保护区网络目标没有改变。See, OSPAR Recommendation 2010/2 on amending Recommendation 2003/3 on a network of Marine Protected Areas, 2010, paragraphs 2.2-2.3.

[3] CM 91-04 ‘General framework for the establishment of CCAMLR Marine Protected Areas’, 2011, paragraph 2.

[4] Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (3rd Edition), Oxford University Press, 2008, p.616.

[5] UN, General Assembly Resolution on Oceans and the Law of the Sea, A/RES/61/222, 20 December 2006, paragraph 119.

[6] Southern Bluefin Tuna (New Zealand *v.* Japan; Australia *v.* Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, p. 280, paragraph 70.

庭主张,《联合国海洋法公约》第 194 条所规定保护海洋环境的措施应不限于控制污染的措施，还应包括为养护生物资源和保护生态系统这方面的措施。[1]为此，根据《维也纳条约法公约》第 31 条，从《联合国海洋法公约》上下文、制度设计及其权利义务和第十二部分目的等角度进行整体分析，以厘清它们相互法律关系，正本清源。

1.上下文相互关系

在结构上看，《联合国海洋法公约》将海洋环境和海洋生物资源分别安排在不同的部分，制定了不同的法律制度。尽管《联合国海洋法公约》在序言中指出“各海洋区域的种种问题都是彼此密切相关的”，需要从整体上进行考虑，在“妥为顾及所有国家主权的情况下”，“建立一个法律秩序”，除其它外，以促进“海洋生物资源的养护”和“研究、保护和保全海洋环境”，[2]但是第三次联合国海洋法大会将“海洋生物资源”和“海洋环境”作为两个不同的事项。

根据 1970 年 12 月 17 日联合国大会通过的第 2750C（XXV）号决议看，“捕鱼及公海生物资源的养护（包括沿海国的优先权利问题）”和“海洋环境保护（除其它外，包括防止污染）”是两个独立的议题。[3]在第三次联合国海洋法大会期间，这两个议题分由不同的委员会进行讨论和起草：海洋生物资源由第二委员会讨论与处理，环境保护由第三委员会讨论与处理。[4]综观《联合国海洋法公约》所有条款的标题，其中有 5 条的标题使用了“海洋生物资源”，它们分别是第 61 条和第 62 条、第 117 条至第 119 条；也就是《联合国海洋法公约》第五部分专属经济区和第七部分公海。[5]这显然是和第十二部分“保护和保全海洋环境”相对。

2.制度设计及其权利义务

在制度设计方面，《联合国海洋法公约》关于海洋环境保护与保全的制度设计是围绕船舶污染与船舶航行权这对矛盾而展开的，[6]强调了“国际规则和标准”的平衡与协调作用，如第 208 条至第 220 条等。在海洋生物资源的制度设计围绕了养护与利用这对矛盾，如第 61 条和第 62 条，以及第 87 条和第 116 条至第 119 条；对于公海生物资源养护，还增加了沿海国与公海捕鱼国这对矛盾，如《联合国海洋法公约》第 116 条、《联合国鱼类种群协定》第 7 条等。

在具体权利义务方面，《联合国海洋法公约》第五部分“专属经济区”凸显了海洋生物资

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[1] Chagos Marine Protected Area Arbitration (Mauritius *v.* United Kingdom), Award of 18 March 2015, PCA Case No. 2011-03, paragraph 538.

[2] 《联合国海洋法公约》，序言第 3-4 段。

[3] 《第三次联合国海洋法会议最后文件》，第 1 段。

[4] 第一委员会讨论海底制度；第二委员会讨论领海、毗连区、大陆架、专属经济区、公海、捕鱼及公海生物资源的养护、海峡、群岛水域等；第三委员会讨论海洋环境保护和科学研究。See, Robin R. Churchill and Vaughan Lowe, *The Law of the Sea* (3rd Edition), Manchester University Press, 1999, p. 16.

[5] 有学者统计，“生物资源”（living resources）在《联合国海洋法公约》共出现过 38 次，强调了这些资源的商业开发利用以及养护与管理。See Vonintsoa Rafaly, *The Concept of "Marine Living Resources": Navigating a Grey Zone in the Law of the Sea*, The Canadian Yearbook of International Law, Volume 59, p. 285, 286-287.

[6] Tommy T.B. Koh, *Negotiating a New World Order for the Sea*, 24 Virginia Environmental Law Journal 762, 775 (1984).

源与海洋环境之间的区别。《联合国海洋法公约》第 56 条规定，沿海国享有对海洋生物资源的主权权利和对海洋环境保护与保全的管辖权；主权权利和管辖权，是两种不同性质的权利。综合《联合国海洋法公约》第五分部、第十二部分和第十五部分看，沿海国依此两种权利所享有的立法权、执法权与司法权存在显著差异。例如，《联合国海洋法公约》第 211 条规定，沿海国可通过制定法律和规章控制船舶污染，以保护和保全其专属经济区的海洋环境；但是，“这种法律和规章应符合通过主管国际组织或一般外交会议制定的一般接受的国际规则和标准，并使其生效”。如果沿海国基于特殊原因需要对“特定区域”（a particular, clearly defined area）制定较“一般接受的国际规则和标准”更严格的法律法规，以保护其特殊的海洋环境或海洋生态系统，则必须经过主管国际组织与任何相关国家进行协商并得到该主管国际组织的认可，这些法律和规章方可适用于外国船舶。[1]相反，如果沿海国认为上述“特定区域”的非生物条件和生态条件是其养护海洋生物资源的基础条件，根据沿海国享有的主权权利，则可拥有很大的自由裁量权。当然如果沿海国肆意扩大解释和适用这种主权权利，则会影响其他国家船舶在沿海国专属经济区的航行权。[2]至少在此可认为，在严格法律意义上，沿海国对于海洋生物资源主权权利是有别于保护和保全海洋环境的管辖权，且主权权利要强于管辖权。

从制度设计及具体的权利义务看，海洋环境和海洋生物资源两者之间都是不同的。当然，两者之间并不当然没有联系。一方面，《联合国海洋法公约》也要求沿海国在行使其关于海洋生物资源主权权利时，应承担养护的义务，这种义务包括：“确保专属经济区内生物资源的维持不受过度开发的危害”，沿海国采取养护措施时应考虑各种有关的环境因素限制，以及“应考虑到与所捕捞鱼种有关联或依赖该鱼种而生存鱼种所受的影响”等。[3]类似的海洋生物资源养护要求，也适用于公海。[4]《联合国鱼类种群协定》进一步要求：采取对环境无害的渔具渔法，“尽量减少污染、废弃物、遗弃渔具所致的资源损耗量”，保护海洋环境的生物多样性等。[5]

3.《联合国海洋法公约》第十二部分的目的

《联合国海洋法公约》关于“海洋环境污染”的定义，以及第十二部分第一节的内容，基本是强调防止、减少和控制海洋环境（其中非生物组成部分），以保护海洋生物资源所处的生态条件。第 194 条（4）规定，“各国采取措施防止、减少或控制海洋环境的污染时，不应对其他国家依照本公约行使其权利并履行其义务所进行的活动有不当的干扰。”此款所指的活

[1] 《联合国海洋法公约》，第 211 条（5）和（6）。
[2] James Kraska, *Maritime Power and the Law of the Sea: Expeditionary Operation in the World Politics*, Oxford University Press, 2011, pp. 8-13.
[3] 《联合国海洋法公约》，第 61 条。
[4] 《联合国海洋法公约》，第 119 条。
[5] 《联合国鱼类种群协定》，第 5 条。

动，既可解释为依照《联合国海洋法公约》的航行活动，也解释为依照《联合国海洋法公约》实施的捕鱼活动，或者其它活动。第 194 条（5）要求保护特殊的生态系统、物种和生境，以及第 196 条关于防止引入外来的或新物种，也是强调从污染防止的角度采取措施，正如第 194 条的标题“防止、减少和控制海洋环境污染的措施”所明示的那样。

因此，《联合国海洋法公约》第十二部分所规定的海洋环境保护和保全的目标可以认为是有两个层次：第一层次是，通过防止、减少和控制海洋环境污染达到保护和保全海洋生态系统中非生物组成；第二层次是，通过保护和保全海洋生态系统中的非生物组成来保障海洋生物资源生存条件，通过保持海洋环境质量来养护海洋生物资源。考虑到“保护”（protect）是指那些应对即将或已经存在的危险或损害的措施，“保全”（preserve）包含了养护自然资源和保持海洋环境质量的意思，[1]《联合国海洋法公约》第十二部分标题“保护和保全海洋环境”可解释为：防止海洋环境污染、保持海洋环境质量。

从这个意义上看，《联合国海洋法公约》第十二部分中那些涉及海洋物种、环境和生态系统的条款，类似于《联合国鱼类协定》或《西北大西洋渔业合作公约》关于保全海洋环境或保护渔业资源所处海洋生态系统的目标，都属于各自的第二层次目标。这种二元目标的结构，强调了两个层次目标之间的主次关系，明确了实现目标的路径：第一个层次目标是主要目标，是实现第二个层次目标的前提条件和基础，或者是说，第二个层次目标是实现第一个层次目标的必然结果，是“如此做”（in so doing）的应有之义。[2]所以，在进行条约解释和适用时，应遵循条约术语所在上下文，参照目标，并注意到术语与目标之间逻辑关系。东北大西洋渔业委员会和保护东北大西洋海洋环境委员会的协调与合作，可认为是阐述这种关系的典范。[3]

4.养护海洋生物资源是保护和保全海洋环境中的一个要素

1999 年国际海洋法法庭（ITLOS）在“南方蓝鳍金枪鱼案”中提出的“养护海洋生物资源是保护和保全海洋环境中的一个要素”论断，一定程度上影响了《联合国海洋法公约》关于海洋环境和海洋生物资源条款的解释与适用。本文在此不讨论国际海洋法法庭在该案中能否依《联合国海洋法公约》第 290 条（5）规定“防止对海洋环境的严重损害”方面的临时措施，以及 2000 年仲裁法庭撤销此临时措施对该论断的影响；而是根据前述法律分析，并结合相关国际组织实践，试图提出一个关于此论断的合理解释。

根据此论断可得到这样结论，即：从事渔业活动应负有保护和保全海洋环境的义务。对此结果，需要分别从沿海国的权利与义务和从船旗国的义务两个不同角度进行分析。就沿海

[1] Shabtai Rosenne & Alexander Yankov, *United Nations Convention on the Law of the Sea 1982: A Commentary (Volume IV)*, Martinus Nijhoff Publishers, 1990, p. 11.
[2] Convention on Cooperation in the Northwest Atlantic Fisheries, 2017, Article 2.
[3] Stefán Ásmundsson & Emily Corcoran, *The Process of Forming a Cooperative Mechanism Between NEAFC and OSPAR: from the First Contact to a Formal Collective Arrangement*, UNEP Regional Seas Reports and Studies No. 196, UNEP, 2015.

国而言，养护其专属经济区生物资源是《联合国海洋法公约》第 61 条规定的义务，和主权权利相对。如前面关于海洋环境与海洋生物资源的条约术语辨析那样，这种相对于主权权利的养护义务是关于海洋环境中的生物组成部分而言的。尽管从结果看，沿海国履行了这种养护义务也就相应地从一个方面保护和保全了海洋环境，但是不能把这种义务的法律性质和相对于保护与保护海洋环境的管辖权的义务相混淆。《联合国海洋法公约》第 56 条明确区分了沿海国的主权权利和管辖权；《联合国海洋法公约》第 297 条（1）（c）与（3）再次区分两种不同权利的解释与适用引起的争端解决机制。关于保护与保全海洋环境的争端应遵守第十五部分第二节所规定的程序，即“导致有拘束力裁判的强制程序”；而关于生物资源养护的争端仅能通过调解程序加以解决。正是因为这种权利性质之间的差异，英国主张其在查戈斯群岛周围建立的海洋保护区是一种保护海洋环境的措施，行使的是保护与保全海洋环境的管辖权，所以应接受第三方强制争端解决程序。[1]

就船旗国而言，其渔船所开展的渔业活动利用海洋环境中的生物组成部分，根据《联合国海洋法公约》第 62 条、第 87 条和第 119 条等，其所承担的义务是相对于利用沿海国剩余可捕量和公海捕鱼自由而言的，是养护海洋生物资源的义务。当然，这些渔业活动不可避免对海洋环境中的非生物组成和生物组成造成影响。对于非生物组成的影响包括：底层作业对脆弱生态系统的破坏，将生活垃圾、污水、渔获物废弃物（offal）等直接排放导致海洋环境污染；对生物组成的影响包括：过度捕捞导致物种资源衰退甚至濒危或灭绝、兼捕非目标物种等。从自然科学看，海洋渔业活动对于海洋环境中非生物组成和生物组成的影响都可归为海洋环境保护与保全范畴；从法律上看，海洋渔业活动对于非生物组成的影响仍属于养护海洋生物资源的义务。例如，南极海洋生物资源养护委员会通过的养护措施 CM26-01“捕捞作业中一般环境保护”以及中西太平洋渔业委员会通过的第 2017-04 号“关于海洋污染的养护与管理措施”，分别在各自管辖海域实施《国际防止船舶造成污染公约》及其附件的规定，管理和控制渔业活动可能造成对非生物组成的影响。

由此可以看出，船旗国对其渔船所从事的渔业活动既负有养护海洋生物资源的义务，也负有保护与保全海洋环境的义务，这既是由于渔船作为船舶的特性所决定的，也因为渔业活动过程中的确会对海洋环境中的非生物组成造成影响或破坏。渔业活动对海洋环境中生物组

[1] 当然，此案应考虑两个国家关于查戈斯群岛主权争议。1984 年 12 月毛里求斯建立了 200 海里专属经济区，1991 年 10 月英国宣布建立 200 海里的渔业养护与管理区（fisheries conservation and management zone）以及于 2003 年 9 月宣布建立环境保护与保全区（environment protection and preservation zone）。在仲裁案中，毛里求斯认为英国在此区域不是《联合国海洋法公约》意义上的沿海国，所以英国选择认为其建立的海洋保护区是保护海洋环境的措施是有其原因的。另外，从全球海洋治理的角度看，英国及欧盟确实试图通过海洋保护区来促进全球海洋治理的改革。See Chagos Marine Protected Area Arbitration (Mauritius *v.* United Kingdom), Award of 18 March 2015, PCA Case No. 2011-03, paragraph 7; Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, ICJ, 25 February 2019; Peter H. Sand, *“Marine protected areas” off UK overseas territories: comparing the South Orkneys Shelf and the Chagos Archipelago*, The Geographical Journal, 178(3), p.201 (2012).

成所造成的影响，法律意义上仍属于养护海洋生物资源义务的范围。[1]尽管船旗国负有两种义务，但是必须看到这两种义务存在不可分割性，本质上仍是渔业活动。根据前面二元目标分析的方法，船旗国所负的主要义务是养护海洋生物资源，次要义务或伴生义务是保护与保全海洋环境；而不是相反。这符合《关于环境保护的南极条约议定书》明确规定环境影响评估不适用于南极生物资源“捕捞及其相关活动”的实践，也符合国际海洋法法庭不把环境影响评估纳入船旗国勤勉义务的推理，也符合生态系统方法（ecosystem approach）的基本逻辑。

三、海洋生物资源和海洋环境：勤勉义务视角

2015 年，国际海洋法法庭在“分区域渔业委员会咨询意见请求案”中确认，《联合国海洋法公约》第 192 条是船旗国加强对悬挂其旗帜渔船进行监管的法律依据之一；这是一种勤勉的义务（due diligence）。[2]2016 年，“南海仲裁案”仲裁法庭认为，《联合国海洋法公约》第 192 条包括了勤勉义务（due diligence），防止捕捞那些被国际认可有灭绝风险并需要保护的物种。[3]为此，本文从勤勉义务视角分析两者之间的关系。

1.勤勉义务的标准及其内容

国际法协会认为，勤勉义务适用有三个核心标准：第一，主权国家负有确保的义务；第二，所确保的对象在其管辖范围之内，既可是在其管辖地理范围之内，也可是在其控制之下（under its control）；第三，其他国家的权利与利益没被侵犯之前。[4]总体上，勤勉义务，作为一种行为义务而非结果义务，要求采取足够措施、尽最大可能努力、最大可能地、去达到这样结果的义务。[5]其核心内容，在于“措施”的足够或必要程度，以避免出现违约问题。《联合国海洋法公约》第 194 条要求各国在采取措施防止、减少和控制海洋环境污染时，明确这些措施应是“一切的”（all）和“必要的”（necessary）。对于船旗国的责任，《联合国海洋法公约》第 94 条要求船旗国采取的措施应是“必要的”，《联合国鱼类种群协定》第 18 条要求这些措施应为“可能必要的”（as may be necessary）。

国际海洋法法庭海底争端分庭认为，很难准确地确定勤勉义务内容，因为它是一个变化的概念（a variable concept）。随着时间的变化，一个原来认为是足够谨慎的管理措施，过一段时间后可能就会被认为是谨慎不够的，特别是新的科学技术的发展。同时，它还将随着活

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[1] 类似地，在沿海国专属经济区内给渔船加油，被认为是捕捞相关活动而属于沿海国对海洋生物资源享有的主权权利范畴；但是在沿海专属经济区内给游船加油，则被认为是公海航行自由而不属于沿海国主权权利或管辖范围范畴。See, The M/V “Virginia G” Case (Panama *v.* Guinea-Bissau), Judgment, ITLOS Reports 2014, p.4, paragraph 223; The M/V "Norstar" Case (Panama *v.* Italy), Judgment, ITLOS Reports 2018–2019, p. 10, paragraph 219.

[2] Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC) (Request for Advisory Opinion Submitted to the Tribunal), Advisory Opinion, ITLOS, 2 April 2015, paragraphs 124-140.

[3] South China Sea Arbitration (Philippines *v*. China), Award of 12 July 2016, PCA Case No. 2013–19, paragraph 956.

[4] ILA Study Group on Due Diligence in International Law (Second Report), July 2016, p. 5-6.

[5] Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10 paragraph 110.

动所带来风险程度的变化而变化；风险越大的活动，勤勉义务的标准应越高。[1]尽管如此，国际法院认为勤勉义务包含内容应包括三个方面：一是，适当的管制与行政措施，如制定法律或规章等；二是，日常监督与执法措施，以保持一定程度的警惕，防止可能出现违法行为；三是对于可能出现的违法行为积极采取调查处理措施，及时进行纠正。[2]

2.勤勉义务在海洋环境和海洋生物资源的适用

前述关于两种术语条约解释的分析，是从沿海国的角度，以突出两者在权利方面的内容。相对而言，上述有关国际司法与仲裁实践所涉及的勤勉义务，是从利用的角度进行分析，以突出两者在义务方面的内容，区别于违约问题（questions of breach）。就海洋环境保护和保全而言，拟开展活动的国家所负有勤勉义务可包括：第一，制定相应的法律和行政程序等制度；第二，采取措施防止发生重大的污染事件，包括对那些可能产生污染或环境破坏的活动进行监测和许可，特别是进行适当的风险评估和环境影响评估；第三，当环境污染或破坏风险很高时，应及时通报相关的国家或国际组织等。[3]随着环境影响评估已经成为国际习惯法的一般性义务，在环境保护领域，如果一个国家没有进行环境影响评估，则无法自证其已经履行勤勉义务。[4]就养护海洋生物资源而言，国际海洋法法庭认为船旗国所负有勤勉义务包括：第一，根据其国内法制定相应的法律、法规和管理措施；第二，还应建立执法机制，监控和确保这些法律制度得以落实；第三，对从事非法、不报告与不管制（IUU）捕捞活动的制裁应足够严厉，制止未来可能的违法行为，并剥夺违法者的违法所得。[5]

由此可看出，海洋环境保护与保全和海洋生物资源养护两个领域所对应的勤勉义务基本遵循国际法院所列的三个要点，都强调制定法律及其规章应根据各国国内法进行，属于各国内政，[6]都强调监督、监测、执法及处罚等措施，但具体内容有所不同。环境影响评估就是其中这样一个典型内容。一方面，环境影响评估是海洋环境保护与保全领域一个国家履行勤勉义务必须采取的措施，尽管国际法还没有明确其内容与范围；[7]另一方面，它并不是海洋生物资源养护领域必然采取的一项措施，如《关于环境保护的南极条约议定书》第 8 条及其附件

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1 Ibid, paragraph 117.

2 Case Concerning Pulp Mills on the River Uruguay (Argentina *v.* Uruguay), Judgment of 20 April 2010, ICJ Reports 2010, p. 14, paragraph 197.

3 Joanna Kulesza, *Due Diligence in International Law*, Brill Nijhoff, 2016, p. 224-225.

4 Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, paragraph 145; Case Concerning Pulp Mills on the River Uruguay (Argentina *v.* Uruguay), Judgment of 20 April 2010, ICJ Reports 2010, p. 14, paragraph 204.

5 Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 4, paragraph 138.

