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编者言

当前，百年变局和世纪疫情交织叠加，国际局势出现深刻复杂变化，世界进入新的动荡变革期，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、新冠肺炎疫情蔓延反复、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。在积极响应海南自由贸易港建设、推进 21 世纪海上丝绸之路发展的号召下，《海洋法律与政策》（Marine Law and Policy），ISSN 2709-3948，ISSN 2710-1738（online）紧扣国际法、海洋法、海商法、海事行政法律及政策等主题，以期达到交流成果，启迪智慧，紧跟学术思潮，为广大读者服务的目的。

本期《海洋法律与政策》刊发的论文包含司法保护海洋生态环境、拜登政府的南海政策与南海地区的多边主义合作、防空识别区的实践与习惯国际法规则等热点问题。

司法权在海洋生态环境治理领域具有其独特价值。在全面治理我国海洋生态环境的背景下，司法既能够对行政执法进行有益补充，又能对行政权予以监督，与之相辅相成，特别是通过法律释明、损害救济以及典型案例等手段，能够有效提升我国海洋生态环境治理能力的上限。为此，上海市高级人民法院课题组通过对近五年发生在我国海域内，与海洋生态环境污染相关的民事、行政和刑事案件进行司法统计，聚焦上述三类案件呈现的特点与争议，发现我国司法保护海洋生态环境的依据存在缺陷，尺度不尽统一，创新也有所不足，并认为现行立法应进一步研究完善，进而达成法律观点共识，统一司法裁判规则，同时可以适度突破现有框架，形成一定创新成果。由于本刊篇幅有限，该文章将分由上下两期刊出，本期仅聚焦于我国涉海洋生态环境纠纷案件的状况以及司法保护海洋生态环境面临的障碍，对于司法保护海洋生态环境的实现路径和建议将刊发于第六期。

拜登政府上台后，为掩盖其国家治理失败的政治现实，转嫁经济发展乏力的国内压力，美国在可预见的未来内将在全球范围继续加剧与中国的博弈对抗。南海地区作为拜登政府所推动的“价值观外交”和“基于规则的国际秩序”两项政治议程的交汇点，自然将成为拜登政府抗衡和遏制中国的重要战场。武汉大学中国边界与海洋研究院的硕士研究生于子明及武汉大学中国边界与海洋研究院副教授、国家领土主权与海洋权益协同创新中心副研究员吴蔚通过分析美国拜登政府在南海地区的目标和具体策略，认为其推行包括法律战、价值战、规则战、军备战和外交战在内的一系列政策手段，实质上是以多边之名，行单边之实，试图利用其“伪多边主义”在南海地区实现修复盟友关系、维持有利于己方力量对比和推行美国主张的地区规则的战略目标，对此，中国应秉持共商共建共享的国际治理观，推动和践行真正的多边主义，维护南海地区的繁荣稳定。

自美国 1950 年划设防空识别区以来，世界上仅一小部分国家相继划设防空识别区，且各国实践尚未形成“统一标准”。中国国际问题研究院美国研究所副研究员曹群发现，多数国

家所划防空识别区在地理覆盖范围上比较灵活，与领土主权和海域权利主张范围并无直接关联，而且各国防空识别区规则中有关适用对象的表述似乎大都较为模糊，是否排除“仅穿越”情况适用的实践也并未形成“国际惯例”，因此目前关于防空识别区的具体操作规程尚未形成比较清晰的“一般惯例”及“法律确信”，很难说存在较为明晰完备的防空识别区“习惯国际法规则”。

另外，本刊新推出“境外案例”栏目，刊内载有英国最高法院“Jean Elaine”游艇案法院判决的论证思路总结。该案中，英国法院通过分析《雅典公约》的效力范围、时效期间、时效期间中止和中断事由、时效规定如何跨法域解释以及《1973 时效和期间（苏格兰）法》第 18 条关于死者亲属因未成年而不计时效期间的规定是否适用于《雅典公约》第 16 条时效规定等问题，最终认定一国法院不应将推迟计算时效期间理解为不属于《雅典公约》第 16 条第（3）款规定的“中止”。

本期在“新发展与新文献”栏目呈现了七份相关文献，分别是《中华人民共和国湿地保护法》《将不具有涉外因素的争议交由境外仲裁机构仲裁，仲裁条款无效》《全国法院涉外商事海事审判工作座谈会会议纪要》《中国法院首次单独以法律确信作为承认与执行外国判决中互惠原则的认定标准》《中华人民共和国水下文物保护管理条例》《美国船级社 ABS 自主船白皮书》《中华人民共和国地名管理条例》。

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。

编辑部 谨识

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Editor's Note

The COVID-19 pandemic is still spreading while 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 spreading pandemic, 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 Hainan Free Trade Port and the development of the 21st-Century Maritime Silk Road, this journal, Marine Law and Policy [ISSN 2709-3948, ISSN 2710-1738(online)], which aims to provide a platform for all practitioners and academics to exchange ideas, to inspire each other, and to keep up with the trending academic views, is open to all kinds of papers and case reviews covering international law, oceans law, maritime law, maritime administrative law and policy, etc.

In this issue of Marine Law and Policy, we have included articles on the judicial protection of marine ecological environment, the prospects for US South China Sea Policy under the Biden Administration and multilateral cooperation in the region, and the practice of air defense identification zone and the rules of customary international law.

The judicial branch plays a unique role in governing the marine ecological environment. The judiciary can assist administrative law enforcement in the context of comprehensively managing China's marine ecological environment by supervising the administrative organs and providing legal interpretations, damage relief, and standard cases. China's capacity to govern the marine ecological environment, therefore, can be improved effectively. The research team from Shanghai High People's Court analyzed the judicial statistics on civil, administrative and criminal cases relating to marine ecological and environmental pollution that have occurred in China's sea areas over the past five years, focusing on the characteristics and disputes of the aforementioned three types of cases. It is found that China's judicial protection of the marine ecological environment requires a sound legal foundation because it lacks uniform judging criteria and innovation. The research team emphasized that additional analysis and amendments to the current legislation are required in order to reach consensus and align the requirements for judicial adjudication.

Breakthroughs on the current framework can be made in this fashion. This paper will be published in two issues of Marine Law and Policy, one for each half, due to the limited space in this one. This issue only addresses the current status of cases involving disputes over marine ecological environment in China and the barriers to judicial protection of the environment. Techniques and suggestions for enhancing the judicial protection of the marine ecological environment will be included in the upcoming issue.

In order to conceal the political reality of its failed domestic governance and shift the domestic pressure from sluggish economy growth, the US, after the Biden administration came into power, is expected to continue or even intensify the competition and confrontation with China in the foreseeable future. Since the South China Sea region represents a confluence of the Administration's two political agendas, namely "value-oriented diplomacy" and "rules-based international order", it is understandable that Biden uses the region as a primary theater to counter and contain China. Through a detailed analysis of the concrete strategies employed by the Biden Administration to achieve its goals in the South China Sea, Mr. YU Ziming, graduate student from China Institute of Boundary and Ocean Studies of Wuhan University, and Ms. WU Wei, associate research fellow at the Collaborative Innovation Center for Territorial Sovereignty and Maritime Rights and associate professor at China Institute of Boundary and Ocean Studies of Wuhan University, drew the following conclusion: In the face of profound changes and accelerating pace of restructuring of the world, the United States, after President Biden took office, remains keen to advance confrontation with China in the South China Sea. It pursues unilateralism in the name of multilateralism, attempting to manipulate "pseudo-multilateralism" in the South China Sea to achieve its strategic goals of restoring alliance relations, maintaining a balance of power favorable to itself and implementing regional rules championed by itself. To this end, a series of policies and strategies which combines legal, value and rule wars with arms race and diplomatic war has been carried out. In response to these challenges, China should hold fast to the principle of "consultation, contribution and shared benefits" in international governance, and promote and practice genuine multilateralism to preserve the prosperity and stability of the South China Sea.

There aren't many States in the world that have established the Air Defense Identification Zone (ADIZ) since the United States did so in 1950, and their actions haven't yet resulted in the creation of a "uniform standard". Mr. CAO Qun, associate researcher from China Institute of International Studies, found that ADIZs designated by most States are relatively flexible regarding geographic coverage, and are not directly linked to the area of territorial sovereignty and maritime claims. Most descriptions of applicable objects in the rules of various countries' ADIZs appear relatively vague. Whether the application of "merely transiting" should be excluded remains an unsettled question in international community. At present, there is no clearly discernible "general

practice" and "*opinio juris*" for the specific operating procedures of the ADIZ, and it is difficult to state that there is a relatively clear and complete "customary international law rule" for the ADIZ.

The new column "Overseas Cases" in this issue contains a summary of the ruling in the case concerning the motor vessel "Jean Elaine" heard by the Supreme Court of the United Kingdom. In this case, the court has thoroughly examined the scope of the Athens Convention, the limitation period, the grounds of suspension and interruption of limitation periods, how the limitation period is interpreted in various jurisdictions, and whether section 18 of the Prescription and Limitation (Scotland) Act 1973, which stipulates that the operation of prescription or limitation shall be suspended when a claimant is a minor, is applicable to that of Article 16 of the Athens Convention. The court finally decided that a postponement of the start of a limitation period does not fall outside an international understanding of a "suspension" of limitation periods set out in Article 16(3) of the Athens Convention.

This issue also provides our readers with easy access to seven documents in the column of Recent Developments and Documents, namely, Wetlands Conservation Law of the People's Republic of China; The arbitration clause is invalid when disputes involving no foreign elements are submitted to and decided by an overseas arbitral institution; Minutes of the National Symposium on the Foreign-related Commercial and Maritime Trial Work of Courts; Chinese courts, for the first time, only consider *opinio juris* when determining whether to recognize and enforce the principle of reciprocity in foreign decisions; Regulation of the People's Republic of China on the Administration of the Protection of Underwater Cultural Relics; Whitepaper on Autonomous Vessels from American Bureau of Shipping; Regulation of the People's Republic of China on the Administration of Geographical Names.

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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Databases:

Cqvip http://www.cqvip.com/

Lawinfochina.com https://www.chinalawinfo.com/

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司法保护海洋生态环境实证研究（上）

上海市高级人民法院课题组*

【编者按】

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

引言部分：“海洋强国”战略背景下司法对海洋生态环境治理的价值

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* 上海市高级人民法院课题组。本文为 2021 年度上海司法智库重大课题研究成果，课题主持人：吴金水，上海市高级人民法院副院长，审判委员会委员，二级高级法官；课题组成员：王珊，上海市高级人民法院海事及海商审判庭庭长；周燦（执笔人），上海市高级人民法院海事及海商审判庭三级高级法官；辛海，上海海事法院海事审判庭庭长；蔡戬（执笔人），上海海事法院海事审判庭法官助理。

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引言部分：“海洋强国”战略背景下司法对海洋生态环境治理的价值

关于“治理”的概念，学界认为是指“各类组织、机构和个人共同管理特定事项的诸多方式的总和”。[1]为更好地推进我国海洋生态环境治理水平的提升，促进经济与社会的可持续发展，在 2018 年的国务院机构改革中，国务院组建了自然资源部，改组了生态环境部，原国家海洋局的相关职责被整合到上述两大主管部门，部门职责更加明确。但是，我国在海洋生态环境治理的实践中，依然面临着诸如政策设计适应性不强、部门职责存在交叉、基层治理能力有待提升等突出问题。仅凭行政一家无法实现我国海洋生态环境的全面治理。

应当认识到，除行政权之外，司法权在海洋生态环境治理领域同样具有其独特价值。行政是国家利益的代表者，司法则是人民权利的庇护者。[2]在全面治理我国海洋生态环境的背景下，司法既能够对行政执法进行有益补充，又能对行政权予以监督，与之相辅相成；特别是通过法律释明、损害救济以及典型案例等手段，能够有效提升我国海洋生态环境治理能力的上限。[3]关于司法对海洋生态环境治理的重要作用，无论是理论界还是实务界，都还存在较大的研究空间。本课题组通过对该领域内现有的各项研究和观点进行综合考察，发现其中大多更侧重聚焦难点、分析问题，而少有能够提出可行的司法方案或者具体的制度框架。对于司法实践中新产生的与存在已久的焦点、难点、堵点、痛点等问题，亟需进行系统性梳理，并对相关解决路径进行可行性分析、论证。

本课题拟通过对近五年发生在我国海域内，与海洋生态环境污染相关的民事、行政和刑事案件进行司法统计，聚焦上述三类案件呈现的特点与争议，分析问题的成因和本质，从而提出可行性的解决措施，进一步夯实司法对海洋生态环境治理的独特价值。

第一部分：现状分析　我国涉海洋生态环境纠纷案件的状况考察

司法领域所谓的实证研究，本质上是以数据分析为核心的经验性法学研究。详言之，就是将法律实践的经验现象作为关注点，通过收集、整理、分析、运用数据，特别是应用统计学的方法进行特定研究的范式。[4]

一、案件类型相对集中

为给本课题的研究内容提供可靠、充分的数据，使得出的相应结论更为贴近我国司法实践，课题组通过“中国裁判文书网”，全面收集、整理了 2016 年至 2020 年间，已由我国海事法院及其上诉审高级法院，以及最高法院审结的涉及海洋生态环境的案件总共 932 件，并

[1] 全球治理委员会：《我们的全球伙伴关系》，牛津大学出版社，1995 年版，第 15 页。
[2] [德]拉德布鲁赫：《法学导论》，米健、朱林译，中国大百科全书出版社 1997 年版，第 100 页。
[3] 梅宏：《海洋环境司法保护的多元主体及其联动机制》，载《浙江海洋大学学报（人文科学版）》，2020 年第 1 期，第 5 页。
[4] 左卫民：《一场新的范式革命？——解读中国法律实证研究》，载《清华法学》，2017 年第 3 期，第 46 页。

将其作为研究样本进行司法统计学分析。首先，经过对案由的考察，发现样本案件在类型上呈现以下特征：

	案　由	**数　量** **（含二审、申请再审案件）**
民事	海上、通海水域污染损害责任纠纷案件	509 件（含系列案件 492 件）
	海上、通海水域养殖损害责任纠纷案件	286 件（含系列案件 277 件）
	海难救助合同纠纷案件	31 件（含系列案件 15 件）
	船舶污染损害责任纠纷案件	30 件（含系列案件 11 件）
行政	行政处罚纠纷	30 件（含系列案件 26 件）
	行政许可纠纷	15 件（含系列案件 14 件）
	行政补偿纠纷	7 件
	行政赔偿及不履行职责纠纷	2 件
	其他行政案件	17 件（含系列案件 17 件）
刑事	刑事案件	5 件
共计		932 件（含系列案件 852 件）

表 1：样本案件各类案由数量（计算二审、申请再审案件）

根据表 1，课题组将样本案件的类型分为 10 类。表中所称系列案件，是指基于同一海洋生态环境损害的事实，由不同的原告向相同的被告提起的一系列诉讼。另外，为避免对基于同一事实起诉、上诉、申请再审案件进行重复计算，影响统计结果的科学性，课题组将上述案件中，基于同一事实提起的一审、二审与再审案件合并计算为 1 件案件，进一步得到了以下统计结果：

	案　由	数　量 （不计二审、申请再审案件）
民事	海上、通海水域污染损害责任纠纷案件	368 件（含系列案件 356 件）
	海上、通海水域养殖损害责任纠纷案件	148 件（含系列案件 139 件）
	海难救助合同纠纷案件	26 件（含系列案件 12 件）
	船舶污染损害责任纠纷案件	19 件（含系列案件 7 件）
行政	行政处罚纠纷	30 件（含系列案件 17 件）
	行政许可纠纷	15 件（含系列案件 14 件）
	行政补偿纠纷	7 件
	行政赔偿及不履行职责纠纷	2 件
	其他行政案件	17 件（含系列案件 15 件）
刑事	刑事案件	5 件
共计		637 件（含系列案件 560 件）

表 2：样本案件各案由数量（不计二审、申请再审案件）

将一审案件与二审、申请再审案件合并计算后，样本案件中民事案件共 561 件，占全部案件的 88.07%；行政案件共 71 件，占 11.15%，刑事案件共 5 件，占 0.78%。可见，涉海洋生态环境案件以损害赔偿为主要表现形式的民事案件居多。关于行政案件，由于 2016 年 3 月 1 日起施行的《最高人民法院关于海事法院受理案件范围的规定》（以下简称《海事法院受案范围的规定》）首次明确界定了海事行政案件的概念和范围，自此明确赋予海事法院海事行政案件管辖权，[1]因而我国海事法院对此类案件的审理仍处于理论探索、建章立制阶段，案件总体数量不多，[2]体现在涉海洋生态环境案件中亦是如此。至于刑事案件，目前海事法院对海事刑事案件的管辖权不论是在理论界还是在实务界仍存有不同看法，故目前仅有宁波海事法院在个别案件上进行了尝试，[3]其中 5 起涉及海洋生态环境的海事刑事案件已被收集至样本案件中。

涉海洋生态环境案件多为前文所述的系列案件，该类案件占全部样本案件的 91.42%。其主要原因在于，损害海洋生态环境行为造成的危害后果较为复杂，受损方众多，部分案件受损方的数量甚至达几百人。例如，在样本案件中，涉及“康菲溢油案”的案件总数高达 395 件，仅在天津海事法院提起的再审申请就有 189 件。[4]

通过考察不同类型的案由，可以发现民事案件中数量占据多数的为海上、通海水域污染

[1] 刘振华、丁启学：《三位一体：中国海事行政案件范围界定研究》，载《中国海商法研究》，2018 年第 1 期，第 98 页。
[2] 以上海海事法院为例，2020 年该院总共受理海事行政案件 14 件，占全部受理案件的 0.32%。
[3] 曹兴国：《海事刑事案件管辖改革与涉海刑事立法完善——基于海事法院刑事司法第一案展开》，载《中国海商法研究》，2017 年第 4 期，第 43 页。
[4] （2019）津 72 民申 1-189 号。

损害责任纠纷与海上、通海水域养殖损害责任纠纷，占全部民事案件数量的 91.98%，说明实践中此二类纠纷为损害海洋生态环境的主要形式，在我国海域内发生的频率较高。而船舶污染损害责任纠纷与海难救助合同纠纷，虽然从案件数量上看较少，但是，由于其个案标的额较高，且损害后果较之前述二类案件通常更为严重，故本课题也将其作为重点研究对象。样本案件中，行政案件多为涉及损害海洋生态环境的行政处罚纠纷案件与涉及海域使用权的行政许可纠纷；仅有的 5 起刑事案件，其罪名均为非法收购、运输、出售珍贵、濒危野生动物及珍贵、濒危野生动物制品罪。

二、审理周期较长

通过考察样本案件，可以发现其平均审理周期明显长于一般民事、刑事和行政案件。以具有代表性的船舶污染损害责任纠纷案件为例，样本案件中由上海海事法院审理的该类案件，平均审理周期达到了 226 日。经过对样本案件的进一步分析，发现此种情况系由以下几类原因共同造成。

1.服判息诉率低

根据表 1 与表 2 两次统计结果的不同可以发现，表 2 在数量上降幅不大，总共相差 295 件，说明样本中存在相应数量的案件经过二审甚至是再审申请审查程序，此类案件占全部案件的 68.35%，即有超过一半以上样本案件的当事人不认同相应的裁判结果。与此相对的，2020 年，全国法院各类案件一审后当事人服判息诉率为 89%，二审后达到 98.1%。[1]可见，对于涉海洋生态环境的民事纠纷案件，当事人的服判息诉率较低，对裁判结果接受度不高。并且，由于此类案件多为系列案件，故相应的上诉、申请再审案件也为系列案件居多。

2.举证难度较大

样本中，存在较多数量的案件系因索赔方举证不足以至其诉讼请求未被支持。这反映出涉海洋生态环境案件在一定程度上存在“举证难”的问题。该问题又具体由以下两方面原因所致：一是由于部分案件具有涉外性，涉及境外举证。例如，在样本案件中的“连云港予盛国际货运代理有限公司与哈罗娜航运私人有限公司、中国再保险（集团）股份有限公司船舶污染损害责任纠纷案”中[2]，由于被告中有外国公司，且该案的审理涉及司法鉴定，被告总共耗时 441 天才最终完成全部举证。二是由于海洋生态环境的损害事实较为特殊，由此导致举证难度大。以油污损害为例，其为海洋生态环境损害的主要形式之一，损害的结果也较为严重。但油污损害具有潜在性、延续性、缓慢性，通常需经过一定时间后，通过多种因素复合累积后才会逐渐显现。其原因事实与损害结果的发生、内容与经过质检的关系难以明确，要

[1] 参见最高人民法院院长周强所作的《2020 年最高人民法院工作报告》。
[2] （2018）沪 72 民初 4298 号。

证明因果关系的存在十分困难。比如，在“杨绍国等与康菲石油中国有限公司、中国海洋石油集团有限公司海上污染损害责任纠纷系列案”中，计有 11 件案件的原告已尽可能提交了涉案海域的《调查报告》《鉴定报告》《监测评估报告》以及专家意见等证据材料，但由于上述证据材料无法证明原告所主张的因果关系成立，最终其所有诉请均被一审、二审与再审法院驳回。

3.存在管辖争议的案件占据一定比例

样本案件中共有 16 件涉及管辖方面的争议，占全部样本案件的 2.52%，高于一般的海事海商纠纷案件，[1]主要为“是否应由海事法院专门管辖”、“涉案污染行为是否发生于特定海事法院管辖海域内”、“被告是否为海事行政主管机关”三类。案件管辖的确定问题历来系涉海洋生态环境案件的审理难点，当事人之间、甚至是各法院之间对该问题的理解不同，造成部分涉海洋生态环境案件的审理周期冗长。

4.当事人对司法鉴定结论认同度低

样本案件中，一审案件有 332 件案件的当事人在诉讼过程中对鉴定机构（法院或对方当事人委托）出具的鉴定报告提出异议，占全部一审案件的 52.12%；二审、再审申请案件中则有 226 件存在该问题，占全部二审、再审申请案件的 76.61%。涉海洋生态环境案件的司法鉴定一般涉及诊断污染源、确定影响范围和损害程度以及评估损害价值三方面。较之普通的司法鉴定，该类案件的司法鉴定对鉴定机构的专业能力有更高的要求。同时，由于作为鉴定证据的海水具有易逝性，鉴定结果不可避免地存在局限性。[2]此外，关于鉴定机构出具的鉴定报告，其在诉讼意义上证明力的有无或者证明力的大小问题，在实践中一直颇有争议。上述情况共同导致在涉海洋生态环境案件的审理中，相关部门出具的鉴定意见难以被认证、采纳，往往需要进行多次、反复鉴定，增加了法院查明案件事实的难度。

三、争议焦点多样

争议焦点部分是裁判文书说理的轴心和关键，并且是当事人纠纷的直观体现。[3]为整体把握涉海洋生态环境案件最为集中、突出的实体问题，课题组对所有样本案件的裁判文书进行了系统分析，对每篇文书“本院认为”部分中涉及的争议焦点进行了提炼和概括。经过统计分析，样本案件的争议焦点情况如表 3 所示。

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[1] 以上海海事法院 2020 年全年受理的案件为例，在 2145 件适用普通程序的案件中，仅有 27 件存在提起管辖异议的情况，比例仅为 1.26%。

[2] 孙光：《船舶污染海洋环境损害司法鉴定研究》，载《环境保护》，2011 年第 2 期，第 57 页。

[3] 王松：《民事判决书的制作与执行》，载《法律适用》，2011 年第 2 期，第 97 页。

争议焦点	出现次数（一审）	出现次数（二审、申请再审）	合计
因果关系的认定	393	183	576
损失数额的认定	319	180	499
索赔权利的认定	160	143	303
责任承担的主体	252	5	257
诉讼时效的认定	188	3	191
海域、水域、滩涂使用权的认定	188	2	190
责任的划分	169	4	173
举证责任的认定	1	50	51
费用数额的认定	34	3	37
行政处罚决定书的审查	27	0	27
起诉的条件	22	0	22
限制性债权的认定	9	2	11
应急行动、救助合同性质的认定	10	1	11
海事赔偿责任限制的认定	5	0	5
被告是否具有法定职责	3	0	3

表 3：样本案件的争议焦点

从数量上看，涉海洋生态环境案件总共可能涉及 15 项争议焦点，样本的一审与二审案件、申请再审案件中占到最大比例的争议焦点均是“因果关系的认定”与“损失数额的认定”。一方面，此二类争议本质上为针对案件事实方面的争议，且相关事实的查明与案件的处理结果存在直接、密切的联系，系涉海洋生态环境案件审理的核心环节；[1]但由于此类案件的举证难度较大，并且现阶段司法鉴定程序的不够完善，导致相关事实在案件审理中难以完全查明；尤其是在系列案件中，对某项重要因果关系的争议将影响几十件甚至是几百件案件的解决。[2]另一方面，目前司法实践对于海洋生态环境损害赔偿的标准并未达成统一认识，特别是赔偿范围、赔偿标准以及恢复性责任等问题争议很大。

表 3 中“索赔权利的认定”、“海域、水域、滩涂使用权的认定”以及“应急行动、救助合同性质的认定”三项争议焦点也达到了较高数量，均属于当事人对于请求权基础的争议。整体来看，环境权长期以来一直是我国环境法基础理论研究的重点与难点，有学者称其为“一道迷人的难题”。[3]而上述三项争议则是该难题在涉海洋生态环境案件中的具体体现。

表 3 中“责任承担的主体”、“责任的划分”、“举证责任的认定”以及“海事赔偿责

[1] 范兴龙：《民法典背景下环境侵权因果关系认定的完善》，载《法律适用》，2020 年 23 期，第 81 页。
[2] 在全部涉及“因果关系的认定”的 576 件样本案件中，有 558 件为系列案件。
[3] 吴卫星：《我国环境权理论研究三十年之回顾、反思与前瞻》，载《法学评论》，2014 年第 5 期，第 181 页。

任限制的认定”四项争议焦点均系当事人对责任承担方面的争议。经过对个案的具体考察，发现其中部分问题系环境侵权案件中的一般性问题，如举证责任的分配、多个侵权人是否承担连带责任以及各方当事人之间的责任比例等问题；而另有部分问题系涉海洋生态环境案件中特有，如当事人可否享受海事赔偿责任限制、溢油船与非溢油船责任承担的形式等。上述问题均反映了涉海洋生态环境案件的审理难点，将在下文具体分析其形成原因以及解决路径。

四、裁判依据庞杂

为系统梳理审理涉海洋生态环境案件涉及的法律、法规以及司法解释，同时对我国海洋生态环境的法律框架进行全面把握，课题组对样本案件裁判文书所依据的法律条文进行了完整整理。根据统计结果，样本案件所引用的法律条文和司法解释如表 4 所示：

法律、法规、司法解释名称	引用次数（一审）	引用次数（二审、申请再审）	合计
《侵权责任法》	520	288	808
《最高人民法院关于审理环境侵权责任纠纷案件适用法律若干问题的解释（2015）》	358	278	636
《渔业法》	391	138	529
《涉外民事关系法律适用法》	206	2	208
《海域使用管理法》	197	3	200
《海洋环境保护法（2016）、（2017）》	53	7	60
《环境保护法》	41	2	43
《海商法》	32	9	41
《民法通则》、《民法总则》	18	17	35
《最高人民法院关于审理船舶油污损害赔偿纠纷案件若干问题的规定》	14	9	23
《水污染防治法（2008）、（2017）》	21	0	21
《物权法》	13	2	15
《最高人民法院关于海事法院受理案件范围的规定》	13	0	13
《水法》	11	0	11
《最高人民法院关于审理环境民事公益诉讼案件适用法律若干问题的解释》	3	0	3
《刑法》	5	0	5

表 4：样本案件引用的法律条文

表 4 中包含的各项法律、法规和司法解释共同构成了我国的海洋生态环境法律体系。分析表 4 中的各项数据，结合前文的统计结果，不难发现，涉海洋生态环境案件基本为侵权案

件，主要适用《民法典》（在民法典生效之前，则主要涉及《民法总则》《民法通则》《物权法》与《侵权责任法》）与《环境保护法》等确立的一般规则，同时由《海洋环境保护法》《海商法》《渔业法》《海域使用管理法》《水法》《水污染防治法》等特别法就海洋生态环境领域的部分问题进行补充。涉海洋生态环境案件的审理涉及大量的法律条文，这些条文涵盖了海洋生态环境治理的方方面面，由此不可避免地造成各规范在形式上的冲突。就样本案件来看，对于上述条文的司法适用并不统一，部分案件体现了我国在特定领域的立法有待完善，相关问题亟待通过立法或是司法手段予以解决。

五、公益诉讼程序适用性不强

样本案件中总共仅有 3 起公益诉讼案件，原告分别为中国生物多样性保护与绿色发展基金会、湖北省人民检察院武汉铁路运输分院与十堰沧浪绿道环保服务中心，均系一审案件，反映出目前适用公益诉讼程序案件较少，程序适用性不强。样本案件中存在大量的系列案件，往往因为索赔方为诉讼能力较低的养殖户等群体，以至诉讼周期较长。例如，在“王永存等与康菲石油中国有限公司、中国海洋石油集团有限公司海上污染损害责任纠纷系列案件”中，共计 189 名原告均为我国河北省唐山市曹妃甸区的养殖户，该案自污染发生之日直至再审裁定生效之日历经 9 年。对于此类案件，若能充分利用公益诉讼程序，由检察机关、社会组织代不特定的群体进行诉讼，则一方面可以提升诉讼效率，减轻受损方对部分关键事实的举证难度；另一方面可以释放司法资源，减轻法院案件压力。

第二部分：原因分析　司法保护海洋生态环境面临的障碍

一、司法保护海洋生态环境的依据存在缺陷

我国海洋生态环境治理领域涉及的法律规范大多是针对单项海洋资源的利用、开发以及海洋生态环境的污染防治而分门别类制定的。这些规定通常具有明显的行业性、部门性，但缺乏综合性、整体性和前瞻性的考虑。[1]由此导致现阶段司法保护海洋生态环境所依据的法律规范存在一定缺陷，主要体现为以下几个方面：

1.部分规范存在滞后性

目前，司法保护海洋生态环境所依据的法律规范存在严重的滞后性，现有的法律规范已不适应近年来我国海洋生态环境治理实践、环境保护政策、“海洋强国”战略的发展变化及其对立法的要求。

例如，现阶段海洋生态环境领域的司法鉴定规范已与司法实践明显脱节，造成我国各地

[1] 高晓露、梅宏：《中国海洋环境立法的完善——以综合生态系统管理为视角》，载《中国海商法研究》，2013 年第 4 期，第 18 页。

普遍缺乏专业化的、具有公信力的鉴定机构，具备司法鉴定资质的机构更是寥寥无几。[1]在对海洋生态环境损害进行认定的相关行政职能部门中，负责勘测、鉴定与损失认定的分别为不同的部门，得出的结果往往存在矛盾。尤其是在渔业经济损失和海洋生态环境损害评估方面，各项技术规范之间还存在缺失和冲突，法律依据也不足。[2]这也是法院在审理涉海洋生态环境案件中，对公估公司的鉴定结论有时难以采信的原因。例如，在样本案件“乳山市新嘉华水产有限公司与中交烟台环保疏浚有限公司海上养殖损害责任纠纷”案中，[3]被告于 2012 年 3 月 15 日向一审法院提出鉴定申请，法院依法准许该鉴定申请后，依法委托山东海洋与渔业司法鉴定中心对其申请事项进行鉴定。该鉴定中心于 2013 年 3 月 12 日出具（2013）渔鉴字第 3 号司法鉴定意见书。原告收到该意见书后，质证认为该司法鉴定书鉴定结论错误，不应被采信。2013 年 8 月 15 日，该鉴定中心分析原告质证意见后，向法院出具了《关于撤销鲁海渔鉴（2013）渔鉴字第 3 号鉴定意见书的函》，以该鉴定意见书中使用的数据系根据数模分析得出的预测数据，并非现场实测数据，可能影响鉴定意见科学性为由，决定撤销鲁海渔鉴（2013）渔鉴字第 3 号鉴定意见书。由此可见，现阶段我国海洋生态环境领域的司法鉴定工作存在较大的改进空间，目前迫切需要对相应的制度予以完善。

2.部分领域存在立法空白

在我国各项基本民商事法律的起草过程中，受限于当时的经济发展水平与社会认识层次，海洋污染损害的危害性与保护海洋生态环境的重要性尚未得到足够的重视，导致目前在海洋生态环境治理的多个领域无专门的制度进行规范。总体而言，我国在海洋生态环境治理领域仍存在较大的立法空白。

以海上有毒有害物质造成的损害为例，按照现行有关国际公约的规定，其种类数量有 6000 种之多。[4]近年来，因船舶运输有毒有害物质引起的重大泄露事故在我国海域内也时有发生。例如，2018 年 11 月 3 日，中国籍油船“天桐 1 号”轮在我国福建省泉州市东港石化公司码头利用输油管进行裂解碳九装船作业期间，因违规操作、人工拖拽，导致管道拉裂，最终造成约 69 吨裂解碳九外泄。大多数有毒有害物质具有强毒性、强挥发性的特点，增加了污染的不可控性与危害的范围，对接触相关海水人群的生命造成严重威胁。然而，我国目前尚未有专门规范海上有毒有害物质污染损害赔偿责任的立法，尤其是《海商法》中也无相关规定，只能通过《民法典》《海洋环境保护法》等一般规定进行调整，无法满足受损方进行充分索赔的需要。

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[1] 王旭光：《环境损害司法鉴定中的问题与司法对策》，载《中国司法鉴定》，2016 年第 1 期，第 2 页。

[2] 童丽珏，周伯煌：《“桑吉”轮引发的海洋生态环境损害问题探析》，载《中国环境管理干部学院学报》，2018 年第 4 期，第 12 页。

[3] （2015）青海法海事重字 1 号、（2017）鲁民终 1899 号。

[4] Alan Khee-Jin Tan; *Vessel-Source Marine Pollution*, Cambridge University Press, 2006, p. 337.

3.部分条文难以协调适用

由于我国对海洋生态环境领域的立法研究不够完善，使我国在一般民商事立法与刑事立法的过程中，未对海洋生态环境的治理予以充分、特别的考虑，使部分条款在海洋生态环境治理领域难以协调适用。

以损害海洋生态环境的刑事责任为例，《海洋环境保护法》第 90 条第 3 款规定：“对严重污染海洋环境、破坏海洋生态，构成犯罪的，依法追究刑事责任。”然而，我国《刑法》并未专门针对海洋污染设置独立的罪名，导致某些足以构成犯罪的损害海洋生态环境的行为却很难入刑。[1]目前，若将《刑法》第 338 条“污染环境罪”套用至损害海洋生态环境的行为上，会存在以下问题：一是该条款属于故意犯罪，但实践中行为人对损害海洋生态环境往往不存在直接的故意。二是该条款将犯罪行为定义为“排放、倾倒、处置”，但现实中损害海洋生态环境的行为远超该三种形态。比如，对于因船舶碰撞事故溢油损害海洋生态环境的，若将行为人的行为认定为“排放、倾倒、处置”中的一类，就有违背罪刑法定原则之嫌。三是损害海洋生态环境的犯罪后果并不仅限于环境污染，还包括影响水产养殖、导致海洋生物灭绝等，这点在该条款中也未涉及。

二、司法保护海洋生态环境的尺度不尽统一

根据前文对样本案件争议焦点的考察，部分争议焦点产生的原因主要在于：对于涉海洋生态环境案件涉及的部分法律问题，不同案件的处理结果体现了截然不同的审理思路，反映出司法裁判的尺度不统一。

1.法律适用观点不一

涉海洋生态环境案件的审理指向我国多部法律、法规以及司法解释，还涉及我国加入的国际公约，但其原则和内容并不一致。对于部分条文，司法实践中存在不同的理解，进而产生了不同的处理结果。

（1）管辖法院难以确定

司法实践中，确定案件的管辖成为了审理涉海洋生态环境案件所面临的首当其冲的难点。例如，样本案件“广西桂水电力股份有限公司、广西桂水电力股份有限公司岑溪发电分公司与覃某某财产损害赔偿纠纷案”中，三被告在一审、二审中均提出，涉案河域为西江支流，由西江流入珠江后最终汇入我国南海海域，故根据法律、司法解释的相关规定，本案系通海水域污染损害责任纠纷，应由海事法院专门管辖，受理该案一审的岑溪市人民法院对该案无管辖权，一审系程序违法。本案一审、二审对三被告的该项主张均未支持，但值得注意的是，

[1] 张蕾：《海事法院扩大审理海事刑事案件的司法构建与立法完善——以海洋环境犯罪为切入点》，载《中国海商法研究》，2021 年第 2 期，第 50 页。

广西高院已于 2020 年 9 月受理本案三被告的再审申请，同时决定提审该案，目前该案正处于再审审理过程中。就三被告的上述主张，也许另有不同的处理结果。

（2）有权提起公益诉讼的主体不够明确

2012 年修正的《民事诉讼法》首次规定了环境公益诉讼制度。2015 年施行的《环境保护法》对有权提起公益诉讼的主体作出规定后，环境公益诉讼在我国开始正式发展。但整体看来，环境民事公益诉讼案件的数量极少，环境公益诉讼的指引、评价和政策形成功能未能得到有效发挥。[1]就海洋生态环境民事公益诉讼而言，其专业性更强，涉及的问题也更为复杂。目前，理论界与实务界的主要争议在于，现行法律框架下，有权提起海洋生态环境公益诉讼的主体难以明确。《海洋环境保护法》第 89 条第 2 款规定，有权提起海洋生态环境公益诉讼的是行使海洋环境监督管理权的部门，主要对应我国的海事管理机构和渔业行政主管部门。《民事诉讼法》第 55 条对该问题的规定则是“法律规定的机关和有关组织。”而根据《环境保护法》《最高人民法院关于审理环境民事公益诉讼案件适用法律若干问题的解释》和《最高人民法院、最高人民检察院关于检察公益诉讼案件适用法律若干问题的解释》等的规定，对于生态环境损害，有权提起公益诉讼的主体为“法律规定的机关”、“有关组织”和“检察机关”三类。可见，从相应的条文出发难以明确有权提起海洋生态环境公益诉讼的主体。

（3）请求权基础较为模糊

对海洋生态环境损害的赔偿请求，要求索赔方证明其对所主张的海洋生态环境享有利益，即享有环境法意义上的环境权，[2]但这一点通常难以实现。司法实践中存在以下两类问题：

一是养殖户的索赔权利难以认定。根据《民法典》物权编的规定，当事人依法取得的使用水域、滩涂从事养殖、捕捞的权利受法律保护。养殖权属于“准物权”的范畴。由于准物权涉及对矿产、渔业等稀有资源的利用，我国对此采取严格的行政许可制度进行管理。[3]对于养殖权的取得，根据《渔业法》的规定，当事人应当向县级以上地方人民政府渔业行政主管部门提出申请，由本级人民政府核发养殖证。同时，由于海上养殖附着于特定海域，因此当事人还应当依法取得海域使用权证。然而，法律的规定仅代表社会实践的应然状态，特定制度的运行并不尽然依照法律规定。就涉海洋生态环境案件的司法实践来看，在海上污染损害责任纠纷与海上养殖损害责任纠纷中，存在大量案件的养殖户无上述两项证书的情形。[4]例如，“刘延平与康菲石油中国有限公司、中国海洋石油总公司海上污染损害责任纠纷案”等系列案中，作为索赔主体的养殖户，均既未取得海域使用权证，亦未取得养殖证。在我国海域内，

[1] 江必新：《中国环境公益诉讼的实践发展及制度完善》，载《法律适用》，2019 年第 1 期，第 9 页。
[2] 张震：《环境权的请求权功能：从理论到实践》，载《当代法学》，2015 年第 4 期，第 25 页。
[3] 崔建远：《准物权研究》，法律出版社 2012 年版，第 120 页。
[4] 崔亚东：《国际海事司法中心建设与司法体制改革》，法律出版社 2017 年版，第 195 页。

造成此种情况多发的原因是多方面的，比如办理证书流程复杂、养殖户欠缺法律意识等，但更为突出的原因在于，部分地方政府基于未来规划、调整、征收海域的考虑，有意延发、停发甚至不发海域使用证、养殖证，造成了当地大量养殖户事实上长期正常养殖但不具备证书的“常态”。[1]在此情况下，若相关海域受到损害，则养殖户是否具有提起索赔的请求权基础，已在司法实践中引起较大争议。

二是清污单位的索赔权难以认定。争议主要在海事行政主管机关组织清污单位进行救助的情形下，对所采取清污防污等措施产生的费用如何进行法律救济的问题。对此，实务界与理论界主要存在以下几种观点：一是认为清污单位可基于民事债权，直接对责任人提起诉讼。[2]二是认为构成无因管理，实际参与清防油污的清污单位可以依无因管理请求责任人支付费用。[3]三是认为海事行政主管机关组织清污单位进行清防油污的行为，属于行政代履行行为，不能直接提起民事诉讼，应依据《行政强制法》等规定，通过行政程序予以解决。[4]四是认为清污单位与责任人之间不存在任何法律关系，应当驳回其直接针对责任人提起的诉讼。[5]可见，对于该问题的处理方式，实践中的做法形式多样，由此得到的处理结果也存在较大区别。

（4）责任承担主体不够明确（国内法与国际公约规定存在矛盾）

《海洋环境保护法》第 89 条第 1 款仅对海洋生态环境损害的赔偿责任主体作了一般性的规定。2017 年中共中央办公厅、国务院办公厅联合下发的《生态环境损害赔偿制度改革方案》在其第 3 点“工作内容”的第 2 项中将“赔偿义务人”定义为“违反法律法规，造成生态环境损害的单位或个人”。可见，上述有关海洋生态环境损害赔偿的制度规范，对赔偿责任承担的主体规定得都较为笼统、原则。

司法仅凭上述条文难以确定海洋生态环境损害赔偿责任承担的主体。这点在船舶油污损害赔偿责任纠纷中尤为明显，[6]因为该领域还涉及我国针对该领域制定的规范与参加的国际公约之间的冲突和矛盾。例如，样本中的“交通运输部上海打捞局与普罗旺斯船东 2008-1 有限公司、法国达飞轮船有限公司、罗克韦尔航运有限公司船舶污染损害责任纠纷”案中，[7]“达飞佛罗里达”轮与“舟山”轮因互有过失碰撞，致使“达飞佛罗里达”轮燃油舱严重破损，泄漏约 613 吨燃油入海。本案的争议焦点之一在于，清污单位因实施清、防污行动所产生的相关费用，两船应以何种形式承担。一、二审法院共同认为，涉案损害属于发生在我国海域

[1] 李彤、张昕：《海上污染案件中主体诉权、责任主体、因果关系的认定及损害赔偿额的酌定—栾树海等 21 人与康菲石油中国有限公司、中国海洋石油总公司海上污染损害责任纠纷案评析》，载《法律适用》，2017 年第 20 期，第 93 页。
[2] 帅月新：《船舶油污事故中强制清污费用索赔问题分析》，载《世界海运》，2019 年第 12 期，第 50 页。
[3] （2002）广海法初字第 106 号。
[4] 王婷婷、叶舟：《船舶油污事故中强制清污费用请求权基础之证成——以“中恒 9”轮溢油事故为视角》，载《大连海事大学学报（社会科学版）》，2019 年第 1 期，第 11 页。
[5] （2018）闽 72 民初 176 号。
[6] 廖兵兵：《生态文明视角下海洋环境损害赔偿研究》，载《政法学刊》，2020 年第 6 期，第 63 页。
[7] （2015）甬海法商初字第 442 号、（2017）浙民终 581 号、（2018）最高法民再 368 号。

内的燃油污染，且一方当事人为境外主体，故本案应适用我国加入的《2001 年国际燃油污染损害民事责任公约》（以下简称《燃油公约》），即漏油船系溢油损害的责任主体，涉案费用应由漏油船“达飞佛罗里达”轮一方向清污单位承担全部费用。而最高法院经再审认为，《燃油公约》中的条文仅为原则性规定，对该公约未规定的事项，应适用我国《海商法》等法律及司法解释的规定。涉案费用的责任承担应以《燃油公约》的规定为原则，同时以《海商法》对互有过失船舶碰撞的规定为补充，即在“达飞佛罗里达”轮承担全部赔偿责任的前提下，“舟山”轮按碰撞责任比例承担补充责任。对于上述的类似问题，除法院之间的观点不同外，理论界也存有较大争议。[1]

2.权利责任分配欠妥

法院审理涉海洋生态环境案件，对部分法律未作规定或规定不明确的问题，必然需要依据自由裁量权，对涉及的权利与责任在当事人之间进行平衡。在个别问题上，目前司法裁判中的平衡方式不够妥当，具有进一步完善的空间。

（1）损害赔偿的范围有限

就海洋生态环境损害的赔偿责任，司法裁判大多聚焦于判决责任人承担清污防污费用或是赔偿受损方的直接经济损失，而对于恢复性的责任却少有涉及。即使有所涉及，也远远无法弥补海洋生态环境遭受的实际损失。例如，样本案件“湖北省人民检察院武汉铁路运输分院与杨裕青、周勇通海水域污染损害责任纠纷”案中，[2]法院认定两被告应当承担违法向涉案水域排放重金属污染物造成的损害共计 717506 元，但对涉案水域生态环境的恢复性责任，却基于修复难度大、修复成本高的原因未作涉及。造成上述情况的原因在于，若索赔方请求责任方承担恢复性责任，其举证事项就要包括生态环境的原状、侵害活动使之改变的程度、恢复原状的可行性等内容。[3]但是，受制于现有的技术水平与诉讼成本上的障碍，目前在相关案件的审理中难以对上述问题加以涉及。

（2）行政信息的公开有所不足

样本中的行政案件，主要争议焦点围绕行政机关是否负有特定职责、相关行政行为是否符合法定程序。通过进一步分析，发现这些争议焦点的产生大多源于行政相对人对行政机关的职责以及具体行政行为的内容、程序不够了解或没有渠道掌握相关信息。例如，样本案件“叶乾坤与中华人民共和国浙江海事局、中华人民共和国宁波海事局”案中，各方的争议焦点

[1] 韩立新：《船舶污染损害赔偿法律制度研究》，法律出版社 2007 年版，第 83—86 页；韩立新、初北平：《船舶碰撞油污损害承担连带赔偿责任的法理分析——兼评最高人民法院 2005 年〈纪要〉第 149 条》，载《辽宁大学学报（哲学社会科学版）》，2008 年第 4 期，第 140 页。