6 Ibid; Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, paragraph 218-219.

7 Case Concerning Pulp Mills on the River Uruguay (Argentina *v.* Uruguay), Judgment of 20 April 2010, ICJ Reports 2010 p. 14, paragraph 205.国际法院认为，各国应根据其国内法及其许可程序决定自行环境影响评估的具体内容，考虑到活动的性质及规模、活动可能产生的不利影响等；在活动开展后，必须对所许可活动进行持续监测。

I 规定环境影响评估不适用于《南极海洋生物资源养护公约》所管理“捕捞及其相关活动”。[1]除此之外，在海洋生物资源养护领域，国际海洋法法庭更重视船旗国对违法行为的处罚严厉程度，特别是对于 IUU 捕捞。这符合《联合国鱼类种群协定》第 19 条的要求。

厘清上述两个领域所对应的勤勉义务之间的关系，结合前述“养护海洋生物资源是保护和保全海洋环境中的一个要素”论断的分析，可更好地理解 2015 年国际海洋法法庭“分区域渔业委员会咨询意见请求案”中提出的船旗国负有确保其渔船保护与保全海洋环境义务的观点。[2]从渔船首先是且根本上是船舶这个特性看，《联合国海洋法公约》第十二部分关于船舶污染的内容当然适用于从事渔业活动的船舶。从生态系统方法（ecosystem approach）原则看，渔船所从事的活动是捕捞或捕捞相关活动，其可能造成的海洋环境污染或破坏是从属于捕捞或捕捞相关活动，不是独立存在的一种活动，因此应内化于养护海洋生物资源的义务之中。FAO 关于渔业生态系统方法阐述，则可佐证此分析。FAO 认为，生态系统方法在渔业领域应用方面应称之为“渔业生态系统方法”（ecosystem approach to fisheries），而不是“基于生态系统方法的渔业管理”（ecosystem-based fisheries management）。这是因为后者隐含着生态系统是渔业管理基础的含义，进而可被解释认为环境因素高于社会经济和文化因素。这会引起公平性关切，以及政治、社会经济成本与可行性的关切。[3]

四、结束语

生物多样性主流化，不可避免地影响了《联合国海洋法公约》框架下海洋生物资源和海洋环境条款的解释与适用，模糊《联合国海洋法公约》第五部分、第七部分和第十二部分之间的关系，进而影响《联合国鱼类种群协定》和《BBNJ 协定》之间相互关系。在自然科学上，养护海洋生物多样性需要可持续海洋渔业，反之亦然。[4]2001 年《雷克雅未克宣言》确认，“渔业与海洋生态系统其它方面之间存在复杂的相互关系”，强调“某些非渔业活动对海洋生态系统产生影响”，决定“制定并实施结合生态系统考虑的管理战略发展科学基础……保证可持续产量的同时保护种群及保持生态系统及其赖以生存的生境的完整性”。[5]从可持续发展的角度看，即经济、社会和环境三个要素，[6]海洋渔业资源和海洋环境中的海洋生物多样性都是海洋可持续发展内在不可分割的要素。

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1 Final Act of Protocol on Environmental Protection to the Antarctic Treaty, 1991, paragraphs 7-8.

2 Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 4, paragraph 136.

3 Serge M. Garcia, Alfonso Zerbi, Catherine Aliaume, et al., *The Ecosystem Approach to Fisheries: Issues, Terminology, Principles, Institutional Foundations, Implementation and Outlook*, FAO Fisheries Technical Paper No. 443, FAO, 2003, p. 6; UN, Report of the Secretary-General on Oceans and the Law of the Sea, A/61/63, 9 March 2006, paragraph 158.

4 Serge M. Garcia, Jake Rice & Anthony Charles, *Governance of marine fisheries and biodiversity: The integration challenge*, in Serge M. Garcia, Jake Rice & Anthony Charles (eds.), *Governance of Marine Fisheries and Biodiversity Conservation: Interaction and Coevolution*, John Wiley & Sons, 2014, p. 37.

5 *The Reykjavik Declaration on Responsible Fisheries in the Marine Ecosystem*, 1-4 October 2001, paragraph 5.

6 UN, General Assembly Resolution on Transforming our world: the 2030 Agenda for Sustainable Development, A/RES/70/1, 25 September 2015, preamble.

但在法律上，两者属于两种不同的法律制度安排。在《联合国海洋法公约》框架下，海洋渔业资源与海洋环境中的海洋生物多样性存在着法律属性上的差异，不能相互混淆或同等视之。对于国家管辖范围内的海域，沿海国享有对海洋渔业资源的主权权利，但仅享有对海洋环境的管辖权。对于国家管辖范围外区域海洋环境与海洋生物资源，就涉及《联合国海洋法公约》第七部分与《联合国鱼类种群协定》等关于海洋生物资源法律制度和《联合国海洋法公约》第十二部分关于海洋环境的法律制度之间的关系。这种法律制度的关系，仍延续了专属经济区内的架构，即公海捕捞自由或公海生物资源养护与可持续利用和公海环境保护与保全之间划分；两者之间存在船旗国专属管辖的共性，即船旗国同时享有养护公海渔业资源的义务和保护与保全海洋环境的义务，两种国际法义务统一在船旗国身上。因此，从船旗国角度看，它同时负有两种国际法义务，是海洋可持续发展的重要主体之一。

从《BBNJ 协定》发展历程看，2004 年联合国大会第 59/24 号决议明确，“BBNJ 工作组”职责范围除其它外包括审查国家管辖范围外海洋生物多样性养护与可持续利用所涉及的科学、技术、经济、法律、环境、社会经济及其他方面的问题，以及指出可促进国际合作与协调的办法与方法等。[1]2017 年 6 月，在联合国总部召开的第一次联合国海洋会议，突出强调了各类区域机构和组织开展跨部门合作的重要性。[2]在此方面， FAO 和联合国环境规划署（UNEP）已经开展讨论与相关合作。例如，在可持续海洋倡议的框架下，FAO 与 UNEP 推动区域渔业组织与区域海洋组织的合作，共同应对可持续发展目标、爱知生物多样性目标、具有生态或生物重要性的海洋区域（EBSAs）和脆弱海洋生态系统（VME）等问题。[3]

2023 年 3 月通过的《BBNJ 协定》在不同部分对该协定和相关法律文书、相关机制的相互关系作出不同规定，为未来条约解释与适用留下很大空间。本文认为，关于《BBNJ 协定》和相关法律文书、相关机制的相互关系规定的未来解释与适用，应切实反映条约术语通常意义，尊重《联合国海洋法公约》框架下各自权利义务关系，真正体现生态系统方法原则以及各种人类活动管理基本原则，应能够体现了各国对国际组织间融合或协调界限的关切。具体而言，《BBNJ 协定》应为公海渔业活动提供海洋环境条件保障；区域渔业管理组织根据生态系统方法原则管理公海渔业活动，在保护和保全海洋环境的同时为人类可持续性提供粮食与动物蛋白以及社会经济发展等产品与服务。[4]

[1] UN, General Assembly Resolution on Oceans and the Law of the Sea, A/RES/59/24, 17 November 2004, paragraphs 73-74.
[2] Our Ocean, Our Future: Call for Action, A/CONF.230/11, 30 May 2017, paragraph 13 (b).
[3] See FAO, The State of World Fisheries and Aquaculture, 2018, p. 173.
[4] See Report of Fourteenth round of Informal Consultations of States Parties to the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, ICSP 14/UNFSA/INF.3, 15 August 2019, paragraph 71.

On Legal Relationship between Marine Living Resources Conservation and Marine Environmental Protection

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Abstract: As the concept of biodiversity is gaining popularity, people are becoming increasingly aware of marine biodiversity and marine environmental protection, which may also result in misunderstanding or over-interpretation of different legal terms and rights and obligations in established treaties if not handled properly. The negotiation on the Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction was completed in March 2023; at the center of the dispute during the negotiation and in the future interpretation of the agreement is the relationship between the agreement and relevant legal instruments and mechanisms, in particular the relationship between fisheries treaties and bodies. In this regard, this paper traces back to the time when the United Nations Convention on the Law of the Sea (hereinafter referred to as UNCLOS) was established and examines the intricate relationship between marine living resources and the marine environment from legal terms and rights and obligations, as well as from the perspective of due diligence. The legal relationship between the conservation of marine living resources and the protection of marine environment in the framework of UNCLOS, therefore, can be clarified. The paper can serve as a reference for future interpretation of the legal relationship between the Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction and relevant fisheries treaties and bodies.

Keywords: marine living resources; marine biological diversity; marine environment; United Nations Convention on the Law of the Sea

Goal 14 of the 2030 Agenda for Sustainable Development involves several core elements of sustainable development of the oceans and seas: pollution of the marine environment, marine and coastal ecosystems and their biodiversity, and conservation of marine living resources. Marine

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fishing activities are considered as one of the causes affecting marine biodiversity and marine environmental protection.[1] The United Nations General Assembly adopted Resolution 69/292 in June 2015 deciding to develop an international legally binding instrument under the UNCLOS on the conservation and sustainable use of marine biodiversity beyond areas of national jurisdiction[2] to implement Part XII of UNCLOS. In December 2017, the United Nations General Assembly adopted Resolution 72/249, deciding to convene an intergovernmental conference to develop a legally binding instrument as soon as possible.[3] The agreement will be the third implementing agreement of the UNCLOS and is expected to provide the legal basis for a future comprehensive governance regime for the high seas.[4] However, a key issue arisen is the relationship between the Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction (hereinafter referred to as the "BBNJ Agreement") and the conservation of marine living resources; or more directly, the relationship between the BBNJ Agreement and the United Nations Fish Stocks Agreement and regional fisheries management organizations.

Although it had been specified in the 2015 UN General Assembly resolution that the BBNJ Agreement should "not undermine" relevant agreements or mechanisms,[5] there was a clear disagreement over the scope of application of the BBNJ Agreement and the interpretation of what is "not undermine".[6] According to some research, it is unlikely that the BBNJ Agreement will "undermine" the existing international treaties, but leaving these treaties untouched is also impossible; the principle of integrated governance will affect future marine fisheries management in at least two aspects: area-based management tools (e.g. marine protected areas) and environmental impact assessment.[7] The BBNJ Agreement, adopted in March 2023, not only retains the statement of "not undermine", clarifying that "shall respect the competences of, and not undermine, relevant

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[1] See IPBES, The Global Assessment Report on Biodiversity and Ecosystem Services: Summary for Policymakers, IPBES Secretariat, 2019, p. 28-29; Laurent Lebreton, Sarah-Jeanne Royer, Axel Peytavin, et al., *Industrialised Fishing Nations largely Contribute to Floating Plastic Pollution in the North Pacific Subtropical Gyre*, Scientific Reports 12, 12666 (2022).

[2] UN, General Assembly Resolution on Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, A/RES/69/292, 19 June 2015.

[3] UN, General Assembly Resolution on Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, A/RES/72/249, 24 December 2017, paragraph 1.

[4] See Rosemary Rayfuse & Robin Warner, *Securing a Sustainable Future for the Oceans Beyond National Jurisdiction: The Legal Basis for an Integrated Cross-Sectoral Regime for High Seas Governance for the 21st Century*, International Journal of Marine and Coastal Law 23(3), September 2008, p.399-421.

[5] UN, General Assembly Resolution on Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, 19 June 2015, paragraph 3.

[6] See Zoe Scanlon, *The Art of "not Undermining": Possibilities within Existing Architecture to Improve Environmental Protections in Areas beyond National Jurisdiction*, ICES Journal of Marine Science, Volume 75, Issue 1, January/February 2018, Pages 405–416; Ethan Beringen, Nengye Liu & Michelle Lim, *Australian and the Pursuit of "not Undermining" Regional Bodies at the Biodiversity beyond National Jurisdiction Negotiation*, Marine Policy, Volume 136, February 2022, 104929.

[7] Richard Barnes, *The Proposed LOSC Implementation Agreement on Areas Beyond National Jurisdiction and Its Impact on International Fisheries Law*, The International Journal of Marine and Coastal Law 31(4), September 2016..

legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies", but also "strengthens cooperation and coordination" to "develop a mechanism regarding existing area-based management tools, including marine protected areas, adopted by relevant legal instruments and frameworks or relevant global, regional, subregional or sectoral bodies". It also clarifies that "unless the planned activities that meet the criteria set out in paragraph 4 (b) (i) above are subject to monitoring and review under a relevant legal instrument or framework or relevant global, regional, subregional or sectoral body, Parties shall monitor and review the activities and ensure that the monitoring and review reports are published through the Clearing-House Mechanism"[1] These provisions, as the result of the negotiation, also leave great uncertainty for the future interpretation and application of the treaty. In order to accurately clarify the relationship between the BBNJ Agreement and fisheries treaties, it is necessary to take a closer look at the UNCLOS and examine the nuances and intricate relationships between the conservation of marine living resources and marine biodiversity and marine environmental protection from the perspective of treaty terms and rights and obligations.

I. Marine Living Resources and Marine Environment: Ordinary Meaning of Treaty Terms

According to Article 31(1) of the 1969 Vienna Convention on the Law of Treaties, treaty terms "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". The ordinary meaning of the terms in different treaties may vary; different terms in the same treaty can be interpreted in different ways based on their context and should have different meaning. The ordinary meaning of the terms such as biological resources, biodiversity and the marine environment, though closely related in natural science, should be interpreted with caution in different treaties and should not be treated as the same. Given that different English terms can be translated into the same Chinese, greater attention should be paid to the interpretation of these terms when the Chinese text of the treaty is also used as a standard text. The first paragraph of the preface of the BBNJ Agreement makes it clear that this agreement aims to protect the marine environment so as to put Part XII "Protection and Preservation of the Marine Environment" as stipulated in the UNCLOS into practice; marine biodiversity is a concept subordinate to the marine environment, so this section analyses the relationship between biological resources and the marine environment before moving to study the relationship between biological resources and biodiversity.

1. Marine Living Resources and the Marine Environment

The marine environment and marine living resources are closely related. From a natural

[1] Draft Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction, 4 March 2023, Articles 14 (b), 19 (2)-(4) and 23 (6).

science perspective, living resources are one of the elements constructing the marine environment and an integral part of the marine ecosystem; a healthy marine environment is conducive to the growth and reproduction of marine living resources. Conservation of marine living resources can contribute to the protection and preservation of the marine environment and ecosystem to a certain extent.[1] Otherwise, disputes may occur. That is, can conservation of living resources be included in the scope of environmental protection, or can the relevant provisions of international environmental law be directly applied to the conservation and sustainable use of marine living resources? The relationship between the Convention on the Conservation of Antarctic Marine Living Resources (hereinafter referred to as CCAMLR) and the Protocol on Environmental Protection to the Antarctic Treaty may be a case in point.

Judging from treaty terms, the UNCLOS does not define what is "marine environment". Article 1(4) of UNCLOS only stipulates that "pollution of the marine environment" means "the introduction by man, directly or indirectly, of substances or energy into the marine environment", which results in such deleterious effects as harm to living resources and marine life, hindrance to marine activities, including fishing. This definition reveals an implied message that damage or destruction of the marine environment can affect marine living resources and their use.

As provided in the International Seabed Authority's (ISA) Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, "marine environment" includes "the physical, chemical, geological and biological components, conditions and factors".[2] This definition draws a line between biotic and abiotic components, similar to the way in which "ecosystems" are defined. According to Article 2 of the Convention on Biological Diversity, "ecosystem" means "a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit." According to the Food and Agriculture Organization of the United Nations (hereinafter referred to as FAO), ecosystems should include living plants and animals as well as non-living abiotic structures; they can be defined at many scales, from small habitats to whole ecosystems. Although most ecosystems have no fixed boundaries, delineation of the boundaries is still required for management purposes.[3] As defined in the CCAMLR, this convention applies to the Antarctic marine living resources of the area south of 60° and "the Antarctic marine ecosystem means the complex of relationships of Antarctic marine living resources with each other and with their physical environment."[4] The definition stipulated in the CCAMLR is compatible with both the provision set out in Article 2 of the Convention on

[1] See *The Reykjavik Declaration on Responsible Fisheries in the Marine Ecosystem*, 1-4 October 2001, paragraphs 3-5.
[2] Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (2013), Regulation 1 (3)(c).
[3] FAO, *Fisheries Management 2: The ecosystem approach to fisheries*, FAO Technical Guidelines for Responsible Fisheries No. 4 Suppl. 2, FAO, 2003, p. 18-19.
[4] Convention on Conservation of Antarctic Marine Living Resources, Article 1(3).

Biological Diversity (i.e. living and non-living structures) and the FAO guidance on the delineation of specific boundaries for management purposes, namely, the marine ecosystems south of the Antarctic Convergence Zone.

Agenda 21 emphasizes that "the marine environment" – "including the oceans and all seas and adjacent coastal areas – forms an integrated whole that is an essential component of the global life-support system" and that the marine and coastal environment and its resources should be protected and sustainably developed as a whole; and the goal of protecting and preserving the marine environment is "to maintain and improve its life-support and productive capacities".[1] In other words, the conservation of the marine environment is not the ultimate goal, but a means to sustain marine ecological services and products; or, to put it differently, environmental protection serves socio-economic development under the premise of not undermining the ability of the environment to provide ecological services or products. Such an interpretation is in line with the UN General Assembly's understanding of the social, economic and environmental trinity in the principle of "sustainable development".[2]

In this way, the relationship between the marine environment and marine living resources can be better clarified from an ecosystem perspective. The abiotic components of the marine ecosystem, such as the physical, chemical and geological conditions in the ocean, are the living environment for its biotic components and constitute the external conditions for the habitat or ecological processes of living species. The abiotic components are affected by external factors such as climate change, pollution (from land-based sources, ship-borne sources, pollution and damage from seabed activities and atmospheric transport) and habitat destruction. For example, climate change can lead to ocean acidification and increased sea temperatures which in turn affect the migration range of marine organisms and the bleaching of coral reefs. Fishing activities, of course, can also destroy marine geological habitats, such as bottom trawling. The biotic components are even more complex and can include primary producers, secondary consumers, marine fish and invertebrates (benthic, demersal and pelagic communities), seabirds, marine mammals, sea turtles and other predators. Generally-speaking, ecosystems with high productivity tend to have more fish and invertebrates and more organisms.[3] These biotic components, in turn, can be referred to as the "marine living

[1] Paragraphs 17.1 and 17.22 of Agenda 21.

[2] See UN, General Assembly Resolution on Transforming our world: the 2030 Agenda for Sustainable Development, A/RES/70/1, 25 December 2015, preamble. On 10 May 2019, Mr. ZHANG Xinsheng, then President of IUCN and Executive Chairman of the Guiyang International Forum on Ecological Civilization, proposed in his keynote speech at the China Sub-Forum of the Circumpolar Forum that China's "Five-in-One" concept as stated in the Five-Sphere Integrated Plan is more advanced than the UN's concept of the Trinity of Sustainable Development, with the addition of politics and civilization. Mr. ZHANG believes that "civilization" is more important to sustainable development, or that sustainable development needs the support of civilization in order to be more sustainable or long-lasting.

[3] United Nations, *Ecosystem approaches to the management of ocean-related activities: Training manual*, United Nations, 2010, p. 80-93.

resources".[1] Even seabirds are considered to be marine living resources in some regional fisheries treaties, such as the CCAMLR and the Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean.[2] Those biotic components that can be used for fisheries purposes, mainly marine fish and invertebrates, can be referred to as "marine fishery resources". According to the State of World Fisheries and Aquaculture Report released by FAO, the term "fish" indicates "fish, crustaceans, molluscs and other aquatic animals, but excludes aquatic mammals, reptiles, seaweeds and other aquatic plants".[3]

2. Biological Resources and Biodiversity

The Chinese term "生物资源" can be translated into two English terms: one for living resources and the other for biological resources. The first term, living resources, is applied to the UNCLOS, the United Nations Fish Stocks Agreement and regional fisheries treaties, while the second term, biological resources, is included in the Convention on Biological Diversity. The UNCLOS and the UN Fish Stocks Agreement do not make a definition for "living resources"; however, regional fisheries treaties, such as the Convention on Cooperation in the Northwest Atlantic Fisheries, define "living resources" as "all living components of marine ecosystems".[4] According to the CCAMLR, the term "Antarctic marine living resources" means "the populations of fin fish, molluscs, crustaceans and all other species of living organisms, including birds, found south of the Antarctic Convergence."[5]

As stipulated in Article 2 of the Convention on Biological Diversity, "biological resources" include "genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity." This definition covers the three levels of biodiversity, namely genetic resources, species resources and ecosystems.[6] Biological resources are the carriers of genetic resources, and the genetic diversity is an important component of biodiversity; the diversity of ecosystems cannot be separated from the diversity of species or from the genetic diversity that species possess.[7]

Therefore, in terms of treaty terminology, biological resources in the context of the Convention on Biological Diversity are different from living resources stipulated in the international law of the sea and international fisheries law; the former focuses more on the genetic nature of organisms and the ecosystems, while the latter emphasizes resources at the level of "species" that can be used by

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[1] As stipulated in the Convention on Cooperation in the Northwest Atlantic Fisheries, "living resources" means "all living components of marine ecosystems". See Convention on Cooperation in the Northwest Atlantic Fisheries (2017), Article 1 (k).
[2] Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean, Article 1 (n).
[3] FAO, The State of World Fisheries and Aquaculture, 2018, p. 2.
[4] Convention on Cooperation in the Northwest Atlantic Fisheries (2017), Article 1 (f) and (k).
[5] Convention on the Conservation of Antarctic Marine Living Resources, Article I (2).
[6] Lyle Glowka, Françoise Burhenne-Guilmin & Hugh Synge, *A Guide to the Convention on Biological Diversity*, Environmental Policy and Law Paper No. 30, IUCN, 1994, p. 16-17.
[7] LIU Huirong & LIU Xiu, *Research on International Law of the Utilization and Protection the Antarctic Biological Genetic Resources*, China University of Political Science and Law Press, 2013, p. 33-34.

humans. To further elaborate, “species” embody genetic diversity and are biological components of ecosystems, thus making it a core concept in the Convention on Biological Diversity.[1] The key to biodiversity conservation is species conservation; however, conservation is not focusing on a specific species itself, but on the genetics of that species and the role of that species in the structure and function of ecosystems. This is in line with the provisions concerning species conservation measures in the Convention on Biological Diversity. For example, Article 7 of the Convention on Biological Diversity makes it clear that each contracting party shall “identify components of biological diversity important for its conservation and sustainable use having regard to the indicative list of categories set down in Annex I,” including “ecosystems and habitats”, “species and communities” and “genomes and genes”.

Based on the difference between the two English terms for the Chinese term “生物资源”, what the UNCLOS, the United Nations Fish Stocks Agreement, and related regional fisheries treaties emphasize is the conservation and sustainable use of “species”, which is also the reason why marine fisheries resources should be governed and preserved. However, the Convention on Biological Diversity emphasizes three levels of diversity including “species”, focusing on genetic resources and ecosystems, with species as their carriers, and conservation of species is viewed as the fundamental way to achieve diversity of genetic resources and ecosystems, which is also the reason for marine biodiversity conservation. The difference in the logical starting point of these two governance systems engenders different choices of conservation tools, namely Area Based Management Tools (ABMT) and other effective conservation tools.

An important disputed point during the negotiation of the BBNJ Agreement was whether marine genetic resources (MGR) should include fish.[2] In fact, the difference between marine genetic resources and fish in the usual sense lies in how humans use them. Marine genetic resources are mainly used because of the genetic information they carry, which can be replicated and used in a variety of ways; while fish are mainly used as food supply. Both marine genetic resources and fish carry genes and are regarded as marine biological resources. In this sense, all the genes carried by fish can be exploited as a resource; however, currently, the value of such fish genes in relation to marine genetic resources is less than that of marine genetic resources. The micro-organisms of the deep sea are currently the focus of international attention as a genetic resource. These micro-organisms have adapted to survive in extreme environments and have developed unique

[1] Lyle Glowka, Françoise Burhenne-Guilmin & Hugh Synge, *A Guide to the Convention on Biological Diversity*, Environmental Policy and Law Paper No. 30, IUCN, 1994, p. 16.

[2] The BBNJ Agreement, adopted in March 2023 (unedited draft), further clarifies fishing and its associated activities regulated by international law; or fishing and its associated activities in areas beyond national jurisdiction, and living marine resources, unless they are already regulated by Part II of the BBNJ Agreement. See Draft Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction, 4 March 2023, Article 8 (2).

genetic information that can be used in biotechnological fields such as drugs, enzymes, biofuels, cosmetics, pesticides and environmental remediation. Given the difficulty in identifying the source of various microbial samples used for pharmaceuticals or industrial enzymes, it is not easy for the international community to assess the actual or potential total economic value of marine genetic resources in areas beyond national jurisdiction.[1] Conversely, in terms of food supply, fish is traditionally conceived as an important source of high quality animal protein for current human societies and, more importantly, as a means of ensuring food security in the context of a growing world population.[2] By studying fish genetics, the genetically independent fish in natural marine habitats can be protected from the influence brought by alien species, and aquaculture fish stocks can be improved as well. This will increase fish productivity and improve fish health condition,[3] thus further strengthening the contribution of fish to food security.

As defined in Article 2 of the Convention on Biological Diversity, biological diversity means "the variability among living organisms from all sources" including "diversity within species, between species and of ecosystems". As mentioned above, how to maintain species diversity is a crucial part of biodiversity conservation. Species may be reduced in number, or become endangered or even extinct due to human fishing activities, which can affect the genetics of the species and the structure and function of the ecosystem in which the species is found. Antarctic krill, for example, because of its essential role in the Antarctic marine ecosystem, prompts the groundbreaking introduction of the ecosystem approach in the CCAMLR. Besides, species migration or destruction may occur due to changes in ecosystems or habitats. For example, the acidification of the oceans and the increase in seawater temperatures caused by climate change can lead to the migration of some organisms towards the poles; marine pollution or seabed development activities can also cause damage to marine living resources by depriving them of a suitable growing environment, resulting in a decrease in the amount of living resources or their disappearance. The 2001 Reykjavik Declaration on Responsible Fisheries in the Marine Ecosystem (hereafter referred to as the Reykjavik Declaration) emphasizes that "sustainable fisheries management incorporating ecosystem considerations entails taking into account the impacts of fisheries on the marine ecosystem and the impacts of the marine ecosystem on fisheries" and recognizes that "certain non-fishery activities have an impact on the marine ecosystem and have consequences for management."[4] Conservation of biological diversity therefore centers on the maintenance or preservation of critical habitats and their ecological processes throughout the whole life of species, and the protection and preservation of rare or vulnerable ecosystems such as coral reefs, seamounts,

[1] UN, Report of the Secretary-General on Ocean and the Law of the Sea, A/64/66/Add.2, 19 October 2009, paragraphs 103-104.
[2] Christopher Costello, Ling Cao, Stefan Gelcich, *et al*., The Future of Food from the Sea, 588 *Nature* 95 (2020).
[3] FAO, The State of World Fisheries and Aquaculture, FAO, 2018, p.78-79.
[4] *The Reykjavik Declaration on Responsible Fisheries in the Marine Ecosystem*, 1-4 October 2001, Preamble.

hydrothermal vents and cold-water corals.

As stipulated in Article 194(5) of UNCLOS, measures taken shall include those necessary to protect and preserve species, habitats and ecosystems. Species, habitats and their ecological processes, and ecosystems are also the core elements of area-based management tools for biodiversity conservation adopted by relevant international or regional organizations, such as the ecological criteria for the establishment of special areas under the International Convention for the Prevention of Pollution from Ships (MARPOL)[1], the objectives of the Commission for the Protection of the Marine Environment of the North-East Atlantic for the establishment of marine protected areas[2] and the objectives of establishing marine protected areas by the Commission for the Conservation of Antarctic Marine Living Resources, etc.[3] In other words, these international and regional organizations have adopted measures to regulate human activities that may affect species, habitats and their ecological processes, and ecosystems, including ship discharges, marine pollution, fishing and related activities. Such an arrangement aims to achieve the goal of biodiversity conservation in different ways. Some researchers, therefore, believe that "biological diversity" is in fact an organizing or at least integrating concept, used to organize or integrate other existing agreements.[4]

In accordance with the UN General Assembly resolution, "ecosystem approaches to ocean management should be focused on managing human activities."[5] The above distinction between abiotic and biotic components from an ecosystem perspective will help to properly address the holistic and compositional relationships between the marine environment and marine living resources and to implement the ecosystem approach in each area separately. This will also help better understand the fact that IMO, ISA, FAO and RFMOs all include species, habitats and their ecological processes and ecosystems as their objectives or key factors in the conservation of marine biodiversity, but each has a different focus: IMO is concerned with the impact of ship-source pollution on the abiotic components of marine ecosystems, and the following impact on the external conditions for species survival or development; ISA is concerned with the potential impacts and damage to the abiotic components of marine ecosystems from seabed development activities; the FAO and RFMOs are concerned with both the potential damage to seabed habitats from bottom operations and the potential impacts on target organisms and the interrelationships between target

[1] Guidelines for the Designation of Special Areas under MARPOL 73/78, IMO Resolution A. 927 (22), 2001, paragraph 2.5.

[2] OSPAR Recommendation 2003/3 on a Network of Marine Protected Areas, 2003, paragraph 2.1. The recommendation was revised by OSPAR in 2010, but the objectives of the MPA network as set out in paragraph 2.1 remain unchanged. See, OSPAR Recommendation 2010/2 on amending Recommendation 2003/3 on a network of Marine Protected Areas, 2010, paragraphs 2.2-2.3.

[3] CM 91-04 'General framework for the establishment of CCAMLR Marine Protected Areas', 2011, paragraph 2.

[4] Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (3rd Edition), Oxford University Press, 2008, p.616.

[5] UN, General Assembly Resolution on Oceans and the Law of the Sea, A/RES/61/222, 20 December 2006, paragraph 119.

organisms and other organisms resulting from the use of biotic components. For example, Article II of the Convention on Cooperation in the Northwest Atlantic Fisheries sets out its objectives at two levels: the first one is to ensure the long term conservation and sustainable use of the fishery resources; and the second is to safeguard the marine ecosystems in which these resources are found. Article 6 "Application of the Precautionary Approach" of the UN Fish Stocks Agreement also regulates that the precautionary approach should be applied in order to "protect the living marine resources and preserve the marine environment". To "preserve the marine environment" is the second level of the objectives of the UN Fish Stocks Agreement in relation to those set out in Article 2.

II. Marine Living Resources and the Marine Environment: Interpretation of Treaty Terms

Relevant international judicial and arbitral practice seems to indicate that the obligations of marine environmental protection and preservation should be incorporated into the conservation of marine living resources. Regarding the "Southern Bluefin Tuna" case, in 1999, the International Tribunal for the Law of the Sea (ITLOS) suggested that "the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment".[1] In 2015, in the Case of Chagos Marine Protected Area, the arbitral tribunal asserted that measures to protect the marine environment under Article 194 of UNCLOS should not be limited to measures aimed strictly at controlling pollution and should be extended to include measures focused primarily on conservation and the preservation of ecosystems.[2] In this regard, a holistic analysis of the context of the UNCLOS, its institutional design and its rights and obligations, and the designing purpose of Part XII, in accordance with article 31 of the Vienna Convention on the Law of Treaties, is undertaken in order to clarify their mutual legal relationship.

1. Contextual Interrelationship

In terms of structure arrangement, the UNCLOS places the marine environment and marine living resources in separate parts and establishes different legal regimes. The UNCLOS states in its preamble that "the problems of ocean space are closely interrelated and need to be considered as a whole", and "the desirability of establishing, with due regard for the sovereignty of all States, a legal order for the seas and oceans" which, among other things, will promote "the peaceful uses of the seas and oceans", and "the conservation of their living resources, and the study, protection and preservation of the marine environment".[3] However, the Third United Nations Conference on the

[1] Southern Bluefin Tuna (New Zealand *v.* Japan; Australia *v.* Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, p. 280, paragraph 70.
[2] Chagos Marine Protected Area Arbitration (Mauritius *v.* United Kingdom), Award of 18 March 2015, PCA Case No. 2011-03, paragraph 538.
[3] Paragraphs 3-4, Preamble of the United Nations Convention on the Law of the Sea.

Law of the Sea viewed the "living resources" and "the marine environment" as two separate parts.

In the light of resolution 2750C (XXV) adopted by the United Nations General Assembly on 17 December 1970, "fishing and conservation of the living resources of the high seas (including the question of the preferential rights of coastal States)" and "the preservation of the marine environment (including, inter alia, the prevention of pollution)" are two separate issues.[1] During the Third United Nations Conference on the Law of the Sea, these two issues were discussed and drafted by different committees: Living resources were discussed and dealt with by the Second Committee and environmental protection by the Third Committee.[2] Looking at the titles of all the articles of UNCLOS, the term "living resources" is used in the titles five times: articles 61 and 62, articles 117 to 119; these articles are included in Part V Exclusive Economic Zone and Part VII High Seas.[3] This is obviously corresponding to Part XII Protection and Preservation of the Marine Environment.

2. The Design of the Regime and its Rights and Obligations

In terms of institutional design, the UNCLOS regime on marine environmental protection and preservation is designed in order to resolve the contradiction between pollution from ships and the right of navigation of ships,[4] emphasizing the balancing and harmonizing role of "international rules and standards", such as Articles 208 to 220. The design of the regime for living resources aims at resolving the contradiction between conservation and exploitation, e.g. Articles 61 and 62, as well as Articles 87 and 116 to 119; for the conservation of living resources on the high seas, provisions concerning coastal States and high seas fishing nations are also added, e.g. Article 116 of UNCLOS, Article 7 of the UN Fish Stocks Agreement, etc.

In terms of specific rights and obligations, the distinction between living resources and the marine environment is highlighted in Part V Exclusive Economic Zone of UNCLOS. Article 56 of UNCLOS provides that coastal States have sovereign rights over living resources and jurisdiction with regard to the protection and preservation of the marine environment; sovereign rights and jurisdiction are two kinds of rights of a different nature. Taken together, Part V, Part XII and Part XV of UNCLOS show that there are significant differences in the legislative, enforcement and jurisdictional powers of coastal States under these two rights. For example, Article 211 of UNCLOS provides that costal States shall adopt laws and regulations for the prevention, reduction and control

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[1] Paragraph 1 of Final Act of the Third United Nations Conference on the Law of the Sea.

[2] The First Committee discusses the seabed regime; the Second Committee discusses the territorial sea, the contiguous zone, the continental shelf, the exclusive economic zone, the high seas, fishing and the conservation of the living resources of the high seas, straits, archipelagic waters, etc.; and the Third Committee discusses marine environmental protection and scientific research. See, Robin R. Churchill and Vaughan Lowe, *The Law of the Sea* (3rd Edition), Manchester University Press, 1999, p. 16.

[3] According to some scholars, the term "living resources" is used for 38 times in the United Nations Convention on the Law of the Sea, emphasizing the commercial exploitation as well as the conservation and management of these resources. See Vonintsoa Rafaly, *The Concept of "Marine Living Resources": Navigating a Grey Zone in the Law of the Sea*, The Canadian Yearbook of International Law, Volume 59, p. 285, 286-287.

[4] Tommy T.B. Koh, *Negotiating a New World Order for the Sea*, 24 Virginia Environmental Law Journal 762, 775 (1984).

of pollution of the marine environment from vessels. Such laws and regulations, however, shall be "conforming to and giving effect to generally accepted international rules and standards established through the competent international organization or general diplomatic conference". If a coastal State needs, for special reasons, to establish for "a particular, clearly defined area" more serious laws and regulations than "generally accepted international rules and standards" in order to protect its particular marine environment or marine ecosystem, this must be done in consultation with and by the competent international organization and any interested States. After that, such laws and regulations may only be applied to foreign ships.[1] On the contrary, if a coastal State considers that the abiotic and ecological conditions in the "particular, clearly defined area" are fundamental to the conservation of its living resources, it can exercise discretion under its sovereign rights. Of course, if the coastal State were to interpret and apply such sovereign rights in an arbitrary manner, this could affect the navigational rights of ships of other States in the exclusive economic zone of the coastal State.[2] At least in this context, in a strict legal sense, the sovereign rights of the coastal State over living resources are distinct from, and superior to, the jurisdiction to protect and preserve the marine environment.

In terms of institutional design and specific rights and obligations, there is a difference between the marine environment and living resources. But the two are still related in some way. The UNCLOS also requires coastal States, in exercising their sovereign rights over living resources, to undertake conservation obligations to ensure "that maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation." Costal States shall take into account various relevant environmental constraints when adopting conservation measures, and "shall take into consideration the effects on species associated with or dependent upon harvested species."[3] Similar requirements for the conservation of living resources apply to the high seas.[4] The UN Fish Stocks Agreement further requires to adopt environmentally safe and cost-effective fishing gear, and "minimize pollution, waste, discards, catch by lost or abandoned gear" so as to, among others, protect the biodiversity of the marine environment.[5]

3. The Designing Purpose of Part XII of the United Nations Convention on the Law of the Sea

The definition of "pollution of the marine environment" in the UNCLOS, and the content of Part XII, Section 1, basically emphasize the prevention, reduction and control of the marine environment (of which the non-living components are present) in order to protect the living

1 Article 211(5) and (6) of the United Nations Convention on the Law of the Sea.
2 James Kraska, *Maritime Power and the Law of the Sea: Expeditionary Operation in the World Politics*, Oxford University Press, 2011, p. 8-13.
3 Article 61 of the United Nations Convention on the Law of the Sea.
4 Article 119 of the United Nations Convention on the Law of the Sea.
5 Article 5 of the UN Fish Stocks Agreement.

resources in ecological conditions. Article 194(4) provides that "in taking measures to prevent, reduce or control pollution of the marine environment, States shall refrain from unjustifiable interference with activities carried out by other States in the exercise of their rights and in pursuance of their duties in conformity with this Convention." The activities may be interpreted as either navigational activities in accordance with the UNCLOS, fishing activities carried out in accordance with the UNCLOS, or other activities. Article 194(5), which requires the protection of special ecosystems, species and habitats, and Article 196 on the prevention of the introduction of alien or new species, also focus on measures from a pollution prevention perspective, as shown in the title of Article 194, "measures to prevent, reduce and control pollution of the marine environment".

The objectives of marine environmental protection and preservation as set out in Part XII of UNCLOS can, therefore, be classified into two levels: (1) to protect and preserve the non-living components of the marine ecosystem through the prevention, reduction and control of pollution of the marine environment; (2) to safeguard the living conditions of marine living resources through the protection and preservation of the non-living components of the marine ecosystem and to conserve marine living resources by maintaining the quality of the marine environment. Considering that "protection" refers to those measures that respond to imminent or existing hazards or damage, and "preservation" includes the conservation of natural resources and the maintenance of the quality of the marine environment,[1] the title of Part XII of UNCLOS, "Protection and Preservation of the Marine Environment", can be interpreted as: preventing the marine environment from being polluted and maintaining the quality of the marine environment.

In this sense, those provisions of Part XII of UNCLOS that involve marine species, environment and ecosystems are similar to the objectives of the United Nations Fish Stocks Agreement or the Northwest Atlantic Fisheries Cooperation Convention regarding the preservation of the marine environment or the protection of the marine ecosystems in which fisheries resources are found, both of which fall under the respective second level of objectives. This binary structure of objectives clarifies which objective is more important and provides the pathway to achieve these objectives: the first level objective is the primary one and is the precondition and basis for achieving the second level objective; or in other words, the second level objective is an expected result of achieving the first level objective and is a natural outcome of "in so doing".[2] Therefore, treaty interpretation and application should follow the context in which the treaty terms are found, with reference to the objective and noting the logical relationship between the terms and the

[1] Shabtai Rosenne & Alexander Yankov, *United Nations Convention on the Law of the Sea 1982: A Commentary (Volume IV)*, Martinus Nijhoff Publishers, 1990, p. 11.

[2] Convention on Cooperation in the Northwest Atlantic Fisheries, 2017, Article 2.

objective. The coordination and cooperation between the North-East Atlantic Fisheries Commission and the Commission for the Protection of the Marine Environment of the North-East Atlantic can be considered as a case in point.[1]

4. Conservation of Marine Living Resources as an Element in the Protection and Preservation of the Marine Environment

The assertion that "the conservation of the living resources of the sea was an element in the protection and preservation of the marine environment", which was put forward by the International Tribunal for the Law of the Sea in 1999 while handling the Southern Bluefin Tuna case, has, to some extent, influenced the interpretation and application of the provisions of the UNCLOS on the marine environment and marine living resources. Here this paper does not discuss whether the International Tribunal for the Law of the Sea in this case could have provided for interim measures "to prevent serious harm to the marine environment" under Article 290(5) of UNCLOS. Nor the effect of the revocation of such interim measures by the arbitral tribunal in 2000 on this assertion would be discussed. Instead, this paper attempts to provide a plausible explanation for this assertion based on the foregoing legal analysis and the practice of relevant international organizations.

This assertion leads to the conclusion that there is a duty to protect and preserve the marine environment when engaging in fishing activities. It needs to be analyzed from two different perspectives: the rights and obligations of the coastal State and the obligations of the flag State. As far as the coastal State is concerned, the conservation of the living resources of its exclusive economic zone is an obligation under Article 61 of UNCLOS, as opposed to a sovereign right. The obligation to conserve is in relation to the biological components of the marine environment, as in the previous analysis of treaty terminology on the marine environment and marine living resources. Although, as a result, the fulfilment of such conservation obligations by the coastal State would protect and preserve the marine environment in one way or another, the legal nature of such obligations must not be confused with the obligations relative to the jurisdiction to protect and preserve the marine environment. Article 56 of UNCLOS draws a clear distinction between the sovereign rights and jurisdiction of coastal States; Article 297 (1) (c) and (3) of UNCLOS again distinguishes between the dispute settlement mechanisms arising from the interpretation and application of the two different rights. Disputes concerning the protection and preservation of the marine environment are subject to the procedures set out in Part XV, Section 2 "Compulsory Procedures Entailing Binding Decisions"; whereas disputes concerning the conservation of living resources can only be settled through conciliation procedures. Because of this difference in the

[1] Stefán Ásmundsson & Emily Corcoran, *The Process of Forming a Cooperative Mechanism Between NEAFC and OSPAR: from the First Contact to a Formal Collective Arrangement*, UNEP Regional Seas Reports and Studies No. 196, UNEP, 2015.

nature of rights, the UK asserts that the marine protected area it has established around the Chagos Archipelago is a measure to protect the marine environment, exercising jurisdiction to protect and preserve the marine environment, and is therefore subject to a third party compulsory dispute resolution procedure.[1]

In the case of flag States, the fisheries carried out by their fishing vessels make use of the living components of the marine environment, and their obligations under, inter alia, Articles 62, 87 and 119 of UNCLOS are to conserve marine living resources arising from the corresponding right of using the remaining allowable catch of the coastal State and the freedom to fish on the high seas. These fishing activities inevitably have an impact on the abiotic and biotic components of the marine environment. Impacts on abiotic components include damage to vulnerable ecosystems from bottom operations, pollution of the marine environment through direct discharges of domestic waste, sewage, catch waste (offal), etc. Impacts on biotic components include overfishing leading to the decline or even endangerment or extinction of species resources, bycatch of non-target species, etc. From a natural science perspective, the impacts of marine fishing activities on both the abiotic and biotic components of the marine environment involve marine environmental protection and conservation; from a legal perspective, weakening the impacts of marine fishing activities on abiotic components remains within the obligation to conserve marine living resources. Conservation Measure CM26-01 “General Environmental Protection during Fishing” adopted by the Commission for the Conservation of Antarctic Marine Living Resources and No. 2017-04 “Conservation and Management Measure on Marine Pollution” adopted by the Western and Central Pacific Fisheries Commission are cases in point. They both put the provisions of the International Convention for the Prevention of Pollution from Ships and its annexes into practice in areas under their respective jurisdiction to manage and control the potential impacts of fishing activities on non-living components.

Flag States, therefore, are responsible for conserving marine living resources and protecting and preserving the marine environment in relation to the fishing activities carried out by their fishing vessels. This is because of the nature of fishing vessels as ships and the fact that the impact or damage to the abiotic components of the marine environment does occur during fishing activities.

[1] Of course, the case should take into account the sovereignty dispute between the two countries over the Chagos Archipelago. Mauritius established a 200-nautical-mile exclusive economic zone in December 1984, and the United Kingdom declared a 200-nautical-mile fisheries conservation and management zone in October 1991 and an environment protection and preservation zone in September 2003, respectively. In the arbitration case, Mauritius argued that the UK was not a coastal state within the meaning of UNCLOS in this area, so there are reasons why the UK chose to consider the MPAs it established as measures to protect the marine environment. In addition, from the perspective of global ocean governance, the UK and the EU do seek to promote reform of global ocean governance through MPAs. See Chagos Marine Protected Area Arbitration (Mauritius *v.* United Kingdom), Award of 18 March 2015, PCA Case No. 2011-03, paragraph 7; Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, ICJ, 25 February 2019; Peter H. Sand, *“Marine protected areas” off UK overseas territories: comparing the South Orkneys Shelf and the Chagos Archipelago*, The Geographical Journal, 178(3), p.201 (2012).