[2] （2017）鄂 72 民初 1056 号。

[3] 巩固：《2015 年中国环境民事公益诉讼的实证分析》，载《法学》，2016 第 9 期，第 32 页。

在于宁波海事局是否具有港口、码头建设管理行政职能。[1]同样的，在样本案件“南通协和食品有限公司等与盐城市大丰区人民政府、盐城市大丰区自然资源和规划局系列案”中，[2]各方的争议焦点在于，大丰区自然资源局是否具有管理涉案海域的法定职责。不难发现，上述纠纷本可通过海事行政主管机关多渠道、多层次、多形式的行政信息公开手段予以避免，实际则由司法机关承担了释明的职责。

三、司法保护海洋生态环境的创新有所不足

随着我国海洋开发、开放程度的不断提升，海洋经济的不断发展，司法海保护洋生态环境的形式和逻辑亟待创新突破。

1.海事赔偿责任限额过低

我国《海商法》规定的海事赔偿责任限额参照了《1976 年海事赔偿责任限制国际公约》的规定。但时至今日，该公约已分别经过其 1996 年议定书与 2012 年修正案的修改，而《海商法》中的限额却至今未作改变，使受损方通常只能获得少部分的赔偿。对同一船舶而言，其适用前述 2012 年修正案计算得出的限额已达到《海商法》限额的 3 至 4 倍，两者的差距经过不断地扩大已经相当悬殊。但由于我国立法资源有限，短期内难以通过修改《海商法》提高其海事赔偿责任限额，这影响了对责任人提出索赔的受偿率。例如，2020 年 12 月 13 日，安提瓜和巴布达籍集装箱船“长锦海洋”轮与另一中国籍集装箱船“新其盛 69”轮在长江口深水航道 D15 号灯浮附近发生碰撞，事故导致“新其盛 69”轮进水翻扣并最终沉没。“新其盛 69”轮船上共 16 名船员落水，其中 8 人获救，4 人死亡，4 人失踪，构成特大等级水上交通安全事故。事故另造成两船损失、船上货物损失以及海洋生态环境损害赔偿总共 2 亿余元。然而，根据该案目前生效裁判文书的认定，承担主要责任的“长锦海洋”轮一方依据《海商法》的规定计算的责任限额为 3050923 元特别提款权，与其造成的损失形成了巨大的差异。[3]

2.“三合一”审判模式难以落地

2016 年最高法院发布《关于海事法院受理案件范围的规定》，自此海事行政案件由海事法院专门集中管辖，理论界、实务界对海事法院审理海事行政案件不再有争议。但就刑事领域而言，目前仅有宁波海事法院于 2017 年起试点审理海事刑事案件，迈出了“三合一”改革的第一步。到目前为止，宁波海事法院累计受理各类海事刑事案件 29 件，涉及海上交通肇事、海上走私等多个领域，审理效果良好，[4]其中有 5 件为样本案件中的非法收购、运输、出售珍贵、濒危野生动物、珍贵、濒危野生动物制品罪案件，与本文所研究的破坏海洋生态环境的

[1] （2020）浙 72 行初 2 号、（2020）浙行终 1581 号。
[2] （2019）沪 72 行初 21-32 号。
[3] （2021）沪 72 民特 5 号。
[4] 参见宁波海事法院海事庭庭长吴胜顺在 2021 年 6 月 8 日海洋生态环境保护法治论坛上的发言。

行为密切相关。海商法起源的独立性、规范的特殊性决定了海事司法专门管辖的必要性。其他类型专门审判的成功司法实践与海事法院本身的资源优势也为“三合一”改革提供了可行性。同时，这也是建设国际海事司法中心的需要。[1]然而，“三合一”的实施也面临一定的障碍，就刑事案件而言，目前海事法院受理该类案件的法律依据层级较低，从宁波海事法院的实践来看，其受理海洋生态环境刑事案件的依据为最高法院 2017 年的复函意见与浙江高院的个案指定，立法支撑稍显不足。

[1] 张文广：《一带一路”背景下的国际海事司法中心建设》，载《中国远洋海运》，2017 第 11 期，第 68 页。

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

Research Team of Shanghai High People's Court*

[Editor's note]

As this article is too long, we divided it into two parts. This issue presents the first part of the article while the second part will be presented in the next issue. For the perusal of our readers, the article's contents are listed below:

Introduction: The Value of Justice in the Governance of Marine Ecological Environment against the Backdrop of Building China into a Strong "Maritime Country"

Part One. Analysis of the Current Status: Investigation into Cases Involving Disputes over Marine Ecological Environment in China

I. Types of Cases: Relatively Centralized

II. Lengthy Trial Period

1. Decreasing Acceptance of Court Judgements

2. Difficult to Provide Evidence

3. A Few Cases Involve in Disputes over Jurisdiction

4. The Forensic Appraisals Are Not Widely Recognized by the Parties Involved

III. Diverse Points of Dispute

IV. Complex Grounds of Judgements

V. The Procedure for Public Interest Litigation Is Not So Applicable

Part Two. Cause Analysis: Obstacles to Judicial Protection of Marine Ecological Environment

I. Insufficient Legal Grounds for Judicial Protection of Marine Ecological Environment

1. Some Norms Can't Keep Pace with the Time

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

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

2. There Are Legislative Gaps in Some Areas
3. It’s Hard to Apply Some Provisions at the Same Time
II. Without a Standard for Judicial Protection of Marine Ecological Environment
1. Different Views on the Application of Law
2. Improper Distribution of Rights and Responsibilities
III. Lack of Innovation in Judicial Protection of Marine Ecological Environment
1. The Limit of Liability for Maritime Claims Is too Low
2. The “Three-in-one” Trial Mode Is Difficult to Implement

Part Three. Countermeasure Analysis: The Road to Judicial Protection of Marine Ecological Environment
I. Study and Improve the Current Legislation to Fully Fill the Legal Gap
1. To Amend the Outdated Legal System
2. To Improve Inconsistent Legal Norms
3. To Fill Legislative Gaps on Demand
II. Reach Consensus on Legal Views and Unify Judicial Rules
1. To Clarify the Application of the Law
2. To Balance Rights and Responsibilities
III. Make Necessary Changes to the Existing Framework and Be Innovative
1. To Explore Applicable Conventions on Limitation of Liability for Maritime Claims
2. To Reinforce the Implementation of the “Three-in-one” Trial Mode

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

Introduction: The Value of Justice in the Governance of Marine Ecological Environment against the Backdrop of Building China into a Strong "Maritime Country"

Regarding the concept of "governance", it is well recognized among academic circles that "Governance is the sum of the many ways individuals and institutions, public and private, manage their common affairs".[1] In order to better govern the marine ecological environment and secure the sustainable development of economy and society, the State Council established the Ministry of Natural Resources and reorganized the Ministry of Ecology and Environment in its institutional reform in 2018, integrating the former State Oceanic Administration into the two above-mentioned departments with clearly defined responsibilities. In practice, however, China still encounters thorny issues such as inadaptable policies, overlapping departmental responsibilities, and the need to improve the capacity for primary-level governance. In China, the administration department alone cannot fully govern the marine ecological environment.

It should be noted that, in addition to administrative organs, the judicial branch also has its unique role in governing the marine ecological environment. The administration is the representative of national interests, and the judiciary is the guardian of people's rights.[2] In the context of comprehensively managing China's marine ecological environment, the judiciary can not only provide a useful supplement to administrative law enforcement, but also supervise the administrative organs, complementing each other by means of legal interpretations, damage relief and typical cases. The upper limit on China's capacity to govern the marine ecological environment, therefore, can be improved effectively.[3] Regarding the important role played by the judiciary in the governance of the marine ecological environment, there is still much room for further research in both theoretical and practical ways. As shown by a detailed analysis, most of the existing research and mainstream views in this field focus on analyzing and addressing certain serious matters. On the whole, neither a feasible judicial plan nor a specific institutional framework comes into being. It is essential to systematically sort out both the emerging and long-existing issues encountered in judicial practice and to test out whether relevant solutions are feasible.

This paper aims to analyze the judicial statistics on civil, administrative and criminal cases related to marine ecological and environmental pollution that have occurred in China's sea areas in the past five years, focusing on the characteristics and disputes of the above three types of cases, and figuring out what causes the problems. Feasible solutions, therefore, will be given, further

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1 The report of the Commission on Global Governance, *Our Global Neighbourhood*, Oxford University Press, 1995, p. 15.

2 [Germany] Radbruch: "*Introduction to Law*", translated by MI Jian and ZHU Lin, China Encyclopedia Publishing House, 1997, p. 100.

3 MEI Hong, *The Judicial Protection Subject of Marine Environment and Its Linkage Mechanism*, Journal of Zhejiang Ocean University (Humanities Sciences), No. 1, 2020, p. 5.

consolidating the unique value of justice in marine ecological environment governance.

Part One. Analysis of the Current Status: Investigation into Cases Involving Disputes over Marine Ecological Environment in China

The so-called empirical study in the judicial field, in fact, refers to the empirical legal study with data analysis as the core. To put it another way, it is a paradigm of specific studies by collecting, sorting, analyzing, and applying data, particularly in applying statistical methods, with the empirical phenomena of legal practice as the focus of study.[1]

I. Types of Cases: Relatively Centralized

In order to provide dependable and sufficient data for the research and to draw reliable conclusions on China's judicial practice, data were collected from the website "China Judgements Online". The research team has sorted out a total of 932 cases involving marine ecological environment that have been concluded by the Chinese maritime courts and their higher courts of appeal, and the Supreme Court from 2016 to 2020. These cases were used as research samples for forensic statistical analysis. After analyzing the cause of action, it is found that the sample cases share the following characteristics:

[1] ZUO Weimin, *A New Paradigm Revolution? - Interpretation of Empirical Research on Chinese Law*, Tsinghua University Law Journal, Issue 3, 2017, p. 46.

	Cause of Action	Number of Cases (including cases of second instance and application for retrial)
Civil	Disputes over liability for pollution damage at sea and in waters connected to the sea	509 (including 492 serial cases)
	Disputes over liability for damage to aquaculture at sea and in waters connected to the sea	286 (including 277 serial cases)
	Disputes over maritime rescue contracts	31 (including 15 serial cases)
	Disputes over liability for ship pollution damage	30 (including 11 serial cases)
Administrative	Administrative penalty disputes	30 (including 26 serial cases)
	Administrative licensing disputes	15 (including 14 serial cases)
	Administrative compensation disputes	7
	Administrative compensation and non-performance disputes	2
	Other administrative cases	17 (including 17 serial cases)
Criminal	Criminal cases	5
In total		932 (including 853 serial cases)

Table 1: Number of cases with different cause of action in the sample
(including cases of second instance and application for retrial)

According to Table 1, the sample cases are divided into ten categories. The serial cases mentioned in the table refer to a series of lawsuits brought by different plaintiffs against the same defendant based on the same fact that causes damage to the marine ecological environment. In addition, in order to avoid double counting of cases of prosecution, appeal, and application for retrial based on the same facts, which would cast doubt on the scientificity of the statistical results, cases of the first instance, second instance and application for retrial based on the same facts are regarded as one case. Here are the statistical results:

	Cause of Action	Number of Cases (excluding cases of second instance and application for retrial)
Civil	Disputes over liability for pollution damage at sea and in waters connected to the sea	368 (including 356 serial cases)
	Disputes over liability for damage to aquaculture at sea and in waters connected to the sea	148 (including 139 serial cases)
	Disputes over maritime rescue contracts	26 (including 12 serial cases)
	Disputes over liability for ship pollution damage	19 (including 7 serial cases)
Administrative	Administrative penalty disputes	30 (including 17 serial cases)
	Administrative licensing disputes	15 (including 14 serial cases)
	Administrative compensation disputes	7
	Administrative compensation and non-performance disputes	2
	Other administrative cases	17 (including 15 serial cases)
Criminal	Criminal cases	5
In total		637 (including 560 serial cases)

Table 2: Number of cases with different cause of action in the sample (excluding cases of second instance and application for retrial)

As the first-instance cases and the second-instance and application for retrial cases are regarded as the same type of cases, there are 561 civil cases in the sample cases, accounting for 88.07% of the total; 71 administrative cases, accounting for 11.15%, and 5 criminal cases, accounting for 0.78%. It follows that most of the cases involving marine ecological environment and damage compensation are civil cases. With regard to administrative cases, the concept and scope of maritime administrative cases have been clearly defined for the first time ever since the adoption of Provisions of the Supreme People's Court on the Scope of Cases to Be Accepted by Maritime Courts (hereinafter referred to as Provisions), which came into effect on 1 March 2016. Since then, the maritime court has been clearly given jurisdiction over maritime administrative cases.[1] China's maritime courts, therefore, are still in the stage of theoretical exploration and establishment of rules and regulations concerning the trial of such cases. Such cases, overall, are not many.[2] The same is true with environmental cases. As for criminal cases, the maritime courts still

[1] LIU Zhenhua & DING Qixue, *Trinity: Research on the Definition of Maritime Administrative Cases in China*, Chinese Journal of Maritime Law, 2018, No. 1, p. 98.

[2] Taking Shanghai Maritime Court as an example, in 2020, the court accepted a total of 14 maritime administrative cases, accounting for 0.32% of all cases accepted.

have different views on the jurisdiction of maritime criminal cases, whether in theory or in practice. Only Ningbo Maritime Court has made attempts in handling some cases,[1] five of which involve maritime criminal cases concerning the marine ecological environment and have been included into the sample cases.

Most of the cases involving marine ecological environment are the serial cases mentioned above, representing 91.42% of all sample cases. The main reason is that the consequences on the marine ecological environment caused by the damage are complex, and there are many damaged parties involved. The number of damaged parties in some cases even reaches hundreds of people. For example, among the sample cases, the total number of cases involving the "ConocoPhillips Oil Spill Case" is as high as 395, and there are 189 applications for retrial filed in Tianjin Maritime Court alone.[2]

Analysis on different types of cases shows that civil cases are mainly about disputes over liability for pollution damage that arises on the sea and on the sea-connected waters and disputes over liability for damage to aquaculture that arises on the sea and on the sea-connected waters, accounting for 91.98% of all civil cases. That indicates that in practice these two disputes are the main type of damage to the marine ecological environment, happening frequently in China's waters. Relatively speaking, the disputes over liability for ship pollution damage and disputes over salvage contracts are rare in number. However, due to the higher amount of money involved in these cases and the more serious damage consequences than the above-mentioned two types of cases, these disputes are also the focus of study in this paper. Among the sample cases, the administrative cases are mostly about administrative punishment disputes involving damage to the marine ecological environment and administrative licensing disputes involving the right to use sea areas; the only five criminal cases are concerning the crime of illegally purchasing, transporting or selling precious and endangered species of wildlife under special State protection as well as the products thereof.

II. Lengthy Trial Period

A thorough review of the sample cases indicates that the average trial period relating to marine ecological environment is significantly longer than that of general civil, criminal and administrative cases. Let's take a closer look at the representative cases of disputes over liability for pollution damage from ships. The average trial period for such cases tried by the Shanghai Maritime Court even reaches 226 days. Why it takes so long to hear those cases will be explained in the following section.

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[1] CAO Xingguo, *Reform of Jurisdiction of Maritime Criminal Cases and Perfection of Maritime Criminal Legislation—Based on the First Judgment of Criminal Case in Maritime Court*, Chinese Journal of Maritime Law, 2017, No. 4, p. 43.

[2] (2019) Jin 72 Min Shen No. 1-189.

1. Decreasing Acceptance of Court Judgements

By comparing the statistical results in Table 1 and Table 2, it can be observed that the number of cases in Table 2 has not dropped considerably, only with a slight decrease of 295 cases. It means a corresponding number of cases in the sample have gone through legal procedures on the second instance or even application for retrial, and such cases take up 68.35% of the total. In other words, more than half of the parties involved in the sample cases disagree with relevant court judgements. However, in 2020, the rate of litigants accepting a judgement after the first instance in courts across the country was 89%, and after the second instance, it even hit a record high, at 98.1%.[1] Obviously, parties involved in civil cases concerning marine ecological environment are unlikely to agree with court judgements. Moreover, as most of the civil cases are serial cases, the resulting appeals and retrial cases are also mostly serial ones.

2. Difficult to Provide Evidence

In the sample, there are a large number of cases where claims are not supported due to insufficient evidence provided by the claimants. This shows that, to some extent, it is difficult to provide evidence for cases involving the marine ecological environment. Specifically, there are two reasons that explain why it is so hard to provide evidence: One is that some are foreign-related cases and involve in collecting overseas evidence. For example, in the case of liability disputes over ship pollution damage [Lianyungang Yusheng International Freight Forwarding Co., Ltd. vs. Halona Shipping Co., Ltd. and China Reinsurance (Group) Co., Ltd.][2], because one of the defendants is a foreign company and the trial of the case involves forensic identification, it took the defendants a total of 441 days to finally provide all the evidence. Another reason is the fact that the damage to the marine ecological environment is rather special, making it difficult to provide evidence to show the damage. Oil pollution damage is a case in point. It is one of the main forms of damage to the marine ecological environment and the resulting consequence is also more devastating. However, the damage caused by oil pollution is potential and is not easy to be observed immediately just after the accident. It usually takes quite a certain period for the damage to gradually emerge in full length with the aid of a combination of factors. It is hard to directly prove the causal relationship between what had happened and what had been resulted therefrom. For example, in the serial cases of disputes between Mr. YANG Shaoguo et al. and ConocoPhillips China Co., Ltd. and China National Offshore Oil Corporation on the liability of marine pollution damage, the plaintiffs in 11 cases have submitted evidential materials as many as possible including the “Investigation Report”, “Appraisal Report”, “Monitoring and Evaluation Report” in the sea area involved, and expert opinions and so on. All their claims, however, were eventually rejected by the

[1] See the “*2020 Work Report of the Supreme People’s Court*” by ZHOU Qiang, president of the Supreme People’s Court.
[2] (2018) Hu 72 Min Chu No. 4298.

courts of first instance, second instance and retrial on the grounds that the above-mentioned evidential materials could not prove the existence of the causal relationship claimed by the plaintiffs.

3. A Few Cases Involve in Disputes over Jurisdiction

There are 16 cases involving disputes over jurisdiction in the sample cases, accounting for 2.52% of the total, which is higher than the general cases involving maritime and commercial disputes.[1] The disputes could be divided into three categories: "whether the case should be under the special jurisdiction of the maritime court", "whether the pollution occurred in the sea area which is under the jurisdiction of a specific maritime court", and "whether the defendant is the maritime administrative authority". The determination of case jurisdiction has always been a tricky issue in the trial of marine ecological environment cases. The parties involved and even courts have different understandings of it, resulting in a lengthy trial period for some marine ecological environment cases.

4. The Forensic Appraisals Are Not Widely Recognized by the Parties Involved

Among the sample cases, the parties of 332 first-instance cases in total objected to the appraisal report issued by the appraisal institution (entrusted by the court or the other party) during the litigation process, accounting for 52.12% of all the first-instance cases; and in the second-instance and retrial cases, the number of such cases is 226, making up 76.61% of the total. Forensic identification of cases concerning the marine ecological environment generally involves three aspects: identifying the source of pollution, determining the scope of polluted areas and the degree of damage, and assessing the losses incurred. Compared with other forensic appraisals, forensic appraisals of such cases are more challenging and demanding and require more professional and competent appraisal institutions. At the same time, given that seawater, which is being examined and appraised, evaporates easily, the corresponding results inevitably have their limitations.[2] In addition, judging from litigation, whether the appraisal report issued by the appraisal institution can be seen as evidence has always been controversial in practice. The above-mentioned circumstances together make it even harder for the court to ascertain relevant facts of the case. That's because the appraisal reports issued by the relevant institutions are hard to be checked and adopted while hearing marine ecological environment cases and the institutions often need to reappraise and reissue the reports several times.

III. Diverse Points of Dispute

The points of dispute are the key to the reasoning of the judgement documents, directly

[1] Taking the cases accepted by the Shanghai Maritime Court in 2020 as an example, among the 2,145 cases that were subject to ordinary procedures, only 27 involved jurisdictional objections, accounting for only 1.26% of the total.

[2] SUN Guang, *Research on Forensic Identification of Marine Environmental Damage Caused by Ship Pollution*, Environmental Protection, 2011, No. 2, p. 57.

revealing the disputes between the parties.[1] In order to get a better understanding of the most prominent issues in cases involving the marine ecological environment, the research team systematically sorted out the judgement documents of all sample cases, and summarized the points of dispute recorded in each document in the "court's opinion" section. After statistical analysis, the points of dispute in the sample cases are shown in Table 3.

Points of Dispute	**Number of Occurrence (First instance)**	**Number of Occurrence (Second instance, application for retrial)**	**Total Number**
Determination of causation	393	183	576
Determination of the amount of loss	319	180	499
Determination of claim rights	160	143	303
Subject of responsibility	252	5	257
Determination of the limitation period	188	3	191
Determination of the right to use sea areas, water areas and tidal flats	188	2	190
Division of responsibilities	169	4	173
Determination of burden of proof	1	50	51
Determination of fee amount	34	3	37
Review of administrative penalty decisions	27	0	27
Conditions for initiating a lawsuit	22	0	22
Determination of claims subject to limitation	9	2	11
Determination of the nature of emergency actions and rescue contracts	10	1	11
Determination of limitation of liability for maritime claims	5	0	5
Whether the defendant has a statutory duty	3	0	3

Table 3: Points of dispute in the sample cases

In terms of number, cases involving marine ecological environment may cover a total of 15 different controversial points. The controversial points that take up the largest proportion both in the first and second instance cases and the retrial cases in the sample are "determination of causation" and "determination of the amount of loss". For one thing, these two points are actually disputes over the facts of the case, and there is a direct and close connection between the identification of the relevant facts and the handling of the case, which is the core link in the trial of marine ecological

[1] WANG Song, *Writing and Enforcement of Civil Decisions*, Journal of Law Application, 2011, No. 2, p. 97.

environment cases;[1] But it is difficult to provide evidence for such cases, and the forensic identification procedures are not perfect at this stage, which makes it difficult to fully ascertain the relevant facts during the trial of the case; This is even more evident in serial cases where a dispute over causation will affect dozens of or even hundreds of cases.[2] For another, there isn't a unified understanding shared by the judicial circle on the compensation standards for damage to the marine ecological environment, and disputes are salient especially over the scope of compensation, compensation standards and restorative liability.

In Table 3, there are also a relatively high number of cases concerning disputes over "determination of claim rights", "determination of the right to use sea areas, water areas and tidal flats", and "determination of the nature of emergency actions and rescue contracts", all of which relate to the parties' rights to claim. On the whole, environmental rights have long been the focus of study in the basic theoretical research on environmental law in China, and it is what a Chinese scholar called "a tough yet fascinating issue".[3] And the above three types of disputes are the vivid manifestations of this tough issue in cases involving marine ecological environment.

As shown in Table 3, the four types of disputes, namely, "subject of responsibility", "division of responsibilities", "determination of burden of proof" and "determination of limitation of liability for maritime claims", are all disputes between the parties over the assumption of responsibility. A detailed examination of each case shows that some of the issues in environmental tort cases are common ones, such as the distribution of the burden of proof, whether tortfeasors shall be liable jointly and severally, and the proportion of responsibilities shared by the parties; while other issues are unique to cases involving the marine ecological environment, such as whether the parties shall apply to the limitation of liability for maritime compensation and how to assume the liability for oil-spilling and non-oil-spilling ships. The above issues all show the difficulties in the trial of marine ecological environment cases, and their causes and according solutions will be analyzed in detail below.

IV. Complex Grounds of Judgements

In order to systematically sort out the laws, regulations and judicial interpretations involved in the trial of marine ecological environment cases and to fully understand the legal basis of China's marine ecological environment, the research team has completely classified the legal provisions on which the judgement documents of the sample cases are based. According to the results, the legal provisions and judicial interpretations cited in the sample cases are shown in Table 4:

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[1] FAN Xinglong, *To Improve the Determination of the Causal Relationship of Environmental Tort under the Background of Civil Code*, Journal of Law Application, 2020, No. 23, p. 81.

[2] Among all the 576 sample cases involving "determination of causal relationship", 558 are serial cases.

[3] WU Weixing, *Review, Reflection and Prospect of the Theoretical Research on Environmental Rights in China for Thirty Years*, Law Review, 2014, No. 5, p. 181.

Titles of Laws, Regulations and Judicial Interpretations	Number of Citations (First instance)	Number of Citations (Second instance, application for retrial)	Total Number
Tort Law of the People's Republic of China	520	288	808
Interpretation of the Supreme People's Court of Several Issues on the Application of Law in the Trial of Disputes over Liability for Environmental Torts (2015)	358	278	636
Fisheries Law of the People's Republic of China	391	138	529
Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relationships	206	2	208
Law of the People's Republic of China on the Administration of Sea Areas	197	3	200
Marine Environment Protection Law of the People's Republic of China (2016, 2017)	53	7	60
Environmental Protection Law of the People's Republic of China	41	2	43
Maritime Law of the People's Republic of China	32	9	41
General Principles of the Civil Law of the People's Republic of China; General Provisions of the Civil Law of the People's Republic of China	18	17	35
Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Cases of Disputes over Compensation for Vessel-induced Oil Pollution Damage	14	9	23
Water Pollution Prevention and Control Law of the People's Republic of China (2008, 2017)	21	0	21
Property Law of the People's Republic of China	13	2	15
Provisions of the Supreme People's Court on the Scope of Cases to Be Accepted by Maritime Courts	13	0	13
Water Law of the People's Republic of China	11	0	11
Interpretation of the Supreme People's Court on Several Issues concerning the Application of Law in the Conduct of Environmental Civil Public Interest Litigations	3	0	3
Criminal Law of the People's Republic of China	5	0	5

Table 4: Legal Provisions Cited by Sample Cases

The various laws, regulations and judicial interpretations contained in Table 4 together constitute China's legal system of the marine ecological environment. A thorough analysis of the data in Table 4, combined with the previous statistical results, finds that cases involving marine

ecological environment are basically torts cases, and they are mainly applied to the general provisions established by the Civil Code of the People's Republic of China (before the Civil Code takes effect, they are mainly applied to the General Principles of the Civil Law; the General Provisions of the Civil Law; Property Law; and Tort Law), the Environmental Protection Law, etc. At the same time, there are also specially-made laws and regulations on marine ecological environment so as to make up for the general laws, such as Marine Environment Protection Law; Maritime Law; Fisheries Law; Law of the People's Republic of China on the Administration of Sea Areas; Water Law; Water Pollution Prevention and Control Law. The trial of cases concerning marine ecological environment involves many legal provisions, which cover all aspects of marine ecological environment governance, thus inevitably leading to inconsistency among various norms. Judging from the sample cases, the judicial application of the above provisions is not consistent, and some cases even show that China's legislation in specific fields needs to be improved, and relevant issues await to be resolved through legislative or judicial means.

V. The Procedure for Public Interest Litigation Is Not So Applicable

There are only 3 cases involving public interest litigation in total in the sample cases. The plaintiffs are China Biodiversity Conservation and Green Development Foundation, Wuhan Railway Transportation Branch of the People's Procuratorate of Hubei, and Shiyan Canglang Greenway Environmental Protection Service Center. These three cases are all first instance cases, indicating that at present, there are only few cases where the procedures for public interest litigation are applicable. Among the sample cases are a large number of serial cases, and the litigation often takes a long time because the claimants are farming households and other groups with little knowledge about litigation. For example, in a series of cases involving WANG Yongcun et al., ConocoPhillips China Co., Ltd. and China National Offshore Oil Corporation Ltd. over liability for marine pollution damage, a total of 189 plaintiffs were from farming households in Caofeidian District, Tangshan City, Hebei Province, China. Nine years have elapsed from the date of occurrence until the day when the retrial ruling takes effect. For such cases, if public interest litigation procedures could be fully utilized, and if procuratorial organs and social organizations could conduct litigation on behalf of unspecified groups, the working efficiency could have been improved and the trial period could have been shortened. This could not only reduce the barrier on providing evidence for some key facts claimed by the injured party, but also help reduce the pressure on the court to handle so many cases.

Part Two. Cause Analysis: Obstacles to Judicial Protection of Marine Ecological Environment

I. Insufficient Legal Grounds for Judicial Protection of Marine Ecological Environment

Most of the legal norms involved in marine ecological environment governance in China are formulated separately to regulate the utilization and development of individual marine resources and the prevention and control of marine ecological environment pollution. These regulations are drafted on a sectoral basis, without a comprehensive and holistic perspective.[1] As a result, the current legal norms on which judicial protection of the marine ecological environment is based are not inclusive, as shown in the following aspects:

1. Some Norms Can't Keep Pace with the Time

At present, the legal norms on which judicial protection of the marine ecological environment is based are incompatible with the time to a large extent. The existing legal norms are no longer suitable for China's current conditions in recent years including its marine ecological environment governance practices, environmental protection policies, the developments and changes brought by echoing the call of building China into a "maritime country" and its supporting legislation.

For example, forensic identification norms in the field of marine ecological environment at the current stage, obviously, have been clearly disconnected from the judicial practice, resulting in a general lack of professional and credible identification institutions in various regions in China. Moreover, there are very few institutions with forensic identification qualifications.[2] In terms of the determination of damage to the marine ecological environment, there are different administrative departments respectively in charge of determining the survey, identification and loss caused. The results issued by these departments, therefore, are often contradictory. Especially in assessing fishery economic loss and marine ecological environment damage, there are still gaps between various specifications, and the legal regulations on this field also await improvement.[3] That's why the court sometimes casts doubt on the appraisal conclusions presented by appraisal companies and institutions while hearing cases involving marine ecological environment. For example, in one of the sample cases concerning disputes over liability for damage to marine aquaculture (Rushan Xinjiahua Aquatic Products Co., Ltd. vs. CCCC Yantai Environmental Protection Dredging Co., Ltd.),[4] the defendant filed an application for identification with the court of first instance on 15 March 2012, so the court entrusted Shandong Ocean and Fishery Judicial Appraisal Center in

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[1] GAO Xiaolu & MEI Hong, *On the Improvement of Marine Environment Legislation in China -- from the Perspective of Integrated Ecosystem Management*, Chinese Journal of Maritime Law, 2013, No. 4, p. 18.

[2] WANG Xuguang, *Problems in Environmental Damage Appraisal and Judicial Countermeasures*, Chinese Journal of Forensic Sciences, 2016, No. 1, p. 2.

[3] TONG Liyu & ZHOU Bohuang, *Analysis on Damage to the Marine Ecological Environment Caused by "Sanchi" Oil Tanker*, JOURNAL OF EMCC, 2018, No. 4, p. 12.

[4] (2015) Qinghai Fa Maritime Chongzi No. 1, (2017) Lu Minzhong No. 1899.

accordance with the law to appraise what have been mentioned in the application. The appraisal center issued a report called (2013) Yujianzi No. 3 Judicial Appraisal Opinion on 12 March 2013. After receiving the report, the plaintiff, however, held that the conclusion given by the appraisal center was wrong and should not be accepted. After taking into account the plaintiff's objections on its appraisal report, the appraisal center issued the "Letter on Revocation of (2013) Yujian Zi No. 3 Judicial Appraisal Opinion" to the court on 15 August 2013 to revoke its appraisal report. The appraisal center decided to revoke its report on the grounds that the data used in it were predicted data based on numerical analysis, not on-site measured data, which may affect the scientific accuracy of the report. To conclude, there is still much room for improvement in the judicial appraisal in the field of marine ecological environment in China at the current stage, and it is urgent to improve the corresponding system.

2. There Are Legislative Gaps in Some Areas

In the early drafting process of various basic civil and commercial laws and regulations in China, little attention was paid to the harmfulness of marine pollution damage and the importance of protecting the marine ecological environment as a result of slow economic development and poor social awareness at that time. Nowadays, many areas concerning ecological environment, therefore, are still in want of special regulations and systems to regulate. Basically, China still needs to fill in the large legislative gap in marine ecological environment governance.

Take the damage caused by toxic and harmful substances at sea as an example. According to the current relevant international conventions, there are as many as 6,000 types of damage.[1] In recent years, major leakage accidents caused by ships transporting toxic and hazardous substances have also occurred in China's waters. For example, the Chinese oil tanker "Tiantong No. 1" was using an oil pipeline to load cracking carbon 9 at the Donggang Petrochemical Company Terminal in Quanzhou City, Fujian Province on 3 November 2018. Due to improper operations and dragging, the pipeline was cracked, leading to the leakage of about 69 tons of cracking carbon 9. Most of the toxic and harmful substances are highly toxic and volatile, which makes them hard to control and extends the scope of pollution, thus posing a serious threat to the lives of people who had used the polluted water. However, there is currently no legislation in China that specifically regulates the liability for damage caused by pollution of toxic and hazardous substances at sea, not even in the Maritime Law. Therefore, only general provisions stipulated in the Civil Code and the Marine Environmental Protection Law can be invoked while handling cases involving damage caused by toxic and hazardous substances at sea. That can not meet the needs of the injured party to make an appropriate and fair claim.

[1] Alan Khee-Jin Tan, *Vessel-Source Marine Pollution*, Cambridge University Press, 2006, p. 337.

3. It's Hard to Apply Some Provisions at the Same Time

Due to the insufficient legislative research on marine ecological environment in China, the governance of marine ecological environment hasn't been given enough consideration while making general civil and commercial laws and regulations. As a result, some clauses and provisions find it hard to apply to the governance of marine ecological environment.

Taking the criminal responsibility for damage to the marine ecological environment as an example, Article 90(3) of the Marine Environmental Protection Law stipulates: "For any accident that causes major marine environment pollution and results thus in grave damage to the marine ecology, criminal responsibility shall be investigated according to law." The Criminal Law, however, does not specifically set up separate charges for polluting marine environment, making it difficult to regulate certain acts, which are enough to constitute a crime of damaging the marine ecological environment.[1] At present, if Article 338 of the Criminal Law "crimes of undermining protection of environmental resources" is applied to acts that damage the marine ecological environment, it will bring the following problems: First, crimes of undermining protection of environmental resources are intentional, but in practice, the perpetrator usually does not intend to damage the marine ecological environment. Second, the article defines the criminal behavior as "releases, dumps, or disposes of…", but in fact there are more than three ways that could damage the marine ecological environment. For example, in an oil spill accident occurred due to ship collision, which does great harm to the marine ecological environment, if the behavior of the perpetrator is determined to fall into the scope of "releases, dumps, or disposes of…", he or she is suspected of violating the principle of statutory crime and punishment. Third, the consequences of crimes that damage the marine ecological environment are not limited to environmental pollution, but also include affecting aquaculture and leading to the extinction of marine life, which is not covered in this provision.

II. Without a Standard for Judicial Protection of Marine Ecological Environment

Based on the previous review of the points of dispute in the sample cases, the main reasons for some of the disputes lie in: for some legal issues involved in marine ecological environment cases, the different handling results reflect completely different mindset in hearing cases, indicating there are different criteria for judicial judgment.

1. Different Views on the Application of Law

The trial of cases concerning the marine ecological environment involves not only many laws, regulations, and judicial interpretations in China, but also international conventions to which China has entered. But the principles and contents stipulated in those laws and regulations are inconsistent. In judicial practice, there are different understanding on some provisions, resulting in different

[1] ZHANG Lei, *Judicial Construction and Legislative Improvement of the Trial of Maritime Criminal Cases by Maritime Courts—taking marine environmental crime as the break point*, Chinese Journal of Maritime Law, 2021, No. 2, p. 50.

handling results.

A. It Is Difficult to Determine the Competent Court

In judicial practice, how to determine the jurisdiction of the case has become the toughest issue encountered while handling cases concerning the marine ecological environment. For example, in one of the sample cases concerning disputes over compensation for property damage (Guangxi Guishui Electric Power Co., Ltd, and Cenxi Power Generation Branch Company vs. Mr TAN), the three defendants all proposed in the first instance and the second instance that the river involved is a tributary of the West River, which flows into the Pearl River from the West River and eventually flows into the South China Sea. Therefore, according to the relevant provisions of laws and judicial interpretations, this case is a dispute over liability for pollution damage in the waters connected to the sea, which should be under the special jurisdiction of the Maritime Court. The People's Court of Cenxi City, which accepted the case at first instance, has no jurisdiction over the case, so the procedure of the first instance was illegal. Neither the first instance nor the second instance of this case supports the claim of the three defendants, but it is worth noting that the Guangxi High People's Court had accepted the retrial application of the three defendants in this case in September 2020, and decided to rehear the case, which is currently under retrial. Regarding the above claims of the three defendants, perhaps this time there may be different results.

B. Who Has the Right to Initiate Public Interest Litigation Is Not Clear

Civil Procedure Law of the People's Republic of China amended in 2012 sets up, for the first time, an environmental public interest litigation system. Marine Environment Protection Law of the People's Republic of China, which was implemented in 2015, stipulates the parties who have the right to initiate public interest litigation, marking the beginning of environmental public interest litigation in China. On the whole, however, cases concerning environmental civil public interest litigation are just few, unable to give free rein to their functions of guiding, evaluating and policy-making.[1] In terms of cases involving civil public interest litigation for marine ecological environment, it requires more professional skills and involves more complex issues to deal with them. At present, the main dispute between the theoretical and practical circles is that under the current legal framework, it is difficult to clarify and determine the party who has the right to initiate a public interest lawsuit concerning the marine ecological environment. Article 89(2) of the Marine Environmental Protection Law provides for who has the right to initiate public interest litigation, that is, the interested department empowered to conduct marine environment supervision and control. In other words, that is the maritime administrative agencies and fishery administrative departments. Article 58 of the Civil Procedure Law of the People's Republic of China stipulates that

[1] JIANG Bixin, *Practical Development and Institutional Improvement of Environmental Public Interest Litigation in China*, Journal of Law Application, 2019, No. 1, p. 9.

for conduct that pollutes environment, infringes upon the lawful rights and interests of vast consumers or otherwise damages the public interest, "an authority or relevant organization as prescribed by law may institute an action in a people's court". According to provisions of Environmental Protection Law of the People's Republic of China, Interpretation of the Supreme People's Court on Several Issues concerning the Application of Law in the Conduct of Environmental Civil Public Interest Litigations, and Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues concerning the Application of Law for Cases regarding Procuratorial Public Interest Litigation, in terms of cases involving ecological and environmental damage, the subjects who have the right to initiate public interest litigation are "organs prescribed by law", "relevant organizations" and "procuratorial organs". Therefore, it is difficult to clarify the party who has the right to file a lawsuit of marine ecological environment public interest from the current provisions.

C. The Legal Basis for the Right of Claim Is Quite Weak

Regarding a claim for compensation for damage to the marine ecological environment, the claimant is required to prove that he or she has the right to claim for compensation in the according marine ecological area; that is to say, he or she enjoys environmental rights in the sense of environmental law.[1] But that is hard to prove. Here are two problems in judicial practice:

First, it is difficult to determine whether those engaging in aquaculture have the right to claim for compensation or not. According to the provisions of the Real Rights stipulated in the Civil Code, the right to use waters and mudflats to engage in aquaculture or fishing that are acquired in accordance with law is protected by law. Aquatic breeding rights fall into the category of "quasi-real rights". Since quasi-real rights involve the utilization of rare resources such as minerals and fisheries, China adopts a strict administrative licensing system to manage them.[2] For the acquisition of aquatic breeding certificates, according to the provisions of the Fisheries Law, the parties concerned shall apply to the department in charge of fishery administration of the local people's government at the county level or above for the aquatic breeding certificate which shall be checked and issued by the people's government at the same level. At the same time, since marine aquaculture involves a specific sea area, the parties should also obtain a certificate to use the sea area in accordance with the law. However, the provisions of the law only represent what it should be in an ideal way, yet the actual enforcement of a specific system does not always follow the said provisions. Judging from the judicial practice of cases involving the marine ecological environment, among cases concerning disputes over liability for marine pollution damage and liability for marine

[1] ZHANG Zhen, *The Claiming Function of Environmental Rights: From Theory to Practice*, Contemporary Law Review, 2015, No 4, p. 25.

[2] CUI Jianyuan, *Treatise on Quasi-Real Rights*, Law Press China, 2012, p. 120.

aquaculture damage, there are a large number of cases where those engaging in aquaculture do not have the above two certificates.[1] For example, in the series of cases such as "LIU Yanping vs. ConocoPhillips China Co., Ltd., China National Offshore Oil Corporation on the liability for marine pollution damage", those who engage in aquaculture and have the right to claim for compensation have neither obtained the certificate to use sea areas nor the aquaculture breeding certificate. The reasons why that is so common in China's sea areas are various, from the complicated process of obtaining certificates to the lack of legal awareness of those who engage in aquaculture. The most crucial reason is that based on the consideration of future planning, adjustment and expropriation of sea areas, some local governments intentionally delayed, stopped or even did not issue sea area use certificates and aquatic breeding certificates, resulting in the fact that many local people who have been regularly engaging in aquaculture for a long time haven't been granted any certificates.[2] Under such circumstances, if a relevant sea area is damaged, whether those who actually engage in aquaculture have the right to file a claim will definitely trigger great controversy in judicial practice.

Second, it is difficult to determine whether the cleaning units have the right to claim for compensation or not. The dispute is mainly on the issue of how to provide legal relief for the expenses incurred by the measures taken such as pollution cleaning and preventing pollution under the circumstance that the maritime administrative authority organizes the cleaning units to clean. Mainstream views prevailing in the practical and theoretical circles in this regard are as follows: (1) some people believe that the cleaning units can directly sue the responsible person based on civil claims.[3] (2) Some people hold that it constitutes Negotiorum Gestio, and the cleaning units , which actually engage in preventing and controlling the oil pollution, can ask the responsible person to pay the fee according to the Negotiorum Gestio.[4] (3) Some people argue that the maritime administrative authority appoints the cleaning units to clean up and prevent the oil pollution, which is a substitute performance of the administrative authority, and it cannot directly initiate a civil lawsuit. It should be resolved through administrative procedures in accordance with the Administrative Compulsion Law of the People's Republic of China and other regulations.[5] (4) Other people believe that there is no legal relationship between the cleaning units and the

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1 CUI Yadong, *Establishment of International Maritime Judicial Center and Judicial System Reform*, Law Press China, 2017, p. 195.

2 LI Tong & ZHANG Xin, *Determination of the Subject's Right of Action, the Subject of Responsibility, the Causal Relationship, and the Amount of Damages Involved in Marine Pollution Cases -- Analysis on Case Concerning Liability Disputes Resulting from Marine Pollution between LUAN Shuhai et al and ConocoPhillips China Co., Ltd., and China National Offshore Oil Corporation*, Journal of Law Application, 2017, No 20, p. 93.

3 SHUAI Yuexin, *Analysis on the Claims for Compensation for Cleanup Costs Incurred by Taking Compulsory Measures in Ship Oil Pollution Accidents*, World Shipping, 2019, No 12, p. 50.

4 (2002) Guang Hai Fa Chu Zi No. 106.

5 WANG Tingting & YE Zhou, *Evidence of the basis for the right to claim for compulsory clean-up costs in the ship oil pollution accident -From the perspective of the oil spill accident of "Zhongheng 9"*, Journal of Dalian Maritime University (Social Science Edition), 2019, No 1, p. 11.

responsible person, so the lawsuit brought directly against the responsible person should be dismissed.[1] It can be seen that there are various ways to deal with this problem in practice, and the results concluded therefrom are also quite different.

D. The Responsible Party Is Not Clearly Stipulated (Contradictions between Domestic Laws and International Conventions)

Article 89(1) of the Marine Environmental Protection Law only makes general provisions on the subject responsible for compensation for damage to the marine ecological environment. Plan for the Reform of the System of Damages for Harm to Ecology and Environment, issued by the General Office of the CPC Central Committee and the General Office of the State Council in 2017, defines "parties liable for compensation" as "whoever, be it organizations or individuals, that violates laws and regulations and causes damage to the ecological environment". Thus, the above-mentioned institutional norms on compensation for damage to the marine ecological environment are relatively general rather than specific in terms of the subject responsible for compensation.

In judicial practice, it is difficult to determine the subject of liability for marine ecological environment damage based on the above provisions alone. This is particularly evident in the disputes over the liability for compensation for oil pollution damage from ships.[2] That's because in this field there are inconsistencies between the norms formulated by China and the international conventions to which it has acceded. For example, in the case of "Disputes over liability for ship pollution damages between Shanghai Salvage Bureau of the Ministry of Transport, PROVENCE SHIPOWNER 2008-1 LTD, CMACGMSA, and Rockwells Shipping Limited,"[3] the vessel "CMA CGM FLORIDA" and the vessel "Zhoushan" collided due to mutual negligence, causing serious damage to the fuel tank of the "CMA CGM FLORIDA", which leaked about 613 tons of fuel into the sea. One of the disputed points in this case is the way how the two vessels should bear the relevant expenses incurred by the cleaning unit that is responsible for cleaning and preventing such pollution. The courts of first and second instance both held that as the fuel oil pollution damage occurred in China's waters and one of the parties involved was an overseas company, this case should apply to the 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage (hereinafter referred to as the "2001 Convention") to which China has acceded. That is to say, the ship that spills oil is the main party responsible for damage incurred, and the costs involved in the case shall be borne by the ship "CMA CGM FLORIDA" alone. After retrial, however, the Supreme Court held that provisions of the 2001 Convention are general, therefore the provisions of

[1] (2018) Min 72 Min Chu No. 176.

[2] LIAO Bingbing, *On the Compensation for Marine Ecological Environment Damage from the Perspective of Ecological Civilization*, Journal of Political Science and Law, 2020, No 6, p. 63.

[3] (2015) Yong Hai Fa Shang Chu Zi No. 442, (2017) Zhe Min Zhong No. 581, (2018) Supreme Fa Min Zai No. 368.

China's Maritime Law and other laws and judicial interpretations should be applied to particulars not stipulated in the 2001 Convention. How to share the expenses involved in this case should be determined mainly by the 2001 Convention with the provisions of China's Maritime Law on collision of ships at fault serving as a supplementary reference. In other words, in this case, on the premise that the CMA CGM FLORIDA is fully liable for compensation, the vessel Zhoushan partly assumes liability according to the proportion of collision liability. Regarding the above-mentioned similar issues in practice, not only different courts have diverse views, there are also considerable disputes among the theoretical circles.[1]

2. Improper Distribution of Rights and Responsibilities

When a court hears a case involving the marine ecological environment, for some issues that are not stipulated or clearly stipulated in the laws and regulations, it is necessary to balance the rights and responsibilities involved between the parties by virtue of the exercise of discretion. On certain issues, the exercise of discretion in judicial adjudication is not perfectly applied, and there is much room for further improvement.