Reducing the impact of fishing activities on the biotic components of the marine environment remains within the scope of the obligation to conserve marine living resources in a legal sense.[1] Despite the fact that flag States have two different obligations, it is important to see that the two obligations are inseparable and are fisheries activities in nature. According to the previous analysis on its two objectives, the primary obligation of the flag State is to conserve marine living resources and the secondary or accompanying obligation is to protect and preserve the marine environment, not the other way around. This is consistent with the practice of the Protocol on Environmental Protection to the Antarctic Treaty, which expressly provides that environmental impact assessments do not apply to Antarctic living resources "fishing and its associated activities". It is also in line with the reasoning of the International Tribunal for the Law of the Sea that environmental impact assessments are not included in the flag State's duty of care, and with the underlying logic of the ecosystem approach.

III. Marine Living Resources and the Marine Environment: From the Perspective of Due Diligence

In 2015, the International Tribunal for the Law of the Sea, in the Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, confirmed that pursuant to Article 192 of UNCLOS, the flag State is under the "due diligence obligation" to take all necessary measures to ensure compliance by fishing vessels flying its flag.[2] In 2016, the arbitral tribunal in the "South China Sea Arbitration" held that Article 192 of UNCLOS includes a duty of diligence to prevent fishing for those species that are internationally recognized as being at risk of extinction and in need of protection.[3] In this regard, this paper analyses the relationship between the two from the perspective of due diligence.

1. The Standard of Due Diligence and its Content

According to the International Law Association, there are three core criteria for the application of due diligence: firstly, the sovereign State is obligated to ensure; secondly, that in its jurisdiction, which includes all those spaces where the sovereign exercises formal jurisdiction or effective control; and thirdly, the rights and interests of other States are not violated.[4] In general, due diligence, as an obligation of conduct rather than an obligation of result, requires to deploy adequate

[1] Similarly, the refuelling of fishing vessels in the exclusive economic zone of a coastal State is considered to be a fishing-related activity that falls within the sovereign rights of the coastal State over marine living resources, whereas the refuelling of cruise ships in the exclusive economic zone of a coastal State is considered to be a freedom of navigation on the high seas that does not fall within the sovereign rights or jurisdiction of the coastal State. See, The M/V "Virginia G" Case (Panama v. Guinea-Bissau), Judgment, ITLOS Reports 2014, p.4, paragraph 223; The M/V "Norstar" Case (Panama *v.* Italy), Judgment, ITLOS Reports 2018–2019, p. 10, paragraph 219.

[2] Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC) (Request for Advisory Opinion Submitted to the Tribunal), Advisory Opinion, ITLOS, 2 April 2015, paragraphs 124-140.

[3] South China Sea Arbitration (Philippines *v.* China), Award of 12 July 2016, PCA Case No. 2013–19, paragraph 956.

[4] ILA Study Group on Due Diligence in International Law (Second Report), July 2016, p. 5-6.

means, to exercise best possible efforts, to do the utmost, to obtain this result.[1] At its core, it lies in adequate and necessary "measures" taken to avoid the question of breach. Article 194 of UNCLOS provides that States shall take "all" measures consistent with this Convention that are "necessary" to prevent, reduce and control pollution of the marine environment. In relation to duties of the flag State, Article 94 of UNCLOS requires that measures taken by flag States should be "necessary" and Article 18 of the United Nations Fish Stocks Agreement requires that such measures should be "as may be necessary".

The Seabed Disputes Chamber of the International Tribunal for the Law of the Sea pointed out that the content of "due diligence" obligations may not easily be described in precise terms due to the fact that "due diligence" is a variable concept. It may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge. It may also change in relation to the risks involved in the activity; the standard of due diligence has to be more severe for the riskier activities.[2] Nevertheless, the International Court of Justice considers that due diligence should include three parts: firstly, prescribing appropriate rules and measures, such as the enactment of laws or regulations; secondly, entailing a certain level of vigilance in the enforcement and the exercise of administrative control so as to prevent possible breaches; and thirdly, conducting all necessary investigative measures to correct possible breaches in a timely manner.[3]

2. Application of Due Diligence in the Marine Environment and Marine Living Resources

The foregoing analysis of the treaty interpretation of the two terms is from the perspective of the coastal State in order to highlight the content of both in terms of rights. In contrast, the above-mentioned analysis of due diligence in relation to international judicial and arbitral practice is conducted from its application in order to highlight the content of both in terms of obligations, which are different with regard to questions of breach. In the case of marine environmental protection and preservation, the diligence obligations of the State in which the activity is to be carried out may include, firstly, the establishment of a system of corresponding laws and administrative procedures; secondly, the adoption of measures to prevent major pollution incidents, including the monitoring and permitting of activities that may engender pollution or environmental damage, and in particular the conduct of appropriate risk assessments and environmental impact assessments; thirdly, relevant national or international organizations should be informed in a timely manner when there is a high risk of such pollution or damage.[4] As the obligation to conduct an

[1] Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10 paragraph 110.
[2] Ibid, paragraph 117.
[3] Case Concerning Pulp Mills on the River Uruguay (Argentina *v.* Uruguay), Judgment of 20 April 2010, ICJ Reports 2010, p. 14, paragraph 197.
[4] Joanna Kulesza, *Due Diligence in International Law*, Brill Nijhoff, 2016, p. 224-225.

environmental impact assessment has become a general obligation under customary international law, in the field of environmental protection, a State cannot demonstrate to itself that it has fulfilled its duty of diligence if it has not carried out an environmental impact assessment.[1] In terms of the conservation of marine living resources, the International Tribunal for the Law of the Sea has held that flag States have a duty of diligence to, firstly, adopt appropriate laws, regulations and management measures in accordance with their domestic law; secondly, establish enforcement mechanisms to monitor and secure compliance with these laws and regulations; and thirdly, to make sure that sanctions applicable to involvement in IUU fishing activities must be sufficient to deter violations and to deprive offenders of the benefits accruing from their IUU fishing activities.[2]

As can be seen, the diligence obligations corresponding to marine environmental protection and preservation and conservation of marine living resources mainly follow the three points listed by the ICJ, both emphasizing that the development of laws and their regulations should be carried out in accordance with the domestic law of each State and be an internal matter for each State,[3] and both emphasizing measures such as oversight, monitoring, enforcement and penalties, but with different specificities. Environmental impact assessment is a case in point. For one thing, environmental impact assessment is a measure that must be taken by a State to fulfil its diligence obligations in the field of marine environmental protection and preservation, although its content and scope have not been specified in general international law.[4] For another, it is not a measure that is necessarily adopted in conserving marine living resources, as in the case of Article 8 of the Protocol on Environmental Protection to the Antarctic Treaty and its annex I, whose environmental impact assessments are not applicable to “fishing and its associated activities” regulated by the CCAMLR.[5] In addition to this, in the field of conservation of marine living resources, the International Tribunal for the Law of the Sea has given greater weight to the flag State penalties for violations, particularly in relation to IUU fishing. This is in line with the requirements of Article 19 of the UN Fish Stocks Agreement.

Clarifying the relationship between the duties of diligence corresponding to the two areas mentioned above (i.e. marine environmental protection and preservation and conservation of marine

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[1] Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, paragraph 145; Case Concerning Pulp Mills on the River Uruguay (Argentina *v.* Uruguay), Judgment of 20 April 2010, ICJ Reports 2010, p. 14, paragraph 204.

[2] Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 4, paragraph 138.

[3] Ibid; Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, paragraph 218-219.

[4] Case Concerning Pulp Mills on the River Uruguay (Argentina *v.* Uruguay), Judgment of 20 April 2010, ICJ Reports 2010 p. 14, paragraph 205.The ICJ considers that it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment. Once operations have started and, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken.。

[5] Final Act of Protocol on Environmental Protection to the Antarctic Treaty, 1991, paragraphs 7-8.

living resources), in conjunction with the analysis of the aforementioned assertion that "the conservation of the living resources of the sea was an element in the protection and preservation of the marine environment", will allow for a better understanding of the view of the International Tribunal for the Law of the Sea that the flag State has the obligation to take the necessary measures to ensure that vessels flying its flag comply with the protection and preservation measures adopted by the SRFC Member States, as set out in the Request for An Advisory Opinion Submitted by the Sub-Regional Fisheries Commission(SRFC) of the International Tribunal for the Law of the Sea in 2015.[1] In the light of the fact that fishing vessels are, first and fundamentally, ships, the content of Part XII of UNCLOS on pollution from ships certainly applies to vessels engaged in fishing activities. In terms of the ecosystem approach, the activities carried out by fishing vessels are fishing or fishing-related activities, and the pollution or damage to the marine environment that they may cause is subordinate to the fishing or fishing-related activities; it is not an activity that exists independently, and should therefore be included in the obligation to conserve marine living resources. The FAO's ecosystem approach to fisheries supports this analysis. According to FAO, the ecosystem approach to fisheries should be referred to as the "ecosystem approach to fisheries", rather than the "ecosystem-based fisheries management". This is because the latter implies that the "ecosystem" would become the new "foundation" of fisheries management. This may have been interpreted as giving to environmental considerations pre-eminence over socio-economic and cultural ones, raising concern about equity, political as well as socio-economic costs and feasibility.[2]

IV. Conclusion

Mainstreaming biodiversity inevitably affects the interpretation and application of the provisions on marine living resources and the marine environment in the framework of the UNCLOS, blurring the relationship between Part V, Part VII and Part XII of UNCLOS, thereby affecting the interrelationship between the United Nations Fish Stocks Agreement and the BBNJ Agreement. In natural science, the conservation of marine biodiversity requires the sustainable development of marine fisheries and vice versa.[3] The 2001 Reykjavik Declaration recognizes "the complex inter-relationship between fisheries and other components of marine ecosystems" and emphasizes that "certain non-fishery activities have an impact on the marine ecosystem" and decides to "advance the scientific basis for developing and implementing management strategies that incorporate ecosystem considerations and which will ensure sustainable yields while

[1] Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 4, paragraph 136.

[2] Serge M. Garcia, Alfonso Zerbi, Catherine Aliaume, et al., *The Ecosystem Approach to Fisheries: Issues, Terminology, Principles, Institutional Foundations, Implementation and Outlook*, FAO Fisheries Technical Paper No. 443, FAO, 2003, p. 6; UN, Report of the Secretary-General on Oceans and the Law of the Sea, A/61/63, 9 March 2006, paragraph 158.

[3] Serge M. Garcia, Jake Rice & Anthony Charles, *Governance of marine fisheries and biodiversity: The integration challenge*, in Serge M. Garcia, Jake Rice & Anthony Charles (eds.), *Governance of Marine Fisheries and Biodiversity Conservation: Interaction and Coevolution*, John Wiley & Sons, 2014, p. 37.

conserving stocks and maintaining the integrity of ecosystems and habitats on which they depend".[1] From a sustainable development perspective, i.e. economic, social and environmental,[2] both marine fisheries resources and marine biodiversity in the marine environment are inherently integral parts of sustainable development of the oceans.

Legally, however, the two are different legal institutional arrangements. Under the framework of the UNCLOS, marine fisheries resources and marine biodiversity in the marine environment have different legal attributes and cannot be confused or treated as the same. For areas within national jurisdiction, coastal States have sovereign rights over marine fisheries resources, but only jurisdiction over the marine environment. The conservation of marine environment and marine living resources beyond areas of national jurisdiction involves the relationship between different legal regimes, such as Part VII of UNCLOS, the United Nations Fish Stocks Agreement concerning the legal regimes on marine living resources, and Part XII of UNCLOS regarding the marine environment. This relationship of legal regimes reveals the structure within the EEZ, i.e. the division between freedom of fishing on the high seas or the conservation and sustainable use of living resources on the high seas and the protection and preservation of the environment on the high seas; there is something in common between the two, that is, the exclusive flag State jurisdiction. In other words, the flag State has both an obligation to conserve fisheries resources on the high seas and an obligation to protect and preserve the marine environment. Thus, from the perspective of the flag State, it has both obligations under international law and is one of the key subjects of sustainable development of the oceans.

From the development of the BBNJ Agreement, the 2004 UN General Assembly Resolution 59/24 specifies that the "BBNJ Working Group" is obliged to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction, to examine the scientific, technical, economic, legal, environmental, socio-economic and other aspects of these issues, and to indicate, where appropriate, possible options and approaches to promote international cooperation and coordination for the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction.[3] The first UN Oceans Conference, held at UN Headquarters in June 2017, highlighted the importance of strengthening cross-sectoral cooperation among diverse regional bodies and organisations.[4] In this regard, FAO and the United Nations Environment Programme (UNEP) have facilitated discussions and strengthen collaboration. For example, FAO and UNEP have promoted, within the framework of its Sustainable Ocean

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1 *The Reykjavik Declaration on Responsible Fisheries in the Marine Ecosystem*, 1-4 October 2001, paragraph 5.
2 UN, General Assembly Resolution on Transforming our world: the 2030 Agenda for Sustainable Development, A/RES/70/1, 25 September 2015, preamble.
3 UN, General Assembly Resolution on Oceans and the Law of the Sea, A/RES/59/24, 17 November 2004, paragraphs 73-74.
4 Our Ocean, Our Future: Call for Action, A/CONF.230/11, 30 May 2017, paragraph 13 (b).

Initiative (SOI), cooperation between regional fisheries organisations and regional seas organisations in addressing issues such as the Sustainable Development Goals, the Aichi Biodiversity Targets, ecologically or biologically significant marine areas (EBSAs) and vulnerable marine ecosystems (VMEs).[1]

The BBNJ Agreement, adopted in March 2023, makes different provisions in different parts on the interrelationship between the Agreement and related legal instruments and mechanisms, leaving much room for future treaty interpretation and application. This paper believes that the future interpretation and application of the provisions on the interrelationship between the BBNJ Agreement and related legal instruments and mechanisms should reflect the ordinary meaning of treaty terminology, respect the relationship of rights and obligations under the UNCLOS, and genuinely embody the principles of the ecosystem approach and the basic principles of management of human activities, and that it should reflect the concerns of States regarding the boundaries of convergence or harmonisation between international organisations. Specifically, the BBNJ Agreement should ensure a favorable and sustainable marine environment for high seas fisheries activities; and regional fisheries management organisations (RFMOs) should manage high seas fisheries activities in accordance with the principles of the ecosystem approach, to protect and preserve the marine environment while at the same time providing food and animal protein, as well as socio-economic development goods and services for the sustainable development of humankind.[2]

Translator: LI Jiaxin

[1] See FAO, The State of World Fisheries and Aquaculture, 2018, p. 173.

[2] See Report of Fourteenth round of Informal Consultations of States Parties to the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, ICSP 14/UNFSA/INF.3, 15 August 2019, paragraph 71.

案例解析(Cases Analysis)

国际海洋法法庭 28 号案海洋划界争议管辖权及可受理性论证

任雁冰*

摘要：国际海洋法法庭于 2021 年 1 月 28 日就毛里求斯诉马尔代夫海洋划界案作出阶段性判决，驳回了马尔代夫对本案管辖权争议及可受理性问题提出的五项先决异议（Preliminary Objection），即：（1）英国是诉讼必不可少的第三人，故特别法庭对本案争议不具有管辖权；（2）特别法庭对查戈斯群岛主权争议没有管辖权；（3）由于毛里求斯与马尔代夫未曾也不可能实质性参与《联合国海洋法公约》第 74 条和第 83 条要求的协商，故特别法庭对本案争议没有管辖权；（4）在马尔代夫与毛里求斯之间不存在也不可能存在海洋划界争议，故特别法庭没有管辖权；（5）毛里求斯起诉构成滥用程序，故不应受理。在作出判决过程中，国际海洋法法庭进行了一系列法律论证，本文拟揭示和把握之，并予以简要评论。

关键词：海洋划界争议； 管辖权； 可受理性

国际海洋法法庭于2021年1月28日就毛里求斯诉马尔代夫海洋划界案（List of Cases: No. 28）管辖权及可受理性问题作出了阶段性判决。[1]

一、案件背景和基本事实

1814 年，法国根据《巴黎条约》将毛里求斯及其属地割让给英国。[2]

1965 年 9 月，英国与毛里求斯殖民地代表在伦敦举行立宪会议，商讨毛里求斯独立问题3。1965 年 11 年英国通过了《英属印度洋领地条例》（The British Indian Ocean Territory Order），

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[1] Dispute Concerning Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean (Mauritius *v.* Maldives), ITLOS, Preliminary Objections Judgement, 28 January 2021, https://www.itlos.org/fileadmin/itlos/documents/cases/28/preliminary_objections/C28_Judgment_prelimobj_28.01.2021_orig.pdf，2023 年 5 月 4 日访问。

[2] See Paragraph 57 of the Judgment: In 1814, France, by the Treaty of Paris, ceded Mauritius and its dependencies to the United Kingdom.

[3] See Paragraph 58 of the Judgment: In September 1965, a constitutional conference took place in London involving representatives of the colony of Mauritius and the United Kingdom. Mauritius submits that at that conference "the British Government made the independence of Mauritius conditional on Mauritius Minister 'agreeing' to detachment [of the Chagos Archipelago], linking 'both matters in a possible package deal'", and that the British Prime Minister "procured the supposed but reluctant 'agreement' of Premier Ramgoolam [of Mauritius] and two of his colleagues to the detachment of the Chagos Archipelago."

规定查戈斯群岛及若干其他岛屿“共同构成一个单独殖民地，名曰英属印度洋领地”[1]。

1965 年 12 月 16 日，联合国大会通过了“毛里求斯问题”2066（XX）号决议，其中载明“深度关切行政权力方采取任何行动将特定岛屿从毛里求斯领土中分离出去以建立军事基地，其系《宣言》之违反”，要求“行政权力方不得采取任何分裂毛里求斯领土或侵犯其领土完整的措施”。[2]

1968 年 3 月 12 日，毛里求斯成为独立国家，而英国继续对查戈斯群岛实施行政统治。[3]

2001 年 6 月 19 日，毛里求斯着手实施查戈斯群岛周围大陆架划界工作。[4]

2010 年 4 月 1 日，英国宣布在查戈斯群岛周围建立海洋保护区。2010 年 12 月 20 日，毛里求斯对英国提起仲裁。[5]2015 年 3 月 18 日，仲裁庭作出裁决，在实体问题上认定“英国在查戈斯群岛周围设立海洋保护区违反了《联合国海洋法公约》第 2 条第 3 款、第 56 条第 2 款和第 194 条第 4 款”。此裁决即“查戈斯裁决”（Chagos Arbitral Award）。[6]

按联合国大会 2017 年 6 月 22 日 71/292 号决议要求，国际法院于 2019 年 2 月 25 日递交了《1965 年查戈斯群岛从毛里求斯分裂的法律后果之咨询意见》（下称“查戈斯咨询意见”），其执行部分相关内容有：“按照国际法，毛里求斯于 1968 年独立时因查戈斯群岛分裂造成去殖民化尚未完成”，“英国有义务结束其对查戈斯群岛之行政统治”，“所有成员国有义务协助联合国以完成毛里求斯去殖民化”。[7]

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[1] See Paragraph 59 of the Judgment: On 8 November 1965, the United Kingdom adopted The British Indian Ocean Territory Order, which provided that the Chagos Archipelago, with certain other islands, “shall together form a separate colony which shall be known as the British Indian Ocean Territory.”

[2] See Paragraph 60 of the Judgment: On 16 December 1965, the United Nations General Assembly (hereinafter “the UNGA”) adopted resolution 2066 (XX) on the “Question of Mauritius”, in which it noted “with deep concern that any step taken by the administering Power to detach certain islands from the Territory of Mauritius for the purpose of establishing a military base would be in contravention of the Declaration” (referring to the Declaration on the Granting of Independence to Colonial Countries and Peoples) and invited the “administering Power to take no action which would dismember the Territory of Mauritius and violate its territorial integrity”.

[3] See Paragraph 59 of the Judgment: On 12 March 1968, Mauritius became an independent State. The United Kingdom continues to administer the Chagos Archipelago.

[4] See Paragraph 62 of the Judgment: In a letter dated 19 June 2001 addressed to the Minister of Foreign Affairs of the Maldives, the Minister of Foreign Affairs and Regional Cooperation of Mauritius stated that Mauritius was “embarking on the exercise to delimit the Continental Shelf around the Chagos Archipelago” and asked the Maldives to “agree to preliminary negotiations being initiated at an early date.”

[5] See Paragraph 64 of the Judgment: On 1 April 2010, the United Kingdom announced the creation of a marine protected area (hereinafter “the MPA”) in and around the Chagos Archipelago. On 20 December 2010, Mauritius instituted arbitral proceedings against the United Kingdom pursuant to Annex VII of the Convention.

[6] See Paragraph 69 of the Judgment: On 18 March 2015, the Arbitral Tribunal constituted pursuant to Annex VII to the Convention rendered its award in the Arbitration regarding the Chagos Marine Protected Area (hereinafter “the Chagos arbitral award”). ... In relation to the merits, the Arbitral Tribunal found that, in establishing the MPA surrounding the Chagos Archipelago, the United Kingdom breached its obligations under article 2, paragraph 3, article 56, paragraph 2, and article 194, paragraph 4, of the Convention.