A. Limited Scope of Compensation for Damage

Regarding the liability for compensation for damage to the marine ecological environment, most judicial judgments focus on adjudicating the responsible person to bear the cost of cleaning up and preventing pollution or compensating for the direct economic loss of the injured party, while they seldom pay attention to the costs needed for restoration. Even if they do, it is far from being able to make up for the actual losses to the marine ecological environment. Take the sample case concerning the dispute over liability for pollution damage in waters connected to sea (Wuhan Railway Transport Branch of the People's Procuratorate of Hubei vs. YANG Yuqing and ZHOU Yong) [2] as an example. The court ruled that the two defendants should bear the cost of 717,506 yuan resulted from damage caused by the illegal discharge of heavy metal pollutants into the waters. However, it did not mention who should take up the responsibility to restore the ecological environment of the polluted waters due to the difficulty and high cost of restoration. The reason for the above situation is that if the claimant means to hold the responsible person accountable for restoration, he or she will have to provide sufficient evidence including the original state of the ecological environment, the degree of damage caused by the accident, and the feasibility of restoring to the original state.[3] However, due to the obstacles to the existing technical level and the high litigation costs, it is difficult to deal with the above-mentioned issues in the trial of relevant

[1] HAN Lixin, *Research on the Legal System of Ship Pollution Damage Compensation*, Law Press·China, 2007, p. 83-86. HAN Linxin & CHU Beiping, *Legal Analysis on the Joint and Several Liability for Oil Pollution Damage Caused by Ships Collision*, Journal of Liaoning University (Philosophy and Social Sciences), 2008, No. 4, p. 140.

[2] (2017) E 72 Min Chu No. 1056.

[3] GONG Gu, *An Empirical Analysis of China's Environmental Civil Public Interest Litigation in 2015*, Law Science, 2016, No. 9, p. 32.

cases at present.

B. The Disclosure of Administrative Information Is Not Enough

Of all the administrative cases in the sample, the main disputed points are whether the administrative organ has specific responsibilities and whether the relevant administrative behaviour complies with legal procedures. A further analysis of the sample cases finds that most of these controversies are caused by the fact that the person subjected to an administrative action has little knowledge about the responsibilities of administrative organs, the administrative actions and their procedures, or has no channels to obtain relevant information. For example, in the sample case involving YE Qiankun, Zhejiang Maritime Safety Administration of the People's Republic of China and the Ningbo Maritime Safety Administration of the People's Republic of China, what is at issue between the parties is whether the Ningbo Maritime Safety Administration has the right to manage port and wharf construction.[1] Similarly, in the serial cases in the sample involving Nantong Xiehe Food Co., Ltd., etc., Dafeng District People's Government of Yancheng City, Dafeng District Yancheng Municipal Bureau of Natural Resources and Planning,[2] the focus of disputes between the parties is whether the Dafeng District Yancheng Municipal Bureau of Natural Resources and Planning has the statutory responsibility to manage the sea area involved. Actually, the above-mentioned disputes could have been avoided by disclosing relevant administrative information about maritime administrative authorities in an all-round way. In reality, however, it is the judicial authority, rather than the administrative authority, that actually assumed the responsibility of interpretation.

III. Lack of Innovation in Judicial Protection of Marine Ecological Environment

As its marine industry and economy is being given more and more importance, China should adopt a creative mindset and figure out how to creatively manage and protect the marine ecological environment in judicial practice.

1. The Limit of Liability for Maritime Claims Is too Low

In China, the limit of liability for maritime claims stipulated in Maritime Law refers to the provisions of the 1976 Convention on Limitation of Liability for Maritime Claims. But today, the 1976 Convention has been amended by its 1996 Protocol and the 2012 Amendment, while the limit of liability set out in the Maritime Law has remained the same so far. The injured party, therefore, normally can only get a small amount of compensation. For the same ship, the limit of liability for claims calculated by applying the afore-mentioned 2012 Amendment has reached 3 to 4 times the limit of the Maritime Law. The gap between the two conventions has been widened continuously. However, due to the limited legislative resources in China, it is difficult to amend the Maritime Law

[1] (2020) Zhe 72 Xing Chu No. 2, (2020) Zhe Xing Zhong No. 1581.
[2] (2019) Hu 72 Xing Chu No. 21-32.

to increase the limits of liability for maritime claims in the short term, which affects the handling of claims against the responsible party. For example, on 13 December 2020, an Antigua and Barbuda-registered container ship "Changjin Ocean" and a Chinese container ship "Xinqisheng 69" collided near the light buoy D15 in the deep water channel of the Yangtze River Estuary. The collision caused the ship "Xinqisheng 69" to overturn and eventually sink to the sea bottom. A total of 16 crew members on the ship "Xinqisheng 69" fell into the water, of which 8 were rescued, 4 were killed, and 4 were missing. That is a major water traffic safety accident. The accident also resulted in a total of more than 200 million yuan in compensation for the loss of two ships, the loss of cargo on board and the damage to the marine ecological environment. However, according to the currently effective judgment document related to this case, the liability limit of the ship "Changjin Ocean", which bears the main responsibility for the accident, calculated according to the provisions of the Maritime Law is 3,050,923 SDRs, which is way less than the huge losses incurred.[1]

2. The "Three-in-one" Trial Mode Is Difficult to Implement

In 2016, the Supreme Court issued the Provisions on the Scope of Cases to Be Accepted by Maritime Courts. Since then, maritime administrative cases have been exclusively under the jurisdiction of the maritime courts, and there is no longer any dispute between the theoretical and practical circles over the adjudication of maritime administrative cases by the maritime courts. However, as far as the criminal field is concerned, currently only the Ningbo Maritime Court has tried maritime criminal cases since 2017, taking the first step in the "three-in-one" reform. So far, the Ningbo Maritime Court has accepted a total of 29 maritime criminal cases of various types, involving maritime traffic accidents, maritime smuggling and other fields. These cases have been handled very well.[2] Among them, 5 cases involve the crime of illegally purchasing, transporting or selling wildlife under special State protection as well as the products thereof, which is closely related to what has been discussed in this paper concerning damage to the marine ecological environment. The unique origin of the maritime law and its special norms indicate the necessity of special jurisdiction over maritime practices. The successful judicial practice of other specialized trials and the advantages of maritime courts themselves both contribute to making the implementation of the "three-in-one" reform possible and feasible. At the same time, that also explains why an international maritime justice center should be established.[3]Nonetheless, the implementation of the "three-in-one" reform is still faced with certain obstacles. As far as criminal cases are concerned, the legal basis to which the maritime court could refer is currently weak and inadequate. Judging from the relevant cases handled by the Ningbo Maritime Court, what it refers

[1] (2021) Hu 72 Minte No. 5.
[2] See WU Shengshun's speech at the Marine Ecological Environmental Protection Legal Forum on 8 June 2021.
[3] ZHANG Wenguang, *Construction of International Maritime Judicial Center under the Background of the Belt and Road Initiative*, Maritime China, 2017, No. 11, p. 68.

to while handling criminal cases concerning marine environment is just the Supreme Court's reply opinion in 2017 and the cases once handled by the Zhejiang High Court, lacking substantial legislative support.

Translator: LI Jiaxin

拜登政府的南海政策展望与南海地区的多边主义合作

于子明 吴蔚*

摘要：拜登政府上台后，面对世界的深刻变革和加速重组，美国在南海地区继续加强与中国的对抗，以多边之名，行单边之实，试图利用其“伪多边主义”在南海地区实现修复盟友关系、维持有利于己方力量对比和推行美国主张的地区规则的战略目标，并为此推行包括法律战、价值战、规则战、军备战和外交战在内的一系列政策手段。对此，中国应秉持共商共建共享的国际治理观，推动和践行真正的多边主义，维护南海地区的繁荣稳定。

关键词：拜登政府；南海政策；南海地区；多边主义；南海仲裁案

一、美国拜登政府在南海地区的目标

当今世界，新冠肺炎全球大流行所造成的经济全球化倒退、增长动能不足、国际贸易萎缩和全球供应链危机等世界性问题日益严重，世界百年未有之大变局和新冠疫情交织影响、叠加震荡，全球已然进入政治、经济、社会、文化、生态格局发生深刻调整变化的时代。处于该时代下，拜登（Joseph Robinette Biden）政府以维护所谓“基于规则的国际秩序”之名，行践踏与抛弃多边主义和国际合作之实。对此，中国则坚持高举真正的多边主义的旗帜，主张“世界只有一个体系，就是以联合国为核心的国际体系。只有一个秩序，就是以国际法为基础的国际秩序。只有一套规则，就是以联合国宪章宗旨和原则为基础的国际关系基本准则。”[1]

拜登政府上台后，为掩盖其国家治理失败的政治现实，转嫁经济发展乏力的国内压力，美国在可预见的未来内将在全球范围继续加剧与中国的博弈对抗。南海地区作为拜登政府所推动的“价值观外交”和“基于规则的国际秩序”两项政治议程的交汇点，其上台后自然将

* 本文系教育部青年基金项目 “应用浮式平台保障南海维权执法的国际法问题研究”（项目编号：20YJC820049）、南方海洋科学与工程广东省实验室（珠海）资助项目“无人船舶和海洋无人设备法律相关问题研究”（项目编号：SML2020SP005）、国家社科基金中华学术外译项目一般项目 “中国特色大国外交与国际法”（项目编号：20WFXB005）的研究成果。

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[1] 习近平：《坚定信心 共克时艰 共建更加美好的世界——在第七十六届联合国大会一般性辩论上的讲话》，载中国政府网 2021 年 9 月 21 日，http://www.gov.cn/gongbao/content/2021/content_5641338.htm。

南海作为抗衡和遏制中国的重要战场，致力于在南海实现若干战略目标。在力图实现其战略意图的过程中，美国虽打着多边主义的幌子，实质上却在坚持“小圈子的多边主义”，“本国优先的多边主义”和“有选择的多边主义”[1]。本文基于拜登政府上台以来美国官方机构以及部分主要官员所发表的公开政策文件与主张[2]，对该政府本任期内对南海地区以伪多边主义为指导的政策目标进行展望。

1.坚持“小圈子多边主义”，修复和巩固美国与南海地区盟友的关系

面对自由主义世界治理经验在疫情面前的失灵和上届政府对美国传统伙伴体系的破坏，[3]拜登政府上台后所面临的首要任务，就是要重启多边主义主张。然而其主张的多边主义是一种“小圈子多边主义”，在这种多边主义下美国选择合作的仍是其传统盟友和地区伙伴。拜登在上任后发表的首场外交演讲中宣称美国将以“更好的国家建设、盟友和伙伴关系、重新发挥在国际组织中的作用和恢复已经失去的信誉和道德权威”与中国进行竞争，[4]强调多边主义和伙伴关系在遏制中国过程中的重要作用，同时在《战略方针》中，美国政府明确提出其战略目标包括“恢复信誉，重获全球领导地位”[5]。美国国务卿安东尼·布林肯（Antony Blinken）也直言“特朗普（Trump）总统奉行的政策将我们的力量削弱了，他没有加强我们的核心同盟，特别是在亚洲的同盟”[6]，布林肯在与菲律宾、韩国、日本这三个与美国签署共同防御或安全保障条约的南海周边盟国外长进行沟通时，均明确强调了美国与该国的盟友关系对美国所支持的“自由和开放的印度-太平洋区域”（Free and open Indo-Pacific region）的重要作用[7]。而白宫国家安全委员会印太协调员坎贝尔（Kurt Campbell）和中国事务主任杜如松（Rush

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[1] 吴文成：《全球治理需要真正的多边主义》，载求是网 2021 年 6 月 7 日，http://www.qstheory.cn/qshyjx/2021-06/07/c_1127537756.htm。

[2] 主要包括：（1）《临时国家安全战略方针》（Interim National Security Strategic Guidance）（2021 年 3 月）（以下简称“《战略方针》”）；（2）《美国政府‘南海仲裁案’五周年声明》（Fifth Anniversary of the Arbitral Tribunal Ruling on the South China Sea）（2021 年 7 月 11 日）（以下简称“《布林肯声明》”）；（3）《为了美国人民的外交政策》（A Foreign Policy for the American People）（2021 年 3 月 3 日）；（4）美国国会研究服务局发布的《美国和中国美中在南海和东海的战略竞争：背景和国会面临的问题》（U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress）（更新于 2022 年 1 月 26 日）（以下简称“《战略竞争》”）；（5）《150 号海洋界限报告》（Limits in the Seas No.150 People’s Republic of China: Maritime Claims in the South China Sea）（6）美国国务院自拜登政府成立以来的公开记录（Press Releases）；（7）美国国防部自拜登政府成立以来的公开记录（Press Releases）；（8）拜登政府主要外交官员言论。

[3] 李晓燕：《多边主义再思考与世界秩序重构》，载《东北亚论坛》2021 年第 6 期，第 89 页。

[4] Biden, *Remarks by President Biden on America’s Place in the World*, White House (February. 4, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/02/04/remarks-by-president-biden-on-americas-place-in-the-world/.

[5] White House, *Interim National Security Strategic Guidance*, March 2021.

[6] Walter Russell Mead, *Transcript: Dialogues on American Foreign Policy and World Affairs: A Conversation with Former Deputy Secretary of State Antony Blinken*, Hudson Institute, (July. 9, 2020), https://www.hudson.org/research/16210-transcript-dialogues-on-american-foreign-policy-and-world-affairs-a-conversation-with-former-deputy-secretary-of-state-antony-blinken.

[7] Office of the Spokesperson, Secretary Blinken’s Call with Japanese Foreign Minister Motegi, (February. 10, 2021), https://www.state.gov/secretary-blinkens-call-with-japanese-foreign-minister-motegi-2/; Office of the Spokesperson, Secretary Blinken’s Call with ROK Foreign Minister Kang, (January. 26, 2021), https://www.state.gov/secretary-blinkens-call-with-rok-foreign-minister-kang/; Office of the Spokesperson, Secretary Blinken’s Call with Philippine Secretary of Foreign Affairs Locsin, (January. 27, 2021), https://www.state.gov/secretary-blinkens-call-with-philippine-secretary-of-foreign-affairs-locsin/.

Doshi）则提出：“美国需要帮助印太地区的国家发展其非对称能力来威慑中国，……这将减少美国对东亚脆弱基础设施的依赖。美国应该鼓励地区国家之间建立新的军事和情报伙伴关系，同时继续深化那些美国发挥主要作用的轮毂和辐条式的地区盟友体系。”[1]

在南海地区，美国需要继续以其条约盟友以及其在地区盟国所驻扎的军事力量作为施行其南海政策与主张的主要抓手和支撑点，而实施和贯彻美国意志的基本前提就是美国要与相关国家保持稳定的盟国关系。尤其是在经历上届特朗普政府对伙伴关系的肆意破坏后，美国将在南海地区重启其主张的所谓多边主义，力图修复和巩固与地区盟友的国家关系，作为其重新恢复所谓“全球领导地位”战略目标的重要组成部分。但也应看到，美国在南海地区展开多边主义合作的重心仍是其“轮毂和辐条”体系中的相关国家，仍没有脱离美国的“小圈子”。

2.坚持“本国优先的多边主义”，维持南海地区有利于美国及其盟国和伙伴的力量对比

拜登政府目前已经将中国视为“21 世纪最大的地缘政治考验”[2]。在中美对抗的大背景下，美国毫不避讳地提出要建设“一个共同的阵线，产生一个统一的愿景，并汇集力量来促进高标准，建立有效的国际规则，迫使像中国这样的国家承担责任”[3]，拜登政府将南海地区作为其抗衡和遏制中国的重要战场，提出要建设美国所主张的“基于规则的南中国海”[4]。美国也对中国在南海地区日益增强的军事实力感到担忧，认定“中国政府计划到 2035 年完成军队现代化建设，到 2049 年全面建成世界一流军队。届时，中国海军虽未必超越美国海军，但也有望与其平起平坐，并且有望抵消美国在其他诸多领域的优势。”[5]在这一背景下，要在南海地区建构美国主导的地区秩序，美国所依赖的就是其寻求建设的“共同阵线”和“统一愿景”。

在美国继续加强自身在南海的军事存在和准军事存在的同时，本届拜登政府正在以“多边”或“小多边”并进的方式团结一切可能的盟友力量，维持美国在南海地区相对中国的力量对比，[6]维持对美国及其盟友和伙伴有利的地区力量平衡（maintaining a regional balance of power favorable to the United States and its allies and partners）也已经被《战略竞争》列为美国在南海与中国战略对抗的目标之一，在此目标下开展的多边主义合作，其实质仍是保证美国

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[1] Kurt M. Campbell & Rush Doshi, *How America Can Shore Up Asian Order: A Strategy for Restoring Balance and Legitimacy*, https://www.foreignaffairs.com/articles/united-states/2021-01-12/howamerica-can-shore-asian-order.

[2] Antony Blinken, *A Foreign Policy for the American People*, March 3, 2021.

[3] White House, *Interim National Security Strategic Guidance*, March 2021.

[4] Office of the Spokesperson, Secretary Blinken's Call with Vietnamese Deputy Prime Minister and Foreign Minister Pham Binh Minh, (February. 4, 2021), https://www.state.gov/secretary-blinkens-call-with-vietnamese-deputy-prime-minister-and-foreign-minister-pham-binh-minh/.

[5] United States Department of Defense, Secretary of Defense Remarks at CSBA on the NDS and Future Defense Modernization Priorities, (October. 6, 2020), https://www.defense.gov/News/Transcripts/Transcript/Article/2374866/secretary-of-defense-remarks-at-csba-on-the-nds-and-future-defense-modernizatio/.

[6] Kurt M. Campbell & Rush Doshi, *How America Can Shore Up Asian Order: A Strategy for Restoring Balance and Legitimacy*, https://www.foreignaffairs.com/articles/united-states/2021-01-12/how-america-can-shore-asian-order.

利益和美国优先。一方面，美国将继续寻求传统西方盟友的力量，试图鼓动七国集团（以下简称“G7”）框架下的西方主要国家介入南海问题，例如美国国务院的一名高级官员就表示，为应对“中国在南海及其周边地区的威胁和侵略行为”，美国要建立一个“包括且不仅包括 G7 国家的联盟”[1]。另一方面将尽可能拉拢新型伙伴[2]，在南海地区建立美国主导的美国与亚太盟友之间的小多边合作机制（Minilateral Mechanism）[3]，并开展具体行动。

事实也是如此，拜登政府上台以来，美国在“双边”和“小双边”的合作框架下，不断挑动地区国家和西方盟国在南海进行安全对话和军事演习，同时将美日印澳四边合作机制（以下简称“Quad”）和 G7 机制全部纳入对抗中国的战略体系。例如美日印澳共同参与的 2021 马拉巴尔（Malabar）军事演习；再如 2021 年 7 月，英国“伊丽莎白女王”号航母进入南海，并在亚太地区永久部署军舰；2021 年 5 月，国务卿布林肯在与澳大利亚外交部长共同举行的新闻发布会上也表示要在 Quad 机制下共同保证东海和南海地区的国际法被遵守[4]。2021 年 9 月，美英澳达成名为“奥库斯”（AUKUS）的新三边安全合作协议，帮助澳大利亚建立核潜艇巡航能力，未来还将开展更加深入的合作。拜登政府正在通过一系列资源整合，在事实上加强对盟友和伙伴的军事联系，提高盟国和伙伴国家挑战中国的能力，联手在亚洲建立“更有弹性和生存力的军事存在”[5]，力图实现并维持南海地区有利于美国的地缘政治格局和地区力量对比。

3.坚持“有选择的多边主义”，推行并迫使中国接受西方价值观语境下的海洋规则

表面上看，拜登政府上台后，美国正在重回多边主义的轨道，但听其言而观其行，美国还是在旧有同盟的基础上坚持以意识形态划线，重新回归“价值观外交”和“民主同盟”的外交路线，提出“绕过中国与其他国家一起制定既符合美国的利益，也体现美国的价值新的全球规则”[6]。可见，美国坚持的并不是真正的多边主义，而是虚伪的多边主义，对于真正的国际规则，则采取“合则用、不合则弃”的态度，其主张的多边合作必须坚持西式议题，必须在西方国家主导和选择的国际规则上开展。而拜登政府在南海地区也意图推行和建立带有西方价值观和意识形态的规则，南海地区作为美国“基于规则的国际秩序”和“价值观外交”

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[1] Office of the Spokesperson, *Briefing with Senior State Department Officials to Traveling Press*, (May. 4, 2021), https://www.state.gov/briefing-with-senior-state-department-officials-to-traveling-press/.

[2] Ronald O’Rourke, *U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress*, Congressional Research Service, R42784, Updated January 26, 2022, p. 30.

[3] 关于“小多边主义”的概念辨析，参见 John Ruggie, *Multilateralism: the Anatomy of an Institution, International Organization*, Vol. 46(3), 1992, p. 561-598；秦亚青：《多边主义研究：理论与方法》，载《世界经济与政治》2001 第 10 期，第 9-14 页；陈柏岑：《美国亚太战略中的小多边问题研究》，载《边界与海洋研究》2021 年第 5 期，第 20-43 页。

[4] United States Department of State, Secretary Antony J. Blinken and Australian Foreign Minister and Minister for Women Marise Payne at a Joint Press Availability, (May. 13, 2021), https://www.state.gov/secretary-antony-j-blinken-and-australian-foreign-minister-and-minister-for-women-marise-payne-at-a-joint-press-availability/.

[5] 张茜：《拜登政府价值观同盟问题评析》，载《国际研究参考》2021 年第 10 期，第 5 页。

[6] White House, *Interim National Security Strategic Guidance*, March 2021.

两项议程的交汇点，在南海对抗中国的行为更是被美国赋予了越来越多的意识形态意义。

美国早在 2017 年就提出“自由开放的印太”，作为美国对包括南海地区在内的印太地区的基本战略主张。美国称其内涵包括“尊重所有国家的主权和独立；和平解决争端；基于开放投资、透明协议和互联互通的自由、公平、互惠贸易；遵守包括航行和飞越自由在内的国际规则与规范。”[1]从美国前国务卿蓬佩奥（Michael Richard Pompeo）在“南海仲裁案”裁决四周年之际抛出的《美国对南海海洋权利主张的立场》（U.S. Position on Maritime Claims in the South China Sea, 以下简称“《蓬佩奥声明》”）中可以看出[2]，这一主张本身就带有虚伪的多边主义掩盖下美国所主导的意识形态色彩。拜登政府上台以来沿用这一概念，在国务卿布林肯与印太地区国家的沟通中反复提及美国所坚持的“自由开放的印太”，从意识形态上继续与中国进行对抗的意图十分明显。

同时，美国主张所谓“海洋自由原则”[3]，套用其“基于规则的国际秩序”，主张建立“基于规则的南中国海”[4]，维持“基于规则的海洋秩序”[5], 并将中国在南海的权利主张定义为“独断性的海洋主张”（assert maritime claims），作为违反美国价值观的行为[6]。美国将中国在南海的行为包装为“强权即公理”（might makes right）的邪恶行径[7]，作为对西方价值观的破坏和挑战，意图将南海问题意识形态化，在虚伪的多边主义掩盖下针对中国进行政治构陷，从而拉拢更多来自传统盟友和国内民众的支持。

4.伪多边主义指导下美国在南海地区的战略目标

综上所述，拜登政府面临的是一个深刻变革、急剧变化、加速重组的世界和一个经济增长失败、疫情防治失灵、民粹主义失控的美国。在此背景下，美国迫切地意图回归多边主义，展示出以基于“伙伴关系”为突出特征的多边主义方案，旨在全面恢复美国在全球秩序重构中的主导地位[8]。美国以多边主义为旗号，实际上却秉持单边主义、保护主义、孤立主义、霸权主义，在南海地区推行其伪多边主义政策，具体表现在：坚持搞美国主导下的“小多边”，

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[1] United States Department of Defense, *Indo-Pacific Strategy Report: Preparedness, Partnerships, and Promoting a Networked Region*, June 1, 2019, p. 4.

[2] “美国历来倡导印度—太平洋的自由和开放。今天，我们正在加强美国对印太区域内一个重要的、存在争议的地区——南海的政策。……在南海问题上，我们坚持维持和平与稳定，维护以符合国际法的方式坚持海洋自由，维护商贸畅通，反对任何以胁迫或武力解决争端的企图。我们与长期以来支持基于规则的国际秩序的众多盟友和伙伴有着深刻和持久的利益。”, United States Department of State, *Michael Pompeo, U.S. Position on Maritime Claims in the South China Sea*, July 13, 2020.

[3] Ronald O’Rourke, *U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress*, Congressional Research Service, R42784, Updated January 26, 2022, p. 4.

[4] Office of the Spokesperson, Secretary Blinken’s Call with Vietnamese Deputy Prime Minister and Foreign Minister Pham Binh Minh, (February. 4, 2021), https://www.state.gov/secretary-blinkens-call-with-vietnamese-deputy-prime-minister-and-foreign-minister-pham-binh-minh/.

[5] United States Department of State, *Fifth Anniversary of the Arbitral Tribunal Ruling on the South China Sea*, July 11, 2021.

[6] Office of the Spokesperson, Secretary Antony J. Blinken and Republic of Korea Foreign Minister Chung Eui-yong Before Their Meeting, (March. 17, 2021), https://www.state.gov/secretary-antony-j-blinken-and-republic-of-korea-foreign-minister-chung-eui-yong-before-their-meeting/.

[7] Michael Pompeo, *U.S. Position on Maritime Claims in the South China Sea*, Department of State, July 13, 2020.

[8] 李晓燕：《多边主义再思考与世界秩序重构》，载《东北亚论坛》2021 第 6 期，第 88 页。

在南海优先恢复和巩固美国与地区盟友的关系；坚持美国利益和美国优先，力图维持有利于美国的地区力量对比；坚持意识形态划线，迫使中国接受西方价值观语境下的海洋规则。

二、美国拜登政府在南海地区实现其目标的具体策略

拜登政府上台后，在伪多边主义的指导下，美国在南海地区将会采取法律战、价值战、规则战、军备战、外交战相结合的综合方式和策略，以实现上述目标。

1.法律战：迫使中国接受“南海仲裁案”及相关法律结论，遏制中国正常的海洋权利主张

目前的拜登政府仍然宣称对中国在南海的岛礁主权和海洋权益主张不持立场[1]，但事实上，美国以“南海仲裁案”和后续相关法律结论为依据，将中国在南海合法的权利主张定义为“扩张性的海洋主张”（expansive South China Sea maritime claims）[2]，意在使用“排除法”收窄其“不持立场”的范围，以在法律上削弱和否认中国在南海地区提出的合法权利主张。在《蓬佩奥声明》中，美国将在南海问题上的官方立场全面对标“南海仲裁案”裁决的结论，明确表示美国完全支持并维护该非法裁决。其根据所谓的“裁决”，调整并更新了美国关于南海海洋主张的立场[3]，在这之后，将“南海仲裁案”的结论固定和强化，是自上一届特朗普政府开始，美国政府延续至今的政策。美国政府的逻辑是美国虽然对南海地物的主权归属不持立场，但是“南海仲裁案”是根据 1982 年《联合国海洋法公约》（以下简称《海洋法公约》）所作出的，则中国所有超出“南海仲裁案”结论的权利主张都是违反《海洋法公约》的，进而是违反国际海洋法的，全然不顾“南海仲裁案”本身的非法性和《海洋法公约》本身的内容特点，进而达到实质上否定中国在南海的领土主权和海洋权利的目的。

本届拜登政府国务卿或白宫发言人多次表示美国的立场是中国的权利不应超过《海洋法公约》的范围[4]，并通过不断敦促中国接受裁决和将“南海仲裁案”与《海洋法公约》直接等同的方式，妄图迫使中国和其他地区国家接受仲裁案结论作为今后南海地区的“基本法”。近来，美国国务院又发布《150 号海洋界限》报告[5]，在报告中不仅继续援引“南海仲裁案”的结论，还详细阐释了《海洋法公约》的相关规定和美国主张的国际习惯法，试图将错误的

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[1] United States Department of State, *Bureau of Oceans and International Environmental and Scientific Affairs*, Limits in the Seas No.150; People’s Republic of China: *Maritime Claims in the South China Sea*, p. 11; Ronald O’Rourke, *U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress*, Congressional Research Service, R42784, Updated January 26, 2022, p. 18.

[2] United States Department of State, *Fifth Anniversary of the Arbitral Tribunal Ruling on the South China Sea*, July 11, 2021.

[3] 参见余敏友：《美国南海政策的新发展及对我国的挑战——评蓬佩奥南海声明》，载《边界与海洋研究》2020 年第 6 期，第 18 页；傅梦孜、陈子楠：《拜登政府南海政策的调整方向与限度》，载《边界与海洋研究》2021 年第 3 期，第 44 页。

[4] Office of the Spokesperson, Secretary Blinken’s Call with Philippine Secretary of Foreign Affairs Locsin, (January. 27, 2021), https://www.state.gov/secretary-blinkens-call-with-philippine-secretary-of-foreign-affairs-locsin/; United States Department of States, *Fifth Anniversary of the Arbitral Tribunal Ruling on the South China Sea*, July 11, 2021; Ned Price, *Department Press Briefing-February 19, 2021*, (February. 19, 2021), https://www.state.gov/briefings/department-press-briefing-february-19-2021/.

[5] United States Department of State & Bureau of Oceans and International Environmental and Scientific Affairs, *Limits in the Seas No.150, People’s Republic of China: Maritime Claims in the South China Sea*.

结论用法律外衣加以包装，使其更具迷惑性和欺骗性，显示出拜登政府继续将中国合法海洋主张“非法化”，将中美在南海地区的竞争包装为国际法维护者和国际法违反者之间的斗争的法律战策略。

2.价值战：将南海问题纳入美国“价值观外交”框架下，意识形态化南海问题

值得注意的是，拜登政府在继承上任政府对中国南海权利主张基本立场的同时，还在“价值观外交”的框架下，将中国的主张渲染包装为“专制政体”的“独断行为”。布林肯在 2021 年 3 月 17 日与韩国外长郑义溶（Chung Eui-yong）的会见前将中国在南海的权利主张称为对“全球民主价值的危险侵蚀”（dangerous erosion of democracy around the world），并与新疆、西藏、香港问题并列[1]，将各国在南海地区的权利争议从外交问题和法律问题扭曲为意识形态问题。在 2021 年 3 月 17 日的白宫记者会上，发言人将南海问题列为美国及国际社会希望中国保持透明性和可问责性（transparency and accountability）的问题之一，暗示中国在南海问题上“不够透明”，“没有承担国际责任”，隐含逻辑是将中国在南海的行为和中国对南海地区的权利主张与美国长期指责中国的“专制”、“独裁”相联系[2]。美国副国务卿舍曼（Sherman）访华期间也将“中国政府在东海和南海的行动”列为美国关切的“违反美国及其盟友价值观和利益的行为”[3]。

可见，本届美国政府试图将南海问题与其长期妖魔化中国政府的“专制”和“独裁”形象相联系，其本质仍是美国受“小圈子多边主义”的影响，将中国的权利主张与相关行为渲染为专制政体对自由世界和民主价值的挑衅和进攻，将国际社会按照意识形态强分彼此，试图通过此种方式向中国施加国际社会的舆论压力，为在南海地区对抗中国增加筹码。同时，美国作为地区外国家，将反对中国的南海主张与捍卫民主自由和全球公共利益相联系，也为美国介入南海问题提供了道义层面的正当性、情理层面的合理性和法律层面的合法性[4]。

3.规则战：强迫中国接受美国所定义的“海洋自由原则”和美国主导的“基于规则的海洋秩序”

拜登政府认为，中国利用特朗普政府施行单边主义政策的影响，在南海地区“更加强势和进取”，寻求重塑印太地区秩序。同时，拜登政府主张美国应当努力恢复印太地区原有规则，坚持“基于规则的秩序”，改变特朗普时期的孤立主义倾向，重接印太地区多边机制并

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[1] Office of the Spokesperson, Secretary Antony J. Blinken and Republic of Korea Foreign Minister Chung Eui-yong Before Their Meeting, (March. 17, 2021), https://www.state.gov/secretary-antony-j-blinken-and-republic-of-korea-foreign-minister-chung-eui-yong-before-their-meeting/.

[2] Jalina Porter, *Department Press Briefing-March 17, 2021*, (March. 17, 2021), https://www.state.gov/briefings/department-press-briefing-march-17-2021/.

[3] Office of the Spokesperson, Deputy Secretary Sherman’s Visit to the People’s Republic of China, (July. 26, 2021), https://www.state.gov/deputy-secretary-shermans-visit-to-the-peoples-republic-of-china/.

[4] 余敏友：《美国南海政策的新发展及对我国的挑战》，载《边界与海洋研究》2020 年第 6 期，第 8 页。

掌握主动[1]。在《布林肯声明》中，美国提出“基于规则的海洋秩序”，意图将南海的地区规则与“基于规则的秩序”相联系并主导南海地区的秩序构建。在上述声明发布的第二天，美国白宫发言人对“基于规则的海洋秩序”作出解释：“基于规则的秩序替代的是一个对我们所有人来说，一个更加暴力和不稳定的，强权即公理、赢者通吃的世界”，并呼吁中国遵守国际法下的义务并停止侵略行为[2]。在 2021 年 9 月 1 日的白宫记者会上，发言人称应对中国在南海地区行动的核心就是“基于规则的国际秩序”，并称这是美国“在印度——太平洋地区讨论的主要议题”，这也是“与中华人民共和国讨论的主要内容”。

除“南海仲裁案”裁决的固化，本届政府延续自上届政府的另一个政策就是对所谓“海洋自由原则”的主张，并将这一原则与美国所主张的“基于规则的海洋秩序”相联系[3]。根据美国的解释，所谓“海洋自由原则”的内涵是“国际法保障所有国家享有海洋和空域的权利、自由和使用，美国反对侵犯属于所有国家的海洋权利、自由和合法使用的主张。”[4]但显然美国所主张的“海洋自由原则”不能等同于《海洋法公约》所规定的航行自由。对于《海洋法公约》没有明确规定所产生的条约解释的分歧，本应由各国协商明确，但美国直接将中国的解释界定为“狭隘的定义”（Narrow Definition）[5]，动辄以《海洋法公约》的权威解释者自居，并不断主张美国所认定的“海洋自由原则”，妄图迫使中国接受美国军舰和军机在南海的非法活动。

美国将南海的地区规则纳入其所主张的“基于规则的国际秩序”，该命题具有浓厚的“冷战”遗毒和意识形态色彩，美国所主张的“规则”是美西方主导的、有选择性的规则，而非公认的国际法规则和国际关系的基本准则。美国的行为实质上仍是通过渲染中国威胁，拉拢地区国家的支持以获得构建南海地区秩序的主导权力，借此强化美国在该地区的政治、经济、军事和外交存在，构建美国控制和主导的亚太海洋秩序。

4.军备战：持续制造地区摩擦，推动“航行自由计划”和舰机过境南海

拜登政府将中国主权范围内的正常行动，如岛礁建设，海洋执法和军事力量的部署等界定为“破坏现状、危害和平与安全的挑衅性或单边行动”[6]和“威胁这一关键地区的航行自由”[7]的行动，试图在实践上阻止中国提升对南海地区控制力的行为，还对《海警法》中将“可能

[1] 傅梦孜、陈子楠：《拜登政府南海政策的调整方向与限度》，载《边界与海洋研究》2021 年第 3 期，第 44 页。
[2] Ned Price, *Department Press Briefing-July 12, 2021*, (July. 12, 2021.), https://www.state.gov/briefings/department-press-briefing-july-12-2021/.
[3] United States Department of States, *Fifth Anniversary of the Arbitral Tribunal Ruling on the South China Sea*, July 11, 2021.
[4] Ronald O’Rourke, *U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress*, Congressional Research Service, R42784, Updated January 26, 2022, p. 16.
[5] Ronald O’Rourke, *U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress*, Congressional Research Service, R42784, Updated January 26, 2022, p. 93.
[6] Ronald O’Rourke, *U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress,* Congressional Research Service, R42784, Updated January 26, 2022, p. 16.
[7] United States Department of States, *Fifth Anniversary of the Arbitral Tribunal Ruling on the South China Sea*, July 11, 2021.

的武力使用（包括中国海警的武装力量）与中国在东海和南海持续存在的领土和海洋争端中的主张相联系”表示关切，否认中国主张海洋权益行为的合法性。但事实上，包括《海警法》的颁布实施在内的中国国家行为，都是在行使基于合法主张的正当权利，《海警法》所规定的海警机构职权的双重属性和针对外国船舶的强制行动，均符合普遍国际实践或《海洋法公约》的规定[1]。在《战略竞争》中，美国指出中国为实现在南海地区的战略目标和权利主张，正在“采用一种综合的，包括外交、信息、经济、军事、准军事/执法和民用元素的全面战略且在实施这一综合战略时，中国表现出了坚持不懈、耐心和战术上的灵活性，并愿意花费大量资源”[2]，这让美国感到军事和安全上的焦虑，美国认定南海地区中国武装力量的整合“意味着中国正在把南海变成一个反介入/区域拒止（A2/AD）的作战区域。这表明中国将军事竞争对手，尤其是美国海军，阻挡在该地区之外，或者严重阻碍他们在该地区的行动自由。”[3] 南海对美国印太战略的意义在于，中国可以通过控制南海地区实质上改变地区均势，相反，美国只要能保持对南海地区的控制，或者至少能阻止中国对南海的控制，中国的行动和战略选择就会受到限制。因此美方有强烈的遏制中国在南海地区军事实力和军事存在的意愿，也看到了南海主权和权利，作为中方的核心利益，在牵制和消耗中国精力上的巨大可能性。

未来美国在南海制造地区紧张局势和显示自身军事存在的主要手段仍会是持续进行其“航行自由计划”并拉拢盟友舰机过境南海。虽然美国宣称其推行“航行自由计划”的目的是针对所谓的“过度的海洋主张” (excessive nature of maritime claims)[4]，而单纯的外交行动又无法消除或迫使各国放弃这种主张。但事实上，美国执行“航行自由计划”的实质仍是利用习惯国际法的发展与《海洋法公约》自身的模糊性，以维护其过时的航行自由主张和国家利益[5]。从公开文件来看，拜登政府将继续倚重“航行自由计划”，因其认为该行动会直接支持其维护“海洋自由原则”[6]，且通过持续进行该行动，尤其是联合盟友舰机过境南海，可有效防止中国将其海洋主张形成国际习惯[7]。

事实上，拜登政府上台后，2021 年 2 月 5 日，美海军“尼米兹”号航母打击群经马六甲海峡进入南海，6 月 15 日，美国航母“里根”号进入南海海域巡航，2021 年 7 月和 10 月，

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[1] 金永明：《论我国〈海警法〉的实施、影响与完善》，载《人民论坛 • 学术前沿》2021 年第 22 期，第 124-127 页。

[2] Ronald O’Rourke, *U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress*, Congressional Research Service, R42784, Updated January 26, 2022, p. 25.

[3] Ronald O’Rourke, *U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress*, Congressional Research Service, R42784, Updated January 26, 2022, p. 106.

[4] United States Department of Defense, *Freedom of Navigation Program: Fact Sheet*, (March 2015), https://policy.defense.gov/Portals/11/Documents/gsa/cwmd/DoD%20FON%20Program%20--%20Fact%20Sheet%20%28March%202015%29.pdf

[5] 参见余敏友：《美国南海政策的新发展及对我国的挑战》，载《边界与海洋研究》2020 年第 6 期，第 18 页。

[6] Ronald O’Rourke, *U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress*, Congressional Research Service, R42784, Updated January 26, 2022, p. 29.

[7] James Holmes, *Are Freedom of Navigation Operations in East Asia Enough?*, The National Interest, (February 23, 2019), https://nationalinterest.org/feature/are-freedom-navigation-operations-east-asia-enough-45257.

英国航母两次过航南海海域，并相继与澳大利亚、新西兰海军舰艇开展联合训练活动[1]，10 月 25 日，美国“卡尔·文森”号航母战斗群再次与日本出云级航母“加贺”号在南海海域开展行动[2]，目前美国没有动机或理由停止“航行自由计划”和联合他国舰机过航南海的行为，在遏制中国的强烈动机下，美国将继续推行其既有政策，持续制造地区摩擦。

5.外交战：强行制造地区对立，在南海地区建立反华联盟

布林肯国务卿在与南海地区国家的沟通中，总是刻意强调“面对中国的压力，（美国）承诺与东南亚声索国站在一起”[3]，暗含将南海周边的国家直接划分为中国和其他国家，强行制造地区对立，挑拨中国与其他南海沿岸国家的关系。美国白宫发言人也表示“美国与我们的菲律宾盟友一样，对中华人民共和国海上民兵在牛轭礁附近的持续聚集表示担忧。”[4]同时，美国也在修复与欧洲传统盟友关系后，希望借助欧洲国家的力量加强在南海对中国的打压。布林肯在上任后与英、法、德、意、西等国外长和欧盟外交事务代表的首次通话中，均将中国列为与新冠大流行和气候变化问题等并列的、美国及其盟友需要共同面对的挑战之一[5]。拜登政府上台不久，英法德等美国在欧洲的传统盟友就纷纷表态并采取实际行动，派军舰通过南海海域，积极响应美国号召。[6]

未来，中美在南海问题上的较量博弈及其引发的外交战将是长期的[7]。早在拜登政府上台前，国际社会就已发生马来西亚 2019 年 12 月 12 日向大陆架界限委员会（CLCS）提出外大陆架划界案所引发的，涉及美、英、法、德和南海地区国家的“外交照会战”，南海沿岸国家和域外西方各国以照会的形式对南海领土和海洋权利的性质与归属表明各自的立场和观点。截至 2021 年 4 月底，该划界案已吸引到 26 件关切性或抗议性的照会，其中有 11 个照会旨在根据“南海仲裁案”的结论否认中国对南海地区的权利主张[8]。“外交照会战”已清楚表

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[1] 环球时报：《过航南海“搞事情”，盘点英航母亚太之行干的那些事》，载新华网 2021 年 10 月 12 日。http://www.news.cn/mil/2021-10/12/c_1211400586.htm.

[2] 环球网：《美日“双航母”南海演习后，又向东海派出准航母》，载新华网 2021 年 11 月 5 日。http://www.news.cn/mil/2021-11/05/c_1211434515.htm.

[3] Office of the Spokesperson, Secretary Blinken’s Call with Philippine Secretary of Foreign Affairs Locsin, (January. 27, 2021), https://www.state.gov/secretary-blinkens-call-with-philippine-secretary-of-foreign-affairs-locsin/.

[4] United States Department of State, *Department Press Briefing*, April 7, 2021.

[5] Office of the Spokesperson, Secretary Blinken’s Call with German Foreign Minister Maas, (January. 27, 2021), https://www.state.gov/secretary-blinkens-call-with-german-foreign-minister-maas/; Office of the Spokesperson, Secretary Blinken’s Call with French Foreign Minister Le Drian, (January. 27, 2021), https://www.state.gov/secretary-blinkens-call-with-french-foreign-minister-le-drian/; Office of the Spokesperson, Secretary Blinken’s Call with UK Foreign Secretary Raab, (January. 27, 2021), https://www.state.gov/secretary-blinkens-call-with-uk-foreign-secretary-raab/; Office of the Spokesperson, Secretary Blinken’s Call with Italian Foreign Minister Di Maio, (January. 28, 2021), https://www.state.gov/secretary-blinkens-call-with-italian-foreign-minister-di-maio/; Office of the Spokesperson, Secretary Blinken’s Call with EU High Representative for Foreign Affairs and Security Policy Borrell, (January. 28, 2021), https://www.state.gov/secretary-blinkens-call-with-eu-high-representative-for-foreign-affairs-and-security-policy-borrell/.

[6] 具体行动参见傅梦孜、陈子楠：《拜登政府南海政策的调整方向与限度》，载《边界与海洋研究》2021 年第 3 期，第 51-52 页。

[7] 金永明：《美国的南海问题政策解析及前景展望》，载《人民论坛·学术前沿》2021 年第 3 期，第 96 页。

[8] 高圣惕：《2019 年马来西亚外大陆架划界案的外交照会：争端与法律意涵》，载《国际法研究》2021 年第 3 期，第 20 页。

明早在拜登政府上台前，西方国家和南海沿岸国家就针对中国在南海地区的合法主张在外交战线展开了激烈斗争。而拜登政府上台后，美国更是公开放弃在南海问题上保持中立的虚伪说辞，强行制造并加强地区对立，公然支持美国的南海地区盟友和伙伴，建立基于价值同盟和美国利益的“小圈子”，强化美国控制的安全体系建设，在南海地区组建以地区伙伴国家和传统西方盟友为基础的反华联盟对抗中国。

三、中国的应对策略

1.坚持真正的多边主义，坚定维护以《联合国宪章》和国际法为基础的国际法秩序

美国及其西方盟友所主张的“基于规则的国际秩序”，暗含有浓厚的“冷战”思维和意识形态对立色彩，实际上是借“法治”之名谋求政治私利，进行政治操弄，试图把自己的意志强加于其他国家，用自己制定的规则取代普遍接受的国际法规则。应认识到，美西方主张的“基于规则的秩序”中的“规则”是西方国家所主导的国际规则，“秩序”是有利于西方国家的秩序，而非普遍公认的国际法规则和国际关系基本准则，这与中国所倡导的“共商共建共享”的国际治理观背道而驰，也不符合全体人类的共同利益和广大国家的普遍愿望。

美国提出在南海地区维护“基于规则的海洋秩序”，同样是要求西方国家掌握地区规则的制定权，在南海地区建构有利于己的地区秩序。美西方国家并不希望看到南海周边国家的团结与合作，其在南海推行的多边主义政策和多边主义合作，实质上是以多边主义之名，行单边主义之实，在实践中非但不利于地区合作，反而会破坏地区秩序，制造对抗和分裂。我国应从国际社会的整体愿望和南海地区国家人民的共同利益出发，秉持共商共建共享原则，坚持真正的多边主义，推动全球治理体系朝着更加公正合理的方向发展[1]，坚决反对美西方所秉持的“伪多边主义”，真正将南海打造成和平、稳定、繁荣之海。

2.推动真正多边主义原则下的“南海行为准则”最终落实

面对美西方等域外国家对南海地区事务的持续干涉，我国应尽快推动“一个符合国际法、符合各方需要、更具实质内容、更为行之有效”的“南海行为准则”（COC）的最终落实[2]，这将成为促进南海地区和平繁荣的关键举措。最终达成的准则内容，不仅应符合包括《海洋法公约》在内的国际法，也应充分保障域外国家的合法权益[3]，但绝不容许来自外部的干扰破坏，也绝不能加入“南海仲裁案”等影响地区和平稳定的内容。

“南海行为准则”的最终达成，将有效地抵制美国将“南海仲裁案”裁决作为南海地区唯

[1] 习近平：《同舟共济克时艰，命运与共创未来——在博鳌亚洲论坛 2021 年年会开幕式上的视频主旨演讲》，载新华网 2021 年 4 月 20 日，http://www.xinhuanet.com/politics/leaders/2021-04/20/c_1127350811.htm。

[2] 新华社：《国务委员兼外交部长王毅就中国外交政策和对外关系回答中外记者提问》，载新华网 2021 年 3 月 7 日，http://www.xinhuanet.com/2021-03/08/c_1127181623.htm。

[3] 新华社：《王毅：中方对达成“南海行为准则”的前景始终充满信心》，载新华网 2022 年 3 月 7 日，http://www.news.cn/politics/2022lh/2022-03/07/c_1128447322.htm。

一法律准则的结论，同时由于“南海行为准则”是南海地区沿岸国家内部独立自主所达成的地区规则，将在法理上最大程度地杜绝区域外国家对南海事务的干涉。更为重要的是，“南海行为准则”是共商、共建、共享的真正的多边主义原则下，在各国平等协商的基础上共同制定，符合南海周边各国的共同利益，这将是对域外国家仅利用地区国家实现自身目的的“伪多边主义”政策的有力抵制和回击。

3.积极扩大与印太国家交流合作，推动构建“印太命运共同体”

美国与东南亚国家从不是铁板一块，南海周边国家也意识到美国所推行的多边主义合作是美国利益优先和意识形态色彩的“伪多边主义”政策。地区国家与美国共同对抗中国不仅要面临经贸合作的损失和政治压力，同时还要面临美国所强调的西方价值观与地区价值观念的协调问题。拜登政府将“普世价值观”置于其与伙伴的共同利益之上，这在东南亚使得那些原本可能支持美国利益的国家也对美国感到反感[1]。中国应当利用好东南亚国家和美国的固有矛盾，积极扩大经贸合作和人文交流，加强共同的利益基础，以抵消和反制美国在南海地区强行制造的阵营对立。

后疫情时代，中国率先恢复正常经济活动，实现经济强劲增长，使得亚太地区国家看到了与中国开展合作的广阔前景。同时，全球防疫合作为中国快速提升国际信誉提供了良机，中国应继续做好亚太地区及第三世界疫苗供应商的角色，特别加大对东南亚和 “一带一路”沿线国家的疫苗出口，不断提升国际道义基础[2]，以经济合作和基础设施建设合作为契机，进一步加强与周边国家的经济合作，推动构建“印太命运共同体”。

4.积极研判南海问题，在国际社会积极发出中国主张并揭露“伪多边主义”

长期以来，南海法理斗争的议程设置权被美国把控，中国所做的更多是被动地批驳和反对。面对拜登政府上台后的南海法理斗争，中国应当“小破大立”，适度说明其他国家或个人的错误之处，同时更加注重宣传中国在南海的合法海洋权利。[3]

针对拜登政府试图将“南海仲裁案”的结论通过反复声明加以确认，并确定为南海地区的“基本法”的行为，中国应当积极组织国际法学者和外事部门在国际社会表达中国的观点和主张，向世界揭露所谓仲裁案的非法、荒谬和错误，坚决抵制美国对“南海仲裁案“的反复渲染和呼吁中国遵守所谓裁决的要求。

针对美国在南海主张的“海洋自由原则”和“航行自由计划”所涉及的《海洋法公约》解释问题，中国应联合国际社会，尤其是广大发展中国家，点明美国对《海洋法公约》的单方解释行为，坚决反对美国以《海洋法公约》的权威和唯一解释者自居的行为。

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[1] Derek Grossman, *Biden's troubled Southeast Asia policy needs a reboot*, Nikkei Aisa, July 6, 2021.
[2] 阎德学、李帅武：《“印太战略”升级版及其对中国的威胁》，载《社会科学》2021 年第 11 期，第 52 页。
[3] 傅崐成：《美国的政策转向与南海形势新动向》，载《人民论坛·学术前沿》2021 年第 3 期，第 40 页。

不仅如此，中国更应主动宣扬自身主张，下大气力加强国际传播能力建设，形成同我国综合国力和国际地位相匹配的国际话语权[1]，加强国际社会的议题设置能力，宣传中国在南海地区践行真正的多边主义和开展互利互惠的多边合作的积极主张，向世界批判和揭露美西方国家所谓多边主义的虚伪面目和险恶真相。

四、结语

当今世界正处于“百年未有之大变局”，新上台的拜登政府进一步将南海地区作为对抗中国的重要战场，试图掌控该地区规则制定的意愿继续加强。与上届政府不同，在以“小圈子的多边主义”、“本国优先的多边主义”和“有选择的多边主义”为实质的“伪多边主义”的政策理念下，本届政府试图重启其虚假的多边主义主张，在南海地区恢复盟友关系，构建一系列地区合作机制。但拜登政府以多边主义之名，行单边主义之实，利用地区国家实现遏制中国发展，主导地区秩序的目的却从未改变。与此同时，中国以共商、共建、共享的全球治理观念，在各国主权平等和推动各国合作的基础上高举多边主义旗帜，践行真正的多边主义，与美西方国家形成了鲜明对比，谁在维护，谁又在破坏南海地区的和平、稳定、团结、繁荣，历史会给出正确答案，国际社会自有公论。

[1] 新华社：《习近平在中共中央政治局第三十次集体学习时强调 加强和改进国际传播工作 展示真实立体全面的中国》，载新华网 2021 年 6 月 1 日，http://www.xinhuanet.com/politics/leaders/2021-06/01/c_1127517461.htm。

Prospects for US South China Sea Policy under the Biden Administration and Multilateral Cooperation in the Region

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Abstract: In the face of profound changes and accelerating pace of restructuring of the world, the United States, after President Biden took office, remains keen to advance confrontation with China in the South China Sea. It pursues unilateralism in the name of multilateralism, attempting to manipulate "pseudo-multilateralism" in the South China Sea to achieve its strategic goals of restoring alliance relations, maintaining a balance of power favorable to itself and implementing regional rules championed by itself. To this end, a series of policies and strategies which combines legal, value and rule wars with arms race and diplomatic war has been carried out. In response to these challenges, China should hold fast to the principle of "consultation, contribution and shared benefits" in international governance, and promote and practice genuine multilateralism to preserve the prosperity and stability of the South China Sea.

Keywords: Biden administration; South China Sea policy; South China Sea region; Multilateralism; the South China Sea Arbitration

I. Biden Administration's Goals in the South China Sea

Currently, the world is afflicted with accelerating global challenges brought by the COVID-19 pandemic, from regression of economic globalization, to lack of growth momentum, to plunge of international trade, and to global supply chain crisis. Changes rarely seen in a century and the global pandemic are closely intertwined and mutually reinforcing, which has ushered in a new era of profound adjustment and transformation in political, economic, social, cultural and ecological landscapes. Against this backdrop, Joseph Biden's administration, in the name of maintaining the

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"rules-based international order", has literally trampled on and abandoned multilateralism and international cooperation. In contrast, China holds high the banner of true multilateralism, asserting that "In the world, there is only one international system, the one that has been built on the foundation of the United Nations. There is only one international order, the one that is underpinned by international law. And there is only one set of rules, namely the basic norms governing international relations underpinned by the purposes and principles of the UN Charter."[1]

In order to conceal the political reality of its failed domestic governance and shift the domestic pressure from sluggish economy growth, the US, after the Biden administration came into power, is expected to continue or even intensify the competition and confrontation with China in the foreseeable future. Since the South China Sea region represents a confluence of the Administration's two political agendas, namely "value-oriented diplomacy" and "rules-based international order", it is understandable that Biden uses the region as a primary theater to counter and contain China, with commitment to achieving several strategic goals in the South China Sea. While attempting to realize its strategic intentions, the US is actually keen on pursuing, under the guise of multilateralism, "small clique multilateralism", "America-first multilateralism" and "selective multilateralism"[2]. Based on the public policy documents and claims made by US government departments and agencies, as well as some key officials after the inauguration of President Biden[3], this paper will forecast the plausible goals of the pseudo-multilateralism pursued by the Biden Administration in the South China Sea in its current term.

1. To Restore and Reinforce the United States' Relations with Its Allies in the South China Sea Region under the Banner of "Small Clique Multilateralism"

Amid the challenges posed by the dysfunction of the liberal governance model in the Covid-ravaged world, along with the damage caused by its previous administration to American traditional partnership system[4], the Biden administration perceives "to reinvigorate the multilateralism doctrine" as its top priority. Nevertheless, the "multilateralism" it advocates is a kind of "small clique multilateralism" in which the US continues to choose to cooperate with its traditional allies and regional partners. To begin with, the importance of multilateralism and

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[1] XI Jinping, *Bolstering Confidence and Jointly Overcoming Difficulties to Build a Better World, Statement by H.E. Xi Jinping at the General Debate of the 76th Session of the United Nations General Assembly*, PRC Government Online (21 September 2021), at http://www.gov.cn/gongbao/content/2021/content_5641338.htm.

[2] WU Wencheng, *Global Governance Requires True Multilateralism*, Qiushi Online (June 7, 2021), http://www.qstheory.cn/qshyjx/2021-06/07/c_1127537756.htm.

[3] These mainly include: (1) *Interim National Security Strategic Guidance* (March 2021) (hereinafter "Strategic Guidance"); (2) *Fifth Anniversary of the Arbitral Tribunal Ruling on the South China Sea* (11 July 1 2021) (hereinafter "Blinken's Statement"); (3) *A Foreign Policy for the American People* (3 March 2021); (4) U.S.-China Strategic Competition in South and East China Seas: *Background and Issues for Congress issued by US Congressional Research Service* (updated January 26, 2022) (hereinafter "Strategic Competition"); (5) *Limits in the Seas No.150 People's Republic of China: Maritime Claims in the South China Sea*; (6) US State Department's Press Releases since the inception of the Biden administration; (7) Press Releases of the US Department of Defense since the inception of the Biden administration; and (8) remarks of the key diplomats in the Biden administration.

[4] LI Xiaoyan, *Reconsideration of Multilateralism and the Reconstruction of World Order*, Northeast Asia Forum, No. 6, 2021, p. 89.

partnerships in checking China is highlighted in Biden's first diplomatic speech as president, where he declared that the US would compete with China from a position of strength by "building back better at home, working with our allies and partners, renewing our role in international institutions, and reclaiming our credibility and moral authority, much of which has been lost"[1]. Second, it is articulated in the Interim National Security Strategic Guidance (INSSG) that "restoring U.S. credibility and reasserting forward-looking global leadership" is among the strategic goals of the Administration.[2] Third, Antony Blinken, current US Secretary of State, also alleges that "the way President Trump has pursued his policies that's weakened, not strengthened our core alliances, particularly in Asia"[3]; when communicating with the foreign ministers of the Philippines, South Korea and Japan, America's three allies neighboring the South China Sea that have signed treaties of mutual defense or security with the US, Blinken underscores with clarity the critical role played the alliances between the US and each of the nations in the "free and open Asia-Pacific region" envisioned by the US.[4] Kurt Campbell, Coordinator for Indo-Pacific Affairs at the U.S. National Security Council, together with Rush Doshi, director for China at U.S. National Security Council, holds that "The United States needs to help states in the Indo-Pacific develop their own asymmetric capabilities to deter Chinese behavior…. This would reduce American reliance on a small number of vulnerable facilities in East Asia. Finally, the United States should encourage new military and intelligence partnerships between regional states, while still deepening those relationships in which the United States plays a major role – placing a "tire" on the familiar regional alliance system with a U.S. hub and allied spokes."[5]

In the South China Sea region, the US needs to keep using its treaty allies and its military forces stationed in these regional allies as the main gripper and fulcrum to support the implementation of its policies and claims in the region, which however is pinned on stable alliance relations with the pertinent States. The US will, especially after the wanton destruction of the regional partnerships inflicted by the Trump administration, revitalize the so-called "multilateralism" in the South China Sea, trying to restore and consolidate relations with its

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[1] Biden, *Remarks by President Biden on America's Place in the World*, White House (February 4, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/02/04/remarks-by-president-biden-on-americas-place-in-the-world/.

[2] White House, *Interim National Security Strategic Guidance*, March 2021.

[3] Walter Russell Mead & Transcript: *Dialogues on American Foreign Policy and World Affairs: A Conversation with Former Deputy Secretary of State Antony Blinken*, Hudson Institute, (July 9, 2020), https://www.hudson.org/research/16210-transcript-dialogues-on-american-foreign-policy-and-world-affairs-a-conversation-with-former-deputy-secretary-of-state-antony-blinken.

[4] Office of the Spokesperson, Secretary Blinken's Call with Japanese Foreign Minister Motegi, (February 10, 2021), https://www.state.gov/secretary-blinkens-call-with-japanese-foreign-minister-motegi-2/; Office of the Spokesperson, Secretary Blinken's Call with ROK Foreign Minister Kang, (January 26, 2021), https://www.state.gov/secretary-blinkens-call-with-rok-foreign-minister-kang/; Office of the Spokesperson, Secretary Blinken's Call with Philippine Secretary of Foreign Affairs Locsin, (January 27, 2021), https://www.state.gov/secretary-blinkens-call-with-philippine-secretary-of-foreign-affairs-locsin/.

[5] Kurt M. Campbell & Rush Doshi, *How America Can Shore Up Asian Order: A Strategy for Restoring Balance and Legitimacy*, https://www.foreignaffairs.com/articles/united-states/2021-01-12/howamerica-can-shore-asian-order.

regional allies, which also serves as an essential part of its strategic goal of restoring America's "global leadership". However, it should also be noted that US multilateral cooperation in the South China Sea remains engaging with the States already included in its "system with a U.S. hub and allied spokes", without going outside the "small clique" of the US.

2. To Maintain a Regional Balance of Power Favorable to the US and Its Allies and Partners in the South China Sea by Upholding a "Multilateralism Placing America First"

The Biden administration now sees China as "the biggest geopolitical test of the 21st century" for the US[1]. Amid the China-US competition and confrontation, the Administration directly says that it is striving to "present a common front, produce a unified vision, and pool our strength to promote high standards, establish effective international rules, and hold countries like China to account"[2]. The Biden administration singles out the South China Sea as a critical theater to counter and deter China, and proposes to build a "rules-based South China Sea" touted by the United States.[3] The United States also shows concerns about China's rising military power in the South China Sea, asserting that "The Chinese Communist Party, in particular, intends to complete the modernization of its Armed Forces by 2035 and to field a world class military by 2049. At that time, Beijing wants to achieve parity with the United States Navy, if not exceed our capabilities in certain areas and to offset our overmatch in several others."[4] In this context, if the US wants to establish the US-led regional order in the South China Sea, it will rely on the "common front" and "unified vision" that it seeks to produce.

While the United States continues to increase military and paramilitary presence in the South China Sea, the Biden administration is also trying to rally all possible allies through the "multilateral" or "minilateral" approach, in an effort to maintain the balance of power in the region between the US and China[5]. As "maintaining a regional balance of power favorable to the United States and its allies and partners" is specified in the Strategic Competition as one of U.S. goals for U.S.-China strategic competition in the South China Sea, multilateral cooperation carried out under this goal still places America first and underscores the protection of American interests. First, the US will continue to unite the strength of its traditional Western allies and try to incite the leading Western G7 States to interfere in the South China Sea issues. For example, in order to deter

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1 Antony Blinken, *A Foreign Policy for the American People*, March 3, 2021.

2 White House, *Interim National Security Strategic Guidance*, March 2021.

3 Office of the Spokesperson, Secretary Blinken's Call with Vietnamese Deputy Prime Minister and Foreign Minister Pham Binh Minh, (February 4, 2021), https://www.state.gov/secretary-blinkens-call-with-vietnamese-deputy-prime-minister-and-foreign-minister-pham-binh-minh/.

4 United States Department of Defense, *Secretary of Defense Remarks at CSBA on the NDS and Future Defense Modernization Priorities*, (October 6, 2020), https://www.defense.gov/News/Transcripts/Transcript/Article/2374866/secretary-of-defense-remarks-at-csba-on-the-nds-and-future-defense-modernizatio/.

5 Kurt M. Campbell & Rush Doshi, *How America Can Shore Up Asian Order: A Strategy for Restoring Balance and Legitimacy*, https://www.foreignaffairs.com/articles/united-states/2021-01-12/how-america-can-shore-asian-order.

"China's threatening and aggressive behavior in the South China Sea and other areas around its border", according to one senior official of the US State Department, the US should build alliances with "not just the G7", but also "other likeminded states"[1]. At the meanwhile, the US will strive to woo new partners[2] and take concrete actions to devise a US-led minilateral mechanism[3] in the South China Sea with its regional allies.

As a matter of fact, since the Biden administration came into power, the United States has continuously incited regional States and its Western allies to hold, within the "bilateral" and "mini-bilateral" cooperation framework, security dialogues and military exercises in the South China Sea. In addition, the US has incorporated both the quadrilateral cooperation mechanism consisting of the US, Japan, India and Australia (hereinafter referred to as "Quad") and the G7 mechanism into its system of U.S.-China strategic competition. The US, Japan, India and Australia joint Malabar exercise 2021 is a perfect example in this case. Such examples also include the following. In July 2021, the British aircraft carrier, HMS Queen Elizabeth, entered the South China Sea and warships were permanently deployed in the Asia-Pacific region. In a press conference in May 2021, US Secretary of State Blinken and Australian Foreign Minister announced to work together through the Quad mechanism to ensure that international law was respected in the East and South China Seas.[4] In September 2021, the US, the UK and Australia agreed to the creation of an enhanced trilateral security partnership – AUKUS, which aimed to help Australia acquire nuclear-powered submarines with cruise missile capability; further collaboration under AUKUS is expected to be carried out in the future. All in all, the Biden administration is putting together a series of resources, seeking to effectively boost its military ties with its allies and partners, develop the latter's capability to challenge China, and jointly build a "more resilient and survivable military presence" in Asia[5], and ultimately to create and maintain a geopolitical landscape and regional balance of power favorable to the United States in the South China Sea.

3. To Promote and Force China to Accept Maritime Rules Based on Western Values by Sticking to "Selective Multilateralism"

After President Biden was sworn into office, the United States is seemingly returning to

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[1] Office of the Spokesperson, Briefing with Senior State Department Officials to Traveling Press, (May 4, 2021), https://www.state.gov/briefing-with-senior-state-department-officials-to-traveling-press/.

[2] Ronald O'Rourke, *U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress*, Congressional Research Service, R42784, Updated January 26, 2022, p. 30.

[3] For a conceptual analysis of "minilateral", see John Ruggie, *Multilateralism: The Anatomy of an Institution*, International Organization, Vol. 46(3), 1992, p. 561-598; QIN Yaqing, *A Study on Multilateralism: Theory and Method*, World Economics and Politics, No. 10, 2001, p. 9-14; CHEN Baicen, *Minilateral Cooperation in US Asia-Pacific Strategy*, Journal of Boundary and Ocean Studies, No. 5, 2021, p. 20-43.

[4] United States Department of State, *Secretary Antony J. Blinken and Australian Foreign Minister and Minister for Women Marise Payne at a Joint Press Availability,* (May 13, 2021), https://www.state.gov/secretary-antony-j-blinken-and-australian-foreign-minister-and-minister-for-women-marise-payne-at-a-joint-press-availability/.

[5] ZHANG Qian, *On the Value-Based Alliance of the Biden Administration*, International Study Reference, No. 10, 2021, p. 5

multilateralism. However, the United States continues to cobble together cliques consisting of its old allies, splitting the world along ideological lines, which shows that the Biden administration is actually following the traditional diplomatic path where "value-oriented diplomacy" and "democracy-based alliance" is the keynote. The Administration even proposes that America, not China, shall work "alongside others to shape new global norms and agreements that advance our [American] interests and reflect our [American] values"[1]. All these indicate that the United States follows pseudo rather than true multilateralism. As for the genuine international rules, it "applies those consistent with its interests and discards those inconsistent". Additionally, in the eyes of the US, multilateral cooperation should focus on issues concerned by Western States and be carried out in accordance with international rules dominated and selected by them. The Biden administration also intends to practice and establish rules based on Western values and ideologies in the South China Sea. The US confrontation with China in the South China Sea, the confluence of America's two agendas ("rules-based international order" and "value-oriented diplomacy"), is therefore endowed with increasing ideological significance by the United States.

The concept of "free and open Indo-Pacific" was first announced by the US in 2017 as its basic strategic proposition in the Indo-Pacific region, including the South China Sea. The US alleges that the concept flows from the following principles: "respect for sovereignty and independence of all nations; peaceful resolution of disputes; free, fair, and reciprocal trade based on open investment, transparent agreements, and connectivity; and adherence to international rules and norms, including those of freedom of navigation and overflight."[2] The U.S. Position on Maritime Claims in the South China Sea, a statement made by US former Secretary of State Michael Richard Pompeo on the occasion of the fourth anniversary of the ad hoc tribunal ruling on the South China Sea Arbitration, hereinafter referred to as "Pompeo's Statement",[3] shows that the concept itself is tinged with an ideology dominated by the United States under the guise of pseudo-multilateralism. The Biden administration has continued the use of this concept ever since it came into power. For instance, State Secretary Blinken, in his communication with some Indo-Pacific countries, repeatedly mentioned the "free and open Indo-Pacific" concept pursued by the United States, which clearly exposes the Administration's intention of continuing ideological confrontation with China.

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[1] White House, *Interim National Security Strategic Guidance*, March 2021.

[2] United States Department of Defense, *Indo-Pacific Strategy Report: Preparedness, Partnerships, and Promoting a Networked Region*, June 1, 2019, p. 4.

[3] "The United States champions a free and open Indo-Pacific. Today we are strengthening U.S. policy in a vital, contentious part of that region – the South China Sea …. In the South China Sea, we seek to preserve peace and stability, uphold freedom of the seas in a manner consistent with international law, maintain the unimpeded flow of commerce, and oppose any attempt to use coercion or force to settle disputes. We share these deep and abiding interests with our many allies and partners who have long endorsed a rules-based international order." United States Department of State, Michael Pompeo, *U.S. Position on Maritime Claims in the South China Sea*, July 13, 2020.

Meanwhile, invoking the so-called "principle of freedom of the seas",[1] and the "rules-based international order", the United States advocates the establishment of a "rules-based South China Sea"[2] to preserve the "rules-based maritime order".[3] China's claims in the South China Sea are defined as "assertive maritime claims", which are said to be against American values.[4] The US vilified China's actions in the South China Sea as malign acts of "might makes right"[5], hurting and threatening Western values. By doing so, the US schemes to ideologicalize the South China Sea issue and politically frame up China under the banner of pseudo multilateralism, and further to gain more support from its traditional allies and domestic public.

4. Strategic Goals that the US Seeks to Achieve in the South China Sea in the Name of Pseudo-Multilateralism

Taken together, the Biden administration faces a world which is undergoing profound rapid changes and accelerating restructure, and a country that is witnessing sluggish economic growth, an uncontrollable pandemic, and unruly populism. In this context, the United States is eager to return to multilateralism by presenting a multilateral program prominently featured by "partnership", with a view to fully restoring its leadership in the reconstruction of global order.[6] Under the banner of multilateralism, the US implements, in reality, a pseudo-multilateral policy – a dangerous mix of unilateralism, protectionism, isolationism and hegemonism – in the South China Sea. Specifically, the US first sticks to the US-led "minilateralism" by prioritizing the restoration and consolidation of its relations with its regional allies in the South China Sea. Second, it insists on placing American interests and America first, striving to maintain a regional balance of power favorable to the United States. Last, it persists in splitting the world along ideological lines, purporting to force China to accept the maritime rules based on Western values.

II. Concrete Strategies Employed by the Biden Administration to Achieve Its Goals in the South China Sea

After the Biden administration came into power, the United States, under the guidance of pseudo-multilateralism, is expected to adopt a comprehensive approach and strategy which combines legal, value and rule wars with arms race and diplomatic war in the South China Sea to achieve the goals aforementioned.

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[1] Ronald O'Rourke, *U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress*, Congressional Research Service, R42784, Updated January 26, 2022, p. 4.

[2] Office of the Spokesperson, Secretary Blinken's Call with Vietnamese Deputy Prime Minister and Foreign Minister Pham Binh Minh, (February 4, 2021), https://www.state.gov/secretary-blinkens-call-with-vietnamese-deputy-prime-minister-and-foreign-minister-pham-binh-minh/.

[3] United States Department of State, *Fifth Anniversary of the Arbitral Tribunal Ruling on the South China Sea*, July 11, 2021.

[4] Office of the Spokesperson, Secretary Antony J. Blinken and Republic of Korea Foreign Minister Chung Eui-yong Before Their Meeting, (March 17, 2021), https://www.state.gov/secretary-antony-j-blinken-and-republic-of-korea-foreign-minister-chung-eui-yong-before-their-meeting/.

[5] Michael Pompeo, *U.S. Position on Maritime Claims in the South China Sea*, Department of State, July 13, 2020.

[6] LI Xiaoyan, *Reconsideration of Multilateralism and the Reconstruction of World Order*, Northeast Asia Forum, No. 6, 2021, p. 88.

1. Legal War: Force China to Accept the South China Sea Arbitration and the Relevant Legal Conclusion, so as to Curb China's Normal Maritime Claims

Currently, the Biden administration clings to the lie that it takes no position on China's sovereignty claims to particular islands in the South China Sea as well as other maritime claims in the area.[1] But in the actuality, the United States defines, based on the South China Sea Arbitration and the subsequent legal conclusion, China's legal claims in the region as "expansive South China Sea maritime claims"[2], attempting to narrow the scope of matters that it "takes no position" by "excluding" certain circumstances and then legally cripple and even negate China's legitimate claims in the region. In Pompeo's Statement, the United States' official position on the South China Sea issue is completely consistent with the conclusion given in the South China Sea Arbitration award, making it clear that the US fully supports and upholds the illegal award. The US adjusted and updated its position on China's maritime claims in the South China Sea in light of the so-called "award".[3] Since then it keeps on securing and cementing the conclusion of the South China Sea Arbitration, which is actually the enduring policy of the U.S. government starting from the previous Trump administration. The US rationale behind that is weak. From the perspective of the United States, it is true that it does not take a position on sovereignty over maritime features in the South China Sea, but the South China Sea Arbitration was initiated in accordance with the 1982 United Nations Convention on the Law of the Sea (UNCLOS), therefore, all China's claims that go beyond the conclusion of the Arbitration are in violation of UNCLOS and, also the international law of the sea. Disregarding to the illegality of the Arbitration and the provisions and characteristics of UNCLOS itself, this policy seeks to achieve the purpose of substantially denying China's territorial sovereignty and maritime rights in the South China Sea.

The State Secretary or White House spokesperson of the Biden administration has reiterated the U.S. position that China's rights should not go beyond the scope of UNCLOS[4]. By constantly urging China to accept the award and directly equating the South China Sea Arbitration with UNCLOS, the US is attempting to force China and other regional States to acknowledge the conclusion of the Arbitration as the "basic law" governing the South China Sea in the future. Notably, the report entitled "Limits in the Seas No. 150", which was released by the US Department

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[1] United States Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, *Limits in the Seas No.150 People's Republic of China: Maritime Claims in the South China Sea*, p. 11; Ronald O'Rourke, *U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress*, Congressional Research Service, R42784, Updated January 26, 2022, p. 18.

[2] A United States Department of States, Fifth Anniversary of the Arbitral Tribunal Ruling on the South China Sea, July 11, 2021.

[3] See YU Minyou, *The New Development of U. S. South China Sea Policy and Its New Challenges to China*, Journal of Boundary and Ocean Studies, No. 6, 2020, p. 18; FU Mengzi & CHEN Zinan, *The Focus and Limits of Biden Administration's South China Sea Policy*, Journal of Boundary and Ocean Studies, No. 3, 2021, p. 44.

[4] Office of the Spokesperson, Secretary Blinken's Call with Philippine Secretary of Foreign Affairs Locsin, (January 27, 2021), https://www.state.gov/secretary-blinkens-call-with-philippine-secretary-of-foreign-affairs-locsin/; United States Department of States, *Fifth Anniversary of the Arbitral Tribunal Ruling on the South China Sea, July 11, 2021*; Ned Price, *Department Press Briefing-February 19, 2021*, (February 19, 2021), https://www.state.gov/briefings/department-press-briefing-february-19-2021/.

of State recently,[1] continues to cite the conclusion reached in the South China Sea Arbitration, and elaborates on the relevant provisions of UNCLOS and the customary international law it favors. The US tries to enshroud false conclusions in a legal cloak, therefore making them more confusing and deceptive. All these indicate that the Biden administration keeps "delegitimizing" China's legal maritime claims and disguising the U.S.-China competition in the South China Sea as a legal warfare between a defender and a violator of international law.

2. Value War: Ideologicalize the South China Sea Issue by Wedging It into the Framework of "Value-Oriented Diplomacy"

It is worth noting that the Biden administration, while following the basic position of its previous administration on China's claims in the South China Sea, also labels China's claims as an "arbitrary act" of an "authoritarian regime" under the framework of "value-oriented diplomacy." Prior to his meeting with South Korean Foreign Minister Chung Eui-yong on 17 March 2021, Blinken denounced China's claims in the South China Sea, along with China's handling of issues related to Xinjiang, Tibet and Hong Kong as "dangerous erosion of democracy around the world,"[2] which has literally distorted the national disputes over the rights and interests in the South China Sea from diplomatic and legal issues to ideological ones. At a press briefing on 17 March 2021, the White House spokesperson listed the South China Sea issue as one of the issues where the United States and the international community expect transparency and accountability from China, suggesting that China is "neither transparent enough" nor "accountable internationally" on the said issue. The implicit logic behind the statement is to align China's actions and claims in the South China Sea with the United States' long held accusation that China is "authoritarian" and "dictatorial."[3] During his visit to China, US Deputy Secretary of State Sherman also raised concerns about a range of "actions that run counter to our [American] values and interests and those of [American] allies and partners", and "Beijing's conduct in the East and South China Seas" is included in those actions.[4]

Obviously, the current US administration is attempting to attribute the South China Sea issue to the "authoritarian" and "dictatorial regime" of China, a demonized image of China long held by the US. In the actuality, under the influence of "minilateralism", the United States is portraying China's claims and related actions as challenges and attacks imposed by an authoritarian regime on

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[1] United States Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, *Limits in the Seas No.150, People's Republic of China: Maritime Claims in the South China Sea*.

[2] Office of the Spokesperson, Secretary Antony J. Blinken and Republic of Korea Foreign Minister Chung Eui-yong Before Their Meeting, (March 17, 2021), https://www.state.gov/secretary-antony-j-blinken-and-republic-of-korea-foreign-minister-chung-eui-yong-before-their-meeting/.

[3] Jalina Porter, *Department Press Briefing - March 17, 2021*, (March 17, 2021), https://www.state.gov/briefings/department-press-briefing-march-17-2021/.

[4] Office of the Spokesperson, Deputy Secretary Sherman's Visit to the People's Republic of China, (July 26, 2021), https://www.state.gov/deputy-secretary-shermans-visit-to-the-peoples-republic-of-china/.

the free world and democratic values, which at heart is an attempt to forcibly divide the international community according to ideology. In so doing, the US intends to invite additional pressure from the international community on China, which in turn can be leveraged by the US in its conflict with China in the South China Sea. In the final analysis, the United States, as a State outside the region, aligns its opposition to China's claims in the South China Sea with defense of democracy and freedom and global public interests; by doing so, the US attempts to provide moral justification, rationality and legitimacy for its intervention in the South China Sea issue.[1]

3. Rule War: Force China to Accept the "Principle of Freedom of the Seas" Defined by the US and the US-Led "Rules-Based Order of the Seas"

The Biden administration alleges that China is becoming "more assertive and aggressive" in the South China Sea, seeking to reshape the Indo-Pacific order by taking advantage of the Trump administration's unilateral policies. At the same time, the Administration holds that the United States should strive to restore the original rules in the Indo-Pacific region by sticking to the "rules-based order", and reintroduce the multilateral mechanism into the region and take the lead in the process by reversing the isolationist tendency in Trump's policies.[2] The United States, according to Blinken's Statement, calls for the establishment of a "rules-based maritime order", aiming to link the regional rules in the South China Sea with the "rules-based order" and lead the building of an order in the South China Sea. On the day immediately after the statement, in order to explain the "rules-based maritime order", a White House spokesperson commented, "The alternative to a rules-based order is a world in which might makes right and winners take all, and that would be a far more violent and unstable world for all of us"; the spokesperson also called on China to abide by its obligations under international law and to stop acts of aggression.[3] At a White House press briefing on 1 September 2021, the spokesperson said that the "rules-based international order" was at the core of dealing with China's actions in the South China Sea, adding that it "has been a staple of our discussions in the Indo-Pacific" and also "has been a staple of our discussions with the PRC."

In addition to the attempts to calcify the South China Sea Arbitration Award into "basic law", the current administration has also inherited another policy from the previous administration – adherence to the so-called "principle of freedom of the seas", which is aligned by the United States with the "rules-based maritime order" championed by itself.[4] According to the definition of the

[1] YU Minyou, *The New Development of U. S. South China Sea Policy and Its New Challenges to China*, Journal of Boundary and Ocean Studies, No. 6, 2020, p. 8.
[2] FU Mengzi & CHEN Zinan, *The Focus and Limits of Biden Administration's South China Sea Policy*, Journal of Boundary and Ocean Studies, No. 3, 2021, p. 44.
[3] Ned Price, *Department Press Briefing - July 12, 2021*, (July 12, 2021), https://www.state.gov/briefings/department-press-briefing-july-12-2021/.
[4] United States Department of States, *Fifth Anniversary of the Arbitral Tribunal Ruling on the South China Sea*, July 11, 2021.

U.S., the "principle of freedom of the seas" means "rights, freedoms, and uses of the sea and airspace guaranteed to all nations in international law. The United States opposes claims that impinge on the rights, freedoms, and lawful uses of the sea that belong to all nations."[1] However, the "principle of freedom of the seas" touted by the US cannot be equated with the freedom of navigation defined by UNCLOS. Differences on the interpretation of provisions unspecified in UNCLOS should have been settled through consultation, nevertheless, the US simply dismissed China's interpretation as "narrow definition"[2]. The US, which views itself as the authoritative interpreter of UNCLOS, constantly invokes its self-defined "principle of freedom of the seas" in an attempt to force China to accept the illegal activities of American warships and military aircraft carried out in the South China Sea.

The US has incorporated the regional rules in the South China Sea into its "rules-based international order", which is apparently an evil legacy left by the Cold War imbued with an ideological tinge. The "rules" championed by the US are selective rules dominated by the US and the West, rather than universally recognized rules of international law and basic norms of international relations. By exaggerating the threat of China and gaining the support of regional States, the US virtually intends to lead the building of a regional order in the South China Sea, and further to strengthen its political, economic, military and diplomatic presence in the region and build a maritime order in Asia-Pacific controlled and dominated by itself.

4. Arms Race: Continue to Stir up Regional Conflicts by Advancing the "Freedom of Navigation Operations", and Deploying Its Warships and Aircraft Carriers to Transit in the South China Sea

The Biden administration defined the normal actions that China took within its sovereignty, such as island-building, maritime law enforcement and deployment of military forces, as "provocative or unilateral actions that disrupt the status quo or jeopardize peace and security",[3] and acts "threatening freedom of navigation in this critical global throughway".[4] In this connection, the US is trying to take real actions to prevent China from enhancing its control over the South China Sea. In addition, it also raised concerns over the Coast Guard Law of the PRC, claiming that this law connects the possible use of force, including the armed forces of China's coast guard, with China's claims in the ongoing territorial and maritime disputes in the East and South China Seas. In so doing, the US denies the legitimacy of China's maritime claims. But in the actuality, China's

[1] Ronald O'Rourke, *U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress*, Congressional Research Service, R42784, Updated January 26, 2022, p. 16.
[2] Ronald O'Rourke, *U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress*, Congressional Research Service, R42784, Updated January 26, 2022, p. 93.
[3] Ronald O'Rourke, *U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress*, Congressional Research Service, R42784, Updated January 26, 2022, p. 16.
[4] United States Department of States, *Fifth Anniversary of the Arbitral Tribunal Ruling on the South China Sea*, July 11, 2021.

state actions, including the promulgation and implementation of its Coast Guard Law, are taken in accordance with its rights legally claimed. The dual nature of the functions and powers of Chinese coast guard institution granted under the Coast Guard Law and the enforcement actions against foreign vessels are compliant with general international practice or the provisions of UNCLOS.[1] As per the Strategic Competition, the US asserts that China, in order to achieve its strategic goals and claims in the South China Sea, is "employing an integrated, whole-of-society strategy that includes diplomatic, informational, economic, military, paramilitary/law enforcement, and civilian elements. In implementing this integrated strategy, China appears to be persistent, patient, tactically flexible, willing to expend significant resources".[2] This has heightened the United States' military and security concerns, because it believes the amalgamation of Chinese forces in the South China Sea means that "China is well on its way toward turning the South China Sea in a zone of anti-access/area denial (A2/AD). This means keeping military competitors (particularly the US Navy) out of the region, or seriously impeding their freedom of action inside it".[3] The South China Sea is important for US Indo-Pacific strategy in that China may substantively change the balance of power in the region by controlling the South China Sea. On the other hand, China's behaviors and strategic options will be restricted, if the United States maintains control over the South China Sea, or stops China from controlling the same. Therefore, being aware that the issue over China's sovereignty and other rights in the South China Sea, one of China's core interests, is highly possible to contain China and drain its resources, the United States is strongly willed to check China's military strength and presence in the South China Sea.

The United States will keep on stirring up regional tensions and demonstrating its military presence in the South China Sea by continuing "Freedom of Navigation"(FON) operations and inciting its allies to have their warships or aircraft carriers transited the South China Sea. The FON, according to the US, is targeted at the "excessive nature of maritime claims",[4] however diplomacy alone is not able to eliminate or force countries to give up such claims. As a matter of fact, the implementation of FON means that the United States is playing the same old trick: taking advantage of the development of customary international law and the ambiguity of some UNCLOS provisions to defend the outmoded concept of freedom of navigation and its national interests.[5] As per

[1] JIN Yongming, *On the Implementation, Influence and Improvement of China's Coast Guard Law*, Frontiers, No. 22, 2021, p. 124-127.

[2] Ronald O'Rourke, *U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress*, Congressional Research Service, R42784, Updated January 26, 2022, p. 25.

[3] Ronald O'Rourke, *U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress*, Congressional Research Service, R42784, Updated January 26, 2022, p. 106.

[4] United States Department of Defense, *Freedom of Navigation Program: Fact Sheet*, (March 2015), https://policy.defense.gov/Portals/11/Documents/gsa/cwmd/DoD%20FON%20Program%20--%20Fact%20Sheet%20%28March%202015%29.pdf

[5] See YU Minyou, *The New Development of U. S. South China Sea Policy and Its New Challenges to China*, Journal of Boundary and Ocean Studies, No. 6, 2020, p. 18.

unclassified documents, the Biden administration will carry on with the FON, which is believed to be able to directly support its protection of the "principle of freedom of the seas".[1] The Administration asserts that continuing freedom-of-navigation deployments, inter alia, having its allies joining such deployments in the South China Sea, can belie China's efforts to calcify its maritime claims into international custom.[2]

In fact, after the Biden administration came into power, US Navy Nimitz Carrier Strike Group entered the South China Sea via the Malacca Strait on 5 February 2021. On June 15 of the same year, US Navy aircraft carrier USS Reagan entered the South China Sea for a "routine mission". A British aircraft carrier sailed through the South China Sea twice in 2021, one in July and the other October, which also conducted joint training exercises with Australian and New Zealand navy ships, respectively.[3] On 25 October 2021, the U.S. Carl Vinson Carrier Strike Group and Japan Izumo-class helicopter carrier JS Kaga conducted joint operations in the South China Sea.[4] At present, there is no motive or reason for the US to stop the FON or the joint freedom-of-navigation deployments in the South China Sea. Conversely, being highly motivated to contain China, the US will continue to pursue its existing policy and stir up regional conflicts.

5. Diplomatic War: Deliberately Create Antagonism in the Region and Establish an Anti-China Alliance in the South China Sea

In his calls with some States neighboring the South China Sea, Secretary Blinken always deliberately emphasized that the US "pledged to stand with Southeast Asian claimants in the face of PRC pressure".[5] Such statements blatantly separate China from other States surrounding the South China Sea, aiming to ignite bitter antagonism among those States in the region, and drive a wedge between China and other littoral States. A White House spokesman also said "we share the concerns of our Philippine allies regarding the continued reported amassing of PRC maritime militia near Whitsun Reef".[6] At the same time, the United States, after mending its traditional alliance with Europe, also hopes to use the strength of European States to impose more pressure on China in the South China Sea. During each of the first calls Blinken made upon taking office with foreign ministers from the UK, France, Germany, Italy and Spain and EU foreign affairs representative, he listed China as one of the challenges that the US and its allies need to face together, alongside the

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[1] Ronald O'Rourke, *U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress*, Congressional Research Service, R42784, Updated January 26, 2022, p. 29.

[2] James Holmes, *Are Freedom of Navigation Operations in East Asia Enough?*, The National Interest (February 23, 2019), https://nationalinterest.org/feature/are-freedom-navigation-operations-east-asia-enough-45257.

[3] Global Times, *Transit the South China Sea to "Stir up Trouble": What the British Aircraft Carrier Did During Its Asia Pacific Tour*, Xinhua Net (October 12, 2021), http://www.news.cn/mil/2021-10/12/c_1211400586.htm.

[4] Global Network, *US Sends a Quasi-Aircraft Carrier to the East China Sea Right After Conducting Dual Aircraft Carrier Exercises in South China Sea with Japan*, Xinhua Net (November 5, 2021), http://www.news.cn/mil/2021-11/05/c_1211434515.htm.

[5] Office of the Spokesperson, Secretary Blinken's Call with Philippine Secretary of Foreign Affairs Locsin, (January 27, 2021), https://www.state.gov/secretary-blinkens-call-with-philippine-secretary-of-foreign-affairs-locsin/.

[6] United States Department of State, *Department Press Briefing*, April 7, 2021.

COVID-19 pandemic and climate change.[1] Shortly after the Biden administration came into power, American traditional allies in Europe, including the UK, France and Germany, responded positively to the call of the United States by sending warships to pass through the South China Sea.[2]

The US-China rivalry or competition regarding the South China Sea issue and the resulting diplomatic war will be long and enduring.[3] Even before the Biden administration came into power, the international community had already witnessed a "battle of diplomatic notes" involving the US, the UK, France, Germany and the South China Sea littoral States, triggered by Malaysia's submission on an extended continental shelf in the South China Sea to the Commission on the Limits of the Continental Shelf (CLCS) on 12 December 2019. Those littoral States, as well as Western States outside the region, stated their respective positions and views on the nature and ownership of territory and maritime rights in the South China Sea by exchanging notes. By the end of April 2021, the submission had attracted 26 notes of concern or protest, 11 of which were aimed at denying China's claims of rights in the South China Sea pursuant to the conclusion of the South China Sea Arbitration.[4] The "battle of diplomatic notes" reveals that the West and the South China Sea littoral States had, even before the President Biden took office, already started a fierce diplomatic battle over China's legal claims in the South China Sea. After Biden was sworn into office, the United States directly unveiled the hypocrisy of its neutrality on the South China Sea issue. It deliberately stirred up or escalated regional hostility and blatantly supported its allies and partners in the South China Sea, attempting to form a "clique" in line with value-based alliance and American interests, enhance the building of a US-controlled security system, and finally establish an anti-China alliance in the South China Sea relying on regional partners and traditional Western allies.

III. China's Countermeasures

1. Uphold Genuine Multilateralism and Staunchly Defend the International Order Based on the UN Charter and International Law

The "rules-based international order" touted by the US and its Western allies, obviously a

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[1] Office of the Spokesperson, Secretary Blinken's Call with German Foreign Minister Maas, (January 27, 2021), https://www.state.gov/secretary-blinkens-call-with-german-foreign-minister-maas/; Office of the Spokesperson, Secretary Blinken's Call with French Foreign Minister Le Drian, (January 27, 2021), https://www.state.gov/secretary-blinkens-call-with-french-foreign-minister-le-drian/; Office of the Spokesperson, Secretary Blinken's Call with UK Foreign Secretary Raab, (January 27, 2021), https://www.state.gov/secretary-blinkens-call-with-uk-foreign-secretary-raab/; Office of the Spokesperson, Secretary Blinken's Call with Italian Foreign Minister Di Maio, (January 28, 2021), https://www.state.gov/secretary-blinkens-call-with-italian-foreign-minister-di-maio/; Office of the Spokesperson, Secretary Blinken's Call with EU High Representative for Foreign Affairs and Security Policy Borrell, (January 28, 2021), https://www.state.gov/secretary-blinkens-call-with-eu-high-representative-for-foreign-affairs-and-security-policy-borrell/.

[2] For concrete actions, see FU Mengzi & CHEN Zinan, *The Focus and Limits of Biden Administration's South China Sea Policy*, Journal of Boundary and Ocean Studies, No. 3, 2021, p. 51-52.

[3] JIN Yongming, *On the Implementation, Influence and Improvement of China's Coast Guard Law*, Frontiers, No. 22, 2021, p. 96.