[7] See Paragraph 71 of the Judgment: On 25 February 2019, the ICJ delivered its advisory opinion on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (hereinafter “the Chagos advisory opinion”). The operative part of the Chagos advisory opinion provides as follows: The Court, ... (3) By thirteen votes to one, Is of the opinion that, having regard to international law, the process of decolonization of Mauritius was not lawfully completed when that country acceded to independence in 1968, following the separation of the Chagos Archipelago; ... (4) By thirteen votes to one, Is of the opinion that the United Kingdom is under an obligation to bring to an ends its administration of the Chagos Archipelago as rapidly as possible; (5) By thirteen votes to one, Is of the opinion that all Members States are under an obligation to cooperate with the United Nations in order to complete the decolonization of Mauritius. ... (Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I. C. J. Reports, 2019, p. 95, at p. 140, para 183)

2019 年 5 月 22 日，联合国大会通过 73/295 号决议，名为“国际法院关于 1965 年查戈斯群岛从毛里求斯分裂的法律后果的咨询意见”，此决议“要求英国在本决议通过之日起不超过六个月内无条件撤回对查戈斯群岛的殖民统治，以使毛里求斯尽快完成其领土去殖民化”，“号召所有成员国协助联合国确保毛里求斯尽快完成去殖民化，不得采取任何措施阻止或延误毛里求斯按国际法院咨询意见和本决议完成去殖民化进程”。[1]

毛里求斯于 2019 年 8 月 23 日在国际海洋法法庭对马尔代夫提起海洋划界诉讼。[2]两国于 2019 年 9 月 24 日达成《特别协议》同意将本案交由特别法庭审理。[3]特别法庭设立后，马尔代夫对本案管辖权争议及可受理性提出了五项先决异议（preliminary objections），依次如下：

第一项异议：英国是本案诉讼必不可少的第三人，故特别法庭对本案争议不具有管辖权；

第二项异议：特别法庭对裁决查戈斯群岛主权争议没有管辖权；

第三项异议：由于毛里求斯与马尔代夫未曾也不可能实质性参与《联合国海洋法公约》第 74 条和第 83 条要求的协商，故特别法庭对本案争议没有管辖权；

第四项争议：在马尔代夫与毛里求斯之间不存在也不可能存在海洋划界争议，故特别法庭没有管辖权；

第五项争议：毛里求斯起诉构成滥用程序，故不应受理。[4]

特别法庭对这五项先决异议进行了逐项审查，于 2021 年 1 月 28 日作出全部予以驳回的判决，即国际海洋法法庭 28 号案海洋划界争议管辖权及可受理性判决，其法律论证路径如下。

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[1] See Paragraph 74 of the Judgment: On 22 May 2019, the UNGA adopted resolution 73/295 entitled “Advisory opinions of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965”. In the resolution, the UNGA, inter alia, 3. Demands that the United Kingdom of Great Britain and Northern Ireland withdraw its colonial administration from the Chagos Archipelago unconditionally within a period of no more than six months from the adoption of the present resolution, thereby enabling Mauritius to complete the decolonization of its territory as rapidly as possible; ... 5. Calls upon all Members States to cooperate with the United Nations to ensure the completion of the decolonization of Mauritius as rapidly as possible, and to refrain from any action that will impede or delay the completion of the process of decolonization of Mauritius in accordance with the advisory opinion of the Court and the present resolution.

[2] See Paragraph 1 of the Judgment: By letter dated 23 August 2019, the Solicitor-General of the Republic of Mauritius (hereinafter “Mauritius”) informed the President of the International Tribunal for the Law of the Sea (hereinafter “the Tribunal”) of the institution of arbitral proceedings by Mauritius against the Republic of the Maldives (hereinafter “the Maldives”) on 18 June 2019, pursuant to Annex VII to the United Nations Convention on the Law of the Sea (hereinafter “the Convention”).

[3] See Paragraph 3 of the Judgment: The Special Agreement and Notification between Mauritius and the Maldives dated 24 September, 2019 (hereinafter “the Special Agreement”), in its relevant part, reads as follows: ... 1. Pursuant to article 15, paragraph 2, of the Statute of the International Tribunal for the Law of the Sea (hereinafter “the Tribunal”), the Republic of Mauritius and the Republic of Maldives hereby record their agreement to submit to a special chamber of the Tribunal the dispute concerning the delimination of the maritime boundary between them in the Indian Ocean. ...

[4] See Paragraph 79 of the Judgment: The Maldives raises five preliminary objections to the jurisdiction of the Special Chamber and the admissibility of Mauritius’ claims. According to the Maldives’ first preliminary objection, the United Kingdom is an indispensable third party to the present proceedings, and, as the United Kingdom is not a party to these proceedings, the Special Chamber does not have jurisdiction over the alleged dispute. In its second preliminary objection, the Maldives submits that the Special Chamber has no jurisdiction to determine the disputed issue of sovereignty over the Chagos Archipelago, which it would necessarily have to do if it were to determine Mauritius’ claims in these proceedings. The Maldives contends in its third preliminary objection that, as Mauritius and the Maldives have not engaged, and cannot meaningfully engage, in the negotiations required by articles 74 and 83 of the Convention, the Special Chamber lacks jurisdiction. According to the Maldives’ fourth preliminary objection, there is not, and cannot be, a dispute between Mauritius and the Maldives concerning its maritime boundary. Without such a dispute, the Special Chamber has no jurisdiction. Finally, the Maldives submits that Mauritius’ claims constitute an abuse of process and should therefore be rejected as inadmissible at the preliminary objection phase.

二、判决驳回第一、二项先决异议的法律论证路径

特别法庭忆及国际海洋法法庭在“Norstar”轮案（MV “Norstar” Case）中表示“货币黄金案原则”是“一项在国际司法诉讼中稳固确立的程序性规则”。在此问题上特别法庭注意到当事人同意“货币黄金案原则”之效力，并进一步同意只有在特别法庭认定毛里求斯（而非英国）对查戈斯群岛拥有主权时毛里求斯的起诉方可受理。[1]因此双方分歧焦点是毛里求斯与英国之间关于查戈斯群岛的主权争议是否仍然存在还是已经解决。[2]如果查戈斯群岛主权争议仍然存在，英国可作为必不可少一方，则“货币黄金案原则”会阻止特别法庭行使其管辖权。相反，如果主权争议已解决且毛里求斯胜出，英国就不能作为必不可少一方，亦不适用“货币黄金案原则”。[3]此问题同时为第一项先决异议和第二项先决异议的核心问题。[4]

特别法庭首先审查《联合国海洋法公约》第 288 条第 1 款赋予它的管辖范围以及向其提交的争议的性质，之后再考量查戈斯群岛的法律地位问题。[5]

《联合国海洋法公约》第 288 条第 1 款规定：“第 287 条所指的法院或法庭，对于按照本部分向其提出的有关本公约的解释或适用的任何争端，应具有管辖权”。显然特别法庭之管辖权限于“本公约的解释或适用的任何争端”。[6]在此问题上，特别法庭回顾了仲裁庭在南海仲裁案中的论述：“本公约不解决国家领土主权争议问题，故本庭从未被要求亦不打算就哪一国对南中国海任何领土享有主权作出任何裁决”。[7]

关于毛里求斯向特别法庭提交的争议之性质，毛里求斯提出：“请求法庭按《国际海洋法公约》规定的原则和规则对毛里求斯与马尔代夫在印度洋上专属经济区和大陆架之间的海洋

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[1] See Paragraph 97 of the Judgment: The Special Chamber recalls that the Tribunal stated in the M/V “Norstar” Case that the Monetary Gold principle is “a well-established procedure rule in international judicial proceedings” (M/V “Norstat” (Panama v. Italy), Preliminary Objections, Judgment, ITLOS Reports 2016, p. 44, at p. 84, para. 172). The Special Chamber notes in this regard that the Parties are in agreement as to the effect of the Monetary Gold principle. The Parties further agree that Mauritius’ claims can be entertained only if the Special Chamber accepts that Mauritius, not the United Kingdom, has sovereignty over the Chagos Archipelago.

[2] See Paragraph 98 of the Judgment: ... Thus the Parties’ disagreement boils down to the question as to whether a sovereignty dispute between Mauritius and the United Kingdom over the Chagos Archipelago still exists or has been resolved.

[3] See Paragraph 99 of the Judgment: Accordingly, if a sovereignty dispute over the Chagos Archipelago exists, the United Kingdom may be regarded as an indispensable party and the Monetary Gold principle would prevent the Special Chamber from exercising its jurisdiction. On the other hand, if such sovereignty dispute has been resolved in favor of Mauritius, the United Kingdom may not be regarded as an indispensable party and the Monetary Gold principle would not apply.

[4] See Paragraph 100 of the Judgment: As the Special Chamber will examine below, the core issue of the second preliminary objection raised by the Maldives also concerns the legal status of the Chagos Archipelago. Therefore, this issue is central to both the first and the second preliminary objection. ...

[5] See Paragraph 102 of the Judgment: In addressing this objection, the Special Chamber will begin by examining the scope of its jurisdiction under article 288, paragraph 1, of the Convention and the nature of the dispute submitted to it. It will then consider the question of the legal status of the Chagos Archipelago.

[6] See Paragraph 109 of the Judgment: Article 288, paragraph 1, of the Convention reads: A court or tribunal referred in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part. It is thus clear that the jurisdiction of the Special Chamber is confined to “any dispute concerning the interpretation or application of [the] Convention”.

[7] See Paragraph 110 of the Judgment: ... In this regard, the Special Chamber recalls the following statement made by the Arbitral Tribunal in the South China Sea Arbitration: The Convention, however, does not address the sovereignty of States over land territory. Accordingly, this Tribunal has not been asked to, and does not purport to, make any ruling as to which State enjoys sovereignty over any land territory in the South China Sea, in particular with respect to the disputes concerning sovereignty over the Spratly Islands or Scarborough Shoal. (The South China Sea Arbitration between the Republic of the Philippines and the People’s Republic of China, Award of 12 July 2016, RIAA, Vol. XXXIII, p. 153, at p. 184, para. 5)

边界进行划界，包括超出毛里求斯领海基线 200 海里外属于毛里求斯的大陆架部分”，“还请求法庭宣告马尔代夫违反了《联合国海洋法公约》第 74 条第 1 款和第 83 条关于待决协议的义务，即尽力达成务实的临时安排，在过渡期间，不得危害或妨碍最后协议的达成”。[1]特别法庭注意到，按照查戈斯群岛附近区域地图，毛里求斯的主张以其对查戈斯群岛享有主权为大前提，从而与马尔代夫存在《联合国海洋法公约》第 74 条第 1 款和第 83 条第 1 款意义上的海岸相对或相邻海域。[2]

然而双方对毛里求斯是否享有查戈斯群岛主权这一大前提之有效性存在分歧。[3]因此，查戈斯群岛的法律地位就是双方分歧的核心。[4]

为解决此问题，特别法庭对查戈斯裁决、查戈斯咨询意见、联合国大会 73/295 号决议及查戈斯群岛主权争议现状进行了审查。

1.特别法庭对查戈斯裁决之审查论证

在查戈斯裁决中，毛里求斯提出的第一项和第四项主张与本案相关[5]，其中第一项主张为“英国无权在查戈斯群岛周围设立海洋保护区或其他海洋区域，因其并非《联合国海洋法公约》第 2、55、56 和 57 条意义上的‘沿海国’”，第四项主张为“英国所谓的海洋保护区与其在《联合国海洋法公约》第 2、55、56、63、64、194 和 300 条项下的义务格格不入”[6]。

对第一项主张裁决认定其“是当事人之间就查戈斯群岛主权存在的争议”，“此主权争议

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[1] See Paragraph 112 of the Judgment: ... In paragraphs 27 and 28 of the Notification, Mauritius makes the following claims: 27. Mauritius requests the Tribunal to delimit, in accordance with the principles and rules set forth in UNCLOS, the maritime boundary between Mauritius and Maldives in the Indian Ocean, in the EEZ and continental shelf, including the portion of the continental shelf pertaining to Mauritius that lies more than 200 nautical miles from the baselines from which its territorial sea is measured. 28. Mauritius also requests the Tribunal to declare that Maldives has violated its obligation to, pending agreement as provided for in paragraphs 1 of Articles 74 and 83 of UNCLOS, make every effort to enter into provisional arrangements of a practical nature and, during such transitional periods, not to jeopardize or hamper the reaching of the final agreement.

[2] See Paragraph 113 of the Judgment: The Special Chamber notes that, given the geography of the area relevant to the present proceedings, in particular the location of the Chagos Archipelago, Mauritius' claims are based on the premise that it has sovereignty over the Chagos Archipelago and thus is the State with an opposite or adjacent coast to the Maldives within the meaning of article 74, paragraph 1, and article 83, paragraph 1, of the Convention and the State concerned within the meaning of paragraph 3 of the same articles. ...

[3] See Paragraph 114 of the Judgment: However, the Parties disagree on the validity of the premise that Mauritius has sovereignty over the Chagos Archipelago. ...

[4] See Paragraph 115 of the Judgment: Therefore, the legal status of the Chagos Archipelago is at the core of the disagreement between the Parties with respect to the second preliminary objection. As noted above, it is also central to the disagreement between the Parties with respect to the first preliminary objection. ...

[5] See Paragraph 131 of the Judgment: In the Chagos Marine Protected Area Arbitration, Mauritius made four submissions to claim that the establishment of the MPA around the Chagos Archipelago by the United Kingdom was in breach of the Convention. The submissions that may be relevant to the question the Special Chamber has to address are the first and fourth submissions.

[6] See Paragraph 132 of the Judgment: The first submission of Mauritius reads as follows: the United Kingdom is not entitled to declare an “MPA” or other maritime zones because it is not the “coastal State” within the meaning of inter alia Articles 2, 55, 56 and 76 of the Convention; (Arbitration regarding the Chagos Marine Protected Area between Mauritius and the United Kingdom of Great Britain and Northern Ireland, Award of 18 March 2015, RIAA, Vol. XXXI, p. 359, at p. 440, para. 158) The fourth submission reads: The United Kingdom's purported “MPA” is incompatible with the substantive and procedure obligations of the United Kingdom under the Convention, including inter alia Articles 2, 55, 56, 64, 194 and 300, as well as Article 7 of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks of 4 August 1995. (Ibid., at pp. 440-441, para. 158)

与《联合国国际法公约》解释或适用无关”，故仲裁庭对此主张没有管辖权，[1]对第四项主张裁决认定其具有管辖权。[2]

经审查，仲裁庭认定，“英国之保证是确保毛里求斯保留在查戈斯群岛的捕鱼权”，“英国之保证是当不再需要用于国防目的时将查戈斯群岛返还毛里求斯”，“英国之保证是保留在查戈斯群岛及其附近发现的任何矿产或石油利益”。是故，仲裁庭宣布英国在查戈斯群岛周围设立海洋保护区违反了其在《联合国海洋法公约》第 2 条第 3 款、第 56 条第 2 款及第 194 条第 4 款项下的义务。[3]

2.特别法庭对查戈斯咨询意见之审查论证

联合国大会决议向国际法院咨询的问题是：“毛里求斯 1968 年独立时查戈斯群岛分裂及其国际法去殖民化进程是否已完成？”以及“英国对查戈斯群岛进行持续性的行政统治在国际法上的后果是什么？”[4]

关于联合国大会咨询的第一个问题，国际法院咨询意见答复，“查戈斯群岛 1965 年从毛里求斯分离时显然是该非自治领土整体的一部分”，“国际法院认为毛里求斯去殖民化进程中国际法下的义务及联合国大会决议反映的义务要求英国尊重该国领土完整，包括查戈斯群岛”，“国际法院得出结论是由于查戈斯群岛非法分离及其并入新的殖民地（即英属印度洋领

[1] See Paragraph 133 of the Judgment: Regarding the first submission, the Arbitral Tribunal found that “a dispute between the Parties exists with respect to sovereignty over the Chagos Archipelago” and that “[t]he Parties’ dispute regarding sovereignty over the Chagos Archipelago does not concern the interpretation or application of the Convention.” Accordingly, the Arbitral Tribunal concluded that it had no jurisdiction to entertain Mauritius’ first submission.

[2] See Paragraph 135 of the Judgment: As to the fourth submission, the Arbitral Tribunal found that it had jurisdiction to consider Mauritius’ fourth submission and the compatibility of the MPA with the following provisions of the Convention: (a) Article 2(3) insofar as it relates to Mauritius’ fishing rights in the territorial sea or to the United Kingdom’s undertakings to return the Archipelago to Mauritius when no longer needed for defence purposes and to return the benefit of any minerals or oil discovered in or near the Chagos Archipelago to Mauritius; (b) Article 56(2), insofar as it relates to the United Kingdom’s undertakings to return the Archipelago to Mauritius when no longer needed for defence purpose and to return the benefit of any minerals or oil discovered in or near the Chagos Archipelago to Mauritius; (Arbitation regarding the Chagos Marine Protected Area between Mauritius and the United Kingdom of Great Britain and Northern Ireland, Award of 18 March 2015, RIAA, Vol. XXXI, p. 359, at pp. 500-501, para. 323)

[3] See Paragraph 137 of the Judgment: On the basis of those examinations, the Arbitral Tribunal found: (1) that the United Kingdom’s undertaking to ensure that fishing rights in the Chagos Archipelago would remain available to Mauritius as far as practicable is legally binding insofar as it relates to the territorial sea; (2) that the United Kingdom’s undertaking to return the Chagos Archipelago to Mauritius when no longer needed for defence purposes is legally binding; and (3) that the United Kingdom’s undertaking to preserve the benefit of any mineral or oil discovered in or near the Chagos Archipelago for Mauritius is legally binding; (Arbitration regarding the Chagos Marine Protected Area between Mauritius and the United Kingdom of Great Britain and Northern Ireland, Award of 18 March 2015, RIAA, Vol. XXXI, p. 359, at pp. 582-583, para. 547) Accordingly, the Arbitral Tribunal declared that, in establishing the MPA surrounding the Chagos Archipelago, the United Kingdom breached its obligations under article 2, paragraph 3, article 56, paragraph 2, and article 194, paragraph 4, of the Convention.

[4] See Paragraph 162 of the Judgment: The questions put by the UNGA to the ICJ for an advisory opinion are as follows: (a) Was the process of decolonization of Mauritius lawfully completed when Mauritius was granted independence in 1968, following the separation of the Chagos Archipelago from Mauritius and having regard to international law, including obligations reflected in General Assembly resolutions 1514 (XV) of 14 December 1960, 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967? (b) What are the consequences under international law, including obligations reflected in the above-mentioned resolutions, arising from the continued administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago, including with respect to the inability of Mauritius to implement a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin?

地），毛里求斯于 1968 年独立时尚未在法律上完成去殖民化进程”。[1]

对联合国大会咨询的第二个问题，国际法院咨询意见答复，“国际法院已查明毛里求斯去殖民化未以符合民族自决权之方式进行，故英国对查戈斯群岛进行持续性行政统治属于错误行为和持续性非法行为”，“英国有义务尽快结束其对查戈斯群岛的行政统治，从而使毛里求斯以符合民族自决权的方式完成其领土去殖民化”，“确保毛里求斯完成去殖民化的必要措施属于联合国大会行使去殖民化相关职能之范围”，“国际法院得出结论，英国有义务尽快结束其对查戈斯群岛的行政统治，而且所有成员国须协助联合国完成毛里求斯的去殖民化”。[2]

国际法院的决定对毛里求斯主张的查戈斯群岛主权问题也具有明确无疑的有利默示，根据国际法院查明结果，被英国非法占据的领土包括查戈斯群岛，尤其是国际法院认定“毛里求斯去殖民化进程中国际法下的义务及联合国大会决议反映的义务要求英国尊重该国领土完整，包括查戈斯群岛”。在特别法庭看来，这可以解释为毛里求斯对查戈斯群岛享有主权。[3]

关于查戈斯咨询意见的后果，特别法庭认为，领土去殖民化明显包含了领土主权相关问题，二者密切相关，不过领土去殖民化在何种程度上默示领土主权则取决于个案具体情形。完成去殖民化既不必然也不自动伴有主权丧失，问题在于毛里求斯去殖民化是否如此，而非

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[1] See Paragraph 170 of the Judgment: With respect to the first question posed by the General Assembly, the relevant paragraphs are: 170. ... at the time of its detachment from Mauritius in 1965, the Chagos Archipelago was clearly an integral part of that non-self-governing territory. ... 172. ... Having reviewed the circumstances in which the Council of Ministers of the colony of Mauritius agreed in principle to the detachment of the Chagos Archipelago on the basis of the Lancaster House agreement, the Court considers that this detachment was not based on the free and genuine expression of the will of the people concerned. 173. ... The Court considers that the obligations arising under international law and reflected in the resolutions adopted by the General Assembly during the process of decolonization of Mauritius require the United Kingdom, as the administering Power, to respect the territorial integrity of that country, including the Chagos Archipelago. 174. The Court concludes that, as a result of the Chagos Archipelago's unlawful detachment and its incorporation into a new colony, known as the BIOT, the process of decolonization of Mauritius was not lawfully completed when Mauritius acceded to independence in 1968. (Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I. C. J. Reports 2019, p. 95, at pp. 136-137)

[2] See Paragraph 172 of the Judgment: With respect to the second question of the General Assembly, the relevant paragraphs of the advisory opinion are: 177. The Court having found that the decolonization of Mauritius was not conducted in a manner consistent with the right of peoples to self-determination, it follows that the United Kingdom's continued administration of the Chagos Archipelago constitutes a wrongful act entailing the international responsibility of that State ... It is an unlawful act of a continuing character which arose as a result of the separation of the Chagos Archipelago from Mauritius. 178. Accordingly, the United Kingdom is under an obligation to bring an end to its administration of the Chagos Archipelago as rapidly as possible, thereby enabling Mauritius to complete the decolonization of its territory in a manner consistent with the right of peoples to self-determination. 179. The modalities necessary for ensuring the completion of the decolonization of Mauritius fall within the remit of the United Nations General Assembly, in the exercise of its function relating to decolonization. ... 180. Since respect for the right to self-determination is an obligation erga omnes, all States have a legal interest in protecting that right ... The Court considers that, while it is for the General Assembly to pronounce on the modalities required to ensure the completion of the decolonization of Mauritius, all Member States must co-operate with the United Nations to put those modalities into effect. ... 182. ... the Court concludes that the United Kingdom has an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible, and that all Member States must co-operate with the United Nations to complete the decolonization of Mauritius. (Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019, p. 95, at pp. 138-140)

[3] See Paragraph 174 of the Judgment: The ICJ's determinations may also entail considerable implications for the sovereignty claim of Mauritius, whose territory, as the ICJ found, included the Chagos Archipelago at the time of its unlawful detachment by the United Kingdom. In particular, the ICJ determined that "the obligations arising under international law and reflected in the resolutions adopted by the General Assembly during the process of decolonization of Mauritius require the United Kingdom, as the administering Power, to respect the territorial integrity of that country, including the Chagos Archipelago" (emphasis added by the Special Chamber) (Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019, p. 95, at p. 137, para. 173). In the Special Chamber's view, this can be interpreted as suggesting Mauritius' sovereignty over the Chagos Archipelago.

一般情形下是否如此。[1]

关于查戈斯咨询意见的效力，特别法庭注意到，普遍认为国际法院咨询意见没有法律约束力，但同时亦认为国际法院咨询意见对其处理的问题提供了权威的国际法表述。[2]故有必要对国际法院咨询意见的约束力与权威性作出区分。国际法院咨询意见之所以没有约束力是因为申请咨询方没有义务如同遵守判决一样遵守之。然而国际法院咨询意见中的司法认定并不比判决的权重和权威性低，因其也是联合国内有资质的主要司法机构，具有相同的严谨性和审慎性。[3]因此国际法院咨询意见不应仅以其不具有法律约束力为由就对其不予考虑，[4]查戈斯咨询意见具有法律效力，在评估查戈斯群岛法律地位时应纳入考虑范围。[5]

关于国际法院咨询意见的管辖权范围，特别法庭认为，与仲裁裁决不同，国际法院在作出咨询意见时并无《联合国海洋法公约》第 288 条第 1 款规定的管辖权限制，因此查戈斯咨询意见并未否定查戈斯仲裁裁决。[6]

总之，查戈斯法律意见具有法律效力，其明确默示了查戈斯群岛的法律地位。英国主张查戈斯群岛的主权违反查戈斯法律意见的决定，在去殖民化进程未完成时毛里求斯对查戈斯群岛的主权可从国际法院决定中推断。

3.特别法庭对联合国大会 73/295 号决议之审查论证

特别法庭忆及联合国大会决议“除非存在例外情况，均无约束力，仅具推荐性”，“联合国大会决议的说服力非常强”，然而联合国大会“系在政治层面而非法律层面运转，决议不具

[1] See Paragraph 188 of the Judgment: The Special Chamber considers that decolonization of a territory entails considerable consequences regarding the question of sovereignty over the territory, as decolonization and territorial sovereignty are closely interrelated. To what extent decolonization may implicate territorial sovereignty depends on the particular circumstances of each case.

[2] See Paragraph 202 of the Judgment: The Special Chamber notes that it is generally recognized that advisory opinions of the ICJ cannot be considered legally binding. As the ICJ itself stated in the advisory opinion on Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, “[t]he Court’s reply is only of an advisory character: as such, it has no binding force” (Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 65, at p. 71; see also Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 4, at. p. 26, para. 76). However, it is equally recognized that an advisory opinion entails an authoritative statement of international law on the questions with which it deals.

[3] See Paragraph 203 of the Judgment: In this regard, the Special Chamber finds it necessary to draw a distinction between the binding character and the authoritative nature of an advisory opinion of the ICJ. An advisory opinion is not binding because even the requesting entity is not obligated to comply with it in the same way as parties to contentious proceedings are obligated to comply with a judgment. However, judicial determinations made in advisory opinions carry no less weight and authority than those in judgments because they are made with the same rigour and scrutiny by the “principal judicial organ” of the United Nations with competence in matters of international law

[4] See Paragraph 205 of the Judgment: In the Special Chamber’s view, determinations made by the ICJ in an advisory opinion cannot be disregarded simply because the advisory opinion is not binding. ...

[5] See Paragraph 206 of the Judgment: The Special Chamber, accordingly, recognizes those determinations, and takes them into consideration in assessing the legal status of the Chagos Archipelago.

[6] See Paragraph 214 of the Judgment: ... Unlike the Arbitral Tribunal, whose jurisdiction was limited to disputes concerning the interpretation or application of the Convention under article 288, paragraph 1, of the Convention, the ICJ, in rendering its advisory opinion, had no such jurisdictional limitation. Consequently, it proceeded to examine issues relating to the decolonization of Mauritius and concluded, inter alia, that the detachment of the Chagos Archipelago from Mauritius was unlawful. Irrespective of whether or not the advisory opinion has resolved the sovereignty dispute, therefore, there is no question of the advisory opinion overruling the arbitral award, since, as the ICJ stated, “the issues that were determined by the Arbitral Tribunal in the Arbitration regarding the Chagos Marine Protected Area ... are not the same as those that are before the Court in these proceedings” (Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019, p. 95, at p. 116, para. 81).

有法律约束力”。[1]

特别法庭还引用仲裁庭在沿海国权利裁决中的表述“联合国大会决议中的事实和法律认定的效力在很大程度上取决于其内容及通过的条件和情景，故国际法院或法庭应据此给予相应权重”。[2]

联合国大会 73/295 号决议是在收到国际法院作出的查戈斯咨询意见后通过的。在此问题上应注意国际法院在其咨询意见中强调了联合国大会的去殖民化职能。[3]是故，联合国大会系受托采取必要措施完成毛里求斯去殖民化，因此联合国大会 73/295 号决议与查戈斯群岛法律地位评估相关。[4]该决议重申“按照国际法院咨询意见，查戈斯群岛是毛里求斯领土完整的一部分”[5]，并要求“英国在本决议作出后不超过六个月内无条件撤回其对查戈斯群岛的殖民性行政统治，以使毛里求斯尽快完成去殖民化”[6]。在联合国大会设定期限过去后英国未遵守该要求的事实进一步证明英国对查戈斯群岛主权的主张属非法。

4.特别法庭对查戈斯群岛主权争议当前状态之审查论证

特别法庭注意到长期以来毛里求斯与英国之间对查戈斯群岛主权问题存在争议[7]，但问题在于查戈斯群岛的法律地位是否已由国际法院作出的查戈斯咨询意见澄清，而英国与毛里求斯各自对查戈斯群岛提出的主权主张并非问题所在。[8]按特别法庭忆及，“一方坚称与另一方存在争议并不足够。仅仅坚称一项争议不足以证明争议存在，如同否认一项争议并不足以证

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[1] See Paragraph 224 of the Judgment: The Special Chamber recalls the statements of the ICJ in the South West Africa case that UNGA resolutions “subject to certain exceptions ... are not binding, but only recommendatory in character” and that “[t]he persuasive force of Assembly resolutions can indeed be very considerable,” yet the General Assembly “operates on the political not the legal level: it does not make these resolutions binding in law” (South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase, Judgment, I.C.J. Reports 1966, p. 6, at pp. 50-51, para. 98; see also Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov and Kerch Strait (Ukraine v. the Russian Federation), Award on Preliminary Objections, para. 172)

[2] See Paragraph 225 of the Judgment: The Special Chamber also recalls the statement of the Arbitral Tribunal in its award on Coastal State Rights that “the effect of factual and legal determination made in UNGA resolutions depends largely on their content and the conditions and context of their adoption. So does the weight to be given to such resolutions by an international court or tribunal” (Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov and Kerch Strait (Ukraine v. the Russian Federation), Award on Preliminary Objections, para. 174)

[3] See Paragraph 226 of the Judgment: 37.Resolution 73/295 was adopted by the General Assembly after it received the Chagos advisory opinion. It should be noted in this regard that, in the advisory opinion, the ICJ emphasized the functions of the General Assembly with regard to decolonization, in particular the “crucial role” which it has played in the work of the United Nations on decolonization (Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019,p. 95, at p. 135, para. 163). ...

[4] See Paragraph 227 of the Judgment: The General Assembly has thus been entrusted to take necessary steps toward the completion of the decolonization of Mauritius. In light of the general functions of the General Assembly on decolonization and the specific task of the decolonization of Mauritius with which it was entrusted, the Special Chamber considers that resolution 73/295 is relevant to assessing the legal status of the Chagos Archipelago.

[5] See Paragraph 228 of the Judgment: In resolution 73/295, the General Assembly affirmed, “in accordance with the advisory opinion of the Court”, that: “[t]he Chagos Archipelago forms an integral part of the territory of Mauritius”. The Special Chamber considers that this affirmation is the General Assembly’s view of the advisory opinion.

[6] See Paragraph 229 of the Judgment: In the resolution, the General Assembly demanded that: the United Kingdom ... withdraw its colonial administration from the Chagos Archipelago unconditionally within a period of no more than six months from the adoption of the present resolution, thereby enabling Mauritius to complete the decolonization of its territory as rapidly as possible.

[7] Sea Paragraph 242 of the Judgment: The Special Chamber notes that it is beyond doubt that there had been a long-standing sovereignty dispute between Mauritius and the United Kingdom over the Chagos Archipelago.

[8] See Paragraph 243 of the Judgment: However, the key question in the present proceedings is whether the legal status of the Chagos Archipelago has been clarified by the advisory opinion of the ICJ. In the view of the Special Chamber, therefore, the fact that the United Kingdom and Mauritius continue to make their respective claims to the Chagos Archipelago is beside the point.

明争议不存在”。[1]

5.特别法庭对第一、二项先决异议之审查结论

不论英国仍对查戈斯群岛具有何种利益，均不足以使英国具有充分法律权益使其成为受到查戈斯群岛附近海洋划界影响的必不可少第三人。英国对查戈斯群岛持续性行政统治须尽快终结，而尚未终结的错误行为不能对通过划界而作出的查戈斯群岛周围海洋区域永久性处置具有任何法律权益。[2]因此特别法庭驳回马尔代夫提出的第一项先决异议。

查戈斯群岛的法律地位已由查戈斯裁定、查戈斯咨询意见及联合国大会 73/295 号决议澄清，包括主权问题和沿海国地位问题，[3]故特别法庭驳回马尔代夫提出的第二项先决异议。

三、判决驳回第三项先决异议的法律论证路径

特别法庭注意到，毛里求斯在多个场合尝试与马尔代夫协商其所称的专属经济区和大陆架重叠区域的划界问题。[4]但马尔代夫在大多数情况下拒绝与毛里求斯协商，理由是“毛里求斯政府无权行使查戈斯群岛的管辖权，马尔代夫认为两国讨论查戈斯群岛海洋划界不合适”。[5]马尔代夫坚持“在毛里求斯与英国之间主权争议未解决前，不可能实质性地与毛里求斯进行《联合国海洋法公约》第 74 条和第 83 条规定的协商”。[6]“在不能达成协议”的情形下，按《联合国海洋法公约》第 74 条和第 83 条各条的第 2 款规定寻求本公约第十五部分的程序救济不仅具有正当性，也是当事国的义务。[7]因此，《联合国海洋法公约》第 74 条第 1 款和第 83 条

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[1] South West Africa Cases (Ethiopia *v.* South Africa; Liberia v. South Africa), Preliminary Objections, Judgement, I.C.J, Reports 1962, p.319, at p. 328.

[2] See Paragraph 247 of the Judgment: In light of the above findings, the Special Chamber considers that, whatever interests the United Kingdom may still have with respect to the Chagos Archipelago, they would not render the United Kingdom a State with sufficient legal interests, let alone an indispensable third party, that would be affected by the delimitation of the maritime boundary around the Chagos Archipelago. In the Special Chamber’s view, it is inconceivable that the United Kingdom, whose administration over the Chagos Archipelago constitutes a wrongful act of a continuing character and thus must be brought to an end as rapidly as possible, and yet who has failed to do so, can have any legal interests in permanently disposing of maritime zones around the Chagos Archipelago by delimitation.

[3] See Paragraph 250 of the Judgment: The Special Chamber considers that the above findings as a whole provide it with sufficient basis to conclude that Mauritius can be regarded as the coastal State in respect of the Chagos Archipelago for the purpose of the delimitation of a maritime boundary even before the process of the decolonization of Mauritius is completed. In the Special Chamber’s view, to treat Mauritius as such State is consistent with the determinations made in the Chagos arbitral award, and, in particular, the determinations made in the Chagos advisory opinion which were acted upon by UNGA resolution 73/295.

[4] See Paragraph 288 of the Judgment: The Special Chamber notes that, on the basis of the records before it, Mauritius, on several occasions, attempted to engage the Maldives in negotiations concerning the delimitation of their claimed overlapping exclusive economic zones and continental shelves.

[5] See Paragraph 289 of the Judgment: These records also show that, while the Maldives at times had shown interest in meeting and even had met with Mauritius “to discuss a potential overlap of the extended continental shelf and to exchange views on maritime boundary delimitation between the two respective States”, the Maldives, for most of the time, refused to negotiate with Mauritius, arguing that, “[a]s jurisdiction over the Chagos Archipelago is not exercised by the Government of Mauritius, the Government of Maldives feels that it would be inappropriate to initiate any discussions between the Government of Maldives and the Government of Mauritius regarding the delimitation of the boundary between the Maldives and the Chagos Archipelago.”

[6] See Paragraph 290 of the Judgment: By persisting in its position that, “in circumstances where the sovereignty dispute between Mauritius and the United Kingdom remains unresolved, Mauritius and the Maldives ... cannot meaningfully engage ... in the negotiations mandated by Articles 74 and 83 UNCLOS”, the Maldives demonstrates that “no agreement can be reached within a reasonable period of time”, whatever time could have been reserved for that negotiation.

[7] See Paragraph 292 of the Judgment: The Special Chamber is of the view that, in situations in which “no agreement can be reached”, to resort to the procedures of Part XV of the Convention, as set out in paragraph 2 of each of articles 74 and 83, is not only justified but also an obligation of the States concerned.

第 1 款项下的义务已履行。故驳回马尔代夫提出的第三项先决异议。[1]

四、判决驳回第四项先决异议的法律论证路径

特别法庭忆及，“当事人之间关于本公约解释或适用的争议须在提起申请时已存在”[2]，并注意到，“争议是一种法律或事实分歧，或者法律观点或利益冲突”[3]且“其须显示一方主张与另一方主张针锋相对”[4]。

毛里求斯按其《1977 年海洋区域法》宣布了专属经济区和大陆架，并在毛里求斯《2005 海洋区域法》中重申。[5]

马尔代夫按其《1976 年 30/76 号法律》宣布了专属经济区，后在《1996 年 6/96 号海洋区域法》予以修改。[6]

从两国国内法可以清楚看到两国对专属经济区的主张存在部分重叠。[7]

双方曾于 2010 年 10 月 21 日开会讨论两国专属经济区和大陆架潜在的重叠问题。[8]在特别法庭看来，海洋划界争议不限于海洋边界位置的分歧，还有其他形式和情形。[9]故在毛里求斯向国际海洋法法庭递交通知时，其与马尔代夫之间存在争议。[10]因此马尔代夫提起的第四项先决异议应予驳回。

五、判决驳回第五项先决异议之法律论证路径

基上，毛里求斯与马尔代夫之间海洋划界争议真实存在，且毛里求斯已经履行了《联合国海洋法公约》第 74 条第 1 款和第 83 条第 1 款规定的义务。在未达成协议情况下，毛里求

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[1] See Paragraph 293 of the Judgment: On the basis of the foregoing, the Special Chamber concludes that the obligation under article 74, paragraph 1, and article 83, paragraph 1, of the Convention has been fulfilled. Accordingly, the third preliminary objection of the Maldives is rejected.

[2] M/V“Norstar”(Panama *v.* Italy), Preliminary Objections, Judgment, ITLOS Reports 2016, p. 44, at p. 65, para. 84; see also M/V“Louisa” (Saint Vincent and the Grenadines *v.* Kingdom of Spain), Judgment, ITLOS Reports 2013, p. 4, at p. 46, para. 151.

[3] Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 11.

[4] South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 328. Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999,p. 280, at p. 293, para. 44; see also M/V“Norstar” (Panama *v.* Italy), Preliminary Objections, Judgment, ITLOS Reports 2016, p. 44, at pp. 65- 66, para. 85）

[5] See Paragraph 325 of the Judgment: The Special Chamber observes that, by its Maritime Zones Act of 1977, Mauritius declared an exclusive economic zone extending to a distance of 200 nautical miles from the baseline (section 6) and a continental shelf extending to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baseline where the outer edge does not extend up to that distance (section 5). This was reaffirmed in Mauritius' Maritime Zones Act of 2005 (sections 14 and 18)

[6] See Paragraph 326 of the Judgment: By Law No. 30/76 of 1976, the Maldives declared an exclusive economic zone, indicating the coordinates of its outer limits. In its Maritime Zones Act No. 6/96 of 1996, which repealed Law No. 30/76, the Maldives declared an exclusive economic zone extending up to 200 nautical miles from the archipelagic baselines (section 6).

[7] See Paragraph 327 of the Judgment: The Special Chamber notes that it is clear from the national legislation adopted by the Parties that their respective claims to an exclusive economic zone in the relevant area overlap.

[8] See Paragraph 329 of the Judgment: The Special Chamber notes that the Parties met on 21 October 2010 “to discuss a potential overlap of the extended continental shelf and to exchange views on maritime boundary delimitation between the two respective States.”

[9] See Paragraph 333 of the Judgment: In the Special Chamber's view, maritime delimitation disputes are not limited to disagreement concerning the location of the actual maritime boundary and may arise in various other forms and situations.

[10] See Paragraph 335 of the Judgment: The Special Chamber, therefore, concludes that in the present case a dispute existed between the Parties concerning the delimitation of their maritime boundary at the time of the filing of the Notification.

斯有权按照第 74 条第 2 款和第 83 条第 2 款根据本公约第十五部分寻求救济，[1]这不构成滥用程序。马尔代夫第五项先决异议应予驳回。

六、结语和简评

综上所述，特别法庭得出结论，其对本案争议具有管辖权，且涉案争议具有可受理性，马尔代夫对本案争议管辖权及可受理性提出的先决异议均不能成立。

海洋划界是海洋法基本问题之一，而海洋划界争议管辖权及可受理性又是海洋划界争议诉讼或仲裁的先决问题，故本案对海洋划界争议管辖权及可受理性的论证具有一定指导意义。

另一方面，本案自身具有独特而久远的历史与现实经纬，最早可上溯至 1814 年英国殖民毛里求斯，后经 1965 年英国设立英属印度洋领地吞并查戈斯群岛，至 1968 年毛里求斯独立，又有 2015 年查戈斯裁决、2019 年国际法院作出的查戈斯咨询意见及据此作出的联合国大会 73/295 号决议，使本案呈现出鲜明特性。这些特性都会对本案法律问题产生相应影响，故本案判决对其在国际法上的效力进行了一定辨析。

同时，本案相关事实也会与国际法和海洋法中相关原则和规定发生交织，例如“货币黄金案原则”适用条件和要求、国际法院咨询意见的约束力与权威性、联合国大会决议在国际法院或法庭上的地位和作用等，本案判决对其解释或适用也进行了相应阐发。

总体上，本案判决努力将相关法律问题收束于本案具体事实、双方实际控辩及具体情形自身，而非作出一般性认定，由此来避免对其他已有或潜在海洋划界等争议产生不可逆测之影响或者将影响控制在相对保守范围内。这是一种谨慎的做法。

[1] See Paragraph 346 of the Judgment: Article 74, paragraph 2, and article 83, paragraph 2, of the Convention each provide that, “[i]f no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV” (emphasis added by the Special Chamber).

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

ITLOS/Press 334
28 April 2023

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
TRIBUNAL INTERNATIONAL DU DROIT DE LA MER

Press Release

DISPUTE CONCERNING DELIMITATION OF THE MARITIME BOUNDARY BETWEEN MAURITIUS AND MALDIVES IN THE INDIAN OCEAN (MAURITIUS/MALDIVES)

At a public sitting held today, the Special Chamber of the International Tribunal for the Law of the Sea constituted to deal with the *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)* delivered its Judgment. The Judgment was read by Judge Jin-Hyun Paik, President of the Special Chamber.

Procedure

The dispute was submitted to a special chamber formed in application of article 15, paragraph 2, of the Statute of the Tribunal by way of a special agreement concluded on 24 September 2019 between the two States concerned. On 28 January 2021, the Special Chamber delivered its Judgment on Preliminary Objections. Following the closure of the written proceedings, hearings on the merits of the case took place from 17 to 24 October 2022.

Final submissions of the Parties

In its final submissions, Mauritius requests the Special Chamber to adjudge and declare that

a. the Special Chamber has jurisdiction to determine Mauritius' claim to a continental shelf beyond 200 nautical miles and the claim is admissible;

b. the entire maritime boundary between Mauritius and Maldives in the Indian Ocean, within 200 nautical miles and in the outer continental shelf, connects the 53 points, using geodetic lines, the geographic coordinates for which (in WGS 1984 datum) are set out on pages 54 and 55 of the Reply of Mauritius.

In its final submissions, the Maldives requests the Special Chamber to adjudge and declare that

(a) Mauritius' claim to a continental shelf beyond 200 M from the base lines from which its territorial sea is measured should be dismissed on the basis that it is:

(i) Outside the jurisdiction of the Special Chamber; and/or

(ii) Inadmissible.

(b) The single maritime boundary between the Parties is a series of geodesic lines connecting the points 1 to 46 as set out in the Maldives' Rejoinder at pages 69–70;

(c) In respect of the Parties' Exclusive Economic Zones, the maritime boundary between them connects point 46 to the point 47*bis* following the 200 M limit measured from the baselines of the Maldives as set out in the Maldives' Rejoinder at page 70;

(d) In respect of the Parties' continental shelves, the maritime boundary between the Parties continues to consist of a series of geodesic lines connecting the points as set out in the Maldives' Rejoinder at page 70, until it reaches the edge of the Maldives' entitlement to a continental shelf beyond 200 M from the baselines from which the breadth of its territorial sea is measured (to be delineated following recommendations of the Commission on the Limits of the Continental Shelf at a later date).