[4] Michael Sheng-ti Gau, *The Notifications Relating to the 2019 Malaysian Submission to the CLCS: Disputes Reflected and Legal Implications*, Chinese Review of International Law, No. 3, 2021, p. 20.

legacy left by the Cold War imbued with an ideological tinge, is in reality employed by the US for political gains and manipulation in the name of "rule of law". The US endeavors, precisely, to impose its own will on other States and replace universally accepted rules of international law with its own rules. Note-worthily, the "rules" in the "rules-based order" trumpeted by the US and certain Western States are the international rules dominated by Western States, and the "order" is the order favorable to themselves, rather than the universally recognized rules of international law and basic norms of international relations. Therefore, that "rules-based international order" runs against the international governance concept of "consultation, contribution and shared benefits" advocated by China, and also goes against the common interests of all mankind and the common aspirations of most countries in the world.

The United States proposes to maintain a "rules-based maritime order" in the South China Sea, which means to build a regional order in the South China Sea favorable to itself where the regional rules are made and controlled by Western States. The US and other Western States do not want to see States neighboring the South China Sea projecting a united and cooperated front. The multilateralism and multilateral cooperation presented by them in the South China Sea are substantively unilateral, although in the name of multilateralism. In practice, such a fake multilateralism will not only undermine regional cooperation, but also create confrontation and division in the region. Bearing the mind the prevailing aspiration of the international community and the common interests of the people in the South China Sea littoral States, China should uphold the principle of "consultation, contribution and shared benefits" and true multilateralism, and make efforts to move the global governance system toward a more just and equitable future.[1] China should resolutely reject the "pseudo-multilateralism" peddled by the US and other Western States, and really build the South China Sea into a sea of peace, stability and prosperity.

2. Advance the Implementation of the "Code of Conduct in the South China Sea" under the Principle of True Multilateralism

In the face of constant interference in the South China Sea affairs from the US and other Western States outside the region, China should push for the final implementation of "a more substantive and effective Code of Conduct in the South China Sea (COC) that is consistent with both the international law and the needs of all parties."[2] This will be a key step to promote peace and prosperity in the South China Sea. The final COC should not only comply with international law, including UNCLOS, but also fully protect the lawful rights and interests of States outside the

[1] Xi Jinping, *Pulling Together Through Adversity and Toward a Shared Future for All – Keynote Speech by H.E. Xi Jinpingn at the Opening Ceremony of the Boao Forum for Asia Annual Conference 2021*, Xinhua Net (April 20, 2021), http://www.xinhuanet.com/politics/leaders/2021-04/20/c_1127350811.htm.

[2] Xinhua News Agency, *State Councilor and Foreign Minister Wang Yi Answered Questions from Chinese and Foreign Media about China's Foreign Policy and External Relations*, Xinhua Net (March 7, 2021), http://www.xinhuanet.com/2021-03/08/c_1127181623.htm.

region.[1] However, external interference or sabotage will be in no way tolerated. The COC should not incorporate any content that may affect regional peace and stability, such as the ruling of the South China Sea Arbitration.

The final COC will most effectively refute the United States' claim that the award of the South China Sea Arbitration is the sole legal norm in the South China Sea. Further, non-regional States will be thwarted, to the most extent possible, in their attempt to interfere in the affairs related to the South China Sea at jurisprudential level, as the COC reflects the regional rules independently reached by the littoral States in the South China Sea. More importantly, since the COC is jointly developed by all States neighboring the South China Sea after consultation on an equal footing under the true multilateralism featured by "consultation, contribution and shared benefits", reflecting the common interests of all regional States, the COC will serve as a strong resistance or hard hit against the "pseudo-multilateralism" advanced by non-regional States that merely use regional States for their own purposes.

3. Actively Expand Exchanges and Cooperation with Indo-Pacific States and Promote the Building of "a Community with a Shared Future for Indo-Pacific Region"

The US and Southeast Asian States have never been monolithic, and the States surrounding the South China Sea have also realized that the multilateral cooperation pursued by the United States is a "pseudo-multilateralism" imbued with an ideological tinge which prioritizes American interests first and foremost. Regional States, if partnering together with the US to confront China, will not only suffer losses in economic and trade cooperation and political pressure, but also face the challenge of aligning the regional values with the Western values underlined by the US. The Biden administration prioritizes "universal values" over the common interests of its partners, which has turned against America even Southeast Asian States that might otherwise have supported its interests.[2] Therefore, China is recommended to take advantage of the inherent conflicts between Southeast Asian States and the United States. China should actively expand economic and trade cooperation and cultural exchanges with the regional States, and also broaden their common interests, which, as a countermeasure, could ease or offset the hostility deliberately created by the United States in the South China Sea.

In the post-pandemic era, States in the Asia-Pacific region see broad prospects for cooperation with China as the latter has taken the lead in resuming economic activities and achieving huge economic growth. At the meanwhile, global cooperation on fighting against the pandemic provides a good opportunity for China to elevate its reputation at international level. China should continue

[1] Xinhua News Agency, *WANG Yi: China Has Full Confidence in the Prospect of Finalizing the COC*, Xinhua Net (March 7, 2022), http://www.news.cn/politics/2022lh/2022-03/07/c_1128447322.htm.

[2] Derek Grossman, *Biden's troubled Southeast Asia policy needs a reboot*, Nikkei Aisa, July 6, 2021.

to play its role as a good vaccine supplier for the Asia-Pacific region and the third world, especially to increase vaccine exports to Southeast Asia and the States along the "Belt and Road Initiative". In so doing, China could gradually earn more international moral capital and support.[1] Last, China should take economic cooperation, inter alia, infrastructure construction cooperation as an opportunity to further strengthen economic cooperation with the States neighboring the South China Sea and push for the building of "a community with a shared future for the Indo-Pacific Region".

4. Earnestly Study the South China Sea Issue, Voice China's Claims on the International Arena and Expose "Pseudo-Multilateralism" to the International Community

For a long time, the US has controlled the agenda for legal wars in the South China Sea, while China has been more like passively refuting and denouncing the challenging views or behaviors. In the new era, China is recommended to take a "more aggressive" approach to fighting the legal war concerning the South China Sea after President Biden took office, such as properly pointing out the mistakes of other States or individuals, and putting more efforts to voice China's legal maritime claims in the South China Sea.[2]

To deal with the Biden administration's attempts to calcify the conclusion of the South China Sea Arbitration into the "basic law" regulating the South China Sea, China should actively request publicists and foreign affairs departments to express China's views and positions on the international stage, expose the illegality, absurdity and errors of the so-called "arbitration", and resolutely reject the United States' repeated exaggeration of the South China Sea Arbitration and its call on China to abide by the so-called "award" as well.

As for the interpretation of UNCLOS provisions in connection with the principle of freedom of the seas and the FON touted by the US in the South China Sea, China should work along with the international community, especially developing States, to point out that the United States' interpretation is unilateral or arbitrary, and demand that the US should not pretend to be the authoritative and sole interpreter of UNCLOS.

Additionally, China should make its voice heard more promptly and powerfully, and focus on making greater efforts to strengthen its capability of international communication - and gain an international discourse power that matches China's comprehensive national strength and international status.[3] For one thing, China should enhance its capability to set the agenda for the international community, and voice China's positive position of practicing true multilateralism and carrying out mutually beneficial multilateral cooperation in the South China Sea. For another, China

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[1] YAN Dexue & LI Shuaiwu, *The Upgraded "Indo-Pacific Strategy" and Its Threat to China*, Journal of Social Sciences, No. 11, 2021, p. 52.

[2] FU Kuen-chen, *American Policy Shift and Recent Developments in the South China Sea*, Frontiers, No. 3, 2021, p. 40.

[3] Xinhua News Agency, 1 June 2021, *Improving the Country's Capacity for Engaging in International Communication to Present a True, Multi-Dimensional and Panoramic View of China*, Stressed by Xi Jinping at the 30th Group Study Session of the Political Bureau of the 18th CPC Central Committee, http://www.xinhuanet.com/politics/leaders/2021-06/01/c_1127517461.htm.

should censure the so-called “multilateralism” peddled by the US and other Western powers, and expose to the world the dark truth behind the sham policy.

IV. Conclusion

The world is undergoing “profound changes unseen in a century”. The newly elected Biden administration puts more vigorous efforts to treat the South China Sea as an important battleground against China, reflecting its growing desire to take control of the rule-making in the region. Unlike the previous administration, the current administration is trying, under the banner of “pseudo-multilateralism” with “small clique multilateralism”, “America-first multilateralism” or “selective multilateralism” at its core, to revitalize its fake multilateralism through restoring alliance relations with States surrounding the South China Sea and building a series of regional cooperation mechanisms. Nevertheless, the Biden administration has always been pursuing unilateralism in the name of multilateralism, using regional States to check China’s development and dominate the regional order; that strategy has never changed. In stark contrast to the US and Western powers, China, under the global governance concept of “consultation, contribution and shared benefits”, holds high the banner of multilateralism and practices genuine multilateralism by honoring sovereign equality and promoting international cooperation. History will tell the truth and the international community will have a fair judgment on who is safeguarding peace, stability, unity and prosperity in the South China Sea and who is sabotaging it.

Translator: XIE Hongyue

论防空识别区的实践与习惯国际法规则

曹群*

摘要：防空识别区问世至今已逾 70 年，世界上划设防空识别区的国家并不太多，且各国实践尚未形成“统一标准”。从国际实践来看，多数国家所划防空识别区在地理覆盖范围上比较灵活，与领土主权和海域权利主张范围并无直接关联，一国防空识别区可否超出其本国飞行情报区亦无定论。各国防空识别区规则中有关适用对象的表述似乎大都较为模糊，但从相关国际法学者解读以及各国实践来看，多数已公布之防空识别区规则的主要适用对象为民用航空器，少有明确提及对外国军用航空器的适用（尤其是该防空识别区覆盖“国际空域”的条件下）。美国防空识别区现行规则排除“仅穿越”情况适用的实践并未形成“国际惯例”，且迄今仍在相关国际实践中属于“少数派”。目前，关于防空识别区的具体操作规程尚未形成比较清晰的“一般惯例”及“法律确信”，似乎很难说存在较为明晰完备的防空识别区“习惯国际法规则”。

关键词：防空识别区；《国际民用航空公约》；《联合国海洋法公约》

自美国 1950 年划设防空识别区（Air Defense Identification Zone, ADIZ）以来，世界上仅一小部分国家相继划设防空识别区，且大都为“常设性”防空识别区（仅少数国家划设“临时性”防空识别区），其相关识别规则通常会发布于各国“航行资料汇编”（Aeronautical Information Publication, AIP）。[1]防空识别区在早期多为应对军机空袭风险而划设，后来也可应用于打击非法走私贩毒和防范恐怖主义袭击等。目前，尚无广为认可的关于防空识别区的

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[1] 经国际民航组织（ICAO）秘书长授权，ICAO 网站于 2021 年 2 月（4 月有更新）发布了《空中交通管理军民合作手册》（Doc 10088 号文件）英文版初稿。Doc 10088 号文件专设一章论述有关防空识别区设立和规程的“建议措施”，其虽不具法律拘束力，但作为“指导性文件”或将对该领域习惯国际法的形成产生较大影响。然而，从该第一版 Doc 10088 号文件来看，其起草者对于防空识别区的国际实践缺乏深入调研，存在诸多不严谨的评述（后文详述）。比如，该文件初稿称防空识别区现行有效（active）者少于 20 个，不知其标准为何，且其似无权将部分已划设的防空识别区列为“无效”。参见 ICAO, Manual on Civil-Military Cooperation in Air Traffic Management, Doc 10088, First Edition, 2021, 9-1, https://elibrary.icao.int/home.

汇总清单，经初步统计大致有 27 个国家或地区[1]现仍维持划设防空识别区，而且各国实践做法较为多样化，在操作程序上尚无“国际规范”，仅在覆盖范围、适用对象和识别规则等方面稍具“共识”。中外学界虽不乏关于防空识别区的论著（多偏于国际法分析），但较少涉及各国防空识别区规则细节和实践作法，有些论断与基本事实严重不符，从而导致在法理分析上也难免瑕疵（甚至一些国家官方表态亦存在类似问题，比如美国政府对中国东海防空识别区规则的歪曲解读和无端指责）。由于成文条约法的缺失，目前似乎唯有结合相关国际实践从习惯法角度对防空识别区的“共性”加以分析，而现已划设防空识别区的国家实践对于判断相关操作规程是否符合“国际惯例”便参考价值颇大。鉴此，较有必要加强对世界各国防空识别区现行规则的对比分析研究，并论证各国防空识别区实践之“主流”规范和法理逻辑，从而在法理上研讨有关防空识别区的“多数派”共识。

一、关于防空识别区的通用概念以及“标准和建议措施”

自美国于 1950 年率先设立防空识别区后，虽有一些国家陆续宣告划设防空识别区，但关于设立防空识别区以及相关操作程序的国际条约规范长期以来一直处于“空白”，比如与之相关的 1944 年《国际民用航空公约》（通称《芝加哥公约》）和 1982 年《联合国海洋法公约》都未曾提及防空识别区，直至《芝加哥公约》附件十五 2000 年修订增补，并无任何国际文件对防空识别区加以“定义”。《芝加哥公约》附件十五和附件四（附件并无法律拘束力[2]）分别经 2000 年修订和 2001 年修订[3]增补了有关防空识别区的定义以及相关“标准和建议措施”（且为后续版本继承）[4]，其将防空识别区定义为“特别标出的划定范围空域，航空器于其内

[1] 此系根据目前已掌握资料统计，该 27 个国家或地区包括：中国、台湾地区、美国、加拿大、韩国、日本、菲律宾、印度、巴基斯坦、斯里兰卡、孟加拉国、伊朗、缅甸、泰国、印度尼西亚、澳大利亚、巴拿马、古巴、秘鲁、巴西、阿根廷、乌拉圭、冰岛、芬兰、波兰、土耳其、利比亚。其中，值得注意的是，距今最近划设防空识别区者为乌拉圭，其防空识别区范围已公布于其“航行资料汇编”（AIP）2020 年 9 月 10 日修订版（2020 年 11 月 5 日生效，参见 AIP Uruguay, 5 November 2020, ENR 5.2-2.）；而阿根廷既有常设防空识别区，也曾为举办国际会议划设“临时性”防空识别区；澳大利亚虽未划设“常设性”防空识别区，但其早已颁布“常设性”防空识别区规则（且至今有效），比如在澳举办重大国际会议或赛事均可在特定空域临时划设防空识别区。一些历史上曾存在但现已撤销的防空识别区，比如瑞典所划防空识别区、法国所划防空识别区、意大利所划防空识别区、德国统一前西德政府所划防空识别区、越南统一前南越政府所划防空识别区（覆盖不少南海水域）、“冲绳返还”前美军在琉球“代为划设”的防空识别区、马来西亚所划防空识别区、阿曼所划防空识别区等，均未统计在内。

[2] 《芝加哥公约》的附件包含各类“国际标准和建议措施”，其并非“国际条约”，亦不具备《芝加哥公约》本身所有的法律拘束力（根据《芝加哥公约》第 38 条，缔约各国有权采取不同于附件所含“国际标准和建议措施”的本国规章和措施），仅系“为便利起见，将此种标准和措施称为本公约的附件”。参见 Convention on International Civil Aviation, Article 38 & Article 54.

[3] 附件四 2001 年修订增补有关防空识别区的定义，其在表述上与附件十五 2000 年修订增补者完全一致。参见 Annex 4 to the Convention on International Civil Aviation, 11th Edition, July 2009, p. xvi, 1-1.

[4] 《芝加哥公约》附件十五的第一版系由国际民航组织（ICAO）理事会通过于 1953 年 5 月 15 日，并于 1954 年 4 月 1 日开始适用。2000 年 2 月 21 日，ICAO 理事会通过了包括增加防空识别区定义和相关“建议措施”在内的一系列修订，并于 2000 年 7 月 17 日生效，2000 年 11 月 2 日开始适用。参见 Annex 15 to the Convention on International Civil Aviation, 15th Edition, July 2016, p. ix, xiv.

被要求遵守与提供空中交通服务（ATS）有关的程序之外附加的特定识别和/或报告程序”[1]——此亦可算变相认可防空识别区“合法”存在，至少未将其归为非法。除了以上《芝加哥公约》附件所列定义，《马克斯•普朗克国际公法百科全书》对防空识别区所下定义也较在国际法学界“通用”——“防空识别区系一种划定空域，于其内民用航空器被要求自我识别，这些区域常被划设于邻近海岸的专属经济区或公海，以及领海、内水和陆地领土上空。”[2]《马克斯•普朗克国际公法百科全书》的防空识别区词条系由美国军方专家阿什利 •罗奇（J. Ashley Roach）撰写，其在认知上很可能受美国防空识别区制度影响较大，而以美国的防空识别区定义[3]为标杆。另外，阿什利 • 罗奇在该词条还援引《芝加哥公约》第 11 条，提出一国有权对从事国际航行的航空器进入或离开该国领土设定法律和规章[4]，并（基于美国、加拿大、韩国、日本、法国、印度尼西亚和澳大利亚等国单方面宣告划设防空识别区未被反对[5]）认为可以假定习惯国际法现已承认宣告划设防空识别区之权[6]。

较之《芝加哥公约》附件，《马克斯•普朗克国际公法百科全书》对防空识别区所下定义在覆盖范围和适用对象上相对更加清晰，而在具体操作程序上后者则远不如前者之定义表述明确。值得注意的是，以上二者所作定义的表述虽有细微差别，但该两种定义并无实质性分歧，亦均未能成功提炼各国防空识别区实践的“最大公约数”，而忽略了少数国家相关实践存在该两种定义无法涵盖的“特殊性”。首先，该两定义的防空识别区均无覆盖范围限定，前者仅称“特别标出的划定范围空域”，后者虽较清晰地指明防空识别区可被划设于“专属经济区或公海，以及领海、内水和陆地领土上空”，但实际上等同于列举所有类型的空域。其次，后者明确指出在防空识别区内是“民用航空器被要求自我识别”，而前者虽未在适用对象的表述上明确加“民用”二字，但不论是从《芝加哥公约》的适用性（“本公约仅适用

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[1] 参见 Annex 15 to the Convention on International Civil Aviation, Amendment 37, 14th Edition - July 2013, Chapter 1. Definition；《国际民用航空公约》附件 15，2013 年 7 月，第十四版，第 1-2 页。

[2] J. Ashley Roach, *Air Defence Identification Zones*, in R. Wolfrum (ed.), The Max Planck Encyclopedia of Public International Law, Article last updated: March 2017, para. 1.

[3] “防空识别区（ADIZ）系指陆地或水域之上空域，于其内为国家安全利益而需要对所有航空器（美国防部和执法航空器除外）准备识别、定位和管控。”[参见 14 CFR (2005-2020), §99.3.] 美国防空识别区制度对该领域“国际规范”影响巨大，但不能言其可代表“国际习惯”。

[4] J. Ashley Roach, *Air Defence Identification Zones*, in R. Wolfrum (ed.), The Max Planck Encyclopedia of Public International Law, Article last updated: March 2017, para. 4.

[5] 此处值得质疑的是，1961 年苏联曾明确质疑法国所划防空识别区。20 世纪 50 年代末阿尔及利亚独立战争期间，法国宣布划设阿尔及利亚防空识别区（1962 年阿尔及利亚独立后不复存在），其范围延伸至公海上空（至少据海岸 80 海里）。1961 年 2 月，法国战机在其划设阿尔及利亚防空识别区覆盖公海上空区域内对时任苏联最高苏维埃主席团主席勃列日涅夫乘坐的苏联民机进行拦截并开火，此事后苏联官方表态明确质疑相关国家是否有权单方面在公海上空划设防空识别区（苏联外长葛罗米柯发表声明质问：“谁赋予法国当局对在公海上空飞行的他国航空器进行识别之权？”）。参见 O. O. Ogunbanwo, *The Exercise of State Authority in the Airspace over the High Seas*, a thesis submitted to the Faculty of Graduate Studies and Research, McGill University, in candidacy for the degree of Master of Laws, March 1966, p. 37, 47; Elizabeth Cuadra, *Air Defense Identification Zones: Creeping Jurisdiction in the Airspace*, Virginia Journal of International Law, Vol. 18, No. 3, 1978, p. 494-495.

[6] J. Ashley Roach, *Air Defence Identification Zones*", in R. Wolfrum (ed.), The Max Planck Encyclopedia of Public International Law, Article last updated: March 2017, para. 6.

于民用航空器，不适用于国家航空器”[1]）来看，还是从所谓“遵守与提供 ATS 有关的程序”来看[2]，均体现出其仅系针对民用航空器而言。再次，该两定义虽皆未曾言及防空识别区规则的具体操作程序有否“标准规范”，但从二者表述（“航空器于其内被要求遵守……”；“民用航空器被要求自我识别”）来看，二者似均倾向于认为各国所颁防空识别区规则仅包括“主动识别程序”[3]，因为“自我识别”显然应属“主动识别”，而“被动识别程序”也无须通过宣告防空识别区才能“被要求遵守”[4]。最后，该两定义虽尽可能“模糊”以保证灵活性和包容性，但仍仅能代表大多数国家的防空识别区实践，一些比较“特殊”的少数实践似与该两定义皆略有出入（从此角度来说，《芝加哥公约》附件所列定义似有必要作出修订，以使其更具包容性）。比如，印度尼西亚、古巴和乌拉圭三国虽划有常设防空识别区，但并未颁布与之相应的“主动识别程序”相关识别规则，仅提及航空器在相关空域可能遭遇其战机查证识别。[5]印尼、古巴和乌拉圭三国相关实践，显然不符合前述定义中的条件——即航空器“被要求自我识别”或“被要求遵守与提供 ATS 有关的程序之外附加的特定识别和/或报告程序”。再如，一些国家或地区所颁防空识别区规则中还明确列有“被动识别”之类的“拦截程序”，这似已超出前述定义所指内容（因“被动识别程序”难言“被要求遵守”与否，或是否与划设防空识别区相关亦难以确定）。另外，在防空识别区规则的适用对象限定上也有特例，如韩国便明确其规则适用无意进入其领空的外国军用航空器。[6]

《芝加哥公约》附件十五“航空情报服务”（Aeronautical Information Services）和附件四“航图”（Aeronautical Charts）皆包含有关防空识别区的“标准和建议措施”（Standards and Recommended Practices）：前者提出有关防空识别区的覆盖范围及适用规则“必须”[7]在“航

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[1] 关于《芝加哥公约》的适用性条款，参见 Convention on International Civil Aviation, Article 3(a)。同时，《芝加哥公约》第 3 条（b）规定：“用于军事、海关和警察部门的航空器，应认为是国家航空器。”关于“国家航空器”和“民用航空器”的定义及其区分解读，目前尚无统一标准或国际共识，《芝加哥公约》也几乎未曾提供任何指引。1993 年 ICAO 秘书处的“民用/国家航空器”研究报告就此提出三大疑难：1）某些特定的用于军事、海关和警察部门的航空器能否被认定为民用航空器；2）一国政府部门还包括许多除军事、海关和警察之外的其他部门，用于其他政府部门的航空器可否被认定为国家航空器；3）某一航空器在何种限定条件下可被认定为用于军事、海关和警察部门。参见 ICAO, Legal Committee -- 29th Session (Montreal, 4-15 July 1994), Working Paper, Agenda Item 2: Report of the Secretariat, Secretariat Study on “Civil/State Aircraft”, LC/29-WP2/1, p. 5-6.

[2] 国家航空器，尤其是外国军用航空器，若在一国领空之外操作，则并无义务遵守该国发布的 ATS 有关程序，遑论遵守“与提供 ATS 有关的程序之外附加的特定识别和/或报告程序”。

[3] 这里所谓“主动识别程序”是指，航空器遵照相关规则“主动”提交飞行计划、保持无线电通信和进行位置报告以便于其被识别；“被动识别程序”是指，航空器并未“主动”令空管单位识别其身份，而“被动”地遭雷达探测跟踪乃至引发他国军机“拦截”查证识别。参见苏金远：《防空识别区国家实践：地理范围、识别对象以及识别程序》，载《国际法学刊》2020 年第 3 期，第 89-91 页。

[4] 无论是否划设防空识别区，所有国家在其本国领空和“国际空域”皆可施行“被动识别程序”（但不得侵犯他国领空）。一般而言，若不颁布针对航空器操作的“主动识别程序”，而仅在特定范围划设防空识别区（或提示划设国将在该空域施行“被动识别程序”），对于划设国辨识空防威胁的价值几乎为零。关于该议题的详细论述，参见后文。

[5] See AIP Indonesia, 20 September 2012, ENR 5.1-2; AIP Cuba, 25Apr 2019, ENR 5.1-5; AIP Uruguay, 5 Nov 2020, ENR 5.2-2.

[6] 关于该议题的详细论述，参见后文。

[7] 《芝加哥公约》附件十五明确指出，在该附件中，“标准”用“必须”（shall）来表示，而“建议措施”用“应该”（should）来表示。（这里将 shall 和 should 翻译“必须”和“应该”，是参考该附件中文版）。参见 Annex 15 to the Convention on International Civil Aviation, 16th Edition, July 2018, p. ix；《国际民用航空公约》附件 15，2013 年 7 月，第十四版，第 x 页。

行资料定期颁发制”（AIRAC[1]）系统传布[2]；后者提出防空识别区程序可在图例中加以描述[3]，防空识别区范围应恰当显示便于辨识，并给出了建议使用的关于防空识别区界线的图示符号（  ）[4]。对于《芝加哥公约》附件中的“标准”或“建议措施”[5]，虽各缔约国皆无硬性遵守之义务，但也有区别，“标准”相对而言更易得到遵守（因若缔约国未能执行“标准”，则依《芝加哥公约》第 38 条须通知 ICAO 理事会）。因此，多数划设防空识别区的国家或地区积极执行《芝加哥公约》附件十五所提“标准”，大多数都会遵照“航行资料定期颁发制”（AIRAC）在其发布的“航行资料汇编”（AIP）或“航行通告”（NOTAM）中传布有关其防空识别区的详细信息。[6]值得注意的是，《芝加哥公约》附件四所提较易实施且不易导致执行困难的关于防空识别区界线图示符号的“建议措施”，不知为何，并未得到多数划设防空识别区之国遵行。虽然是 2001 年修订之后《芝加哥公约》附件四才增补关于防空识别区界线的“建议”图示符号，此前已划设防空识别区的国家或地区可能对此并未重视，但是最近 20 年来划设或作出范围调整的一些防空识别区很多也没有采纳“建议”图示符号，比如 2007 年划设的斯里兰卡防空识别区、2018 年划设的孟加拉防空识别区以及在 2016 年因扩展范围而有发布新图示的秘鲁防空识别区、在 2018 年调整和扩展范围的加拿大防空识别区、在 2018 年发布新图示的印度防空识别区。目前，似乎仅有中国“航行资料汇编”内所附东海防空识别区图示，美国联邦航空局出版的相关航图，以及阿根廷于 2019 年修订相关规则之时[7]和乌拉圭于 2020 年划设防空识别区之时发布的官方图示，采用了与附件四“建议”相类似的图示符号（在符号颜色和点线间距等细节上多有差异）。

二、防空识别区的覆盖范围及相关法律问题

如前所述，《芝加哥公约》附件中“定义”并未言明一国划设防空识别区可覆盖的区域，这很可能是由于“国际惯例”尚无统一标准，但并不意味着在防空识别区的覆盖范围问题上连初步的“多数派”意见也不存在。关于防空识别区的可覆盖范围，各国实践似已稍具“雏

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[1] AIRAC 是 Aeronautical Information Regulation And Control（“航行资料调控制度”）的简称，是指对航空运行惯例必须作出重大变更的情况按共同生效日期提前发出通知的制度。参见《国际民用航空公约》附件 15，2013 年 7 月，第十四版，第 x 页。

[2] Annex 15 to the Convention on International Civil Aviation, 16th Edition, July 2018, 6.2.1 a).

[3] See Annex 4 to the Convention on International Civil Aviation, 11th Edition, July 2009, 7.9.3 Air traffic services system.

[4] Annex 4 to the Convention on International Civil Aviation, 11th Edition, July 2009, APP 2-18.

[5] 按《芝加哥公约》附件十五中的定义，“标准是指凡有关物理特征、结构、材料、性能、人员或程序的规格，其统一应用被认为对国际航行的安全或正常是必需的，各缔约国将按照公约予以遵守；如不可能遵照执行时，按照公约第三十八条必须通知理事会”；“建议措施是指凡有关物理特征、结构、材料、性能、人员或程序的规格，其统一应用被认为对国际航行的安全、正常或效率是有利的，各缔约国将力求按照公约予以遵守”。参见 Annex 15 to the Convention on International Civil Aviation, 16th Edition, July 2018, p. viii；《国际民用航空公约》附件 15，2013 年 7 月，第十四版，第 ix 页。

[6] 少数划设防空识别区的国家似乎并未严格执行《芝加哥公约》附件十五所提“标准”，比如冰岛和利比亚在其近年 AIP 中似乎“错漏”了有关防空识别区的信息发布，但也有可能是该两防空识别区业已撤销。

[7] 阿根廷 2015 年划设防空识别区之时并未公布官方图示，在 2019 年 1 月修订时才发布。

形”。就纵向范围而言，防空识别区与外层空间[1]无关，仅可覆盖地面/海平面以上的空气空间，且多数为地球表面至无限高（SFC-UNL; GND/MSL-UNL），个别有对海拔高度范围加以限定[2]。就横向范围而言[3]，绝大多数国家的防空识别区均覆盖领空（或全部或部分，而且不少国家所划防空识别区完全位于其领空之内），对领空之外的专属经济区或公海上空亦有覆盖。从国际实践来看，多数国家所划防空识别区在地理覆盖范围上比较灵活，与领空界线并无直接关联，甚有覆盖他国无争议领空者，更多考虑似乎在于用尽量少的坐标点勾连出其防空识别区范围。

1.防空识别区可否覆盖他国飞行情报区尚无定论

从美国 1950 年 12 月划设防空识别区以来，相关国家实践似乎少有在意其覆盖范围是否超出本国飞行情报区（FIR）[4]，亦少有划设国在该问题上被其他攸关方公开质疑或指责。比较少见的知名案例包括：日本和美国曾“变相地”就中国东海防空识别区与他国飞行情报区重叠之事向 ICAO 秘书处提出“疑问”[5]（ICAO 秘书处至今亦未给出解答）；孟加拉防空识别区与他国飞行情报区有大面积重叠，遭不少攸关方质疑。对于民用航空器而言，当其飞行于一国飞行情报区和另一国防空识别区的重叠部分空域，确实可能面临接受不同空中交通管制（ATC）“指令”的问题——比较讽刺的是，2014 年向 ICAO 秘书处提出该问题的美国恰为始作俑者，其所划防空识别区曾长期大面积覆盖他国飞行情报区[6]，且目前仍与加拿大的蒙克顿飞行情报区稍有重叠[7]。在防空识别区实践中，超出己方被分配的飞行情报区范围者并不罕见，共有 14 个案例（含历史上曾经超出但现已调整而不再超出者），包括以下国家和地区

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[1] 外层空间（outer space）是指空气空间（air space）以外的整个空间。空气空间一般指地球表面上空大气层以内、不包括外层空间的空间。目前，尚未形成众所公认的科学标准来划分外层空间和空气空间的界限。

[2] 斯里兰卡防空识别区和澳大利亚所划临时性防空识别区，在一定地理范围内，均未覆盖地表至无限高的全部空气空间而对海拔高度范围有所限定。

[3] 鉴于防空识别区的纵向覆盖范围少有争议性，本文重点研讨其横向覆盖范围的相关法律问题，后文所称防空识别区的覆盖范围，若未加限定且无特别说明，则仅指其横向覆盖范围。

[4] 飞行情报区（FIR）指的是“提供飞行情报服务和告警服务的一定划定范围的空域”，是由国际民航组织（ICAO）划定的用以区分各国或地区的空管服务的责任区。参见 Annex 2 to the Convention on International Civil Aviation, 10th Edition, July 2005, 1-5. 即便不设防空识别区，当民航客机进入一国管理的飞行情报区时一般即须向其报告并服从管理。对于覆盖范围超出本国飞行情报区的防空识别区而言，其实际效果是会在一定程度上使划设国“空中交通管制”职责延展至他国飞行情报区，使其对更广空域的民航活动情况掌握得更加清楚，从而利于其以“排除法”辨识对国家安全利益具有威胁的外国“不友好”军机并减轻军用雷达监控负担（相关分析详见后文）。

[5] 2014 年 3 月 10 日，日本和美国代表团向 ICAO 秘书处递交了一份有关“民用航空器在国际空域的飞越自由及所指定 FIR 内民航空中交通管理功效问题”的书面信件。具体而言，日、美代表团试图确定“一国是否有权在其民航空中交通管制单位管辖范围之外空域对商用航空器下达命令或对其飞行予以限制”。值得注意的是，日本现行 ADIZ 超出其本国福冈 FIR 而与台北 FIR、仁川 FIR 皆有部分重叠，美国现行 ADIZ 也与加拿大的蒙克顿 FIR 略有重叠。参见曹群：《美国防空识别区的历史和法理研究》，海洋出版社 2020 年版，第 272-273 页。

[6] 比如 1988 年修订前美国相关防空识别区曾大面积覆盖墨西哥飞行情报区（Mexico FIR）和马萨特兰海上飞行情报区（Mazatlan Oceanic FIR），且覆盖墨西哥的瓜达卢佩岛领空，亦未闻对其批评之声。参见曹群：《美国防空识别区的历史和法理研究》，海洋出版社，2020 年版，第 52，126，157 页。

[7] 美国此前所划太平洋、墨西哥湾、大西洋沿海防空识别区均曾伸入他国飞行情报区，但经多次修订大体“缩回”本国飞行情报区内。目前，美国本土防空识别区已不再伸入墨西哥飞行情报区和马萨特兰海上飞行情报区，但其东北部仍与蒙克顿飞行情报区有所重叠。

所划防空识别区：美国、加拿大、韩国、日本、琉球当局[1]、中国、台湾当局[2]、泰国、孟加拉国、印度、斯里兰卡、古巴[3]、巴拿马[4]、冰岛[5]等。目前，一国防空识别区可否超出其本国飞行情报区，还没有在各国实践中形成“最大公约数”。

值得注意的是，2021 年发布于 ICAO 网站的《空中交通管理军民合作手册》（Doc 10088 号文件）虽未直接提出有关防空识别区可覆盖范围的议题，但部分论述已隐含其观点，比如：划设国颁布的防空识别区程序和通信要求“不应与 ATS 或飞行操作程序相抵触”，也不应“与本地区其他防空识别区所适用的规则相冲突”，否则便可证明系“对与其邻近国家 ATS 当局管辖空域之挑战，除非其防空识别区程序适用范围非常有限”；“飞行员仅应与相关 ATS 单位通信联络”。[6]Doc 10088 号文件初稿所提“建议”对于超出本国飞行情报区范围和较晚划设的防空识别区并不公平，过于偏向较早划设的防空识别区，并似已默认飞行情报区 ATS 权限优于防空识别区程序（若 ICAO 按此形成定论，则 Doc 10088 号文件将成为对 2014 年美日所呈信件提问的“变相”解答）。Doc 10088 号文件，作为 ICAO 所发第一份有关防空识别区的“指导性文件”，理应避免牵涉国际政治敏感议题。为确保客观公正，Doc 10088 号文件所提“建议措施”似不当冒然引入与多国实践不符的“规范”，也不应对《芝加哥公约》附件中有关防空识别区“定义”所未明确的可覆盖范围问题进行不当解读，更不应偏向在覆盖范围上有所重叠的两个或两个以上防空识别区中划设时间较早者而“建议”后划设者所颁布的识别规则不得与先划设者相矛盾。

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[1] 美军在占领琉球期间所“代为划设”的防空识别区与“台北飞行情报区”范围有重叠，该防空识别区在 1972 年移交日本政府后虽有调整但仍与“台北飞行情报区”有重叠。关于早期的“日本防空识别区”和“冲绳防空识别区”坐标范围及相关图示，参见 O. O. Ogunbanwo, *The Exercise of State Authority in the Airspace over the High Seas*, A thesis submitted to the Faculty of Graduate Studies and Research, McGill University, in candidacy for the degree of Master of Laws, March 1966, p. 125. 关于 1972 年后日本防空识别区在冲绳地区的相关范围图示，可参见：US Defense Mapping Agency, Operational Navigation Chart, ONC H-12, 11 October 1972; US Defense Mapping Agency, Tactical Pilotage Chart, TPC H-12B, 5 March 1996; US National Imagery and Mapping Agency, Operational Navigation Chart, ONC H-13, 30 March 2001.

[2] “台湾防空识别区”的情况比较特殊，其覆盖中国大陆部分地区虽并未超出台湾当局单方面主张的“台北飞航情报区”范围，但远远超出国际民航组织认可的“台北飞行情报区”范围。

[3] 此处指的是古巴 1977 年所划防空识别区覆盖范围，其现今内层和外层防空识别区均位于其哈瓦那飞行情报区之内且外层防空识别区的外圈界线与哈瓦那飞行情报区重合。依据现有资料，尚难确知古巴何时调整了 1977 年所划范围，（依据已出版的美国国防绘图局航图）至晚在 1991 年已修订为现今版本。参见 Federal Aviation Administration, US Department of Transportation, International Notices to Airmen, November 2, 1977, p. 5-6; US Defense Mapping Agency, Tactical Pilotage Chart, TPC J-26D, 9 September 1977; US Defense Mapping Agency, Tactical Pilotage Chart, TPC J-26A, 31 May 1991; US National Imagery and Mapping Agency, Tactical Pilotage Chart, TPC J-26C,13 May 1996; US National Imagery and Mapping Agency, Tactical Pilotage Chart, TPC J-26B, 4 June 1996.

[4] 此处指的是巴拿马早期所划防空识别区覆盖范围，其现今防空识别区覆盖范围完全位于巴拿马飞行情报区之内且二者东、西部界线多有重合。参见 AIP Panama, 30 Nov 2020, ENR 5.2-1; US Defense Mapping Agency, Tactical Pilotage Chart, TPC K-25C, 3 January 1984; US Defense Mapping Agency, Operational Navigation Chart, ONC K-26, 12 July 1984; US Defense Mapping Agency, Operational Navigation Chart, ONC K-25, 2 June 1989; US Defense Mapping Agency, Operational Navigation Chart, ONC L-25, 6 February 1990; US Defense Mapping Agency, Tactical Pilotage Chart, TPC L-26A, 10 September 1990; US Defense Mapping Agency, Tactical Pilotage Chart, TPC K-26D, 28 March 1991.

[5] 此处指的是“冰岛军事防空识别区”（Iceland Military ADIZ），其外圈西北端似有小面积超出雷克雅未克飞行情报区。参见 O. O. Ogunbanwo, *The Exercise of State Authority in the Airspace over the High Seas*, A thesis submitted to the Faculty of Graduate Studies and Research, McGill University, in candidacy for the degree of Master of Laws, March 1966, p. 126; A Chart produced by Canada Department of Natural Resources, 1998, http://flightlane.net/atlantic_lo10.pdf.

[6] ICAO, Manual on Civil-Military Cooperation in Air Traffic Management, Doc 10088, First Edition, 2021, 9-2.

2.防空识别区与领土主权和海域权利主张范围并无直接关联

由于目前尚不存在管理防空识别区设立和实施的相关法律框架，防空识别区重叠争端似乎只能通过有关各方外交磋商加以解决，或者任其“搁置”而加强信任措施建设。从 1950 年起至今 70 年来三十多个国家或地区[1]的防空识别区实践来看，绝大多数国家划设防空识别区皆与领土主权或海洋划界争端并无直接关联，邻国防空识别区重叠情况亦不多，更极少有遭他国公开反对或抗议的情况发生[2]。单就国际法角度而言，一国划设防空识别区并不能赋予其对防空识别区所覆区域的主权、主权权利或管辖权，也无益于强化其对争议区域之主张。

首先，一国划设防空识别区所覆范围与该国海洋权利主张范围无关。有不少国家是在 1950 年代划设防空识别区，当时尚无 1958 年海洋法四公约[3]，亦无 1982 年《联合国海洋法公约》建立的专属经济区制度，但一些国家的防空识别区明显大幅超出其领空范围，并无证据显示此与其海洋权利主张有任何联系。在当下 27 个划设防空识别区的国家或地区中，似乎只有孟加拉防空识别区的较大区域边界与其专属经济区（EZZ）相重合——从近年 ICAO 亚太地区小组会议有关孟加拉防空识别区的各方讨论来看，一国专属经济区航空管理之权取决于该空域的飞行情报区所属，全赖 ICAO 所指定分配而与专属经济区无关。[4]也许是受到了西方智库和媒体的“歪曲”引导，近年来有关防空识别区议题的研讨中并不乏见将防空识别区范围与海洋权利主张相关联的错误论调，比如菲律宾国防部长德尔芬•洛伦扎纳（Delfin Lorenzana）2020 年 6 月曾表示中国若划设南海防空识别区则会非常不利于地区稳定，且会“侵犯”他国专属经济区权益。[5]然而，防空识别区与专属经济区和大陆架在范围界定上并无任何关联性，美国和日本政府对于此点的认识还比较清楚，（如前所述）其基于自身对相关国际航空法的解读质疑中国东海防空识别区有“侵犯”他国飞行情报区管制权限之嫌。从国际实践看，很少有国家会将防空识别区与海域主张相联系，而多数国家是将其与真正涉及相关海域上空之航空管理的飞行情报区加以关联。

其次，防空识别区本身并无任何主权主张含义，不论其是否覆盖争议领土，皆与主权主

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[1] 这里是将已撤销的防空识别区也算在内。

[2] 中国东海防空识别区是一个非常特殊的案例，相关国家对中国东海防空识别区的异常关注很可能是受西方媒体“中国威胁论”宣传影响所致，从其相关表态来看，其实际上对有关防空识别区的国际法知识和各国实践情况并不了解。

[3] 这里是指 1958 年第一次联合国海洋法会议上制定的四项公约，包括《领海及毗连区公约》（1964 年生效）、《公海公约》（1962 年生效）、《公海捕鱼和生物资源养护公约》（1966 年生效）、《大陆架公约》（1964 年生效）。

[4] 2018 年 7 月 30 日至 8 月 3 日的香港会议文件指出：“该（孟加拉国）防空识别区并未与 ICAO 及受影响之国家与空域用户进行协商（特别是，该防空识别区横穿一个交通流量较大区域，部分设立于相邻两国飞行情报区(FIRs)之内且未曾协商）；该防空识别区延伸入国际（公海）空域[似乎碰巧与孟加拉国的专属经济区(EEZ)相一致，而根据 1982 年《联合国海洋法公约》之 EEZ 对空域并无影响]——这一空域由另一国家负责。”参见 International Civil Aviation Organization, The Sixth Meeting of the APANPIRG ATM Sub-Group (ATM/SG/6), Hong Kong, China, 30 July - 03 August 2018, Agenda Item 5: ATM Coordination (Meetings, Route Development, Contingency Planning), CIVIL/MILITARY COOPERATION UPDATE (Presented by the Secretariat), p. 2.

[5] *US Carriers Drill after Southeast Asian Nations Rebuke China*, Associated Press News, June 29, 2020, https://apnews.com/b24af56aed1b31e7dba24c746b7e1ad9.

张无关。也许正是基于此种“共识”，存在领土争议的相关国家所划防空识别区未必定会重叠，相关国家亦不会定要使其防空识别区范围覆盖争议领土。比如，印度与巴基斯坦之间存在领土争端，但两国防空识别区并无重叠状况，而且还签署了有关协议规定双方作战飞机“将不会在对方空域包括防空识别区 10 公里以内范围飞行”。[1]另如，加拿大 2018 年 5 月扩展和调整后的防空识别区[2]覆盖其与丹麦存在主权争议的汉斯岛，但并未覆盖该岛全部领空，似应与其主权主张无关。再如，日本防空识别区并未覆盖竹岛（韩称独岛）和北方四岛（俄称南千岛群岛），但这并不意味着日本放弃了其对上述岛屿的主权主张；韩国防空识别区[3]覆盖独岛（日称竹岛），而东京或将认同的是，这在法律上与其主张无关；台湾当局所划防空识别区并未覆盖钓鱼岛，但这也与其主张无关。值得注意的是，日本对韩国防空识别区覆盖其“竹岛”似无异议，但比较在意其拥有“无争议主权”的与那国岛被台湾当局所划防空识别区覆盖之事[4]，为此于 2010 年单方面宣布扩展防空识别区界线以覆盖与那国岛全部领空及邻近空域，从而导致双方防空识别区略有重叠。对于 2010 年扩展，日本外务省官员在接受《台北时报》采访时表示：防空识别区划界听凭一国自行决断，（因此）日本自然无须求得台湾当局的事先批准。[5]迄今，台湾当局在该问题上并未对日“妥协”，仍坚持美军占领琉球期间所划纵贯与那国岛上空的东经 123 度线为防空识别区分界。[6]

最后，设立包含“争议领土”的防空识别区并不可使某一主权主张合法化，但以往案例显示这种作法在法律上并非不可接受，因为还存在一国将他国无争议领土纳入其防空识别区的先例。仅从覆盖范围来看，防空识别区与飞行情报区一定程度上存在很大相似性，飞行情报区亦与主权主张无关，可覆盖不同国家领土以及争议领土（比如新加坡飞行情报区既覆盖印尼的纳土纳群岛也覆盖部分南沙岛礁）。也许正是由于防空识别区向来与主权主张并无直接关联，防空识别区覆盖他国领空往往不会招致“外交抗议”，一些国家所划防空识别区迄今仍覆盖他国无争议领空并成功“隐身”而免于国际舆论关注，比如美国防空识别区覆盖巴

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[1] 巴基斯坦与印度于 1991 年 4 月 6 日签署《关于防止军用航空器侵犯领空以及允许军用航空器飞越和降落的协定》，其第 2 条规定：两国作战飞机，包括战斗机、轰炸机、侦察机、军用训练机和武装直升机，“将不会在对方空域包括防空识别区 10 公里以内范围飞行”；非武装的后勤运输机（包括非武装直升机和对空观测飞机）飞行将被允许，但须“距对方空域包括防空识别区最少 1000 米”。See India and Pakistan, Agreement on prevention of air space violations and for permitting over flights and landings by military aircraft (with appendix), Signed at New Delhi on 6 April 1991, Article 2.

[2] AIP Canada, Supplement 26/18, 24 May 2018.

[3] 关于韩国防空识别区的具体范围，参见 AIP Republic of Korea, 27 September 2018, ENR 5.2 - 5.