Judgment

In its Judgment of 28 April 2023, the Special Chamber decided as follows:

THE SPECIAL CHAMBER,

(1) Unanimously,

Decides that the single maritime boundary delimiting the exclusive economic zones and the continental shelves of the Parties within 200 nm extends from west to east between the intersections of the respective 200 nm limits determined in paragraphs 248 and 250 above and is composed of geodetic lines connecting the following points in WGS 84 as geodetic datum: Point 1 with coordinates 2° 17' 21.4" S and 70° 11' 56.2" E; turning points 2 to 36 with the coordinates identified in paragraph 249 above; Point X (Point 37) with coordinates 3° 07' 28.9" S and 73° 19' 11.0" E; and Point Y (Point 38) with coordinates 3° 20' 54.8" S and 75° 12' 52.1" E.

(2) Unanimously,

Finds that its jurisdiction to delimit the continental shelf between the Parties includes the continental shelf beyond 200 nm.

(3) Unanimously,

Rejects the objection raised by the Maldives to the admissibility of Mauritius' claim to the continental shelf beyond 200 nm on the grounds that Mauritius' submission to the CLCS was not filed in a timely manner.

(4) Unanimously,

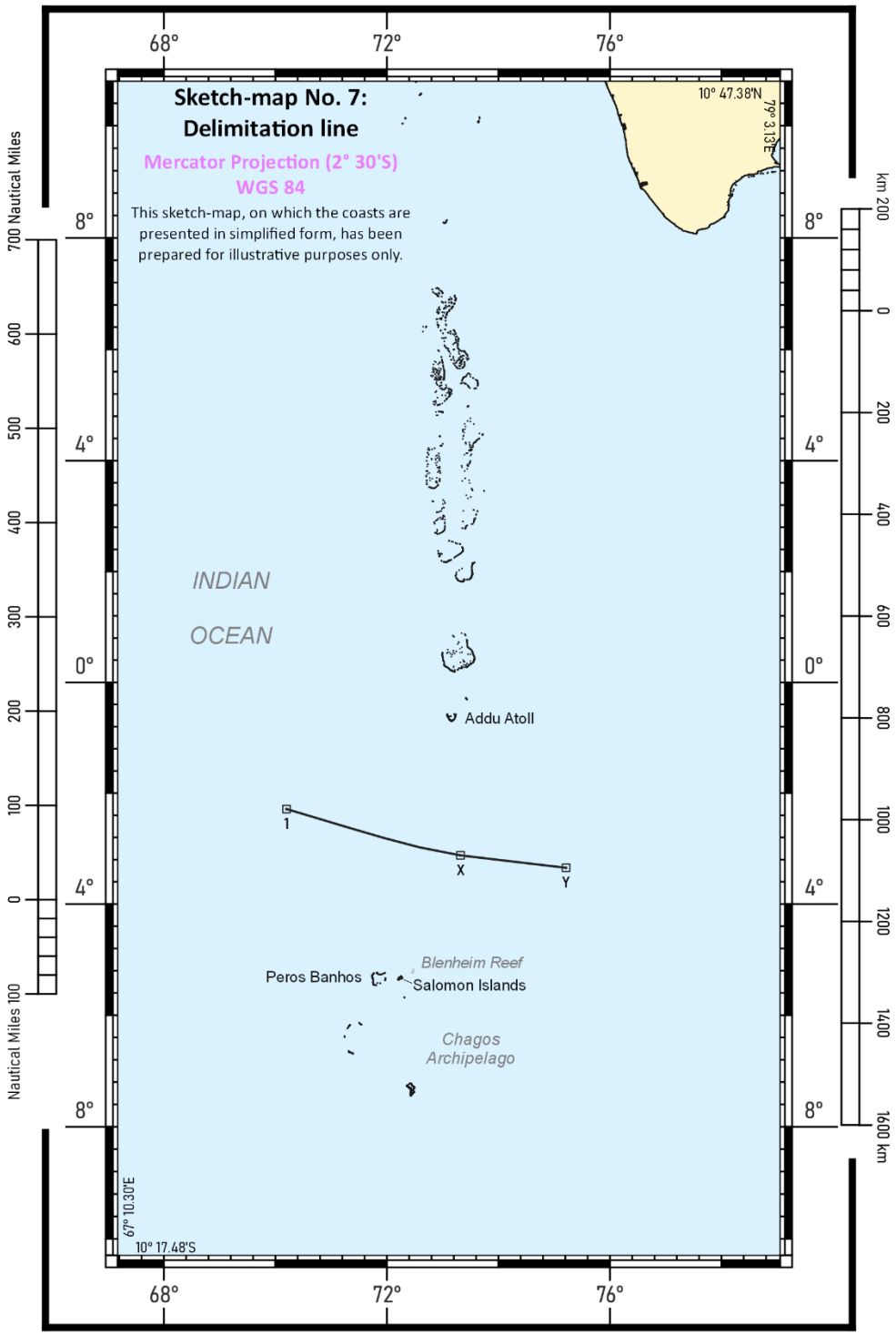
Finds that, in the circumstances of the present case, it is not in a position to determine the entitlement of Mauritius to the continental shelf beyond 200 nm in the Northern Chagos Archipelago Region and *decides* that, consequently, it will not proceed to delimit the continental shelf between Mauritius and the Maldives beyond 200 nm.

***

President Paik, Judge Heidar and Judge *ad hoc* Schrijver appended declarations to the Judgment.

The single maritime boundary, illustrated in the sketch map below, is taken from the Judgment.

The texts of the Judgment and declarations as well as a recorded webcast of the reading are available on the website of the Tribunal.



Note: The press releases of the Tribunal do not constitute official documents and are issued for information purposes only.

The press releases of the Tribunal, documents and other information are available on the Tribunal's websites (http://www.itlos.org and http://www.tidm.org) and from the Registry of the Tribunal. Please contact Ms Julia Ritter or Mr Robert Steenkamp at: Am Internationalen Seegerichtshof 1, 22609 Hamburg, Germany, Tel.: +49 (40) 35607-227/181; Fax: +49 (40) 35607-245; E-mail: press@itlos.org

联合国通过保护公海生物多样性的历史性协定

经过近 20 年的艰苦谈判，联合国 193 个会员国在纽约通过了一项具有里程碑意义、具有法律约束力的海洋生物多样性协定。该协议旨在加强各国管辖范围以外区域的海洋生物多样性的养护和可持续利用，覆盖全球三分之二以上的海洋。

长期以来，各国有责任保护和可持续利用其国家管辖范围内的水域，但随着新协定的通过，对于公海的保护也得以加强，使其免受污染和不可持续的捕鱼活动等破坏性趋势的影响。

这份《<联合国海洋法公约>下国家管辖范围以外区域海洋生物多样性的养护和可持续利用协定》共计 75 条，为国家和其他利益攸关方之间的跨部门合作提供了一个重要框架，以促进海洋及其资源的可持续发展，并解决海洋面临的多方面压力。

秘书长古特雷斯指出，协定的通过展现了多边主义的力量。他对参与谈判的各国代表表示：“通过采取行动，应对我们星球面临的超越国界的威胁，你们正在表明，面对全球威胁应拿出全球行动。并且表明，各国可以为共同利益走到一起，团结起来。”

他说：“你们注入了新的活力和希望，给海洋一线生机。”

关键问题

《〈联合国海洋法公约〉下国家管辖范围以外区域海洋生物多样性的养护和可持续利用协定》主要应对四个关键问题。

协定为公正和公平分享国家管辖范围以外区域海洋遗传资源和海洋遗传资源数字序列信息方面的活动产生的惠益建立了一个框架，确保这类活动造福全人类。

协定将有助于建立包括海洋保护区在内的划区管理工具，以养护和可持续管理公海和国际海底区域的重要生境和物种。此类措施对于实现《昆明-蒙特利尔全球生物多样性框架》中商定的“到 30 达 30”全球目标即到 2030 年有效养护和管理至少 30%的世界陆地和内陆水域以及海洋和沿海区域而言至关重要。

协定将确保在国家管辖范围以外区域的活动对环境的影响在决策时得到评估和考虑。它还首次提供了一个国际法律框架，用于评估国家管辖范围以外区域内各项活动以及气候变化、海洋酸化和有关影响的后果造成的累积影响。

协定还将便利在能力建设和海洋技术转让方面开展合作，以协助缔约方，特别是发展中国家缔约方实现协定目标，从而为所有国家提供公平的参与环境，以便负责任地利用国家管

辖范围以外区域海洋生物多样性并从中获益。

此外，协定还处理若干跨领域问题，例如与《联合国海洋法公约》和相关法律文书和框架以及相关全球、区域、次区域和领域机构的关系，以及筹资和争端解决。协定还建立了体制安排，包括缔约方大会、科学和技术机构以及缔约方大会其他附属机构、信息交换机制和秘书处。

期待早日生效

该协定将自 2023 年 9 月 20 日，即 2023 年可持续发展峰会次日起，在纽约联合国总部开放供签署，并持续两年。协定将在 60 个国家批准后生效。秘书长须在不迟于协定生效后一年内召开协定缔约方大会第一次会议。

秘书长敦促所有国家不遗余力确保该协定生效，并促请它们毫不拖延地采取行动，尽快签署和批准协定。他指出，“这对于应对海洋所面临的威胁，以及与海洋相关的目标及具体目标的成功至关重要，包括《2030 年可持续发展议程》和《昆明-蒙特利尔全球生物多样性框架》”。他还表示愿意帮助各国做到这一点。

为使协定得到批准和早日执行，将需要各国、利益攸关方和联合国系统共同努力。协调进行这些努力及合作将至关重要。

（文章来源：联合国新闻，UN News，2023 年 6 月 19 日，https://news.un.org/zh/story/2023/06/1118977）

中华人民共和国对外关系法

（2023 年 6 月 28 日第十四届全国人民代表大会常务委员会第三次会议通过）

目 录

第一章 总 则

第一条 为了发展对外关系，维护国家主权、安全、发展利益，维护和发展人民利益，建设社会主义现代化强国，实现中华民族伟大复兴，促进世界和平与发展，推动构建人类命运共同体，根据宪法，制定本法。

第二条 中华人民共和国发展同各国的外交关系和经济、文化等各领域的交流与合作，发展同联合国等国际组织的关系，适用本法。

第三条 中华人民共和国坚持以马克思列宁主义、毛泽东思想、邓小平理论、“三个代表”重要思想、科学发展观、习近平新时代中国特色社会主义思想为指导，发展对外关系，促进友好交往。

第四条 中华人民共和国坚持独立自主的和平外交政策，坚持互相尊重主权和领土完整、互不侵犯、互不干涉内政、平等互利、和平共处的五项原则。

中华人民共和国坚持和平发展道路，坚持对外开放基本国策，奉行互利共赢开放战略。

中华人民共和国遵守联合国宪章宗旨和原则，维护世界和平与安全，促进全球共同发展，推动构建新型国际关系；主张以和平方式解决国际争端，反对在国际关系中使用武力或者以武力相威胁，反对霸权主义和强权政治；坚持国家不分大小、强弱、贫富一律平等，尊重各国人民自主选择的发展道路和社会制度。

第五条 中华人民共和国对外工作坚持中国共产党的集中统一领导。

第六条　国家机关和武装力量、各政党和各人民团体、企业事业组织和其他社会组织以及公民，在对外交流合作中有维护国家主权、安全、尊严、荣誉、利益的责任和义务。

第七条　国家鼓励积极开展民间对外友好交流合作。

对在对外交流合作中做出突出贡献者，按照国家有关规定给予表彰和奖励。

第八条　任何组织和个人违反本法和有关法律，在对外交往中从事损害国家利益活动的，依法追究法律责任。

第二章　对外关系的职权

第九条　中央外事工作领导机构负责对外工作的决策和议事协调，研究制定、指导实施国家对外战略和有关重大方针政策，负责对外工作的顶层设计、统筹协调、整体推进、督促落实。

第十条　全国人民代表大会及其常务委员会批准和废除同外国缔结的条约和重要协定，行使宪法和法律规定的对外关系职权。

全国人民代表大会及其常务委员会积极开展对外交往，加强同各国议会、国际和地区议会组织的交流与合作。

第十一条　中华人民共和国主席代表中华人民共和国，进行国事活动，行使宪法和法律规定的对外关系职权。

第十二条　国务院管理对外事务，同外国缔结条约和协定，行使宪法和法律规定的对外关系职权。

第十三条　中央军事委员会组织开展国际军事交流与合作，行使宪法和法律规定的对外关系职权。

第十四条　中华人民共和国外交部依法办理外交事务，承办党和国家领导人同外国领导人的外交往来事务。外交部加强对国家机关各部门、各地区对外交流合作的指导、协调、管理、服务。

中央和国家机关按照职责分工，开展对外交流合作。

第十五条　中华人民共和国驻外国的使馆、领馆以及常驻联合国和其他政府间国际组织的代表团等驻外外交机构对外代表中华人民共和国。

外交部统一领导驻外外交机构的工作。

第十六条　省、自治区、直辖市根据中央授权在特定范围内开展对外交流合作。

省、自治区、直辖市人民政府依职权处理本行政区域的对外交流合作事务。

第三章　发展对外关系的目标任务

第十七条　中华人民共和国发展对外关系，坚持维护中国特色社会主义制度，维护国家主权、统一和领土完整，服务国家经济社会发展。

第十八条　中华人民共和国推动践行全球发展倡议、全球安全倡议、全球文明倡议，推进全方位、多层次、宽领域、立体化的对外工作布局。

中华人民共和国促进大国协调和良性互动，按照亲诚惠容理念和与邻为善、以邻为伴方针发展同周边国家关系，秉持真实亲诚理念和正确义利观同发展中国家团结合作，维护和践行多边主义，参与全球治理体系改革和建设。

第十九条　中华人民共和国维护以联合国为核心的国际体系，维护以国际法为基础的国际秩序，维护以联合国宪章宗旨和原则为基础的国际关系基本准则。

中华人民共和国坚持共商共建共享的全球治理观，参与国际规则制定，推动国际关系民主化，推动经济全球化朝着开放、包容、普惠、平衡、共赢方向发展。

第二十条　中华人民共和国坚持共同、综合、合作、可持续的全球安全观，加强国际安全合作，完善参与全球安全治理机制。

中华人民共和国履行联合国安全理事会常任理事国责任，维护国际和平与安全，维护联合国安全理事会权威与地位。

中华人民共和国支持和参与联合国安全理事会授权的维持和平行动，坚持维持和平行动基本原则，尊重主权国家领土完整与政治独立，保持公平立场。

中华人民共和国维护国际军备控制、裁军与防扩散体系，反对军备竞赛，反对和禁止一切形式的大规模杀伤性武器相关扩散活动，履行相关国际义务，开展防扩散国际合作。

第二十一条　中华人民共和国坚持公平普惠、开放合作、全面协调、创新联动的全球发展观，促进经济、社会、环境协调可持续发展和人的全面发展。

第二十二条　中华人民共和国尊重和保障人权，坚持人权的普遍性原则同本国实际相结合，促进人权全面协调发展，在平等和相互尊重的基础上开展人权领域国际交流与合作，推动国际人权事业健康发展。

第二十三条　中华人民共和国主张世界各国超越国家、民族、文化差异，弘扬和平、发展、公平、正义、民主、自由的全人类共同价值。

第二十四条　中华人民共和国坚持平等、互鉴、对话、包容的文明观，尊重文明多样性，推动不同文明交流对话。

第二十五条　中华人民共和国积极参与全球环境气候治理，加强绿色低碳国际合作，共谋全球生态文明建设，推动构建公平合理、合作共赢的全球环境气候治理体系。

第二十六条　中华人民共和国坚持推进高水平对外开放，发展对外贸易，积极促进和依

法保护外商投资，鼓励开展对外投资等对外经济合作，推动共建“一带一路”高质量发展，维护多边贸易体制，反对单边主义和保护主义，推动建设开放型世界经济。

第二十七条　中华人民共和国通过经济、技术、物资、人才、管理等方式开展对外援助，促进发展中国家经济发展和社会进步，增强其自主可持续发展能力，推动国际发展合作。

中华人民共和国开展国际人道主义合作和援助，加强防灾减灾救灾国际合作，协助有关国家应对人道主义紧急状况。

中华人民共和国开展对外援助坚持尊重他国主权，不干涉他国内政，不附加任何政治条件。

第二十八条　中华人民共和国根据发展对外关系的需要，开展教育、科技、文化、卫生、体育、社会、生态、军事、安全、法治等领域交流合作。

第四章　对外关系的制度

第二十九条　国家统筹推进国内法治和涉外法治，加强涉外领域立法，加强涉外法治体系建设。

第三十条　国家依照宪法和法律缔结或者参加条约和协定，善意履行有关条约和协定规定的义务。

国家缔结或者参加的条约和协定不得同宪法相抵触。

第三十一条　国家采取适当措施实施和适用条约和协定。

条约和协定的实施和适用不得损害国家主权、安全和社会公共利益。

第三十二条　国家在遵守国际法基本原则和国际关系基本准则的基础上，加强涉外领域法律法规的实施和适用，并依法采取执法、司法等措施，维护国家主权、安全、发展利益，保护中国公民、组织合法权益。

第三十三条　对于违反国际法和国际关系基本准则，危害中华人民共和国主权、安全、发展利益的行为，中华人民共和国有权采取相应反制和限制措施。

国务院及其部门制定必要的行政法规、部门规章，建立相应工作制度和机制，加强部门协同配合，确定和实施有关反制和限制措施。

依据本条第一款、第二款作出的决定为最终决定。

第三十四条　中华人民共和国在一个中国原则基础上，按照和平共处五项原则同世界各国建立和发展外交关系。

中华人民共和国根据缔结或者参加的条约和协定、国际法基本原则和国际关系基本准则，有权采取变更或者终止外交、领事关系等必要外交行动。

第三十五条　国家采取措施执行联合国安全理事会根据联合国宪章第七章作出的具有约束力的制裁决议和相关措施。

对前款所述制裁决议和措施的执行，由外交部发出通知并予公告。国家有关部门和省、自治区、直辖市人民政府在各自职权范围内采取措施予以执行。

在中国境内的组织和个人应当遵守外交部公告内容和各部门、各地区有关措施，不得从事违反上述制裁决议和措施的行为。

第三十六条　中华人民共和国依据有关法律和缔结或者参加的条约和协定，给予外国外交机构、外国国家官员、国际组织及其官员相应的特权与豁免。

中华人民共和国依据有关法律和缔结或者参加的条约和协定，给予外国国家及其财产豁免。

第三十七条　国家依法采取必要措施，保护中国公民和组织在海外的安全和正当权益，保护国家的海外利益不受威胁和侵害。

国家加强海外利益保护体系、工作机制和能力建设。

第三十八条　中华人民共和国依法保护在中国境内的外国人和外国组织的合法权利和利益。

国家有权准许或者拒绝外国人入境、停留居留，依法对外国组织在境内的活动进行管理。

在中国境内的外国人和外国组织应当遵守中国法律，不得危害中国国家安全、损害社会公共利益、破坏社会公共秩序。

第三十九条　中华人民共和国加强多边双边法治对话，推进对外法治交流合作。

中华人民共和国根据缔结或者参加的条约和协定，或者按照平等互惠原则，同外国、国际组织在执法、司法领域开展国际合作。

国家深化拓展对外执法合作工作机制，完善司法协助体制机制，推进执法、司法领域国际合作。国家加强打击跨国犯罪、反腐败等国际合作。

第五章　发展对外关系的保障

第四十条　国家健全对外工作综合保障体系，增强发展对外关系、维护国家利益的能力。

第四十一条　国家保障对外工作所需经费，建立与发展对外关系需求和国民经济发展水平相适应的经费保障机制。

第四十二条　国家加强对外工作人才队伍建设，采取措施推动做好人才培养、使用、管理、服务、保障等工作。

第四十三条　国家通过多种形式促进社会公众理解和支持对外工作。

第四十四条　国家推进国际传播能力建设，推动世界更好了解和认识中国，促进人类文明交流互鉴。

第六章　附则

第四十五条　本法自 2023 年 7 月 1 日起施行。

最高人民法院发布 2022 年全国海事审判典型案例

（2023 年 6 月 30 日）

案例 1　SPAR 航运有限公司（SPAR SHIPPING AS）申请承认英国法院判决案

基本案情

2010 年 3 月，大新华控股公司为香港大新华轮船公司向挪威 SPAR 公司提供租船合同的履约担保。后因大新华轮船公司申请清盘，SPAR 公司在英国高等法院对大新华控股公司提起诉讼。英国高等法院、上诉法院先后作出判决，判令大新华控股公司承担担保责任。因大新华控股公司系在我国上海登记注册的企业，SPAR 公司向上海海事法院申请承认相关英国法院判决。

裁判结果

上海海事法院审理认为，我国与英国之间尚未缔结或者参加相互承认和执行法院民商事判决、裁定的国际条约，故应以互惠原则作为承认英国法院判决的审查依据。根据英国法律，其并不以存在相关条约作为承认和执行外国法院民商事判决的必要条件，我国法院作出的民商事判决可以得到英国法院的承认和执行，且大新华控股公司也未证明英国法院曾以不存在互惠关系为由拒绝承认和执行我国法院判决。案涉判决不存在违反我国法律基本原则或者损害我国国家主权、安全、社会公共利益的情形，故在本案中可以根据互惠原则对案涉英国法院判决给予承认。

典型意义

随着我国“一带一路”建设和高水平对外开放的深入实施，如何通过推动民商事判决的跨境承认与执行，公正高效化解跨境经贸纠纷，营造法治化营商环境是中国法院面对的时代命题。合理确定互惠关系的判断标准对于促进国家间相互承认和执行判决具有重要意义。拓宽互惠原则的适用范围，正是中国法院在新时期对此作出的积极回应。本案系我国对英国法院判决予以承认的首例案件，也是中国法院适用法律互惠原则的有益探索，营造了健康向好的判决跨境执行环境，进一步增进我国同世界各国间的司法协作互信基础，充分展现了我国在国际商事纠纷解决领域开放包容的大国司法形象。