[4] 事实上，台湾当局并未对与那国岛主权质疑，且划入台防空识别区的亦非与那国岛之全部，而是该岛西侧约 2/3 部分。但英国《经济学人》曾发文称防空识别区可以“宣示权力”（show authority），还以日本与台湾当局之间的防空识别区界线纠纷为例，指称日本 2010 年单方面扩展防空识别区是为了覆盖被台湾当局“声索”且划入台防空识别区的与那国岛。参见 *Identify yourself - China's next move in the South China Sea: Is it about to claim the skies above it?*, The Economist(June 18, 2020), https://www.economist.com/china/2020/06/17/chinas-next-move-in-the-south-china-sea.

[5] Shih Hsiu-chuan, *Japan extends ADIZ into Taiwan space* , Taipei Times, June 26, 2010, http://www.taipeitimes.com/News/front/archives/2010/06/26/2003476438/1.

[6] 台湾当局所划防空识别区范围为以下坐标点连线之内区域：“北纬 21 度 00 分、东经 117 度 30 分，北纬 21 度 00 分、东经 121 度 30 分，北纬 22 度 30 分、东经 123 度 00 分，北纬 29 度 00 分、东经 123 度 00 分，北纬 29 度 00 分、东经 117 度 30 分，北纬 21 度 00 分、东经 117 度 30 分”，参见 AIP Taipei FIR, 7 May 2020, ENR 1.12-1.

哈马部分领空[1]、韩国防空识别区覆盖朝鲜部分领土[2]、日本防空识别区覆盖俄罗斯和韩国部分领海[3]、古巴防空识别区覆盖巴哈马部分岛礁[4]、印度防空识别区覆盖斯里兰卡部分领空[5]。当一国所划防空识别区覆盖他国领空之区域位于划设国飞行情报区范围内的情况下，划设国所颁防空识别区规则对于操作于该区域的民用航空器尚可实现“管控”（比如美国本土防空识别区虽覆盖巴哈马的穆埃尔托斯群岛和多格岩，但其所覆盖岛礁皆位于美国的迈阿密飞行情报区之内），但若该区域位于他国飞行情报区范围，则划设国所颁防空识别区规则几乎不可能“奏效”（比如韩国防空识别区覆盖无争议的由朝鲜管辖之北纬 39 度以南领土，且该区域位于朝鲜的平壤飞行情报区之内）。[6]

三、关于防空识别区规则的适用对象和适用穿越情况

在一国所划防空识别区覆盖其领空的范围内，该国依据其领土“主权”[7]，当然完全有权要求进入其领空的外国国家航空器（尤其是军用航空器）遵守防空识别区规则。但在“国际空域”，一国似乎并无国际法依据要求无意进入其领空的外国军用航空器遵守其防空识别区规则（对于覆盖他国领空的防空识别区划设国而言，若该国对在他国领空操作的外国军用航空器提出遵守该国防空识别区规则的要求，则更不可能得到施行，且有侵犯他国领空主权之嫌[8]）。《芝加哥公约》及其附件，一般而言，对在“国际空域”操作的国家航空器并不适用

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[1] 自 1950 年起至 1988 年修订，美国所划太平洋沿海防空识别区曾一直覆盖墨西哥的瓜达卢佩岛全部领空，自 1959 年按国防部建议划设实际上包围美国大陆的“周边防空识别区”（Perimeter ADIZ）以来，美国相关防空识别区（起初为“大西洋沿海防空识别区”和“墨西哥湾沿海防空识别区”，后为“本土防空识别区”）范围一直覆盖巴哈马的多格岩和穆埃尔托斯群岛，以及巴哈马基于其群岛基线主张的群岛水域和相关领海，至今依然。参见曹群：《美国防空识别区的历史和法理研究》，海洋出版社，2020 年，第 22-23，58-60 页。

[2] 韩国自 1951 年划设防空识别区即覆盖北纬 39 度以南的现今朝鲜之领空，这与当时朝鲜半岛情势特殊及两国并无公认“边界”有关，但两国在 1991 年均已成为联合国会员国，韩国防空识别区继续大面积覆盖另一联合国会员国之领空似有不妥。

[3] 因为在 1982 年《联合国海洋法公约》生效后领海宽度由 3 海里变为 12 海里，起初并不覆盖韩国领空的日本防空识别区，在当时韩日皆未更改防空识别区界线的条件下，也便覆盖了韩国最南端的马罗岛（Mara-Do Island）12 海里领海部分范围。另外，日本防空识别区北部还小面积覆盖俄罗斯的萨哈林岛部分领海区域。关于日本防空识别的具体覆盖范围，参见 AIP Japan, 10 March 2011, ENR 5.2-22.

[4] 古巴防空识别区对他国无争议领空有所覆盖，其不仅覆盖巴哈马部分岛礁陆地和邻近海域，还覆盖海地西北部分 12 海里领海，但这些区域皆未超出古巴的哈瓦那飞行情报区范围（亦未曾闻相关方有公开抗议或反对意见）。参见 US Defense Mapping Agency, Tactical Pilotage Chart, TPC J-26D, 9 September 1977; US Defense Mapping Agency, Tactical Pilotage Chart, TPC J-26A, 31 May 1991; US National Imagery and Mapping Agency, Tactical Pilotage Chart, TPC J-26C,13 May 1996; US National Imagery and Mapping Agency, Tactical Pilotage Chart, TPC J-26B, 4 June 1996.

[5] 印度南部防空识别区范围已尽量避免覆盖斯里兰卡北部岛屿陆地领空，但仍不能避免覆盖斯里兰卡相关岛礁 12 海里领海之上领空，而且印斯两国防空识别区有小面积重叠。参见曹群、贾丁：《印度洋国家防空识别区现行特点与法理辨析》，载《边界与海洋研究》2021 年第 4 期，第 20 页。

[6] 韩国防空识别区划设较早，其覆盖范围很可能受到冷战初期朝韩分裂以及当时复杂的地缘政治格局所影响，而韩国政府后来或许不愿（或已忘记）对其北部边界加以修订调整（这似与台湾当局所划防空识别区目前仍覆盖大陆部分沿海地区的情况类似）。美国防空识别区并无与韩国相类的特殊情况。从美国 1988 年调整其防空识别区边界以避免覆盖墨西哥瓜达卢佩岛的案例来看，美国政府似乎并非有意令其防空识别区覆盖他国领空（很可能是相关技术人员疏忽大意所致）。目前，美国防空识别区覆盖的巴哈马部分岛礁面积很小，在地图上较不易发现，相关技术人员更易疏漏忽视之。

[7] 《芝加哥公约》第 1 条规定：“缔约各国承认每一国家对其领土之上的空气空间具有完全的和排他的主权”。参见 Convention on International Civil Aviation, Article 1.

[8] 至于民用航空器，若该国防空识别区覆盖他国领空范围在其飞行情报区内，则要求民用航空器遵守飞行计划和位置报告等“识别”规定似乎并未侵犯他国领空主权，因为这些“识别”规定一般皆与 ICAO 相关程序一致（或稍有“特殊”），大略可算归属飞行情报区空管单位之职责“权限”（而且飞行情报区范围向来与领土主权并无直接关联）。

（《芝加哥公约》第 3 条仅略有“规范”[1]）。在“国际空域”，国家航空器通常无须遵守民航规则，但可自愿按民航规定依照飞行计划操作，包括遵照空管许可进入管制空域（法律上，不可拒绝给予国家航空器通行之空管许可）。[2]

必须明确的是，本文分析防空识别区规则的适用对象及适用穿越情况问题，或者言及对防空识别区规则的遵守，绝大多数情况下仅针对“主动识别程序”而言，而不会牵涉“被动识别程序”（作如此界定的原因，详见下文）。基于此种界定，关于防空识别区规则（尤其是“主动识别程序”）的适用对象和适用穿越情况，以美国为首的西方国家之“解读”较具代表性，且似无先例表明各国防空识别区实践能令无意飞入划设国领空的外国军用及其他国家航空器遵守其防空识别区规则[3]。关于防空识别区规则是否可适用“仅穿越”情况[4]下的外国民用航空器，目前虽未形成众所公认的“国际规范”，但多数国家实践皆未明确排除“仅穿越”情况适用其防空识别区规则。

1.应当区分空防针对目标与防空识别区规则的适用对象

空防针对目标与防空识别区规则的适用对象是两个不同的概念。空防针对目标可以包括所有航空器，不论其为本国或外国、民用或军用航空器，也不论其是否有义务遵守防空识别区规则或配合空中交通管制，军方相关单位皆可对其“不受限制地”（在适当顾及其飞行安全的前提下）进行雷达探测和“拦截”[5]目视识别。而防空识别区规则的适用对象所指范围较窄，其应是划设防空识别区的国家基于相关国际法在一定空域范围内可以要求接受“管控”、服从“指令”的航空器，否则便可能影响“航行和飞越自由”及违反相关国际法。对于以上两个概念的区分，美国专家理查德·巴特勒（Richard J. Butler）略有论及，值得参考：“建立于战争年代并于此后为国际法所接纳的便是防空识别区（ADIZ）这一概念。……这些规则并非针对军用航空器，但如欲进入美国领空而又不想引发拦截战机的紧急升空，这些规则必

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[1] 针对国家航空器，1944 年《芝加哥公约》第 3 条规定其未经授权不得飞入他国领空，缔约国承诺“在发布关于其国家航空器的规章时，对民用航空器的航行安全予以应有的注意”。有关国家航空器的“操作规范”迄今尚未能形成很多国共识，较大的进展是在《芝加哥公约》第三条下增加“分条”（1998 年 10 月 1 日生效），其中最重要的是：“每一国家必须避免对飞行中的民用航空器使用武器，如拦截，必须不危及航空器内人员的生命和航空器的安全。此一规定不应被解释为在任何方面修改了联合国宪章所规定的各国的权利和义务。”参见 Convention on International Civil Aviation, Article 3 bis.

[2] International Civil Aviation Organization, Ninth Meeting of the South Asia/Indian Ocean ATM Coordination Group (SAIOACG/9), Bangkok, Thailand, 26 - 30 March 2019, Agenda Item 7: ANSP Coordination and Civil/Military Cooperation, p. 7.

[3] 若一国将其防空识别区规则适用本国国家航空器，则无论航空器操作于本国领空抑或“国际空域”，此属划设国主权范围内之事，皆无不妥。因此，本文所主要关注的是，一国防空识别区规则的适用对象可否包括外国军用航空器，尤其是在该外国军用航空器操作于“国际空域”且无意进入划设国领空的情况下。对于飞入或飞离一国领空的外国军用航空器，事实上无须划设防空识别区而可利用其他规则加以“管制”，比如美国对此类情况有“外交许可”规定，要求飞入或飞离美国领空、在美国领空之内飞行或飞经美国领空的外国国家航空器应当获得美国国务院以外交许可的方式授权（“外交许可”规定并不见于美国联邦航空局颁布的防空识别区规则任一部分）。参见曹群：《美国防空识别区的历史和法理研究》，海洋出版社，2020 年，第 222-231 页。

[4] 本文所称“仅穿越”情况指的是，不会飞入且亦非飞离防空识别区划设国的领空，而仅穿越该国防空识别区所覆“国际空域”部分。

[5] 本文将 intercept 翻译为“拦截”是不得已而为之。各国 AIP 大都专列“民用航空器的拦截”（Interception of Civil Aircraft）一节，其使用 interception 一词，与“拦截”的中文流行语义（阻拦；阻断；中途阻挡，不让通过）有着较大区别，并非仅指“使航空器改变航线”，更多是与“识别”（identification）相关。

须得到遵从。美国本质上并不主张这些区域的主权，但对于所有进入该区域的目标都进行抵近监控并要求提供信息。”[1]为更好理解上述概念区分，有必要将与之相关的“主动识别程序”和“被动识别程序”（前者系防空识别区规则的主体，后者系用于“拦截”空防针对目标的手段）之间的区别作详细分析，亦可使后文论述避免偏离主题。

第一，“被动识别程序”并不依赖于防空识别区，即便不划设防空识别区，一国军机亦有权在邻近其领空之“国际空域”巡逻查证识别他国航空器——换言之，“被动识别程序”是所有国家皆具之物，而非划设防空识别区的国家所特有（很难区分某一“拦截”是施行防空识别区规则的“被动识别程序”抑或是行使所有国家皆享有的自保权或自卫权措施）。对于已划设防空识别区的国家而言，“被动识别程序”即便可算作防空识别区规则的一部分，也并非其主要部分。一国划设防空识别区并颁布相关“识别”规则，应当并非主要为了使国际社会了解其欲在相关地理范围空域内针对各国航空器施行“被动识别程序”的意图，而更可能是为了利用“主动识别程序”使各国航空器在相关空域自行表明“不具敌意”身份，从而减轻其军用雷达和拦截机的工作任务量，令其能将主要精力用于监控“疑有敌意”的航空器活动。因此，“主动识别程序”应当是一国防空识别区规则的主要部分以及划设防空识别区的有利价值所在[2]。

第二，就一国对他国航空器实施“拦截”抵近目视识别之类“拦截程序”而言，遭拦截一方实际上是“被动”承受，即便拦截一方认为其是在施行防空识别区规则，而遭拦截一方不论是否主动配合“拦截”（比如与拦截机保持无线电通信或拒绝之），都很难说其“被拦截”是遵守防空识别区规则，或者以其“被拦截”为据证明其为拦截一方所设防空识别区规则的适用对象。主动配合“拦截”的被拦截一方亦可提出，其配合“被拦截”与遵守防空识别区规则无关，而是遵行未划设防空识别区条件下的“国际惯例”。

第三，许多已划设防空识别区的国家在其相关规则中提及（美国现行规则并未提及[3]）“拦截程序”之类“被动识别程序”，主要是将其作为不遵守“主动识别程序”所致“违规后果”以“威胁”他国航空器尽量遵守“主动识别程序”。从各国多将“ENR 1.12 民用航空器的拦截”列为不遵守“主动识别程序”的“违规后果”来看，防空识别区规则适用对象似应主要为民用航空器。

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[1] Richard J. Butler, *Sovereignty and Protective Zones in Space and the Appropriate Command and Control of Assets*, Maxwell Air Force Base, Alabama, April 2001, p. 15.

[2] 少数国家（比如印尼、古巴和乌拉圭）虽划设防空识别区，但并未颁布任何“主动识别程序”的识别规则，其亦有自身存在价值，不过相对较少而已。

[3] 以美国现行防空识别区规则为例，其并无任何条款提及“拦截”识别等“被动识别程序”，而仅包括飞行计划、无线电要求、开启应答机和位置报告等“主动识别程序”（美国早期防空识别区规则的相关条款所附小字注释中有提及：可对“未能最大限度遵守飞行计划”的航空器“实施拦截”）。值得注意的是，虽然遭拦截的航空器亦可利用无线电与实施“被动识别程序”的拦截机进行通信，但是此种无线电通信与防空识别区规则中“无线电要求”是不同的。参见曹群：《美国防空识别区的历史和法理研究》，海洋出版社，2020 年版，第 87 页。

第四，即便一国防空识别区规则具体条款并未明言该国对他国航空器可采取雷达探测和“拦截”行动，也不代表该国不会如此施为或不享有此项权利，将此类权利写入具体条款的实际意义不大。例如，日本防空识别区规则相关条款规定：“在防空识别区之内，日本航空自卫队会识别接近日本领空的航空器，未经飞行计划识别的航空器可能易遭飞行中拦截以进行目视确认。”[1]日方作此明文规定的实际意义有限，因为其不必公开宣告而自然有权对未被识别的航空器实施“拦截”，而且似乎无人质疑一国可实施此类自保权或自卫权措施。从逻辑上讲，遵守或违反一国防空识别区规则更多也是针对其“主动识别程序”有关条款，似乎较难理解何为遵守或违反“被动识别程序”条款（比如前述日本相关条款，其只是描述了日方可能采取之行动，未曾提及遭拦截航空器之“配合义务”）。

2.多数国家防空识别区规则的适用对象并不包括外国军用航空器

基于以上界定，各国防空识别区规则中有关适用对象的表述似乎大都较为模糊（多简单地使用“航空器”表述，而不加以明确区分），但从相关国际法学者解读以及各国实践来看，多数已公布之防空识别区规则的主要适用对象为民用航空器（少数包括本国军机[2]或“公用航空器”[3]），少有明确提及对外国军用航空器的适用（尤其是该防空识别区覆盖“国际空域”的条件下[4]）。值得注意的是，美国和加拿大于 1950 年代初划设覆盖大片“国际空域”的防空识别区，其相关规则中适用对象表述也是模糊的（加拿大使用“航空器”表述至今[5]；美国在 1961 年修订前使用“美国和外国航空器”表述，其甚至可被解读为包括外国军用航空器[6]），但 1958 年第一次联合国海洋法会议时国际法委员会的分析报告仍将美国、加拿大两国防空识

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[1] AIP Japan, 1 March 2018, ENR 5.2-21.

[2] 比如印度和巴基斯坦的防空识别区规则，从其表述来看，均有适用本国军机之可能。

[3] 美国防空识别区规则在部分区域不仅适用所有“民用航空器”，还适用美国国防部和执法航空器除外的“公用航空器”。美国防空识别区规则起初曾在适用航空器的类别上有所模糊，但 1961-2003 年一直明确仅适用于民用航空器，2004 年修订后再度模糊化为“所有航空器（美国防部和执法航空器除外）”，从其实践和其他相关文件中方能辨析出其对操作于美国领空之外的国家航空器并不适用。《美国法典》第 49 编中“公用航空器”的定义表述较为复杂。根据联邦航空局（FAA）发布的相关“咨询通告”（Advisory Circular），“公用航空器操作”（PAO, Public Aircraft Operations）仅存在于美国领空之内。简言之，“公用航空器”可以概括为美国武装部队以及美国联邦、州政府各级部门公务使用而操作于美国领空之内的航空器。关于“公用航空器”的定义和解析，可参见曹群：《美国防空识别区的历史和法理研究》，海洋出版社，2020 年版，第 145-150 页。另外，美国印度洋-太平洋司令部 2021 年 1 月发表了有关防空识别区的最新政策阐释，其“修订”了美国防空识别区规则的相关定义表述，将其规则适用对象进一步澄清为“除军用和其他国家航空器之外的所有航空器”[The United States defines an ADIZ, as an area of airspace over land or water in which the ready identification, location, and control of all aircraft, except military and other state aircraft, is required in the interest of national security.] See Office of the Staff Judge Advocate, U.S. Indo-Pacific Command, Indo-Pacific Command Paper Series, Int'l L. Stud. Ser. US Naval War Col., Vol. 97, 2021, p. 8.

[4] 一国在其领空内自有权对外国军机活动加以管控，但在“国际空域”并无国际法依据要求无意进入其领空的外国军机提交飞行计划或定时报告位置。

[5] 关于 1950 年代加拿大防空识别区规则条款，参见 *National Claims and Agreements Providing for Air and Sea Zones for Defensive Purposes*, Int'l L. Stud. Ser. US Naval War Col., Vol. 51, 1956, p. 594. 关于加拿大防空识别区现行规则条款，参见 Canadian Aviation Regulations (Last amended on June 27, 2018), Part VI—General Operating and Flight Rules, Subpart 2—Operating and Flight Rules, Division IX—Emergency Communications and Security, Sec. 602.145.

[6] 根据当时美国规则中“定义”，“外国航空器”是“除本部分(l)段定义之美国航空器以外的航空器”，而“美国航空器”定义又包含“美国国防力量的航空器”。从条文字面分析，“外国航空器”也应包括外国军用航空器。若将此联系美国防空识别区覆盖公海上空范围，显与军用航空器所享“传统公海自由”有相矛盾之嫌。参见曹群：《美国防空识别区的历史和法理研究》，海洋出版社，2020 年版，第 18-20 页。

别区规则的适用对象解读为民用航空器——国际法委员会利用直接引语和间接引语相结合的方式“篡改”了相关条款原文，将其适用性限定于“对所论区域内飞行的所有民用航空器‘为国家安全利益而进行识别、定位和管控’”。[1]国际法委员会作出此种解读（并未遭到美国和加拿大反对），显然并非是由于文本审读马虎，其似应是进行了“善意”解读（调和其与《芝加哥公约》潜在矛盾），抑或是基于当时两国防空识别区规则从未曾有适用外国军用航空器的实践而作之分析[2]。因此，不能仅仅基于一国防空识别区规则有关适用对象的模糊表述，便认定其包括外国军用航空器，而更应详细考察其实践再下论断。

一般而言，若未在“适用性”条款明确提及“国家航空器”或“军用航空器”，则该国防空识别区规则仅适用民用航空器（除非其实践中有反例）。根据目前已有公开资料统计，似乎仅有韩国防空识别区规则明确适用无意进入领空的外国军用航空器[3]（已撤销的意大利防空识别区延伸至领空之外，且其规则适用“所有军用航空器”[4]；巴拿马防空识别区现行规则虽表明适用外国军用航空器，但缺乏实践案例论析其是否适用无意进入领空的外国军用航空器[5]）。在“国际空域”，一国所设防空识别区规则适用外国军用航空器似难有成功先例，比如韩国对中国和俄罗斯军机进入其防空识别区活动屡曾“外交抗议”，而中俄往往答以军机正常活动并未侵犯韩领空。从各国实践的“最大公约数”来看，防空识别区规则的施行与军用航空器所享“公海传统自由”似可并行不悖，少数国家试图在其所划防空识别区范围之内的国际空域“管控”外国军机活动在法理上有很大瑕疵。

如果国际社会多数国家继续认可军机在领空外享有“传统公海自由”，那么一国划设防空识别区（若非如韩国般“自取其辱”设定外国军机不可能遵守之规定）的基本作用或许是为便于在相关空域更加清晰地辨识正常民航活动，从而减轻其军用雷达监控工作负担，以“排除法”过滤出“疑有敌意”的外国航空器。世界上大多数国家并未划设防空识别区，但不代表其国内部没有拟定周边空防预警范围（可对进入该范围的不明目标进行识别、伴飞或拦截）。

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[1] [The statutory instruments relating, respectively, to the ADIZ and the CADIZ each state that they contain “rules which have been found necessary in the interest of national security to identify, locate and control” all civil aircraft operated in the areas in question.] See United Nations Conference on the Law of the Sea, A.CONF.13/37, Official Records, Volume 1: Preparatory Documents, p. 70.

[2] 当时美加两国空防针对之外国军用航空器（尤其是苏联轰炸机）涉及的相关外国政府显然不会认可美加防空识别区规则在公海上空适用于无意飞入该两国领空的外国军机。

[3] AIP Republic of Korea, 27 September 2018, ENR 5.2-5. See also Ian E. Rinehart & Bart Elias, China’s Air Defense Identification Zone (ADIZ), CRS Report R43894, Congressional Research Service, January 30, 2015, p. 4.

[4] 根据已掌握的资料，意大利在 1960 年代已设有防空识别区，且在 1990 年代和 21 世纪初似还曾维持（不过，值得注意的是，美国国防绘图局 1981 年出版的相关航图上有明确标示，但其 2000 年航图已无）。参见 O. O. Ogunbanwo, *The Exercise of State Authority in the Airspace over the High Seas*, A thesis submitted to the Faculty of Graduate Studies and Research, McGill University, in candidacy for the degree of Master of Laws, March 1966, p. 126-127; Steve Davies, *F-15C Eagle Units in Combat*, Bloomsbury Publishing PLC, 2005, p. 80; US Defense Mapping Agency, Operational Navigation Chart, ONC F-2, 28 October 1981; US National Imagery Mapping Agency, Tactical Pilotage Chart, TPC F-2C, June 2000.

[5] 巴拿马相关规则具体表述为：“在该空域通行的外国军用航空器应当通过外交渠道获得巴拿马当局的事先授权批准。该授权请求须在飞行有效日期之前 48 小时提交。”（参见 AIP Panama, 30 Nov 2020, ENR 5.2-1.）虽然相关规定表述上并未排除适用无意飞入领空的外国军用航空器（可能是表述不严谨所致），但是从其具体要求来看，与对飞入领空者的要求极为相似，似应仅适用飞入领空者——因为巴拿马所划防空识别区超出其领空范围，其并无国际法依据“管辖”无意进入其领空而仅穿越“国际空域”的外国军用航空器。

比如，苏联和俄罗斯从未公开划设防空识别区，但这并不意味着其不重视空防或空防能力较弱，其战机亦享有与美国主张之“传统公海自由”一样的权利——紧急升空对在国际空域活动的不明航空器进行识别或拦截。换言之，在“国际空域”，不论是否划设防空识别区，也不论军用航空器的注册国籍，一方航空器（军用）对另一方航空器（民用或军用）的查证识别、追踪伴飞甚或拦截驱离之权皆源于此种“自由”，而非取决于一方是否有公开的国内法授权或公开划设防空识别区。美国军方学者乔纳森•奥多姆（Jonathan G. Odom）早有专题论文分析防空识别区的基本逻辑，指出其作用在于可“减少该国所需主动监视的‘感兴趣的航空器’数量”。[1]防空识别区规则中要求民机提交飞行计划等规定大都是为了便于对航空器进行识别，区分哪些是正常民航，以“排除法”帮助辨识真正威胁——也就是说，某一民用航空器若遵守防空识别区规则按其提交的航线正常飞行，相关空防单位便可不必将其视作威胁，从而可将主要精力用于监视和应对雷达不明空情（针对不明航空器，可派战机升空“拦截”进行查证识别）。

3.多数国家防空识别区规则并未明确排除适用“仅穿越”情况

暂不论防空识别区规则的适用对象是否可包括外国国家航空器，仅就民用航空器的适用穿越情况而言，亦仍存诸多“未知之数”，尚待不断发展以及更多划设国的实践对相关“国际习惯”加以确认或修补。也许正因如此，对于“仅穿越”情况下航空器的适用问题，《马克斯•普朗克国际公法百科全书》的防空识别区词条解析较为含糊。该词条系由美国专家阿什利 • 罗奇（J. Ashley Roach）撰写，他一方面指出确有一些国家将防空识别区规则适用无意进入领空的航空器[2]，另一方面又提出沿海国无权将提交飞行计划和位置报告等防空识别区规则要求适用于无意进入领空的航空器[3]。作出以上含糊解析的阿什利 • 罗奇所述虽与美国官方表态[4]相符合，但其与美国现行防空识别区规则“适用性”条款[5]并不一致，其忽略了现行防空识别区规则适用飞离美国通过防空识别区的航空器。换言之，被阿什利 • 罗奇立为“标杆”的美国防空识别区规则“适用性”条款恰恰是其所论“沿海国无权将防空识别区规则适用于无意进入领空的航空器”的反例。值得注意的是，美国现行防空识别区规则对航空器飞行目

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[1] Jonathan G. Odom, *A ‘Rules-based Approach’ to Airspace Defense: A U.S. Perspective on the International Law of the Sea and Airspace, Air Defense Measures, and the Freedom of Navigation*, REVUE BELGE DE DROIT INTERNATIONAL, 2014/1 – Éditions BRUYLANT, Bruxelles, p. 74.

[2] J. Ashley Roach, *Air Defence Identification Zones*, in R. Wolfrum (ed.), The Max Planck Encyclopedia of Public International Law, Article last updated: March 2017, para. 5.

[3] J. Ashley Roach, *Air Defence Identification Zones*, in R. Wolfrum (ed.), The Max Planck Encyclopedia of Public International Law, Article last updated: March 2017, para. 7.

[4] 比如美国《海上行动法指挥官手册》（2017 年版）中有关防空识别区的表述：“美国颁布的防空识别区规则适用于飞往美国领空的航空器，并要求提交飞行计划和定时位置报告。美国不承认沿海国有权将其防空识别区程序适用于无意进入其领空的外国航空器，美国也不会将其防空识别区程序适用于无意进入美国空域的外国航空器。”参见 Department of the Navy & Department of Homeland Security, The Commander’s Handbook on the Law of Naval Operations, NWP 1-14M/MCTP 11-10B/COMDTPUB P5800.7A, EDITION AUGUST 2017, 2-14.

[5] “本子部分为操作所有航空器（美国防部和执法航空器除外）在防御区之内飞行，或者通过 B 子部分指定的防空识别区（ADIZ）而进入美国、在美国内或离开美国飞行，订立规则。”参见 14 CFR (2020), §99.1(a), p. 907.

的地和始发地的限定并非自其诞生之日起便如此，而是 1961 年“适用性”严苛化修订之后才改变了此前 1950 年代规则对航空器“飞入或飞行于”防空识别区宽泛适用的情况。[1]事实上，很多划设防空识别区的国家并未效仿 1961 年修订后的美国防空识别区规则，不少国家所颁防空识别区规则反而更与美国 1950 年代规则相类似，美国防空识别区规则在“飞行目的地和始发地”适用情况的限定上目前仍属“少数派”，其排除“仅穿越”情况适用的实践并未形成“国际惯例”。

就“仅穿越”情况的适用而言，有两类防空识别区与本议题无关。一类是并未颁布“主动识别程序”之类相关识别规则的防空识别区，比如印尼和古巴所划防空识别区，因其无有具体适用规则，自然无法谈及是否适用“仅穿越”情况。另一类是仅在本国领空内划设的防空识别区，对其适用规则而言根本不存在“仅穿越”划设国周边“国际空域”的情况，比如斯里兰卡防空识别区范围全在领空之内，尽管斯里兰卡防空识别区规则相关条款[2]“照抄”了美国防空识别区规则中“飞入、飞行于、飞离”的表述，亦与本议题无关。与本议题相关的防空识别区必须覆盖“国际空域”且需有具体识别规则，而该类防空识别区划设国在“仅穿越”情况适用上的实践对于判断相关操作规程是否符合“国际惯例”才具有一定参考价值。

在目前划设防空识别区的国家或地区中，芬兰、波兰、土耳其、利比亚、斯里兰卡、秘鲁、阿根廷[3]、乌拉圭[4]等 8 国所划防空识别区完全在其本国领空之内，加上虽覆盖“国际空域”但并未颁布具体识别规则的印尼和古巴防空识别区，共 10 个防空识别区与本议题无关。除以上 10 个防空识别区外，尚有 19 个覆盖“国际空域”且已颁布具体识别规则的防空识别区，包括中国、美国、加拿大、日本、韩国、台湾地区、菲律宾、泰国、缅甸、巴拿马、巴西、印度、巴基斯坦、孟加拉国、伊朗和冰岛[5]等所划的“常设性”防空识别区均覆盖“国际空域”（澳大利亚、阿根廷、乌拉圭也曾划设超出本国领空范围的“临时性”防空识别区[6]）。在以上 19 个防空识别区中，相关规则在对航空器穿越情况的适用性上限于“飞入或飞离领空”或某些具体条款仅适用“飞入领空”情况者，从最大范围来看，似乎仅有美国、日本[7]、印度

[1] 参见曹群：《美国防空识别区的历史和法理研究》，海洋出版社 2020 年版，第 238-240 页。

[2] See AIP Sri Lanka, 30 Jan 2015, ENR 2.2 Other Regulated Airspaces.

[3] 此处仅指阿根廷所划南纬 29 度以北至其与智利、玻利维亚、巴拉圭和巴西边界为限的常设防空识别区，阿根廷所划临时防空识别区将计入覆盖“国际空域”者。

[4] 此处仅指乌拉圭 2020 年 11 月所划常设防空识别区，2020 年 3 月为举行乌拉圭新总统就职仪式所划临时防空识别区将计入覆盖“国际空域”者。参见 AIP Uruguay, 5 Nov 2020, ENR 5.2-2.

[5] 冰岛防空识别区现行规则不明（或已撤销），但其 20 世纪 60 年代规则显然并未排除适用“仅穿越”情况。参见 O. O. Ogunbanwo, *The Exercise of State Authority in the Airspace over the High Seas*, A thesis submitted to the Faculty of Graduate Studies and Research, McGill University, in candidacy for the degree of Master of Laws, March 1966, p. 126.

[6] 澳大利亚和阿根廷均曾为举办 G20 峰会划设临时防空识别区且皆超出本国领空范围。参见：AIP Australia, Supplement H62/14, 11 November 2014; AIP Argentina, Supplement A 28/2018, 11 Oct 2018。

[7] 关于提交飞行计划要求，仅适用自外通过日本防空识别区飞往日本领土的航空器。参见 AIP Japan, 1 Mar 2018, ENR 5.2-21.

[1]（巴基斯坦存疑[2]）、巴西等防空识别区规则的某些具体条款规定有此倾向，其他都未明确排除适用“仅穿越”情况。换言之，排除适用“仅穿越”情况者在以上 19 个防空识别区中最多仅占 4~5 个，而另外 14~15 个在相关识别规则上皆未明确排除适用“仅穿越”情况。

值得注意的是，ICAO 发布的《空中交通管理军民合作手册》英文版初稿（Doc 10088 号文件，2021 年第一版）对本议题也有论及，其“建议”：“防空识别区程序应……仅适用于意图操作飞入、飞行于或飞离主权空域的航空器。”[3]从其表述细节看来（以上文句基本是照抄美国防空识别区现行规则中“适用性”条款相关表述），Doc 10088 号文件起草者很可能受美国相关规则影响较大（也仅一知半解），对其他国家防空识别区实践了解十分有限。Doc 10088 号文件理应在技术细节上更加严谨，似不当未经论证便将个别国家防空识别区规则排除适用“仅穿越”情况的“少数派”实践列为“建议措施”。鉴于学界对各国防空识别区实践细节的掌握程度极为有限，Doc 10088 号文件起草者似当勇于担负“历史重任”就各国防空识别区规则的适用情况作出详细论证，而不应未作任何论证就照抄美国防空识别区规则中“适用性”相关表述，或毫无依据地将美国防空识别区规则定为“国际规范”和“多数派”实践代表，至少应对相关国际实践作初步梳理后再下断语。

四、关于防空识别区的国际法分析

关于防空识别区尚有诸多“未知之数”，但关于主要识别方式及相关拦截程序在各国实践中似已有“初步共识”，至少也可说形成了一些类似的“特定识别和/或报告程序”（包括“飞行计划要求”、“位置报告”要求、“无线电要求”、“应答机要求”和“空防许可（ADC）”要求等）。基于前文各国防空识别区实践特性的总结阐释，本节将主要依据国际法委员会《习惯国际法的识别》报告中“两要素法”[4]剖析是否存在有关防空识别区的习惯国际法规则，并探讨防空识别区所涉相关“公约”解读、防空识别区的合法性依据、防空识别区程序有否基本“规范”等国际法相关问题。以“两要素法”析之，如要确定关于防空识别区是否存在“习

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[1] 印度早期防空识别区规则在此方面并无任何限定，但 2018 年修订后其“空防许可”（ADC）要求有在适用性上限定于“进入或离开印度空域”情况的明显迹象，比如其规则的 5.2.2.2.3 条规定：“离开或进入印度空域航空器的 ADC 号码应由 ATC 严格执行，而且若无有效 ADC 号码则不得批准任何飞行。”参见 AIP India, 19 Jul 2018, ENR 5.2-18, 5.2.2.2.3.

[2] 巴基斯坦防空识别区规则在此方面较为模糊，比如其 D5.3.3.3 条规定：“所有飞行皆应在进入巴基斯坦空域/防空识别区之前至少 15 分钟由相关 ACC 获得 ADC。”由于条款表述上不如印度相关规则“明确”，巴基斯坦防空识别区规则是否适用“仅穿越”情况，便主要取决其实践和官方将来细化解读。参见 Air Navigation Standards (ANS), Intercept of Civil Aircraft, ANO-004-DRAN-1.0, Date of Implementation: 04-12-2009, D5.3.3.3, p. 42.

[3] ICAO, Manual on Civil-Military Cooperation in Air Traffic Management, Doc 10088, First Edition, 2021, 9-2.

[4] 所谓“两要素法”是指该报告中确定习惯国际法规则的“基本方法”，主要包括“结论 2”[两个构成要素: “要确定一项习惯国际法规则的存在及内容，必须查明是否存在一项被接受为法律(法律确信)的通例。”]和“结论 3”[两个构成要素的证据评估: “1. 为查明是否存在一项通例及该通例是否被接受为法律(法律确信)而对证据进行评估时，必须考虑到总体背景、规则的性质以及有关证据被发现时的具体情况。2. 两个构成要素中的每一要素必须单独予以确定。这就要求评估每一要素的证据。”]以及其他相关“结论”。参见 Resolution adopted by the General Assembly on 20 December 2018 [on the report of the Sixth Committee (A/73/556)], Identification of Customary International Law, UN. A/RES/73/203, 11 January 2019, p. 2-5.

惯国际法规则”，须调查两项独立而相关的问题：是否存在关于防空识别区的一般惯例（亦即审视各国划设防空识别区的实践作法）；若存在一般惯例，该惯例是否伴有法律确信（亦即确定各国是否承认对该惯例作法存在遵守义务）。[1]

1.需要区分“存在”和“内容”

《习惯国际法的识别》提出：“要确定习惯国际法的‘存在及内容’，这反映出，虽然往往既需要识别规则是否存在也需要识别规则有何内容，但有时也会仅承认规则存在，但对其具体内容仍有争议。”[2]基于此，要确定关于防空识别区是否存在“习惯国际法规则”，也需对其“存在”和“内容”按“两要素法”加以分析[3]。首先，所称“防空识别区”者，在概念认知上差异性较大。问题的关键是，在“防空识别区”名称之下，划设国所颁布的“规则”包括哪些内容，对他国航空器所要求遵守的“义务”具体是什么。其次，“存在”和“内容”具有紧密联系，“内容”分歧可能导致“存在”成疑。假设世界各国对于防空识别区“多样化”界定并无异议，那么有关防空识别区的习惯国际法规则“存在”便不成问题。不论有关防空识别区的习惯国际法规则是否“存在”，其“内容”包含不少分歧和争议是比较明确的，尤其是关于防空识别区的可覆盖范围、可适用规则、可适用对象和适用情况等方面。最后，论及防空识别区习惯国际法规则的“存在”和“内容”，必须考虑不同时期、不同地区的相关国家实践，而不能仅考虑早期最先划设防空识别区的一些国家实践，后来之相关国家实践对于该领域习惯国际法规则的“存在”和“内容”皆有不容忽视的影响作用。

2.是否形成“一般惯例”

按“两要素法”分析，识别习惯国际法规则的两个构成要素“一般惯例”和“法律确信”是相互交织的，需单独调查每个要素，审查的顺序虽非强制，但往往首先考虑是否存在一般惯例。[4]因此，我们分析有关防空识别区是否存在习惯国际法规则，便可先从审查是否存在“一般惯例”入手，而且“主要应审视国家实践”以识别其“存在”和“内容”。[5]同时，就“国家实践”并不太充分的防空识别区而言，似还尤当审视相关国际组织的实践（如国际民航组织所发“附件”中对防空识别区的“定义”等）以及其他实体的行为（如各国民航对相关防空识别区规则的遵守）。

首先，防空识别区划设国的实践“公开性”较易判断，但大多数国家对已划设防空识别区所采“不作为”之实践较难解析，而且目前在大部分相关国家实践历史和现状尚未得细致梳理辨明的条件下进行整体评估尤有难度。按《习惯国际法的识别》，所涉行为主体须为国

[1] Identification of customary international law, Conclusion 2, Commentary (1), Commentary (4) and Commentary (5).
[2] Identification of customary international law, Conclusion 1, Commentary (4).
[3] Identification of customary international law, Conclusion 2, Commentary (2).
[4] Identification of customary international law, Conclusion 3, Commentary (6), Commentary (8) and Commentary (9).
[5] Identification of customary international law, Conclusion 4, Commentary (2).

家方能构成国家实践[1]，实践必须被其他国家知晓才有助于习惯国际法规则的形成和识别[2]，而且“不作为”也可算作实践。从已知国际实践来看，似乎不存在一国所划防空识别区得到世界上大多数国家“承认”之先例。虽然一国所颁防空识别区规则一般定会对进入其区域的其他所有国家民航航班飞行操作产生影响，但是受到影响的各国政府大都并未提出反对意见，而多以“不作为”的方式加以应对——不明确承认其合法性，但默许或明示本国民航飞行受相关防空识别区规则“管制”（也有明确表示不予承认但明示本国民航飞行接受“管制”的情况，比如美国对中国东海防空识别区便是如此）。

其次，遵循“惯例必须具备一般性”之原则，对防空识别区划设国和受影响国家的相关实践进行审视，目前似很难说形成了比较确定和明晰的“一般惯例”（尚存诸多模糊不定之处）。按《习惯国际法的识别》，惯例必须具备一般性[3]（并无存续时间长短要求[4]），即必须足够广泛和有代表性[5]，表现出一致性，还必须是一贯的[6]。上述“一般性”要求，皆无可量化的明确标准，还允许存在“不一致和矛盾之处”[7]，这些“模糊的”论述无疑会加大解析国家实践的难度，甚或导致较难确定是否存在防空识别区“一般惯例”。对于确定有关防空识别区的“一般惯例”而言，评估其惯例的“一般性”似乎主要在于解析以下两类涉及划设防空识别区或受防空识别区影响的国家实践。

其一，关于受防空识别区影响的国家实践，其更多表现为“不作为”，且在“足够广泛和代表性”或“一贯性”方面皆较无争议。欲要论证“不作为”算作国家实践，则须证明受影响的各国政府是“蓄意不采取行动”[8]，并考虑所有已知实践进行整体评估[9]。各国政府对已划设防空识别区（不论其规则如何“多样化”）的长年“默认”可算“蓄意不采取行动”，亦即形成“不作为”惯例——除 70 多年来未曾反对本国民航遵守相关规则这一原因外，21 世纪初《芝加哥公约》相关附件中增补防空识别区“定义”得到各缔约国之“认可”已不仅是“蓄意不采取行动”，甚至可算作是在防空识别区诞生半个世纪后以“国际组织决议”方式默许其“合法”存在。

其二，关于防空识别区划设国的实践，其在“足够广泛和代表性”或“一贯性”方面皆具较多争议，目前尚难确定其是否形成“一般惯例”。若以比较严苛的标准论之，目前全球仅有廿余国划设防空识别区（而且各国所颁规则差异不小，整体看来前后发展变化亦颇大，

[1] Identification of customary international law, Conclusion 5, Commentary (2).
[2] Identification of customary international law, Conclusion 5, Commentary (5).
[3] Identification of customary international law, Conclusion 8, Commentary (2).
[4] Identification of customary international law, Conclusion 8, Commentary (9).
[5] Identification of customary international law, Conclusion 8, Commentary (3).
[6] Identification of customary international law, Conclusion 8, Commentary (5).
[7] Identification of customary international law, Conclusion 8, Commentary (7) & Commentary (8).
[8] Identification of customary international law, Conclusion 6, Commentary (3).
[9] Identification of customary international law, Conclusion 7, Commentary (1).

较难进行整体性和一致性评估），虽然其所颁规则得到了各国民航遵守，但是其实践是否满足“足够广泛和有代表性”和“一贯性”的条件值得质疑——似乎应给其他现今尚未划设防空识别区的国家“参与”机会，或者至少待此廿余国防空识别区实践得到清晰梳理、准确分析及整体评估（最好是由相关国际组织负责并经尽量广泛的国家代表和相关专家进行细致研讨）之后再判断有否形成“一般惯例”，否则将有失公平和严谨。若以相对宽松的标准论之，基于各国民航在本国政府默许或明示下对已颁布防空识别区规则的遵守以及已知防空识别区实践彼此间存在“不一致和矛盾之处”的事实，目前也可算形成了在诸多具体操作规则上比较模糊且多样化的“一般惯例”，其似可概括如下：在覆盖范围上，可覆盖本国领空以及“国际空域”（可否覆盖他国领空存疑），亦多有超出本国飞行情报区之实践；在适用对象上，“主动识别程序”多明确规定仅适用于民用航空器，少数国家规则提及对外国国家航空器亦适用；在适用情况上，多数实践并未排除适用“仅穿越”情况，也有部分国家规则对此予以明确排除；在识别方式上，大多数国家规则皆有“飞行计划要求”，“位置报告要求”和“无线电要求”亦约占半数，部分国家实践包含“应答机要求”或“空防许可”要求。

最后，相关国际组织的实践以及其他实体的行为皆相对明确，且似对判断“一般惯例”形成时间颇具参考价值，但如何评估其“权重”尚需研讨。按《习惯国际法的识别》，国际组织的实践，在某些情况下有助于习惯国际法规则的形成或表述[1]，在伴有法律确信时可算作产生或证明习惯国际法规则的实践（规则的主题须属于国际组织的任务范围）[2]。就防空识别区而言，国际民航组织（ICAO）制订和发布了很多涉及民航各方面活动的国际标准和建议措施，21 世纪初修订后的《芝加哥公约》附件中便包含防空识别区的“定义”和“建议措施”。虽然《芝加哥公约》附件中“定义”未能反映所有国家的防空识别区实践而略有瑕疵，但是其已模糊地概括出“多数派”实践，非常有助于该领域“一般惯例”的“形成或表述”。《芝加哥公约》现有 193 个缔约国，按照《芝加哥公约》规定成立的国际民航组织，对于影响国际民航业务的防空识别区实践当然拥有“发言权”，其所发“决议”[3]（如经理事会成员国或更广泛的各缔约国代表讨论而通过者）在伴有法律确信时“权重”[4]颇大——可算作产生或证明习惯国际法规则的实践。

这里所称“其他实体”指的是国家和国际组织以外的实体，就防空识别区所涉而言，便主要是指被要求遵守“特定识别和/或报告程序”的各国民航飞行。按《习惯国际法的识别》，

[1] Identification of customary international law, Conclusion 4, Commentary (3).
[2] Identification of customary international law, Conclusion 4, Commentary (5).
[3] Identification of customary international law, Conclusion 6, Commentary (7).
[4] 《习惯国际法的识别》相关评注指出：“一般规则是，越是直接代表成员国实施或越是直接经成员国核可实施的国际组织实践，且上述成员国数量越多，在习惯国际法规则的形成或表述方面就可能具有更大的权重。”参见 Identification of customary international law, Conclusion 4, Commentary (7).

“国家和国际组织以外的实体的行为”无助于形成或表述习惯国际法规则，也不能作为证明习惯国际法规则存在及内容的直接（主要）证据，但可在识别习惯国际法的工作中发挥间接作用（可规定或记录国家和国际组织的实践及其被接受为法律的情况）。[1]因此，各国民航对相关防空识别区规则的遵守，其本身“权重”似乎很小，但其系在各国政府默许或明示下如此行事便可作为反映国家实践的“间接”证据，甚或可以“间接”证明防空识别区“被接受为法律”之程度

3.是否伴有“法律确信”

基于上述有关防空识别区“一般惯例”的评析，目前似乎至多可以判定“一般惯例”之模糊“存在”而无法确定其具体“内容”，故按“两要素法”便只需审视关于“一般惯例”之模糊“存在”是否伴有“法律确信”——若可证明“被接受为法律”，则能确定有关防空识别区“习惯国际法规则”之“存在”（至于其“内容”可暂保持模糊表述，并待此后国际实践愈丰再加以确认）。按《习惯国际法的识别》，只有各国接受“一般惯例”的约束性将之接受为法律，才能识别习惯国际法规则。[2]就防空识别区而言，必须逐案证明防空识别区的划设国确信其“在法律上必须或有权利”颁布本国防空识别区规则，而受防空识别区影响的国家在允许其民航飞行遵守相关识别规则时是感到其“在遵守相当于法律义务的东西”[3]，且并非出于条约义务[4]。

基于已知实践，防空识别区规则对于各国民航飞行而言并非“可依法自由选择遵循或置之不理”，证明各国皆了解防空识别区“一般惯例”且认可其符合习惯国际法并不容易，虽满足“广泛和有代表性的接受以及没有反对或很少反对”条件即可，但亦须“查明特定惯例被接受为法律（法律确信）的证据”[5]。“法律确信”的证据有多重体现形式，“包含与该惯例有关的声明和实际行动（以及不作为）”。[6]就防空识别区而言，在 1950 年代美加等之后划设防空识别区之国的“有关声明和实际行动”皆较明确，并可由此证明其认定拥有依“惯例”划设防空识别区之“法律权利”[7]（尽管划设国在操作规则“内容”上存有诸多争议），但世界上大多数未划设防空识别区的国家罕有发布“声明”、“官方出版物”和“法律意见”

[1] Identification of customary international law, Conclusion 4, Commentary (8).
[2] Identification of customary international law, Conclusion 9, Commentary (1).
[3] Identification of customary international law, Conclusion 9, Commentary (2).
[4] Identification of customary international law, Conclusion 9, Commentary (4).
[5] Identification of customary international law, Conclusion 10, Commentary (1).
[6] Identification of customary international law, Conclusion 10, Commentary (2).
[7] 虽然划设防空识别区的国家少有援引国际条约作为其宣告划设之依据（似仅有孟加拉国援引《芝加哥公约》），而多是以涉及国家安全的国内法为依据宣告划设防空识别区，但是划设国皆认为划设防空识别区并未违反国际法（不论其是否曾作类此明确表态，且似无一国公开表示防空识别区不合国际法却又宣告划设的先例）。就美加等在 1950 年代最早一批划设防空识别区的国家而言，其实践显然并非依循“惯例”，而似可说是创设“惯例”（是否有违反《芝加哥公约》之处，值得研究）。就 1960 年代之后划设国的实际行动而言，其宣告划设防空识别区并颁布有关“特定识别和/或报告程序”的行为（亦有印尼、古巴、乌拉圭等少数国家并未颁布特定“主动识别程序”）本身便可算是证明前文所述防空识别区“一般惯例”之模糊“存在”及其“被接受为法律”的证据。

等文件[1]涉及该领域“一般惯例”或“法律确信”问题，而长期以来更常见的情况是广泛的“不作为”。

假设 1950 年代美加等国防空识别区实践可算形成“一般惯例”，那么其他各国在 1950 年代末期的“不作为”（如 1958 年第一次联合国海洋法会议期间国际法委员会的报告中有关美加等防空识别区实践的评述）便可算是“法律确信”——即便 1958 年第一次联合国海洋法会议之前还有理由可称对“惯例”并未知悉的话，那么此后难有适当理由解释为何各国不采取行动而仍默许其民航遵守相关识别规则。除 1960 年代初苏联曾公开质疑法国所划防空识别区外，似未再发生未划设防空识别区的国家公开“反对”某一国划设防空识别区之事。当然，防空识别区实践并未固步自封于 1950 年代之“规则”，随着后续多国相继划设并在操作规则上推陈出新，该领域“一般惯例”之“内容”也在发展变化（各国实践彼此间亦有诸多“不一致”），至 21 世纪得以“国际组织决议”方式被总结“表述”于《芝加哥公约》相关附件。

与未划设防空识别区的国家广泛“不作为”略有不同的是，一些划设国因在具体操作规则上之“内容”争议而公开声明“不承认”某一国防空识别区的情况曾有发生，比如美日等国针对 2013 年中国划设东海防空识别区的相关声明和表态（后亦明示本国民航可遵行中方所颁识别规则）。不过，美日等国并未质疑中国划设防空识别区之“法律权利”，而是在承认这一权利的基础上质疑中方有关识别规则与“惯例”不符——此种有关操作规则“内容”的争议并不妨碍各方确认有关防空识别区“一般惯例”之模糊“存在”，亦无碍其“法律确信”（甚至可算强调一国有划设防空识别区之“法律权利”的证据）。

值得注意的是，国际民航组织相关“决议”可发挥重要作用，但应保证是在充分了解和分析相关国家实践的条件下所作“决议”，并确定与“一般惯例”相一致。“决议”一词特指国际组织或政府间会议通过的决议、决定和其他文件，而无论其名称如何，也无论它们是否具有法律约束力。[2]尽管“决议”本身既不构成习惯国际法规则，也不能作为证明习惯国际法规则的存在及其内容的确凿证据，但它们在为现有或正在形成的法律提供证据方面有其价值，可以促进一项习惯国际法规则的发展。[3]就防空识别区而言，国际民航组织（包括其相关机构）通过的“决议”并不多见且皆不具法律拘束力，主要是 21 世纪初《芝加哥公约》附件十五和附件四中增补的有关“定义”和“建议措施”，还有便是 2021 年经国际民航组织秘书长授权发布的 Doc 10088 号文件。国际民航组织上述“决议”本身不会产生“速成习惯”（须确定“决议中提出的规则确实与被接受为法律（伴有法律确信）的某项一般惯例”是否相一

[1] Identification of customary international law, Conclusion 10, Commentary (3) & Commentary (4).
[2] Identification of customary international law, Conclusion 12, Commentary (2).
[3] Identification of customary international law, Conclusion 12, Commentary (1).

致[1]），其仅是“可”通过为习惯国际法规则的存在及其内容提供证据来协助确定习惯国际法规则，比如可以作为其中所提规则“被支持决议的各国接受为法律的证据”[2]。虽然《芝加哥公约》附件中有关防空识别区“定义”无法涵盖所有国家的防空识别区实践情况（比如印尼、古巴、乌拉圭三国防空识别区[3]），但是其与 2000 年前形成的“一般惯例”基本上相一致，反映了防空识别区“多数派”实践。因此，就防空识别区而言，其“一般惯例”伴有“法律确信”，至晚在 21 世纪初已可证明相关习惯国际法规则之模糊“存在”（尽管其“内容”尚多分歧）。

五、结语

多数国家设立防空识别区主要是为了保障其国家安全利益，其合法性依赖于“当时被世界各国所接受”的对“自卫权”的解释以及“受到影响的国家所采取的态度都不是抗议而是默默地遵守”[4]。自防空识别区诞生起，美国等一些划设国成功地使各国民航“容忍和默认”其防空识别区规则，从而形成一种“实践中的习惯法”。目前，并无国际公约明确支持或禁止划设防空识别区，在该领域缺乏清晰的习惯国际法规则且各国实践具有差异性和模糊性的情况下，大国实践对相关“国际习惯”的形成至关重要。如前所述，关于防空识别区已可确认“习惯国际法规则”之模糊“存在”，但无法确定其具体操作规则之“内容”。已知的绝大多数防空识别区皆为“单方面”划设，此种宣告方式似已成为有关防空识别区的“最大公约数”。然而，关于防空识别区具体操作规程的很多方面均很难说已有“一般惯例”（比如各国专家迄今仍在争论防空识别区规则是否可适用“仅穿越”情况），尚待不断发展以及更多划设国的实践对相关“国际习惯”确认或修补以形成“法律确信”。

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[1] Identification of customary international law, Conclusion 12, Commentary (4).

[2] Identification of customary international law, Conclusion 12, Commentary (5).

[3] 该三国防空识别区实践并未超出“定义”之上限而似突破了其下限，“定义”指出各国实践会在 ATS 程序之外附加“特定识别和/或报告程序”，但该三国并未颁布此类附加的“程序”，而仅是提示在其防空识别区内有遭遇战机拦截之风险（这当然并不违反国际法，且很类似“危险区”划设）。换言之，该三国事实上放弃了该领域“习惯国际法规则”下其可针对各国民航飞行附加“特定识别和/或报告程序”的“法律权利”。

[4] Ivan L. Head, *ADIZ, International Law, and Contiguous Airspace*, Alberta Law Review, No. 3, 1964, p. 182.

Practice of Air Defense Identification Zones and the Rules of Customary International Law

CAO Qun*

Abstract: It has been over 70 years since the advent of the Air Defense Identification Zone (ADIZ). There are few States in the world that have established ADIZs, and the practice of these States has not yet led to the formation of a "uniform standard". From the perspective of international practice, ADIZs designated by most States are relatively flexible regarding geographic coverage, and are not directly linked to the area of territorial sovereignty and maritime claims. Whether a State's ADIZ can extend beyond its own Flight Information Region(s) is also an unsettled question. Most descriptions of applicable objects in the rules of various States' ADIZs appear relatively vague. However, an interpretation of the writings of international law scholars and the practice of States indicates that most published ADIZ rules are mainly applicable to civil aircraft. A few rules explicitly mention their application to foreign military aircraft (especially in circumstances where the ADIZ covers "international airspace"). The approach of the United States' current ADIZ rules, which excludes the application of "merely transiting" situations, has not formed an "international practice" and remains a "minority" in this regard. At present, there is no clearly discernible "general practice" and "*opinio juris*" for the specific operating procedures of the ADIZ, and it is difficult to state that there is a relatively clear and complete "customary international law rule" for the ADIZ.

Keywords: Air Defense Identification Zone (ADIZ); Chicago Convention on International Civil Aviation; United Nations Convention on the Law of the Sea

Though the United States established the first Air Defense Identification Zones (ADIZs) in 1950, very few countries have since followed the US example. Of these few countries, most have established "permanent" ADIZs, while some have declared "temporary" ADIZs. The relevant identification rules are usually published in the Aeronautical Information Publication (AIP) of each

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country.[1] In the early days, ADIZs were largely set up to address the risk of airstrikes by military aircraft. They were later also used in the fight against drug smuggling and trafficking, and the prevention of terrorist attacks. There is presently no internationally recognized summative list of ADIZs. Preliminary statistics indicate that about 27 countries or regions[2] continue to maintain their ADIZs, with their practices being relatively diversified. There is no "international standard" on operating procedures, and there is only a slight "consensus" in terms of coverage, applicable objects and identification rules. Although there are many scholarly works on ADIZs in Chinese and foreign academic circles (mostly concerning an international law analysis), there is hardly any detail regarding the actual practice of ADIZ rules in various countries. Some of the conclusions drawn from the scholarly works are seriously inconsistent with basic facts, leading to a flawed jurisprudential analysis (even the official statements of some countries have similar problems, such as the US government's distorted interpretation and groundless accusations regarding China's East China Sea ADIZ rules). Considering the lack of treaty laws on this subject, the only way to analyze the "commonness" of ADIZ is from the perspective of customary law based on relevant international practice. The practice of States that have established ADIZs is of great referential value while judging whether operating procedures conform with "international practice". It is therefore necessary to strengthen the comparative analysis and research on existing ADIZ rules, in order to demonstrate "mainstream" norms and the jurisprudential logic of the practice of ADIZs internationally. In doing so, one may advance the discussion on a "majority" consensus on the jurisprudence of ADIZs.

I. General Concepts of the ADIZ and "Standards and Recommended Practices"

Although some States have established ADIZs, international treaty norms regarding their establishment and operating procedures have been "nonexistent" for a long time. For example, the

[1] Authorized by the Secretary General of the International Civil Aviation Organization (ICAO), the ICAO website released the first edition of the English version of Manual on Civil-Military Cooperation in Air Traffic Management (Doc 10088) in February 2021 (updated in April). Doc 10088 has a dedicated chapter to discuss the "recommended practices" on the establishment and procedures of ADIZ. Although it is not legally binding, as a "guidance document", it may have a greater impact on the formation of customary international law in this field. However, judging from the first edition of Doc 10088, its drafters lacked in-depth research on the international practice of ADIZ, and there were many imprecise comments (described in detail later). For example, the first edition of the document stated that there are currently less than 20 active ADIZs globally, but it is unclear what the standard is, and it does not appear to have the authority to list some of the established ADIZs as "inactive". See ICAO, *Manual on Civil-Military Cooperation in Air Traffic Management*, Doc 10088, First Edition, 2021, 9-1, https://elibrary.icao.int/home.

[2] According to the statistics currently available, the 27 countries or regions include: China; the United States; Canada; South Korea; Japan; Taiwan, China; the Philippines; India; Pakistan; Sri Lanka; Bangladesh; Iran; Myanmar; Thailand; Indonesia; Australia; Panama; Cuba; Peru; Brazil; Argentina; Uruguay; Iceland; Finland; Poland; Turkey; and Libya. Among them, it is worth noting that the most recent ADIZ has been established by Uruguay, and the scope of its ADIZ has been published in the revised edition of AIP on September 10, 2020 (effective from November 5, 2020. AIP Uruguay, 5 November 2020, ENR 5.2-2.); Argentina has established a permanent ADIZ and "temporary" ADIZs for international conferences; although Australia has not established a "permanent" ADIZ, it has already issued "permanent" ADIZ rules (which are still valid). For example, an ADIZ in certain airspace for major international conferences or sports events can be temporarily established by Australia. Some of the historical ADIZs that have since been revoked, such as Sweden's ADIZ, France's ADIZ, Italy's ADIZ, the West German government's ADIZ, South Vietnam government's ADIZ (covering a stretch of waters of the south China sea), the ADIZ over Ryukyu actually established by the US military before "Okinawa reversion", Malaysia's ADIZ, Oman's ADIZ, etc., are not counted.

1944 Convention on International Civil Aviation (also known as the Chicago Convention) and the 1982 United Nations Convention on the Law of the Sea both did not mention the ADIZ. Until Annex 15 to the Chicago Convention was amended and supplemented in 2000, there had been no "definition" of the ADIZ in any international document. Annex 15 and Annex 4 to the Chicago Convention (note that the Annexes are not legally binding[1]) were revised in 2000 and 2001[2] to supplement the definition of the ADIZ and related "standards and recommended practices" (and adopted by subsequent editions)[3], which defined an ADIZ as "special designated airspace of defined dimensions within which aircraft are required to comply with special identification and/or reporting procedures additional to those related to the provision of Air Traffic Services (ATS)"[4]. This can also be regarded as a disguised recognition of the "legal" existence of the ADIZ – showcasing that it is at least not classified as illegal. In addition to the definitions listed in the annexes of the Chicago Convention, the definition of the ADIZ in the Max Planck Encyclopedia of Public International Law is also more "common" in international legal circles: "an Air Defence Identification Zone ('ADIZ') is a defined area of airspace within which civil aircraft are required to identify themselves. These zones are established above the exclusive economic zone ('EEZ') or high seas adjacent to the coast, and over the territorial sea, internal waters, and land territory."[5] The ADIZ entry in the Max Planck Encyclopedia of Public International Law was written by J. Ashley Roach, a US military expert. His perspective has likely influenced the definition contained in the ADIZ entry, as the US ADIZ system[6] is defined as the benchmark. In addition, J. Ashley Roach cited Article 11 of the Chicago Convention in this entry to propose that a State has the right to set laws and regulations relating to the admission to or departure from its territory of aircraft engaged in international air navigation[7]. Based on the fact that the United States, Canada, South Korea, Japan, France, Indonesia, Australia and other States have unilaterally declared the establishment of

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[1] The Annexes to the Chicago Convention contain various "international standards and recommended practices", which are not "international treaties" and do not have the legally binding force of the Chicago Convention (According to Article 38 of the Chicago Convention, contracting States have the right to adopt national regulations and measures different from the "international standards and recommended practices" contained in the Annexes). Only "for convenience, such standards and practices are referred to as the Annex to the Convention". See Convention on International Civil Aviation, Article 38 & Article 54.

[2] Annex 4 was revised in 2001 to supplement the definition of the ADIZ, which is exactly the same as that of Annex 15 in 2000. See Annex 4 to the Convention on International Civil Aviation, 11th Edition, July 2009, p. xvi, 1-1.

[3] The first edition of Annex 15 to the *Chicago Convention* was adopted by the Council of the International Civil Aviation Organization (ICAO) on May 15, 1953, and became applicable on April 1, 1954. On February 21, 2000, the ICAO Council adopted a series of amendments including an increase in the definition of the ADIZ and related "recommended practices", which came into effect on July 17, 2000 and became applicable on November 2, 2000. See Annex 15 to the Convention on International Civil Aviation, 15th Edition, July 2016, p. ix, xiv.

[4] See Annex 15 to the Convention on International Civil Aviation, Amendment 37, 14th Edition - July 2013, Chapter 1. Definition.

[5] J. Ashley Roach, *Air Defense Identification Zones,* in R. Wolfrum (ed.), The Max Planck Encyclopedia of Public International Law, Article last updated: March 2017, para. 1.

[6] "Air defense identification zone (ADIZ) means an area of airspace over land or water in which the ready identification, location, and control of all aircraft (except for Department of Defense and law enforcement aircraft) is required in the interest of national security." [See 14 CFR (2005-2020), §99.3.] The US ADIZ system has a huge impact on the "international norm" in this field, but it cannot be said to represent the "international custom".

[7] J. Ashley Roach, *Air Defense Identification Zones,* in R. Wolfrum (ed.), The Max Planck Encyclopedia of Public International Law, Article last updated: March 2017, para. 4.

ADIZs without objection[1], he argued that it could be assumed that customary international law has now recognized the right to declare an ADIZ[2].

Compared with the Annexes to the Chicago Convention, the Max Planck Encyclopedia of Public International Law provides a clearer definition of the ADIZ in terms of coverage and applicable objects, while the latter is far less clear regarding specific operating procedures. It is, however, worth noting that there is no substantial variation between the definitions even though they differ slightly. Neither has succeeded in refining the "greatest common divisor" of various countries' ADIZ practices, and both ignore the "particularity" of the relevant practices of a few countries that cannot be covered by the two definitions. First, there is no coverage limit for the two definitions of the ADIZ. The former definition, namely the definition stipulated in the Chicago Convention, calls it a "special designated airspace of defined dimensions". The latter, namely the definition clarified in the Max Planck Encyclopedia of Public International Law, states that the ADIZ can be established in "the exclusive economic zone or the high seas, as well as over territorial waters, internal waters and land territories" – however, this is actually equivalent to enumerating all types of airspace. Second, the latter clearly states that within the ADIZ, "civil aircraft are required to identify themselves". Although the former has not explicitly added the word "civil" to the expression of the applicable objects, it is shown that the Convention is only applicable to civil aircraft whether in terms of the applicability of the Chicago Convention ("This Convention shall be applicable only to civil aircraft, and shall not be applicable to state aircraft."[3]) or in terms of the so-called "compliance with procedures relating to the provision of ATS"[4]. Thirdly, although neither of these definitions mention whether the specific operating procedures of the ADIZ rules have

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[1] What is worth questioning here is that in 1961 the Soviet Union explicitly questioned the ADIZ established by France. During the Algerian War of Independence in the late 1950s, France declared the Algerian ADIZ (which ceased to exist after Algeria's independence in 1962), extending over the high seas (at least 80 nautical miles from the coast). In February 1961, French military aircraft intercepted and fired upon a Soviet civil aircraft carrying Brezhnev, then President of the Presidium of the U.S.S.R., while it was over the high seas but within the Algerian ADIZ. After the incident, Soviet officials clearly questioned whether the relevant country has the right to unilaterally establish an ADIZ over the high seas (Soviet Foreign Minister Gromyko issued a statement asking: "Who has given to the French authorities the right to identify aircraft of other States which are flying in the airspace over the high seas?") See O. O. Ogunbanwo, "The Exercise of State Authority in the Airspace over the High Seas," A thesis submitted to the Faculty of Graduate Studies and Research, McGill University, in candidacy for the degree of Master of Laws, March 1966, p. 37, 47; Elizabeth Cuadra, "Air Defense Identification Zones: Creeping Jurisdiction in the Airspace," *Virginia Journal of International Law*, Vol. 18, No. 3, 1978, p. 494-495.

[2] J. Ashley Roach, *Air Defense Identification Zones*, in R. Wolfrum (ed.), The Max Planck Encyclopedia of Public International Law, Article last updated: March 2017, para. 6.

[3] For the applicable provisions of the Chicago Convention, see Convention on International Civil Aviation, Article 3(a). Meanwhile, Article 3(b) of the Chicago Convention provides: "Aircraft used in military, customs and police services shall be deemed to be state aircraft." Regarding the definitions of "state aircraft' and 'civil aircraft' and their different interpretations, there is currently no uniform standard or international consensus, and the Chicago Convention has hardly provided any guidance. In 1993, the ICAO Secretariat's "Civil/State Aircraft" research report raised three major problems: 1) whether certain aircraft used in military, customs and police services can be considered to be civil aircraft; 2) The government departments of a country also include many other departments besides the military, customs and police, and whether aircraft used in other governmental services can be deemed to be state aircraft; 3) Under what circumstances an aircraft can be considered to be used in military, customs and police services. See ICAO, Legal Committee - 29th Session (Montreal, 4-15 July 1994), Working Paper, Agenda Item 2: Report of the Secretariat, Secretariat Study on "Civil/State Aircraft", LC/29-WP2/1, p. 5-6.

[4] State aircraft, particularly foreign military aircraft, if operated outside the airspace of a State, they are not obliged to comply with the relevant ATS procedures issued by that State, let alone with "special identification and/or reporting procedures in addition to those related to the provision of ATS".

"standard norms", from the two expressions ("aircraft are required to comply with..."; and "civil aircraft are required to identify themselves") it can be seen that both appear inclined to believe that the ADIZ rules issued by States only include "voluntary identification procedures"[1], because "self-identification" should be "voluntary identification", and "passive identification procedures" do not need to declare an ADIZ to be "required to comply"[2]. Finally, although the two definitions are as "broadly-worded" as possible to ensure flexibility and inclusiveness, they only represent the ADIZ practices of most countries, and some "special" practices seem to be slightly different from the two definitions. From this perspective, the definitions set out in the Annexes to the Chicago Convention may need to be revised to make them more inclusive. For instance, despite having established permanent ADIZs, Indonesia, Cuba, and Uruguay have not yet published the identification regulations for "voluntary identification procedures"; instead, they only state that aircraft may be subject to identification by their fighters in the concerned airspace.[3] The practices of Indonesia, Cuba and Uruguay clearly do not meet the conditions in the aforementioned definition – that is, the aircraft are "required to identify themselves" or "required to comply with specific identification and/or reporting procedures in addition to those related to the provision of ATS". Further, the ADIZ rules promulgated by some States or regions also clearly enumerate "interception procedures" which is a kind of "passive identification". These seemingly exceed the scope of the aforementioned definition, as it is difficult to say whether "passive identification procedures" are "required to comply with" or whether they are related to the establishment of an ADIZ. Additionally, there are special ADIZ rules, applicable objects of which include military aircraft. For example, South Korea has claimed that its ADIZ rules apply to foreign military aircraft that do not intend to enter its airspace.[4]

Both Annex 15 "Aeronautical Information Services" and Annex 4 "Aeronautical Charts" of the Chicago Convention contain "Standards and Recommended Practices" related to ADIZs. Annex 15 proposed that the coverage and applicable rules of the ADIZ "shall"[5] be disseminated in the

[1] The so-called "voluntary identification procedures" here mean that the aircraft "voluntarily" submits flight plans, maintains radio communications and makes position reports in accordance with relevant rules to facilitate its identification; the "passive identification procedures" mean that the aircraft does not "voluntarily" let the air traffic control unit identify its identity, but was "passively" detected and tracked by radar, and even triggered the "interception" by military aircraft of other countries for identification. See SU Jinyuan, "The Practice of States on Air Defense Identification Zones: Geographical Scope, Object of Identification, and Identification Measures," *Journal of International Law*, No. 3, 2020, p. 89-91.

[2] Regardless of whether an ADIZ is declared, all States can implement "passive identification procedures" in their own airspace and the "international airspace" (but not infringe the airspace of other countries). Generally speaking, if the "voluntary identification procedures" for aircraft operation are not promulgated, but an ADIZ is only declared in a specific area (or a reminder that the declaring States will implement "passive identification procedures" in this airspace), the value of identifying air defense threats to the declaring State is almost zero. For a detailed discussion of this issue, see below.

[3] See AIP Indonesia, 20 September 2012, ENR 5.1-2; AIP Cuba, 25Apr 2019, ENR 5.1-5; AIP Uruguay, 5 Nov 2020, ENR 5.2-2.

[4] For a detailed discussion of this issue, see below.

[5] Annex 15 of the Chicago Convention clearly states that in this annex, "standards" are represented by "shall", and "recommended practices" are represented by "should". (The translation of "must" and "should" here is to refer to the Chinese version of this annex).

"Aeronautical Information Regulation and Control" (AIRAC[1]) system[2]. Annex 4 proposed that the ADIZ procedures may be described in the chart legend[3], that the ADIZ coverage should be properly displayed for easy identification, and that a suggested pictorial symbol (

) for the ADIZ boundaries be given[4]. Although contracting States are not obliged to strictly comply with the "standards" or "recommended practices"[5] contained in the Annexes to the Chicago Convention, differences abound. The "standards" are relatively easier to comply with (if a contracting State fails to implement the "standards", it is required to notify the ICAO Council under Article 38 of the Chicago Convention). Therefore, most States or regions that have established ADIZs actively implement the "standards" set out in Annex 15 of the Chicago Convention, and disseminate detailed information about their ADIZs in their AIP or "Notice to Airmen" (NOTAM) in accordance with the AIRAC[6]. It is worth noting that the "recommended practices" set out in Annex 4 of the Chicago Convention regarding graphic symbols for ADIZ boundaries – which do not appear difficult to implement – have not been followed by most ADIZ States. Many of the ADIZs established or adjusted in the last 20 years have not adopted the "suggested" symbol, such as the Sri Lanka ADIZ established in 2007, the Bangladesh ADIZ established in 2018, the Peru ADIZ expanded in 2016 (new map issued), the Canada ADIZ adjusted and expanded in 2018, and the India ADIZ map issued in 2018. At present, very few States have adopted graphic symbols similar to those in Annex 4 "Recommendations". Indeed, it appears that only the East China Sea ADIZ chart attached in China's AIP, relevant charts published by the U.S. FAA, official chart issued by Argentina when it revised its ADIZ rules in 2019[7] and Uruguay ADIZ chart issued in 2020, have seemingly adopted the recommendation (albeit with variations in symbol color and dot and line spacing).

II. The Coverage of the ADIZ and Related Legal Issues

As mentioned above, the "definition" in the Annexes to the Chicago Convention does not

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1 AIRAC is the abbreviation of Aeronautical Information Regulation And Control, which refers to a system for giving advance notice on a common effective date when significant changes to aviation operating practices must be made. See Annex 15 to the Convention on International Civil Aviation, July 2013, Fourteenth Edition, p. x.

2 Annex 15 to the Convention on International Civil Aviation, 16th Edition, July 2018, 6.2.1 a).

3 See Annex 4 to the Convention on International Civil Aviation, 11th Edition, July 2009, 7.9.3 Air traffic services system.

4 Annex 4 to the Convention on International Civil Aviation, 11th Edition, July 2009, APP 2-18.

5 According to the definition in Annex 15 of the Chicago Convention, "standards means any specification concerning physical characteristics, construction, materials, performance, personnel or procedures, the uniform application of which is deemed necessary for the safety or regularity of international navigation, so the contracting States will comply with it in accordance with the convention; if compliance is not possible, the Council must be notified in accordance with Article 38 of the convention"; "recommended practices are any specification of physical characteristics, construction, materials, performance, personnel or procedures, the uniform application of which is considered to be beneficial to the safety, regularity or efficiency of international navigation, so the contracting States will comply with it in accordance with the convention". See Annex 15 to the Convention on International Civil Aviation, 16th Edition, July 2018, p. viii; Annex 15 to the Convention on International Civil Aviation, July 2013, Fourteenth Edition, p. ix.

6 The few countries that have established ADIZs do not appear to have strictly enforced the "standards" set out in Annex15 of the Chicago Convention. For example, Iceland and Libya seem to have "mistakenly missed" the release of information about the ADIZ in their AIPs in recent years, but it is also possible that the two ADIZs have been revoked.

7 The official symbol was not released when Argentina created the ADIZ in 2015, and was only released when it was revised in January 2019.

specify the area that an ADIZ can cover. This is probably because there is no unified standard of "international practice". However, it does not mean that there is no preliminary "majority" opinion on the coverage of an ADIZ. The practice of various States seems to have taken shape in this regard. As far as the vertical range is concerned, the ADIZ has nothing to do with outer space[1]. It can only cover the airspace above the ground/sea level. Most are from the surface of the earth to infinity (SFC-UNL; GND/MSL-UNL), while some have restrictions on the altitude range[2]. In relation to the horizontal range[3], the ADIZs of most countries cover their airspace (either wholly or partly – and the ADIZs of several countries remain completely within their airspace), and they also cover their EEZs or the high seas outside their territorial airspace. In international practice, the ADIZs established by most States are relatively flexible in terms of geographic coverage, and have no direct relationship with territorial airspace boundaries. Some even cover the undisputed territorial airspace of other countries. The trend internationally appears to be to use as few coordinate points as possible when designating the coverage of its ADIZ.

1. Whether the ADIZ Can Cover the Flight Information Regions of Other Countries Is Still Inconclusive

The practice of ADIZ-declaring States seems to have paid little attention to whether its coverage exceeds the domestic Flight Information Regions (FIRs)[4], and few declaring States have been publicly questioned or accused by other stakeholders on this issue. One rare example is of Japan and the United States raising "questions"[5] to the ICAO Secretariat (which the ICAO Secretariat has not yet answered) about the overlap between the East China Sea ADIZ and other countries' FIRs. Another example of public questioning by stakeholders is that of the Bangladesh ADIZ overlapping with other countries' FIRs. Further, when civil aircraft fly in the overlapping

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[1] Outer space refers to the entire space other than airspace. The airspace generally refers to the space above the Earth's surface within the atmosphere, excluding outer space. Currently, there is no generally accepted scientific standard for demarcating the boundaries between outer space and airspace.

[2] The Sri Lankan ADIZ and Australian temporary ADIZ, within a certain geographical range, do not cover the entire airspace from the surface to infinite heights, but have some restrictions on the altitude range.

[3] In view of the fact that the vertical coverage of the ADIZ is less controversial, this paper focuses on the legal issues related to its horizontal coverage. The coverage area of the ADIZ mentioned later, if not limited or otherwise specified, only refers to its horizontal coverage area.

[4] The Flight Information Region (FIR) refers to "a certain designated airspace for providing flight information services and alerting services", and is an area of responsibility demarcated by the International Civil Aviation Organization (ICAO) to distinguish the air traffic control services of countries or regions. See Annex 2 to the Convention on International Civil Aviation, 10th Edition, July 2005, 1-5. Even if there is no ADIZ, when a civil airliner enters the FIR managed by a country, it is generally required to report to ATC units and obey the management. For the ADIZ whose coverage exceeds the declaring State's own FIRs, its actual effect is to extend the "air traffic control" responsibility of the declaring State to the FIRs of other countries to a certain extent, so as to make it clearer about civil aviation activities in a wider range, and help it identify foreign "unfriendly" military aircraft that threaten national security interests by "exclusion method" and reduce the burden of military radar monitoring (relevant analysis will be detailed later).

[5] On March 10, 2014, the delegations of Japan and the United States submitted a letter to the ICAO Secretariat regarding "the issue of freedom of overflight by civil aircraft in international airspace and the effective management of civil air traffic within allocated Flight Information Region (FIR)". Specifically, the Japanese and US delegations sought to determine "the authority of a State to direct or restrict the operation of the flight of civil aircraft outside of that State's FIR." It is worth noting that Japan's current ADIZ exceeds its own Fukuoka FIR and partially overlaps with Taipei FIR and Incheon FIR. The current ADIZ of the United States also slightly overlaps with Canada's Moncton FIR. See CAO Qun, *The U.S. Air Defense Identification Zones: A Historical and Legal Study,* Beijing: China Ocean Press, 2020, p. 272-273.

airspace of one country's FIR and another's ADIZ, they may face the problem of receiving different air traffic control (ATC) "instructions". Ironically, the United States, which had raised the issue to the ICAO Secretariat in 2014, was the initiator and its ADIZ had long covered a large area of other countries' FIRs[1], and still slightly overlaps with Canada's Moncton FIR[2]. In the actual practice of ADIZs, it is not uncommon for States to exceed the coverage of their allocated FIRs. There are 14 cases in total (including those ADIZs that had historically exceeded but have since been adjusted and no longer exceed their domestic FIRs): the ADIZs designated by countries and regions, including the United States, Canada, South Korea, Japan, Ryukyu authorities[3], China, Taiwan authorities[4], Thailand, Bangladesh, India, Sri Lanka, Cuba[5], Panama[6], and Iceland[7]. Presently, there is no "greatest common divisor" amidst the practice of various countries regarding whether a country's ADIZ can exceed its own FIR.

It is worth noting that although the Manual on Civil-Military Cooperation in Air Traffic Management (Doc 10088) published on the ICAO website in 2021 did not directly address the issue of the coverage area of the ADIZ, some discussions have implied its point of view: the ADIZ procedures and communication requirements promulgated by the declaring States "should not conflict with ATS or flight operation procedures", nor should they conflict with "the rules applying

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[1] For example, before the revision in 1988, the relative ADIZ of the United States had largely covered the Mexico FIR and Mazatlan Oceanic FIR, as well as the territorial airspace of Guadalupe Island of Mexico, and there was no criticism of it. See CAO Qun, *The U.S. Air Defense Identification Zones: A Historical and Legal Study,* Beijing: China Ocean Press, 2020, p. 52, 126, 157.

[2] The Pacific, Gulf of Mexico, and Atlantic Coastal ADIZs previously designated by the United States have all extended into other countries' FIRs, but they have been largely "retracted" into its own FIRs after several revisions. Currently, the US ADIZs no longer extend into the Mexican FIR and the Mazatlan Oceanic FIR, but the northeast part still overlaps with the Moncton FIR.

[3] The ADIZ actually established by the U.S. military during its occupation of Ryukyu overlapped with the Taipei FIR, and the ADIZ still overlapped with the Taipei FIR after it was transferred to the Japanese government in 1972. For the early coordinate ranges of Japan ADIZ and Okinawa ADIZ and related illustrations, see O. O. Ogunbanwo, *The Exercise of State Authority in the Airspace over the High Seas*, A thesis submitted to the Faculty of Graduate Studies and Research, McGill University, in candidacy for the degree of Master of Laws, March 1966, p. 125. For a graphic representation of the extent of Japan's ADIZ over Okinawa after 1972, see US Defense Mapping Agency, Operational Navigation Chart, ONC H-12, 11 October 1972; US Defense Mapping Agency, Tactical Pilotage Chart, TPC H-12B, 5 March 1996; US National Imagery and Mapping Agency, Operational Navigation Chart, ONC H-13, 30 March 2001.

[4] The "Taiwan ADIZ" is in a special situation. Although it covers part of the Chinese mainland within the scope of the Taipei FIR unilaterally claimed by the Taiwan authorities, it far exceeds the scope of the Taipei FIR recognized by the International Civil Aviation Organization.

[5] This refers to the coverage of Cuba's ADIZ established in 1977. Its current inner and outer ADIZs are located within its Havana FIR and the outer boundary of the outer ADIZ coincides to the Havana FIR. Based on available information, it is difficult to know for sure when Cuba adjusted the 1977 delineation, which (based on the published U.S. Defense Mapping Agency charts) was revised to the current version as late as 1991. See Federal Aviation Administration, US Department of Transportation, International Notices to Airmen, November 2, 1977, p. 5-6; US Defense Mapping Agency, Tactical Pilotage Chart, TPC J-26D, 9 September 1977; US Defense Mapping Agency, Tactical Pilotage Chart, TPC J-26A, 31 May 1991; US National Imagery and Mapping Agency, Tactical Pilotage Chart, TPC J-26C,13 May 1996; US National Imagery and Mapping Agency, Tactical Pilotage Chart, TPC J-26B, 4 June 1996.

[6] This refers to the coverage of the Panama ADIZ demarcated in the early days. The current coverage of the ADIZ is completely within the Panama FIR, and the eastern and western boundaries of the two mostly overlap. See AIP Panama, 30 Nov 2020, ENR 5.2-1; US Defense Mapping Agency, Tactical Pilotage Chart, TPC K-25C, 3 January 1984; US Defense Mapping Agency, Operational Navigation Chart, ONC K-26, 12 July 1984; US Defense Mapping Agency, Operational Navigation Chart, ONC K-25, 2 June 1989; US Defense Mapping Agency, Operational Navigation Chart, ONC L-25, 6 February 1990; US Defense Mapping Agency, Tactical Pilotage Chart, TPC L-26A, 10 September 1990; US Defense Mapping Agency, Tactical Pilotage Chart, TPC K-26D, 28 March 1991.

[7] This refers to the Iceland Military ADIZ. The northwest end of its outer ring appears to have a small area beyond the Reykjavik FIR. See O. O. Ogunbanwo, *The Exercise of State Authority in the Airspace over the High Seas*, A thesis submitted to the Faculty of Graduate Studies and Research, McGill University, in candidacy for the degree of Master of Laws, March 1966, p. 126; A Chart produced by Canada Department of Natural Resources, 1998, http://flightlane.net/atlantic_lo10.pdf.

to any other ADIZ in the area"; Otherwise, it can be regarded as a challenge "for airspace under the authority of adjacent States' ATS authority, unless the scope of the ADIZ procedures are kept very limited"; "pilots should communicate with the relevant ATS units only"[1]. The "recommendations" contained in the first edition of Doc 10088 inappropriately affect ADIZs which are beyond the country's FIR and which were established later. The "recommendations" are too biased towards the ADIZs established earlier, and seem to have defaulted the FIR ATS authority over the ADIZ procedures (If the ICAO reaches a conclusion based on this, Doc 10088 would indeed provide a "disguised" answer to the questions raised in the letter submitted by the United States and Japan in 2014). Doc 10088, being the first "guidance document" on the ADIZ issued by ICAO, should avoid touching upon international politically sensitive issues. In order to ensure objectivity and impartiality, the "recommended practices" in Doc 10088 should not introduce "norms" that are inconsistent with multinational practice, and should not advance an inappropriate interpretation of the coverage issue that is not clearly "defined" for ADIZs in the Annexes to the Chicago Convention. Further, it should not be biased towards the earlier-established ADIZ amongst the two or more ADIZs which overlap in coverage, nor should "recommend" that the identification rules promulgated by the later-declaring States can not contradict those declared earlier.

2. The ADIZ Is Not Directly Related to Territorial Sovereignty and Maritime Claims

Because a legal framework governing the establishment or enforcement of ADIZs does not exist, overlapping ADIZ disputes can only be resolved through diplomatic consultations between relevant parties, or they can be "shelved" with efforts to strengthen confidence-building measures. The practice of ADIZs established by over 30 States or regions[2] since 1950 shows that the establishment of an ADIZ by most States is not directly related to territorial sovereignty or maritime delimitation disputes. There is little overlap between ADIZs established by neighboring countries, and there are very few cases of pronounced opposition or protest by other countries[3]. From the perspective of international law alone, the establishment of an ADIZ by a State does not confer sovereignty, sovereign rights or jurisdiction over the area covered by the ADIZ, nor does it help strengthen its claims over the disputed area.

Firstly, the coverage of a country's ADIZ has nothing to do with the country's maritime claims. Many States set up ADIZs in the 1950s, when there were no 1958 Four Conventions on the Law of

[1] ICAO, *Manual on Civil-Military Cooperation in Air Traffic Management*, Doc 10088, First Edition, 2021, 9-2.
[2] This includes the revoked ADIZs.
[3] The East China Sea ADIZ is a very special case. The abnormal attention of relevant countries to the East China Sea ADIZ is probably influenced by the propaganda of the "China threat theory" from the western media. Judging from their relevant statements, they actually do not know much about the knowledge of international law related to the ADIZ and the practice of various States.

the Sea[1], nor was there the EEZ system established by 1982 United Nations Convention on the Law of the Sea. However, some countries' ADIZs extend significantly beyond their territorial airspace, and there is no evidence that this bears any connection to their maritime claims. Among the 27 States or regions which have established ADIZs, it appears that only the boundary of the Bangladesh ADIZ largely coincides with its EEZ. Judging from the discussions on the Bangladesh ADIZ at ICAO Asia-Pacific Regional Group Meetings in recent years, the right to manage aviation over a country's EEZ depends on the FIR of that airspace – which is entirely dependent on the allocation designated by ICAO and has nothing to do with the EEZ[2]. Perhaps misled by the "distortion" of Western think tanks and media, in recent years, discussions on the ADIZ issue have seen many erroneous arguments linking the coverage of the ADIZ to maritime claims. For example, the Philippines' Defense Secretary Delfin Lorenzana stated in June 2020 that China's establishment of an ADIZ over the South China Sea would be very detrimental to regional stability and would "violate" other countries' rights to their EEZs[3]. However, the ADIZ has nothing to do with the EEZ and continental shelf. The US and Japanese governments have a relatively clear understanding of this point (as mentioned above). Based on their own interpretation of international aviation law, they argued that China's East China Sea ADIZ is suspected of "infringing" on the ATC authority of other countries' FIRs. From the perspective of international practice, however, few countries associate the ADIZ with maritime claims, and most associate it with the FIR that actually involves aviation management over the relevant waters.

Secondly, the ADIZ itself does not imply any claims to sovereignty. Whether or not it covers disputed territory has nothing to do with sovereignty claims. Perhaps because of this "consensus", the ADIZs of the countries involved in territorial disputes do not necessarily overlap, nor do States necessarily want their ADIZs to cover disputed territories. For example, India and Pakistan have territorial disputes, but their ADIZs do not overlap; they have signed an agreement stating that their

[1] This refers to the four conventions formulated at the first United Nations Conference on the Law of the Sea in 1958, including the Convention on the Territorial Sea and the Contiguous Zone (entered into force in 1964), the Convention on the High Seas (entered into force in 1962), the Convention on Fishing and Conservation of the Living Resources of the High Sea (entered into force in 1966), and the Convention on the Continental Shelf (entered into force in 1964).

[2] The Hong Kong meeting (from 30 July to 3 August 2018) document states that "the (Bangladesh) ADIZ was not consulted with ICAO affected States or airspace users (notably, the ADIZ crossed a major traffic flow and was partly established within the Flight Information Regions (FIRs) of two neighbouring States, without consultation); the ADIZ extended into international (High Seas) airspace [apparently coincident with the Bangladesh Exclusive Economic Zone (EEZ), which had no effect on airspace according to the United Nations Convention on the Law of the Sea 1982] - this airspace being the responsibility of another State". See International Civil Aviation Organization, *The Sixth Meeting of the APANPIRG ATM Sub-Group (ATM/SG/6)*, Hong Kong, China, 30 July - 03 August 2018, Agenda Item 5: ATM Coordination (Meetings, Route Development, Contingency Planning), CIVIL/MILITARY COOPERATION UPDATE (Presented by the Secretariat), p. 2.

[3] *US Carriers Drill after Southeast Asian Nations Rebuke China*, Associated Press News, June 29, 2020, https://apnews.com/b24af56aed1b31e7dba24c746b7e1ad9.

combat aircraft "will not fly within 10 kms of each other's airspace including ADIZ"[1]. In another example, Canada's expanded ADIZ[2] in May 2018 covers the Hans Island, which had been related to a sovereignty dispute with Denmark, but does not cover the entire airspace of the island – which appears to be unrelated to its sovereignty claims. Additionally, Japan's ADIZ does not cover Takeshima (called Dokdo in South Korea) and the Northern Territories (called South Kuril Islands in Russia) – but this does not mean that Japan has given up its sovereignty claims on the above islands; the South Korean ADIZ[3] covers Dokdo (known as Takeshima in Japan), and Tokyo may agree that this is legally irrelevant to its claims. The ADIZ established by the Taiwan authorities does not cover the Diaoyu Dao Islands, but this has no bearing on their sovereignty claim either. Notably, Japan appears to have no objection to the fact that South Korea's ADIZ covers its "Takeshima". It is more concerned about Yonaguni Island, over which it has "undisputed sovereignty", and that this island is covered by the ADIZ designated by the Taiwan authorities[4]. In response, Japan in 2010 unilaterally declared an extended ADIZ line that covered Yonaguni Island completely. Japanese officials with the Ministry of Foreign Affairs told the Taipei Times that "ADIZ demarcation is at the discretion of each country, [so] it was natural for Japan not to seek prior approval" from the Taiwan authorities.[5] So far, the Taiwan authorities have not "compromised" with Japan on this issue, and continue to insist that the 123°00′E line drawn across Yonaguni Island during the U.S. occupation of Ryukyu is the demarcation line between their ADIZs.[6]

Thirdly, the establishment of an ADIZ containing "disputed territory" does not legitimize a sovereignty claim, and existing precedents demonstrate that an ADIZ covering contested territory does not make it legally unacceptable, because there are several international precedents for governments establishing an ADIZ over indisputable territory of another country. In terms of

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[1] On 6 April 1991, Pakistan and India signed the *Agreement on the Prevention of Airspace Violations and for permitting over flights and Landings by Military Aircraft.* Article 2 stipulates that combat aircraft of the two countries, including fighter, bomber, reconnaissance, jet military trainer and armed helicopter aircraft, "will not fly within 10 kms of each other's airspace including ADIZ"; Unarmed transport and logistics aircraft (including unarmed helicopters and Air Observation Post aircraft) will be permitted up to "1,000 meters from each other's airspace including ADIZ." See India and Pakistan, *Agreement on prevention of air space violations and for permitting over flights and landings by military aircraft (with appendix)*, Signed at New Delhi on 6 April 1991, Article 2.