案号

一审案号（2018）沪 72 协外认 1 号

案例 2　东莞市蓝海食品国际贸易有限公司与香港长宁航贸有限公司航次租船合同纠纷管辖异议案

基本案情

长宁公司与蓝海公司签订租船合同，长宁公司是出租人，蓝海公司是承租人，装货港新加坡，卸货港中国广东黄埔。该合同第 17 条载明“ARBITRATION，IF ANY，IN HONGKONG AND ENGLISH LAW TO BE APPLIED”。因履行该合同发生纠纷，长宁公司向广州海事法院提起诉讼，请求判令蓝海公司赔偿其违约损失及利息。蓝海公司以其与长宁公司达成仲裁协议为由提出管辖权异议。

裁判结果

广州海事法院一审裁定驳回蓝海公司管辖权异议，蓝海公司上诉至广东省高级人民法院。广东省高级人民法院二审认为，蓝海公司与长宁公司未协议选择确认仲裁协议效力适用的法律，但双方当事人约定仲裁地为香港，本案应适用香港特别行政区法律对案涉仲裁协议的效力进行审查。根据香港特别行政区《仲裁条例》，案涉仲裁条款关于“ARBITRATION，IF ANY，IN HONGKONG”的约定具有双方当事人同意将争议交付仲裁的明确意思表示，内容和形式亦符合《仲裁条例》关于仲裁协议的相关规定，故案涉仲裁协议应为有效，蓝海公司的管辖权异议成立。遂裁定撤销一审裁定，驳回长宁公司的起诉。

典型意义

本案涉及航次租船合同仲裁条款效力的认定问题。案涉仲裁条款系海事纠纷中常见的表述方式，此案作出了不同于以往同类案件的处理结果，适用仲裁地法律对此类表述的仲裁条款效力作从宽解释，展现了仲裁司法审查案件司法实践的不断完善与成熟，体现了中国司法对当事人意愿的充分尊重。该案的处理表明我国海事司法将以更加开放的态度支持仲裁，持续发力为我国高水平对外开放，营造市场化、法治化、国际化的一流营商环境提供海事司法服务和保障。

案号

一审案号（2019）粤 72 民初 1217 号

二审案号（2019）粤民辖终 327 号

案例 3　丰联克斯海运有限公司（FULLINKS MARINE COMPANY LIMITED）申请海事请求保全案

基本案情

香港丰联克斯公司与安徽进出口公司订立航次租船合同，约定丰联克斯公司派遣船舶，为安徽进出口公司从印度尼西亚向中国运输煤炭。因履行该合同发生纠纷，丰联克斯公司根据仲裁协议向香港国际仲裁中心提起仲裁。在仲裁过程中，丰联克斯公司向武汉海事法院申请海事请求保全，请求查封、扣押、冻结安徽进出口公司的银行存款人民币 5975024 元（或 88 万美元）或其他等值财产。

裁判结果

武汉海事法院审查认为，案涉财产保全申请基于海商合同纠纷提起，但丰联克斯公司请求保全的财产不是《海事诉讼特别程序法》第十二条规定的“船舶、船载货物、船用燃油以及船用物料”，根据《最高人民法院关于适用〈中华人民共和国海事诉讼特别程序法〉若干问题的解释》第十八条的规定，对案涉财产保全的审查应适用民事诉讼法的规定。因案涉仲裁程序系以香港特别行政区为仲裁地，由香港国际仲裁中心管理的案件，符合《最高人民法院关于内地与香港特别行政区法院就仲裁程序相互协助保全的安排》第二条规定的“香港仲裁程序”的要求，仲裁裁决作出之前，当事人有权依据该安排第三条之规定向内地法院申请财产保全。据此，海事法院裁定准许了丰联克斯公司的财产保全申请。

典型意义

本案系香港仲裁当事人于仲裁裁决作出前向海事法院申请对账户进行保全的案件。海事法院在审查过程中，对《民事诉讼法》《海事诉讼特别程序法》及相关司法解释、内地与香港特区仲裁保全安排的衔接适用进行分析，为同类案件的法律适用作出典型示范。海事法院全面落实内地与港澳特区仲裁保全安排，充分发挥仲裁在多元化纠纷解决机制中的重要作用，努力营造仲裁友好型司法环境，是海事司法领域落实“一国两制”方针的实践成果，也有利于为建设亚太区国际法律及争议解决服务中心提供更大支持。

案号

一审案号（2022）鄂 72 财保 45 号

案例 4　海南省海口市人民检察院与梁某等海洋环境民事公益诉讼案

基本案情

2019 年 8 月 19 日晚，梁某、薛某某、简某等人在海南省文昌市海域非法盗采海砂 533m³，被文昌市自然资源和规划局处以没收海砂和罚款的行政处罚。同年 9 月，为达到掩盖非法采砂的目的，薛某某与叶某担任法定代表人的锦南公司签订了港口航道清淤疏浚施工合同。12 日晚，叶某组织薛某某进行采砂作业，梁某安排刘某、简某随船监督，在文昌市海域盗采海砂 3664.70m³ 。被海警查获后，梁某等五人均以非法采矿罪被追究刑事责任。海口市人民检察院向海口海事法院提起公益诉讼，请求判令各被告在各自行为范围内连带赔偿生态环境损失和专家咨询费等。

裁判结果

海口海事法院审理认为，各被告在未取得开采海砂行政许可、未进行专项环境影响评价，亦未采取任何生态保护措施的情况下进行采砂，违反了我国矿产资源和海洋环境保护法律法规，破坏了所涉海域的水文地质和生态环境。各被告明知违法，仍分工进行非法采砂，构成共同侵权，依法应当承担相应的侵权责任，判令被告薛某某、梁某、简某连带赔偿海洋生态环境损失 99560 元，被告叶某、刘某、锦南公司在 60528 元的范围内承担连带赔偿责任，全部被告连带承担专家咨询费用 5999.80 元。本案一审判决已生效。

典型意义

海砂对维系海洋生态系统和海洋地质地貌稳定具有重要作用。非法开采海砂不仅严重破坏国家矿产资源，影响海洋地质构造，破坏海洋生物多样性，还会因海砂未经处理流入市场对建筑安全带来严重隐患，威胁人民群众生命财产安全，必须严厉打击。本案中，海事法院坚持最严格保护和全面、立体追责的生态环境保护理念，依法支持检察机关提起海洋自然资源与生态环境民事公益诉讼，在被告承担刑事责任的基础上，依法追究非法盗采海砂主要参与者的民事侵权法律责任，有力震慑盗采海砂违法犯罪，促进海洋生态环境修复与保护，充分体现海事法院深入贯彻习近平生态文明思想和习近平法治思想，在服务国家海洋战略、护航海洋生态文明建设中的坚定立场、积极作为和重要作用。

案号

一审案号（2022）琼 72 民初 37 号

案例 5　福建省宁德市人民检察院与林某某等海洋自然资源与生态环境民事公益诉讼案

基本案情

林某某在未取得海域使用权证和采矿许可证的情况下，指使高某某驾驶船舶到福安市湾坞镇等海域非法盗采海砂 17 次，累计 11295.33m³ ，并用以销售谋利。林某某、高某某均以非法采矿罪被追究刑事责任。宁德市人民检察院向厦门海事法院提起海洋自然资源与生态环境民事公益诉讼，请求判令林某某、高某某连带赔偿生态环境损害及修复费用 68 万余元。

裁判结果

厦门海事法院在查清事实的基础上，主持各方当事人就案涉损失赔偿达成“海洋碳汇＋替代性修复”的调解协议。二被告连带赔偿海洋生态环境损害修护费用 680298.19 元，其中 18 万元由二被告以自愿认购并委托海峡资源环境交易中心购买海洋碳汇的方式分三年履行，剩余赔偿款项由二被告通过公益性劳务代偿方式履行，承担福安市湾坞镇海域海洋环境治理辅助工作，包括但不限于海洋垃圾打捞、海岸维护、海洋环境保护宣传等，期限酌定为三年，期满后劳务不足以抵偿的，仍需承担赔偿责任。该调解协议经公告和送达生效后，被告已依约购买了首期 2400 吨海洋碳汇，并积极通过劳务履行其他义务。

典型意义

海事法院秉持生态恢复性司法理念，在综合考量生态环境损害、修复成本和被告经济状况、修复能力的情况下，将损害赔偿机制与海洋碳汇开发有机结合，主持双方当事人达成调解。通过“海洋碳汇＋替代性修复”民事责任承担方式，既可以避免因被告赔偿能力弱引发的“执行难”困境，也可以破解赔偿款与治理修复脱节的困境，在一定程度上实现碳平衡的目的。本案探索并丰富了海洋环境侵权的损害赔偿机制，创新海洋生态司法，在“一案一修复”中凸显惩治与教育相结合的司法作用，是海事法院助力构建具有中国特色的海洋环境公益诉讼制度，司法服务碳达峰、碳中和的积极实践。

案号

一审案号（2022）闽 72 民初 40 号

案例 6 中国人寿财产保险股份有限公司湖南省分公司与沃巴海运有限公司（VERBA MARINE COMPANY LIMITED）海上货物运输合同纠纷案

基本案情

塞浦路斯沃巴公司所属“CAPE KASOS”轮装运的一批自美国运往中国的大豆发生货损。人寿湖南分公司作为保险人就上述货物的损失向收货人赔付后提起诉讼，诉请承运人沃巴公司赔偿货物损失。广州海事法院受理后，沃巴公司提出管辖权异议被一、二审法院裁定驳回。后英国高等法院根据沃巴公司申请签发了禁诉令，责令中方当事人立即中止或放弃其在广州海事法院提起的法律程序，并采取所有必要措施立即中止或放弃中国程序。人寿湖南分公司向广州海事法院申请海事强制令，请求责令沃巴公司向英国高等法院申请撤回该禁诉令。

裁判结果

广州海事法院审查认为，一、二审法院已经裁定驳回沃巴公司提出的管辖权异议，沃巴公司不服中华人民共和国广东省高级人民法院作出的终审裁定，向英国高等法院申请禁诉令，侵犯了人寿湖南分公司的合法权益。人寿湖南分公司申请海事强制令符合《海事诉讼特别程序法》的相关规定。按照英国法，当事人可以向英国法院提出撤销禁诉令的申请。广州海事法院裁定责令沃巴公司在裁定书送达之日起三十日内向英国高等法院申请撤回禁诉令。后沃巴公司向英国高等法院提出撤回禁诉令的申请，英国高等法院亦作出同意撤回禁诉令申请的命令。就案涉纠纷，双方当事人亦经广州海事法院主持达成调解并自动履行完毕。

典型意义

在我国法院已经对管辖问题作出终审裁定的情况下，沃巴公司仍向外国法院申请禁诉令，禁止当事人依照我国法律获得正当司法救济。广州海事法院根据《海事诉讼特别程序法》关于海事强制令的规定，责令当事人撤回在外国法院的禁诉令申请，有效保护了当事人的合法权益，维护了中国司法的权威与尊严，也对涉外海运纠纷存在平行诉讼情况下如何解决禁诉令问题提供了新路径。其后当事人在海事法院主持调解下妥善快速解决纠纷，也充分彰显了中国海事司法的效率与智慧。

案号

一审案号（2020）粤 72 民初 675 号

案例 7 STO 租船韩国股份有限公司（STO CHARTERING KOREA CORPORATION）与丰益贸易（亚洲）有限公司[WILMAR TRADING （ASIA） PTE. LTD.]等海上货物运输合同纠纷案

基本案情

2022 年 7 月，韩国 STO 公司所属“STO AZALEA”轮装载散装棕榈酸化油自马来西亚运往中国。提单载明托运人为新加坡丰益公司，收货人凭新加坡中向石油公司指示，通知方为华东中石油公司。提单正面载明租约并入提单，提单和租约均约定了仲裁条款。船舶抵达卸货港后，收货人拒绝提货。STO 公司向南京海事法院提起诉讼，诉请丰益公司、中向石油公司、华东中石油公司赔偿在目的港无人提货造成的滞期费以及船舶营运损失。

裁判结果

南京海事法院受理案件后，主持各方当事人线上听证、调解，仅用 43 天促成本案当事人达成和解并履行完毕，船舶在其他港口卸货，STO 公司向海事法院申请撤回起诉。

典型意义

本案当事人均来自《区域全面经济伙伴关系协定》（RCEP）成员国，韩国船东主动选择我国海事法院提起诉讼，其他当事人也未就仲裁条款效力问题提出管辖异议拖延诉讼，新加坡当事人积极参与海事法院主持的线上听证及调解，表明我国海事司法得到越来越多外国当事人的信赖和认可，充分彰显了我国海事司法的国际公信力和影响力。海事法院积极回应司法需求，充分利用智慧法院成果，仅用 43 天妥善化解纠纷，让滞港近两个月的“海上油仓”安全卸载并重新启航，是我国推进国际海事司法中心建设、打造国际海事纠纷解决优选地的生动例证。

案号

一审案号（2022）苏 72 民初 1300 号

案例 8　宁波港船多多国际船舶代理有限公司与深圳市鑫中孚供应链有限公司集装箱租赁合同纠纷案

基本案情

鑫中孚公司系从事欧洲航线集装箱运输的无船承运人，向船多多公司租赁了 700 余个集装箱。欧洲港口因疫情拥堵，导致集装箱流转缓慢及下落核实困难，双方对已还箱数量产生争议。船多多公司以鑫中孚公司未归还或超期归还集装箱为由要求鑫中孚公司赔偿灭箱费、超期租金等共 2000 余万元。鑫中孚公司反诉船多多公司返还押金及垫付资金 300 余万元。

裁判结果

鉴于疫情影响导致涉案集装箱流转缓慢及下落核实困难，尚有多起与鑫中孚公司租箱、还箱有关的连锁纠纷，宁波海事法院多次组织当事人通过“海上共享法庭”平台进行协商，双方最终就诉争集装箱的数量、各项争议损失及费用数额达成一致，在法院主持下达成调解协议并履行完毕，一揽子解决本案及另外 5 起关联案件以及相关潜在纠纷。

典型意义

本案是疫情背景下因国外港口拥堵、集装箱回流困难、国内集装箱价格暴涨且一箱难求引发连环追偿的集装箱租赁纠纷案件。在国内引发的相关纠纷呈现涉及集装箱数量多、关联案件多、涉诉标的大、境外取证困难等特点。海事法院依托智慧海事审判建设和浙江全域数字化改革成果，组织当事人就近通过移动办案平台和“海上共享法庭”远程对接调解，一揽子解决多起关联纠纷，极大节约了当事人的诉讼成本，确保案件纠纷的彻底化解和各方权益的合法保护。本案的妥善处理，是灵活运用司法政策帮助航运、货代企业减负纾困、恢复发展，依法平等保护市场主体产权和企业合法权益的生动实践，对引导集装箱租赁行业规范发展，实现航运上下游产业链“诉源治理”也具有积极意义。

案号

一审案号（2021）浙 72 民初 2288 号

案例 9　马西马斯国际集团有限公司（MAXIMAS INTERATION GROUP LIMITED）与海城镁肥实业有限公司等航次租船合同纠纷案

基本案情

出租人香港马西马斯公司与海城镁肥公司采用 1994 年版金康航次租船合同范本订立航次租船合同，以“东洋丸（TOYO MARU）”轮装载 6633 吨化肥自中国鲅鱼圈港运至印度尼西亚班贾尔马辛港。卸货作业因下雨、罢工曾发生过中断。马西马斯公司收取海城镁肥公司支付的运费后，向大连海事法院提起诉讼，请求判令海城镁肥公司等连带支付滞期费等及利息。

裁判结果

大连海事法院审理认为，1994 年版金康航次租船合同范本第 16 条（a）和（b）款对因罢工影响装卸时间的计算、卸货港滞期费支付均作出了规定，该条（c）款中的“后果”并不包括装卸时间延长，航次租船合同也未约定罢工时间应从装卸时间中扣除，故案涉罢工期间不应在装卸时间中予以扣除。同时，根据“一旦滞期，永远滞期”的国际惯例，在进入滞期时间后因下雨造成的卸货中断亦不应在滞期时间中扣除。据此，法院判决海城镁肥公司承担滞期费 42 万余元及利息。海城镁肥公司提起上诉，辽宁省高级人民法院二审维持原判。

典型意义

本案系中国企业在向“一带一路”沿线国家提供基础建设物资过程中发生的航次租船合同纠纷。中国法院尊重国际商事规则，根据当事人采用的金康航次租船合同范本，准确认定罢工条款下双方当事人的权利义务，并适用国际惯例处理当事人有关装卸时间的争议，依法保护香港当事人的合法利益，对此类涉外海事纠纷具有类案参考意义。案件的审理有助于引导国内企业在对外贸易活动中正确理解国际商事活动规则，维护自身合法权益，也有利于营造市场化、法治化、国际化一流营商环境，为助力国际航运市场健康发展提供有力服务与保障。

案号

一审案号（2019）辽 72 民初 160 号

二审案号（2021）辽民终 955 号

案例 10　中民国际融资租赁股份有限公司与睿通（广州）海运有限公司等船舶融资租赁合同纠纷案

基本案情

2015 年，中民公司与睿通公司签订《融资租赁合同》和《船舶所有权转让协议》约定：睿通公司向中民公司转让其享有所有权的“东方华信 16”轮，再从中民公司处租回该船舶，以售后回租方式进行融资。睿通公司另提供中商公司等 8 名保证人连带保证及“东方华信 12”轮作为抵押担保，但未办理抵押登记。融资租赁期间，睿通公司擅自将“东方华信 12”轮转让给第三人且仅支付部分租金。中民公司遂诉至法院，要求睿通公司支付剩余全部租金、留购价款及违约金，各担保人承担连带清偿责任，对“东方华信 12”轮折价或者拍卖、变卖后的价款优先受偿。

裁判结果

天津海事法院审理认为，中民公司与睿通公司之间融资租赁合同符合融资租赁“融资”“融物”的双重特性，该合同合法有效，睿通公司拖欠租金已构成违约，应依法承担违约责任，各保证人对睿通公司的付款义务承担连带清偿责任。船舶作为特殊动产，未登记不影响抵押合同生效。睿通公司伙同第三人转让已抵押船舶，逃避抵押责任，第三人对此知情，并非善意，不适用善意取得制度，不能阻却中民公司对“东方华信 12”轮行使抵押权，该抵押权效力仍及于转让后的船舶。故判决睿通公司向中民公司支付全部未付租金及逾期付款违约金，中民公司可以根据合同约定拍卖、变卖“东方华信 12”轮并就所得价款享有优先受偿权利。中商公司提起上诉，天津市高级人民法院二审维持原判。

典型意义

融资租赁是企业获得生产性资产的重要途径，具有优化企业资源配置的巨大优势。人民法院依法认定融资租赁合同的违约责任、所有权保留的责任承担、未登记船舶抵押权的追及力等问题，针对当事人恶意转让未登记抵押财产，逃避抵押责任的行为，依法认定抵押权人对抵押船舶的追及力成立，对违约方失信行为作出否定评价，是倡导诚实守信原则、促进公平交易的有力践行。本案的审理对规范航运金融市场秩序，推动船舶产业转型升级，拓展航运服务产业链具有积极意义，充分体现了海事司法为海事金融改革创新保驾护航、推动船舶产业持续健康发展发挥的重要作用。

案号

一审案号（2021）津 72 民初 283 号

二审案号（2022）津民终 778 号

《海洋法律与政策》稿约

《海洋法律与政策》(Marine Law and Policy)，国际刊号：2709-3948,电子刊号：2710-1738，是大海法领域中英双语对照的优秀国际学术期刊。本刊秉承实事求是的精神，力求刊发海内外与海洋法律、海洋政策相关的一切优秀研究成果，热忱欢迎广大专家、学者不吝赐稿，兹立稿约如下:

一、鼓励英文著述，同一学术水准稿件，英文著述将优先录用。

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《海洋法律与政策》编辑

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（一） 引用书籍的基本格式为：

〔1〕 王名扬：《美国行政法》，北京大学出版社 2007 年版，第 73-75 页。

〔2〕 [美]富勒：《法律的道德性》，郑戈译，商务印书馆 2005 年版。

（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。

（三） 引用网络文章的基本格式为：

〔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。

（七）同一文献多次出现

对同一文献的引用应当适度；同一文献在文中多次出现的，为防止修改、编辑过程中发生错乱，作者投稿时不建议采用略写。

（八）其他

[1] 论文摘要

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；

[2] 关键词

学术论文摘要之后，附关键词 3-5 个。 关键词栏以“关键词”字样引导，后加冒号。关键词应当标示论文的核心主题因素。不使用过分特别、 其他研究者不会 想到的语词， 也不使用过分普通、没有识别度的语词，作为关键词。 关键词一般不带引号、书名号。关键词之间留空格， 或者用分号隔开。 例如，不写“《行政许可法》”， 而直接写：

关键词：行政许可法 行政审批改革 服务行政

[3] 作者介绍

论文作者介绍，应当标明作者的工作单位和学术头衔 （职称、学历）。例如：

林来梵，法学博士，清华大学法学院教授。

作者介绍一般只写最主要身份，不写“博士生导师”“研究会理事”等；除了在职公务人员，不写行政职务。确有必要标明兼职身份的，原则上只写一个。 作者学历，一般只写最高学历，可以具体写上学位授予单位。作者介绍可以置于页下脚注位置，用星号标注。

外文引注体例

一般规则：引用外文文献，一般不做翻译， 直接使用外文； 必要时，可加以解释或者评注。英文姓名，名在前、姓在后，首字母大写。例如， William P. Alford。 姓在前、名在后、中间加逗号，如“ Alford, William P.”，是列举参考文献时的通常写法，不宜用于注释。华人作者的署名，原则上尊重作者在文章中的写法。姓在前、名在后的，姓氏采用大写字母，例如，张力写作 ZHANG Li。

（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.。

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*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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