[2] AIP Canada, Supplement 26/18, 24 May 2018.

[3] For the specific scope of the Korea ADIZ, see AIP Republic of Korea, 27 September 2018, ENR 5.2 - 5.

[4] In fact, the Taiwan authorities have not questioned the sovereignty of Yonaguni Island, and it is not the entire Yonaguni Island that is included in the Taiwan ADIZ, but about 2/3 of the western side of the island. However, the British *Economist* once published an article saying that the ADIZ can "show authority", and also used the dispute over the boundary of the ADIZ between the Japanese and Taiwan authorities as an example, alleging that Japan unilaterally expanded the ADIZ in 2010. It is to cover Yonaguni Island, which was "claimed" by the Taiwan authorities and included in the Taiwan ADIZ. See *Identify yourself - China's next move in the South China Sea: Is it about to claim the skies above it?*, The Economist, 18 June 2020, https://www.economist.com/china/2020/06/17/chinas-next-move-in-the-south-china-sea.

[5] Shih Hsiu-chuan, *Japan extends ADIZ into Taiwan space*, Taipei Times, June 26, 2010, http://www.taipeitimes.com/News/front/archives/2010/06/26/2003476438/1.

[6] The ADIZ defined by the Taiwan authorities is the area within the line connecting the following coordinate points: N21°00′; 117°30′; 21°00′; 121°30′; 22°30′; 123°00′; 29°00′; 123°00′; 29°00′; 117°30′; 21°00′; 117°30′. See AIP Taipei FIR, 7 May 2020, ENR 1.12-1.

coverage, the ADIZ and the FIR have a great similarity to some extent. The FIR has nothing to do with sovereignty claims, and can cover the territory of different States and disputed territories (for example, the Singapore FIR covers both – Indonesia's Natuna Islands and some Nansha Islands). Perhaps it is because ADIZs have never been directly linked to sovereignty claims, that their coverage of other countries' territorial airspace has not often led to "diplomatic protests". The ADIZs set up by some States still cover the undisputed territorial airspace of other States and have been successfully "invisible", thereby avoiding the attention of the public internationally. For example, the Contiguous U.S. ADIZ covers part of the territorial airspace of the Bahamas[1]; South Korea's ADIZ covers part of North Korea's territory[2]; Japan's ADIZ covers part of the territorial waters of Russia and South Korea[3]; Cuban ADIZ covers part of the Bahamas[4]; and India's ADIZ covers part of Sri Lanka's territorial airspace[5]. When the ADIZ declared by one State covers the territorial airspace of other States, and is within the FIR of the declaring State, the ADIZ rules promulgated by the declaring State can still realize "control" of the civil aircraft operating in this area (for instance, although the Contiguous U.S. ADIZ covers the Muertos Cays and Dog Rocks of the Bahamas, the reefs it covers are all within the Miami FIR of the United States). However, if the area is located within the FIR of another State, it is nearly impossible for the ADIZ rules issued by the declaring State to "work" – an example would be that the South Korean ADIZ covers the undisputed territory south of N39° under the jurisdiction of the DPRK, and the area is located

[1] From 1950 to the 1988 revision, the Pacific Coastal ADIZ designated by the United States has always covered the entire airspace of Guadalupe Island of Mexico. Since establishing the Perimeter ADIZ in 1959, as recommended by the Department of Defense, which effectively encircles the continental United States, the Perimeter ADIZ (Originally "Atlantic Coastal ADIZ" and "Gulf of Mexico Coastal ADIZ", later "Contiguous ADIZ") has covered the Muertos Cays and Dog Rocks of the Bahamas, as well as the archipelagic waters and associated territorial waters claimed by the Bahamas based on its archipelagic baselines, and continues to this day. See CAO Qun, *The U.S. Air Defense Identification Zones: A Historical and Legal Study,* Beijing: China Ocean Press, 2020, p. 22-23, 58-60.

[2] Since South Korea established the ADIZ in 1951, it covered the airspace of today's North Korea south of N39°. However, both countries have become members of the United Nations in 1991, and it seems inappropriate for the South Korean ADIZ to continue to cover a large area of the territorial airspace of another United Nations member State.

[3] After the entry into force of the 1982 United Nations Convention on the Law of the Sea, the breadth of the territorial sea has changed from 3 nautical miles to 12 nautical miles. At first, the Japanese ADIZ, which did not cover South Korean territorial airspace, covered part of the 12-nautical-mile territorial waters of Mara-Do Island, the southernmost point of South Korea, under the condition that neither South Korea nor Japan had changed the boundaries of their ADIZs. In addition, the northern part of the Japanese ADIZ also covers a small area of the territorial waters of Russia's Sakhalin Island. For specific coverage of Japanese ADIZ, see AIP Japan, 10 March 2011, ENR 5.2-22.

[4] The Cuban ADIZ covers the undisputed territorial airspace of other countries. It not only covers the land and adjacent waters of some islands and reefs of the Bahamas, but also covers the 12-nautical-mile territorial waters of the northwest part of Haiti, but none of these areas extend beyond Cuba's Havana FIR (and there have been no public protests or objections). See US Defense Mapping Agency, Tactical Pilotage Chart, TPC J-26D, 9 September 1977; US Defense Mapping Agency, Tactical Pilotage Chart, TPC J-26A, 31 May 1991; US National Imagery and Mapping Agency, Tactical Pilotage Chart, TPC J-26C,13 May 1996; US National Imagery and Mapping Agency, Tactical Pilotage Chart, TPC J-26B, 4 June 1996.

[5] The scope of India's ADIZ South has tried to avoid covering the land airspace of Sri Lanka's northern islands, but it still cannot avoid covering the airspace above the 12-nautial-mile territorial sea of Sri Lanka's relevant reefs, and the two ADIZs overlap in a small area. See CAO Qun & JIA Ding, *A Legal Study on the Current Characteristics of Indian Ocean States' ADIZs,* Journal of Boundary and Ocean Studies, No. 4, 2021, p. 20.

within the Pyongyang FIR of the DPRK[1].

III. Applicable Objects and Applicable Transiting Situations of the ADIZ Rules

Within an ADIZ covering its airspace, a State, based on its territorial "sovereignty"[2], has an absolute right to require foreign state aircraft (especially military aircraft) entering its territorial airspace to abide by the ADIZ rules. In "international airspace", however, a country does not appear to have an international legal basis to require foreign military aircraft – that have no intention of entering its territorial airspace – to comply with its ADIZ rules. If a country that declared an ADIZ covering the territorial airspace of another country, requires foreign military aircraft operating in the territorial airspace of another country to abide by its ADIZ rules, it is even less likely to be implemented, and is in fact suspected of violating the sovereignty of another country's territorial airspace[3]. The Chicago Convention and its annexes, in general, do not apply to state aircraft operating in "international airspace" (only Article 3 of the Chicago Convention makes "simple regulation"[4]). In "international airspace", a state aircraft is not normally obligated to comply with civil aviation requirements. Thus a state aircraft operating on a flight plan in such airspace is complying with civil requirements voluntarily, including an ATC clearance to enter controlled airspace, and may not legally be denied an ATC clearance to transit.[5]

It must be clarified that the analysis of applicable objects of the ADIZ rules and the applicable transiting situations, or references to the observation of ADIZ rules, is in most cases only for "voluntary identification procedures" and not for "passive identification procedures" (The reasons for this definition are described below.). Based on this definition, the "interpretation" of Western countries led by the United States is more representative with regards to applicable objects and

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[1] The South Korean ADIZ was established in early stage, and its coverage was likely affected by the split between North and South Korea in the Cold War and the complex geopolitical landscape at that time, and the South Korean government may have been reluctant (or forgotten) to revise its northern boundary later (This seems to be similar to the situation in which the ADIZ claimed by the Taiwan authorities still covers part of Chinese mainland). The U.S. ADIZs have no special case similar to that of South Korea. Judging from the case of the United States adjusting its ADIZ boundaries to avoid covering the Guadalupe Island of Mexico in 1988, it seems that the US government did not intend to make its ADIZs cover the territorial airspace of other countries (probably due to the negligence of drafters). At present, some reefs of the Bahamas covered by the US ADIZ are very small and difficult to find on the map, and technicians are more likely to overlook them.

[2] Article 1 of the Chicago Convention states: "The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory." See Convention on International Civil Aviation, Article 1.

[3] As for civil aircraft, if the ADIZ covers the territorial airspace of other countries and is within its FIR, and civil aircraft are required to comply with the "identification" provisions such as flight plans and position reports, it does not seem to violate the sovereignty of other countries' territorial airspace. Because these "identification" provisions are generally consistent with related ICAO procedures (or slightly "special"), they can roughly be regarded as the "authority" of the air traffic control unit in the FIR (and the scope of the FIR has never been directly related to territorial sovereignty).

[4] Regarding state aircraft, Article 3 of the Chicago Convention stipulates that they shall not fly over the territory of other countries without authorization, and the contracting States undertake to "have due regard for the safety of navigation of civil aircraft, when issuing regulations for their state aircraft". The "regulations" for state aircraft has not yet reached consensus among contracting States. The major progress has been the addition of "Article 3 *bis*" under Article 3 of the Chicago Convention (effective from October 1, 1998), the most important provisions of which are: "every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations" See Convention on International Civil Aviation, Article 3 *bis*.

[5] International Civil Aviation Organization, *Ninth Meeting of the South Asia/Indian Ocean ATM Coordination Group (SAIOACG/9)*, Bangkok, Thailand, 26 - 30 March 2019, Agenda Item 7: ANSP Coordination and Civil/Military Cooperation, p. 7.

applicable transiting situations of the ADIZ rules (especially "voluntary identification procedures"). There appears to be no precedent to show that the actual practice of a declaring State can make foreign military and other state aircraft with no intention of flying into the territorial airspace of the declaring State comply with its ADIZ rules[1]. Regarding the question of whether ADIZ rules can be applied to foreign civil aircraft in situations of "merely transiting"[2]: most practice of States has not explicitly ruled out the application of their ADIZ rules to "merely transiting" situations, even though there is no generally recognized "international norm".

1. A Distinction Should Be Made between Air Defense Targets and the Applicable Objects of the ADIZ Rules

Air defense targets and applicable objects of the ADIZ rules are two different concepts. Air defense targets may include all aircraft: whether or not they are domestic or foreign, civil or military aircraft, and whether they are obliged to comply with the ADIZ rules or operate under air traffic control – all relevant military units can conduct radar detection and "interception"[3] for visual identification of them "without restriction" (albeit with due regard to their flight safety). However, the scope of applicable objects of the ADIZ rules is narrow, and they ought to be aircraft that a declaring State can require to be "controlled" and to obey "instructions" within certain airspace based on international law. Otherwise, it may affect the "freedom of navigation and overflight" and violate international law. American expert Richard J. Butler's contribution is worth referring to while distinguishing between the above two concepts: "Established in the war years, and later accepted by international law, is the concept of air defense identification zones (ADIZ)...These regulations do not pertain to military aircraft, but to enter US airspace, without inducing the scrambling of fighter interceptors, these rules must be complied with and followed. The US does not claim sovereignty over these zones per se, but does closely monitor and request information of all objects entering the zone."[4] In order to better understand the above concepts, it is necessary to distinguish between the related "voluntary identification procedures" and "passive identification

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[1] If a State applies its ADIZ rules to its own state aircraft, no matter whether the aircraft operates in its national airspace or in "international airspace", it is within the sovereignty of the declaring State. Therefore, the main concern of this paper is whether the application of a State's ADIZ rules can include foreign military aircraft, especially if foreign military aircraft are operating in "international airspace" and have no intention of entering the territorial airspace of the declaring State. There is no need to promulgate ADIZ rules for foreign military aircraft flying into or out of a country's territorial airspace, because they can be "controlled" using other rules. For example, the United States has "Diplomatic Clearance" regulations for such situations, requiring that foreign state aircraft operating to or from, within, or in transit of U.S. territorial airspace should be authorized by the U.S. State Department by means of a diplomatic clearance (The "Diplomatic Clearance" regulations are not found in any part of the ADIZ rules promulgated by the FAA.). See CAO Qun, *The U.S. Air Defense Identification Zones: A Historical and Legal Study,* Beijing: China Ocean Press, 2020, p. 222-231.

[2] In this paper, the "merely transiting" situation refers to aircraft not flying into and not flying out of the ADIZ-declaring State's territorial airspace, but only passing through the part of the "international airspace" covered by the ADIZ.

[3] Most of the AIPs of various countries have a special column "Interception of Civil Aircraft", which uses the word "interception", which is quite different from the popular Chinese semantics of "interception" (stop; interdict; interdict midway, not allow passage), not only referring to "diverting", but more related to "identification".

[4] Richard J. Butler, *Sovereignty and Protective Zones in Space and the Appropriate Command and Control of Assets*, Maxwell Air Force Base, Alabama, April 2001, p. 15.

procedures" (the former is the main body of the ADIZ rules, and the latter is the means used to "intercept" the air defense targets). A detailed analysis of the differences between them enables the following discussion without deviating from the main topic at hand.

First, "passive identification procedures" do not depend on the ADIZ. Even if an ADIZ is not established, a country's military aircraft have the right to patrol, verify and identify other countries' aircraft in the "international airspace" adjacent to its territorial airspace. In other words, "passive identification procedures" are common to all countries, and not specifically to the country that has established the ADIZ. It is difficult to distinguish whether an "interception" is a "passive identification procedure" that enforces ADIZ rules, or whether it exercises the right of self-preservation or self-defense enjoyed by all States. For States that have established an ADIZ, the "passive identification procedure" is not an essential part of the ADIZ rules, even though it is present within them. The establishment of an ADIZ by a State and the promulgation of "identification" rules should not be for the purpose of making the international community aware of its intention to implement "passive identification procedures" against aircraft of various countries in the relevant geographical airspace. Rather, it should be used for promulgating "voluntary identification procedures" to enable other countries' aircraft to identify themselves as "non-hostile" in the relevant airspace, thus reducing the workload of their military radars and interceptors and allowing them to focus on monitoring the movements of "suspected hostile" aircraft. Therefore, the "voluntary identification procedures" should be the main part of a country's ADIZ rules, and connote the benefits of establishing an ADIZ[1].

Second, as far as a country implements "interception procedures" such as the "interception" of another country's aircraft by, for example, close-in visual identification, the intercepted party is in fact "passively" to be intercepted. Even if the intercepting party believes that it is enforcing the ADIZ rules – regardless of whether the intercepted party actively cooperates with the "interception" (such as maintaining or rejecting radio communication with the interceptor) – it is difficult to say that "being intercepted" is in compliance with the ADIZ rules, or to use its "being intercepted" as evidence that it is the applicable object of the ADIZ rules set up by the intercepting party. The intercepted party which actively cooperates with the "interception" can also propose that its cooperation with "being intercepted" has nothing to do with complying with the ADIZ rules; rather, it follows the "international practice" under the condition that the ADIZ is not established.

Third, many countries that have established ADIZs refer to "passive identification procedures"

[1] A few States (such as Indonesia, Cuba, and Uruguay) have established ADIZs, but have not promulgated any "voluntary identification procedures", which also have their own value, but are relatively little.

such as "interception procedures" in their rules (note that the current US rules do not[1]), mainly as "consequences of violation" caused by not complying with the "voluntary identification procedures" – in order to "threaten" the aircraft of other countries to comply with the "voluntary identification procedures" as much as possible. Judging from the fact that many countries list "ENR 1.12 Interception of Civil Aircraft" as the "consequences of violation" of the "voluntary identification procedures", it seems that the applicable objects of ADIZ rules should mainly be civil aircraft.

Fourth, even if the specific provisions of ADIZ rules do not explicitly state that a country can undertake radar detection and "interception" actions against other countries' aircraft, it does not mean that the country will not do so, or does not enjoy such rights. Therefore, it is of little practical significance to include such rights in specific provisions. For example, the relevant clause of Japan's ADIZ rules states: "In ADIZ, Japan Air Self Defense Force identifies aircraft approaching Japanese territorial airspace, and aircraft unidentified by flight plan is liable to in-flight interception for visual confirmation."[2] The practical significance of this explicit provision is limited, since Japan naturally has the right to "intercept" an unidentified aircraft without making a public declaration, and no one seems to question that a State can implement such measures of self-defense. Logically speaking, complying with or violating a country's ADIZ rules is more about its "voluntary identification procedures" clauses, and it seems difficult to understand what entails the compliance or violation of "passive identification procedure" clauses. For example, the aforementioned provision of Japanese ADIZ rules only describes the actions that the Japanese side may take, but does not mention the "cooperation obligation" of the intercepted aircraft.

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[1] Taking the current U.S. ADIZ rules as an example, it does not mention any "passive identification procedures" such as "interception", but only includes "voluntary identification procedures" such as filing flight plans, radio requirements, turning on transponders, and position reporting (It is mentioned in the small print accompanying the relevant provisions of the early US ADIZ rules: aircraft failing to "adhere to flight plan" "may be subject to interception"). It is worth noting that although the intercepted aircraft can also use radio to communicate with the interceptor implementing the "passive identification procedures", this radio communication is different from the "radio requirements" in the ADIZ rules. See CAO Qun, *The U.S. Air Defense Identification Zones: A Historical and Legal Study,* Beijing: China Ocean Press, 2020, p. 87.

[2] AIP Japan, 1 March 2018, ENR 5.2-21.

2. Most States' ADIZ Rules Do Not Apply to Foreign Military Aircraft

Based on the above definition, it would appear that expressions of applicable objects of States' ADIZ rules are substantially vague (the expression of "aircraft" is simply used instead of being clearly distinguished). However, through an interpretation of the works of international law scholars, and a study of the practice of States, it can be seen that most of the published ADIZ rules apply mainly to civil aircraft, and a few also include domestic military aircraft[1] or "public aircraft"[2]. There are very few explicit references to the application of foreign military aircraft (especially if the ADIZ covers "international airspace"[3]). It is noteworthy that in the early 1950s, the United States and Canada established ADIZs covering a large area of "international airspace", and the description of applicable objects in the relevant rules was also vague (Canada uses the expression "aircraft" till date[4]; the US used the expression "U.S. and foreign aircraft" prior to the 1961 revision, which could even be read so as to include foreign military aircraft[5]). However, the report of the International Law Commission at the first United Nations Conference on the Law of the Sea in 1958 interpreted the applicable objects of the US and Canada ADIZ rules as civil aircraft – the International Law Commission "tampered" with the original text of the articles by using a combination of direct and indirect quotations, thereby limiting its applicability to "all civil aircraft".[6] Such an interpretation by the International Law Commission (with Canada and the United States not opposing) is not due

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[1] For example, India's and Pakistan's ADIZ rules, from their expression, are likely to apply to their own military aircraft.

[2] The US ADIZ rules apply not only to all "civil aircraft" in some areas, but also to "public aircraft" excluding US Department of Defense and law enforcement aircraft. The U.S. ADIZ rules were initially vague in the categories of aircraft that were applicable, but from 1961-2003 it was clear that they only applied to civil aircraft. After the revision in 2004, it was blurred again to "all aircraft (except for Department of Defense and law enforcement aircraft)", and its practice and other related documents can only tell that the rules do not apply to state aircraft operating outside the United States' territorial airspace. The definition of "public aircraft" in Title 49 of the United States Code is more complicated. According to the relevant "Advisory Circular" issued by the Federal Aviation Administration (FAA), "Public Aircraft Operations" (PAO) exists only within the territorial airspace of the United States. In short, "public aircraft" can be summarized as the aircraft used by American armed forces and any subdivision of the Government of the U.S. or a State in relevant public services and operating within the US territorial airspace. For the definition and analysis of "public aircraft", please refer to CAO Qun, *The U.S. Air Defense Identification Zones: A Historical and Legal Study,* Beijing: China Ocean Press, 2020, p. 145-150. In January 2021, the US Indo-Pacific Command issued its latest policy interpretation on ADIZs, which "revised" the definition of US ADIZs, and further clarified that the ADIZ rules apply to "all aircraft, except military and other state aircraft". [The United States defines an ADIZ, as an area of airspace over land or water in which the ready identification, location, and control of **all aircraft, except military and other state aircraft**, is required in the interest of national security.] See Office of the Staff Judge Advocate, U.S. Indo-Pacific Command, Indo-Pacific Command Paper Series, Int'l L. Stud. Ser. US Naval War Col., Vol. 97, 2021, p. 8.

[3] A country has the right to control the activities of foreign military aircraft in its territorial airspace, but there is no international legal basis in "international airspace" to require foreign military aircraft with no intention of entering its territorial airspace to submit flight plans or regularly report their positions.

[4] For the provisions of the Canadian ADIZ rules of the 1950s, see *National Claims and Agreements Providing for Air and Sea Zones for Defensive Purposes*, Int'l L. Stud. Ser. US Naval War Col., Vol. 51, 1956, p. 594. For the provisions of the current rules of the Canadian ADIZ, see Canadian Aviation Regulations (Last amended on June 27, 2018), Part VI—General Operating and Flight Rules, Subpart 2—Operating and Flight Rules, Division IX—Emergency Communications and Security, Sec. 602.145.

[5] As defined in U.S. rules at the time, "foreign aircraft" is "an aircraft other than a United States aircraft defined in paragraph (l) of this section". The definition of "United States aircraft" includes "an aircraft of the national-defense forces of the United States". According to the literal analysis of the provisions, "foreign aircraft" shall also include foreign military aircraft. If the US ADIZ rules were applicable over the high seas, it would be inconsistent with the "traditional high seas freedoms" enjoyed by military aircraft. See CAO Qun, *The U.S. Air Defense Identification Zones: A Historical and Legal Study,* Beijing: China Ocean Press, 2020, p. 18-20.

[6] [The statutory instruments relating, respectively, to the ADIZ and the CADIZ each State that they contain "rules which have been found necessary in the interest of national security to identify, locate and control" **all civil aircraft** operated in the areas in question.] See United Nations Conference on the Law of the Sea, A.CONF.13/37, Official Records, Volume 1: Preparatory Documents, p. 70.

to reading the text carelessly; rather, it appears to be a "goodwill" interpretation (attempting to harmonize potential conflict with the Chicago Convention), or is an analysis based on the practice that ADIZ rules of the two countries had not been applied to foreign military aircraft at the time[1]. Therefore, it should not be determined that the ADIZ rules are applicable to foreign military aircraft solely on the basis of the vague description regarding the applicable objects of the rules. Rather, a conclusion should be drawn following a detailed examination of relevant practice.

In general, if the term "state aircraft" or "military aircraft" is not explicitly mentioned in the "applicability" clause, the ADIZ rules will apply only to civil aircraft (unless a contrary example exists in practice). According to statistics available, it appears that only the Korean ADIZ rules explicitly apply to foreign military aircraft that do not intend to enter the territorial airspace[2] (The revoked Italian ADIZ extends beyond its territorial airspace and its rules apply to "all military aircraft"[3]. Although the current Panama ADIZ rules indicate that they apply to foreign military aircraft, there is a lack of practical examples to analyze whether they apply to foreign military aircraft that do not intend to enter the territorial airspace[4].). In "international airspace", it seems that there is no successful precedent for the application of ADIZ rules to foreign military aircraft. For example, South Korea has repeatedly made "diplomatic protests" against Chinese and Russian military aircraft entering its ADIZ, with China and Russia often responding that the normal activities of military aircraft have not violated South Korean territorial airspace. From the perspective of the "greatest common divisor" with regards to the practice of various countries, the implementation of the ADIZ rules and the "traditional high seas freedoms" enjoyed by military aircraft seem to go hand in hand, and the attempts of a few States to "control" the activities of foreign military aircraft in the international airspace within the ADIZ are jurisprudentially flawed.

If the majority of the international community continues to recognize the "traditional high seas freedoms" enjoyed by military aircraft outside national airspace, then the basic function of a

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[1] At that time, the relevant foreign governments involved in the US and Canada air defense targeting foreign military aircraft (especially Soviet bombers) obviously would not recognize the US and Canada ADIZ rules applicable to foreign military aircraft operating over the high seas with no intention of entering into the territorial airspace of the two countries.

[2] AIP Republic of Korea, 27 September 2018, ENR 5.2-5. See also Ian E. Rinehart and Bart Elias, *China's Air Defense Identification Zone (ADIZ)*, CRS Report R43894, Congressional Research Service, January 30, 2015, p. 4

[3] According to available information, Italy had an ADIZ in the 1960s, and it appears to have maintained it in the 1990s and early 2000s (However, it is worth noting that the relevant aeronautical charts published by the US Defense Mapping Agency in 1981 were clearly marked, but the 2000 aeronautical charts were not). See O. O. Ogunbanwo, *The Exercise of State Authority in the Airspace over the High Seas*, A thesis submitted to the Faculty of Graduate Studies and Research, McGill University, in candidacy for the degree of Master of Laws, March 1966, p. 126-127; Steve Davies, *F-15C Eagle Units in Combat*, Bloomsbury Publishing PLC, 2005, p. 80; US Defense Mapping Agency, Operational Navigation Chart, ONC F-2, 28 October 1981; US National Imagery Mapping Agency, Tactical Pilotage Chart, TPC F-2C, June 2000.

[4] The relevant Panamanian rules are specifically stated as: "Foreign MIL ACFT traffic by this space should realize previous AUTH given by the Panamanian authority transmitted by the diplomatic way. The authorization request will be made 48Hrs., in advance to the date in which the fly should be effect." (See AIP Panama, 30 Nov 2020, ENR 5.2-1.) Although the expression of the relevant regulations does not exclude the application of foreign military aircraft with no intention of flying into the territorial airspace (which may be due to the imprecise expression), from the perspective of its specific requirements, it is very similar to the requirements for those flying into the territorial airspace. It seems that it should only apply to those who fly into its territorial airspace - because Panama's ADIZ is beyond its territorial airspace, and there is no international law basis to "jurisdict" foreign military aircraft that do not intend to enter its territorial airspace but only pass through "international airspace".

country's ADIZ – other than setting rules that are impossible for foreign military aircraft to abide by, as South Korea has done to itself – may be to facilitate a clearer identification of normal civil aviation activities in the relevant airspace. This would reduce the burden on its military radar surveillance, and would "exclude" foreign aircraft that are "suspected of being hostile". The majority of States do not set up ADIZs, but they nevertheless have an early warning range for air defense, where they may identify, escort or intercept unknown targets entering the range. The Soviet Union and Russia, for example, have never publicly established an ADIZ – but that does not mean they do not value air defense or have weak air defense capabilities. Instead, their military aircraft possess the same rights as the United States deems as "traditional high seas freedoms" – that is, to scramble to identify or intercept unidentified aircraft in international airspace. In other words, in the "international airspace" – regardless of the registered nationality of the military aircraft or whether an ADIZ is established – the aircraft (military) of one State can identify, escort, or intercept a civil or military aircraft of another State. All rights are derived from these "freedoms" and do not depend on domestic legislative authorization or public announcement of an ADIZ by a State. The US military scholar Jonathan G. Odom has analyzed the logic of the ADIZ at length in his monograph, pointing out that its role is to "reduce the number of 'aircraft of interest' the State needs to monitor actively."[1] Most provisions in ADIZ rules, such as requirements for civil aircraft to submit flight plans etc., are present in order to facilitate the identification of aircraft, and help distinguish normal civil aviation from real threats by using "the method of exclusion": if a civil aircraft complies with the ADIZ rules and flies normally along its flight route submitted by it, the relevant air defense units would not regard it as a threat, and could instead focus on monitoring and responding to radar-unidentified air situations (fighter jets would scramble to "intercept" unknown aircraft if required for identification).

3. Most States' ADIZ Rules Do Not Explicitly Exclude the Application of "Merely Transiting" Situations

Regardless of whether ADIZ rules can be applied to foreign state aircraft, there are several "unknowns" in the case of the applicable transiting of civil aircraft. The "international custom" in this regard needs to be confirmed or revised by the continuous development and the practice of more ADIZ-declaring States. Perhaps it is because of vacuum of knowledge that the analysis of the ADIZ entry in The Max Planck Encyclopedia of Public International Law is rather ambiguous in the application of ADIZ rules for "merely transiting" aircraft. This entry was written by American expert J. Ashley Roach, who on one hand pointed out that some countries do apply the ADIZ rules

[1] Jonathan G. Odom, *A 'Rules-based Approach' to Airspace Defense: A U.S. Perspective on the International Law of the Sea and Airspace, Air Defense Measures, and the Freedom of Navigation*, REVUE BELGE DE DROIT INTERNATIONAL, 2014/1 – Éditions BRUYLANT, Bruxelles, p. 74.

to aircraft not intending to enter their territorial airspace[1], while on the other hand proposed that a coastal State has no right to apply the requirements of the ADIZ rules (such as filing of flight plans and periodic position reports) to aircraft that do not intend to enter national airspace[2]. What J. Ashley Roach stated above is consistent with the official position of the United States[3], but is inconsistent with the "applicability" clause[4] of the current United States ADIZ rules, and ignores the current ADIZ rules which apply to aircraft flying out of the United States through the ADIZs. In other words, the "applicability" clause of the US ADIZ rules, which was set up as a "benchmark" by Ashley Roach, is precisely the opposite to the statement that "The coastal State has no right to require a foreign aircraft to identify itself or otherwise to apply its ADIZ procedures if it does not intend to enter national airspace". It may be noted that the restrictions in current US ADIZ rules on destinations and departure points have not been the same since 1950 – the present version appeared following the strict revision of "applicability" in 1961, which restricted the 1950s' rules that broadly applied to aircraft operating "into or within" the ADIZs[5]. In fact, several States that have established ADIZs have not followed the US ADIZ rules revised in 1961, and the ADIZ rules promulgated by many States are similar to the US rules in the 1950s. The US ADIZ rules are nevertheless still a "minority" in the applicable restrictions on destinations and departure points, and the practice of excluding the application of "merely transiting" situation has not formed an "international practice".

There are two types of ADIZs that are not relevant to this topic as far as the "merely transiting" situation is concerned. One type would be an ADIZ that the declaring State has not promulgated the relevant identification rules, such as "voluntary identification procedures". The ADIZs designated by Indonesia and Cuba serve as an example in this regard. Given that there are no specifically applicable rules, it is impossible to talk about whether to apply to "merely transiting" situations. The other type is an ADIZ that is only established within the national airspace, and there is no such thing as "merely transiting" the "international airspace" surrounding the declaring State in terms of its applicable rules. For example, the Sri Lankan ADIZ is entirely within its territorial airspace.

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[1] J. Ashley Roach, *Air Defense Identification Zones,* in R. Wolfrum (ed.), The Max Planck Encyclopedia of Public International Law, Article last updated: March 2017, para. 5.

[2] J. Ashley Roach, *Air Defense Identification Zones,* in R. Wolfrum (ed.), The Max Planck Encyclopedia of Public International Law, Article last updated: March 2017, para. 7.

[3] For example, the U.S. *Commander's Manual for the Law of Maritime Operations* (2017 edition) states the following about ADIZ: "ADIZ regulations promulgated by the United States apply to aircraft bound for U.S. territorial airspace and require the filing of flight plans and periodic position reports. The United States does not recognize the right of a coastal State to apply its ADIZ procedures to foreign aircraft not intending to enter national airspace nor does the United States apply its ADIZ procedures to foreign aircraft not intending to enter U.S. airspace." See Department of the Navy & Department of Homeland Security, *The Commander's Handbook on the Law of Naval Operations*, NWP 1-14M/MCTP 11-10B/COMDTPUB P5800.7A, EDITION AUGUST 2017, 2-14.

[4] "This subpart prescribes rules for operating all aircraft (except for Department of Defense and law enforcement aircraft) in a defense area, or into, within, or out of the United States through an Air Defense Identification Zone (ADIZ) designated in subpart B." See 14 CFR (2020), §99.1(a), p. 907.

[5] See CAO Qun, *The U.S. Air Defense Identification Zones: A Historical and Legal Study,* Beijing: China Ocean Press, 2020, p. 238-240.

Although the relevant provisions of the Sri Lankan ADIZ rules[1] "copy" the expression of aircraft operating "into, within, or out of" as stated in the US ADIZ rules, it is unrelated to this topic. The ADIZs related to this topic must cover "international airspace" and have specific identification rules. The practice of such ADIZs in terms of "merely transiting" has referential value for judging whether the operating procedures comply with "international practices".

Among the States or regions that have so far established ADIZs, the ADIZs designated by 8 States – i.e., Finland, Poland, Turkey, Libya, Sri Lanka, Peru, Argentina[2], and Uruguay[3] – are completely within their national airspace. In addition to the Indonesian and Cuban ADIZs, which cover "international airspace" but have no specific identification rules, a total of 10 ADIZs have nothing to do with this topic. Further to the above 10 ADIZs, there are 19 ADIZs which cover "international airspace" and which have specific identification rules, including the "permanent" ADIZs covering "international airspace" designated by the following States and regions: China, the United States, Canada, Japan, South Korea, Taiwan region, the Philippines, Thailand, Myanmar, Panama, Brazil, India, Pakistan, Bangladesh, Iran and Iceland[4] (Australia, Argentina, and Uruguay have also declared "temporary" ADIZs beyond their national airspace[5]). Among the above 19 ADIZs, there are very few ones, the rules applicability of which is restricted to aircraft "flying into or out of national airspace", or some specific provisions of whose ADIZ rules only apply to aircraft "flying into national airspace" situations. On the largest scale, it would appear that only the ADIZ rules of the United States, Japan[6], India[7] (questionable in Pakistan[8]), Brazil, etc. have this tendency of above restrictions, and others have not explicitly excluded the application of "merely transiting". In other words, only about 4 or 5 of the above 19 ADIZs have excluded the application of "merely transiting", while the other 14 or 15 ones have not clearly excluded the application of "merely

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1 See AIP Sri Lanka, 30 Jan 2015, ENR 2.2 Other Regulated Airspaces.

2 This refers only to the permanent ADIZ designated by Argentina to the north of 29° to its borders with Chile, Bolivia, Paraguay and Brazil. The temporary ADIZ designated by Argentina will be counted as one covering "international airspace".

3 This refers only to the permanent ADIZ designated by Uruguay in November 2020. The temporary ADIZ designated for the inauguration of Uruguay's new President in March 2020 will be counted as one covering "international airspace". See AIP Uruguay, 5 Nov 2020, ENR 5.2-2.

4 The current rules of Iceland's ADIZ are unclear (or the ADIZ has been revoked), but its 1960s rules apparently did not preclude the application of "merely transiting" situations. See *O. O. Ogunbanwo, The Exercise of State Authority in the Airspace over the High Seas*, A thesis submitted to the Faculty of Graduate Studies and Research, McGill University, in candidacy for the degree of Master of Laws, March 1966, p. 126.

5 Both Australia and Argentina have declared temporary ADIZs for hosting the G20 summit, and both are beyond their national airspace. See AIP Australia, Supplement H62/14, 11 November 2014; AIP Argentina, Supplement A 28/2018, 11 Oct 2018.

6 Regarding the requirement of filing a flight plan, it is only applicable to aircraft flying into Japanese territory from abroad through ADIZ. See AIP Japan, 1 Mar 2018, ENR 5.2-21.

7 India's earlier ADIZ rules were not limited in this regard, but the 2018 revision of its Air Defense Clearance (ADC) requirements had clear indications that the applicability was limited to "departing aircraft as well as aircraft entering Indian airspace". For example, Article 5.2.2.2.3 of its rules states: "ADC number for departing aircraft as well as aircraft entering Indian airspace shall be strictly enforced by ATC and no flight would be cleared without a valid ADC number." See AIP India, 19 Jul 2018, ENR 5.2-18, 5.2.2.2.3.

8 Pakistan's ADIZ rules are vague in this regard. For example, its D5.3.3.3 states: "All flights shall obtain ADC from respective ACC at least 15 minutes prior to entering Pakistan airspace/ ADIZ." Since the terms are not as "clear" as the relevant Indian rules, whether the Pakistan ADIZ rules apply to the "merely transiting" situations will mainly depend on its practice and official detailed interpretation in the future. See Air Navigation Standards (ANS), Intercept of Civil Aircraft, ANO-004-DRAN-1.0, Date of Implementation: 04-12-2009, D5.3.3.3, p. 42.

transiting" in their relevant identification rules.

Notably, the Manual on Civil-Military Cooperation in Air Traffic Management issued by ICAO (Doc 10088, first edition, 2021) also discusses this topic, and its "recommendations" are as follows: "ADIZ procedures should be … applicable only to aircraft intending to operate into, within or from sovereign airspace".[1] Judging from the details of its expression (as the above sentences are copied from the relevant expression of the "applicability" clause in the current US ADIZ rules), the drafters of Doc 10088 were probably greatly influenced by the US rules (despite not having a substantial understanding), but have a very limited knowledge of the practice of other States' ADIZs. Doc 10088 should be more precise with technical details. It seems inappropriate and unjustified to list the "minority" practice of excluding the application of "merely transiting" situations in individual States' ADIZ rules as "recommendations". Considering that the academic community has an extremely limited grasp of the practical details of various States' ADIZs, the drafters of Doc 10088 should have undertaken the "historical task" of preparing a detailed study on the application of States' ADIZ rules, rather than copying the "applicability" statement in the US ADIZ rules without any justification, or making the US ADIZ rules an "international norm" and a "majority" practice representative without basis. At least, the drafters should have conducted a preliminary review of relevant international practice before making a conclusion.

IV. Analysis of International Law on ADIZs

There are still several "unknowns" about ADIZs, but there seems to be a "preliminary consensus" on the main identification methods and related interception procedures in the practice of States. At least, it can be said that some similar "special identifications and/or reporting procedures" have developed (including "flight plan requirements", "position reporting" requirements, "radio requirements", "transponder requirements" and "Air Defense Clearance (ADC)" requirements, etc.). This section builds on the summary contained in the previous parts of this paper. By interpreting the practical characteristics of various States' ADIZs, this section will analyze whether there is a rule of customary international law regarding ADIZs based on the "two-element approach"[2] advanced in the report of the Identification of Customary International Law issued by the International Law Commission, as well as discuss issues related to international law, such as the interpretation of the

[1] ICAO, Manual on Civil-Military Cooperation in Air Traffic Management, Doc 10088, First Edition, 2021, 9-2.

[2] The so-called "two-element approach" refers to the "basic approach" for determining a rule of customary international law in the report, mainly including "Conclusion 2" [Two constituent elements: "To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*)."], "Conclusion 3" [Assessment of evidence for the two constituent elements: "1. In assessing evidence for the purpose of ascertaining whether there is a general practice and whether that practice is accepted as law (*opinio juris*), regard must be had to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found. 2. Each of the two constituent elements is to be separately ascertained. This requires an assessment of evidence for each element.."] and other "conclusions". See Resolution adopted by the General Assembly on 20 December 2018 [on the report of the Sixth Committee (A/73/556)], Identification of Customary International Law, UN. A/RES/73/203, 11 January 2019, p. 2-5.

relevant "conventions" involving an ADIZ, the legal basis for an ADIZ, and whether the ADIZ procedures have been "standardized". Based on the "two-element approach", for the sake of determining whether there is a rule of customary international law regarding ADIZs, it is found that two distinct yet related questions must be inquired: first, whether there is a general practice on ADIZs (i.e., inspecting the practice of ADIZ-declaring States); and second, if there is a general practice, whether such general practice is accompanied by *opinio juris* (that is, to determine whether States recognize an obligation or a right to act in that way).[1]

1. Distinction between "Existence" and "Content" Needs to be Done

The Identification of Customary International Law proposes: "The reference to determining the 'existence and content' of rules of customary international law reflects the fact that while often the need is to identify both the existence and the content of a rule, in some cases it is accepted that the rule exists but its precise content is disputed."[2] On this basis, a determination of whether there is a rule of customary international law regarding ADIZs requires an analysis of its "existence" and "content" in accordance with the "two-element approach".[3] First, the so-called "ADIZ" differs in its conceptual cognition. The crux of the question is: under the name of "ADIZ", what are the "rules" promulgated by the declaring State, and what are the specific "obligations" required for other States' aircraft to abide by. Second, "existence" and "content" are closely related, and disagreement over "content" may lead to uncertainty about "existence". Assuming that all States have no objection to the definition of "diversity" of ADIZs, the "existence" of customary international law rules related to ADIZs will not be a problem. However, it is clear that its "content" is disputed – especially with regards to the coverage of an ADIZ, the applicable rules, the applicable objects and the circumstances. Finally, when discussing the "existence" and "content" of customary international law rules for ADIZs, it is necessary to consider the relevant State practice in different periods and regions, and not only the practice of some States that were the first to establish ADIZs in the early years. Subsequent State practices in terms of ADIZs also have an inevitable influence on the "existence" and "content" of the rules of customary international law in this field.

2. Whether There Is a General Practice

In identifying customary international law rules, the "two-element approach" specifies that both elements – "general practice" and "*opinio juris*" – are intertwined, and a separate inquiry needs to be carried out for each element. Although the order of examination is not mandatory, the existence of a general practice is often the initial factor to be considered, and only then is an inquiry

[1] Identification of customary international law, Conclusion 2, Commentary (1), Commentary (4) and Commentary (5).
[2] Identification of customary international law, Conclusion 1, Commentary (4).
[3] Identification of customary international law, Conclusion 2, Commentary (2).

made into whether such general practice is accepted as law.[1] Therefore, when analyzing whether there are customary international law rules regarding ADIZs, one can start by examining whether there is a general practice, and "it is primarily the practice of States that is to be looked to in determining the existence and content of rules of customary international law".[2] Simultaneously, in the case of ADIZs where "State practice" is insufficient, it is appropriate to examine the practice of relevant international organizations (such as the "definition" of ADIZ in the "Annex" issued by ICAO) and the behavior of other actors (such as the observation of ADIZ rules by other States' civil aviation).

Firstly, it is easier to judge the "openness" of the practice of States that have established ADIZs, while it is more difficult to analyze the practice of "inaction" adopted by most States that have not established ADIZs. It is particularly problematic to render an overall assessment when the status quo has not been carefully identified. According to the Identification of Customary International Law, the subject of the conduct must be a State in order to constitute State practice[3], and the practice must be known to other States in order to contribute to the formation and identification of rules of customary international law.[4] "Inaction" can also count as State practice. Judging from known international practice, there seems to be no precedent for a State's ADIZ to be officially "recognized" by most other States. Although the rules of an ADIZ designated by a State will generally affect the civil aviation of all other States entering the area, most of the affected States' governments did not raise objections. Rather, they responded with "inaction" – they did not explicitly recognize its legality, but acquiesced or explicitly indicated that their civil flights are under "control" by the relevant ADIZ rules. There are also circumstances where a State explicitly questions the legality of an ADIZ and indicates that its civil flights are subject to "control", such as the United States has done in the case of China's East China Sea ADIZ.

Secondly, based on the principle "practice must be general", it is difficult to develop a definite and clear "general practice" (as there are still numerous vague and uncertain points) by reviewing the practices of ADIZ-declaring and ADIZ-affected States. According to the Identification of Customary International Law, the relevant practice must be general[5] (no particular duration is required[6]), that is, it must be sufficiently widespread and representative[7] enough to demonstrate consistency[8]. The above "general" requirements are not quantifiable and do not set forth clear

[1] Identification of customary international law, Conclusion 3, Commentary (6), Commentary (8) and Commentary (9).
[2] Identification of customary international law, Conclusion 4, Commentary (2).
[3] Identification of customary international law, Conclusion 5, Commentary (2).
[4] Identification of customary international law, Conclusion 5, Commentary (5).
[5] Identification of customary international law, Conclusion 8, Commentary (2).
[6] Identification of customary international law, Conclusion 8, Commentary (9).
[7] Identification of customary international law, Conclusion 8, Commentary (3).
[8] Identification of customary international law, Conclusion 8, Commentary (5).

standards, therefore allowing "inconsistencies and contradictions"[1]. These "vague" expressions undoubtedly make it more difficult to analyze State practices, or even determine whether there is a "general practice" regarding ADIZs. In terms of determining the "general practice" regarding ADIZs, assessing the "generality" of State practice appears to mainly lie in the analysis of the following two categories of State practice:

1) with regards to the practice of ADIZ-affected States, it manifests more in the form of "inaction", and is less controversial in terms of "widespread and representative" or "consistent" practice. To prove "inaction" as State practice, one would have to demonstrate that the affected States' conduct is "deliberate abstention from acting"[2] and then make an overall assessment that takes into account all known practices[3]. Many years of "acquiescence" by ADIZ-affected States to declared ADIZs (regardless of their "diverse" rules) can be considered as "deliberate abstention from acting", i.e., the practice of "inaction". In addition to the fact that there has been no objection to civil aviation complying with the ADIZ rules for over 70 years, the supplementary "definition" of the ADIZ in the Annexes of the Chicago Convention in the early 21st century has been "recognized" by the contracting States – which may not be a kind of "inaction", but could even be regarded as acquiescence with the "legal" existence of the ADIZ in the form of an international organization "resolution" for half a century after its birth.

2) with regards to the practice of ADIZ-declaring States, there are many disputes in terms of "widespread and representative" or "consistent" practice, and it is difficult to determine whether it has formed a general practice. Under stricter standards, it is not appropriate to give a positive answer for now. There are currently over 20 States that have established ADIZs. The ADIZ rules promulgated by these States are quite different, and the overall development and fluctuations of the rules vary greatly, which makes it difficult to evaluate their generality and consistency. Although the rules are complied with by various States' civil aviation, it is questionable whether its practice meets the conditions of "widespread and representative" and "consistent". It could be argued that other States which do not presently maintain ADIZs should be given the opportunity to "participate". At least, determining a general practice should be done after that the practices of ADIZ-declaring States have been categorized and accurately evaluated as a whole. It may be best to place responsibility on the relevant international organizations to institute a study and conduct discussions with representatives and experts from various countries. Otherwise, it would be unfair and invalid. Under looser standards, it can be considered that a vague and diverse "general practice" has developed in terms of specific operating rules, acknowledging that various States' civil aviation

[1] Identification of customary international law, Conclusion 8, Commentary (7) & Commentary (8).
[2] Identification of customary international law, Conclusion 6, Commentary (3).
[3] Identification of customary international law, Conclusion 7, Commentary (1).

has complied with ADIZ rules either by acquiescence or with the express consent of their governments, even though there are "inconsistencies and contradictions" between known ADIZ practices. Therefore, this vague and diverse "general practice" can be summarized as follows: in terms of coverage, an ADIZ can cover national airspace and "international airspace" (although it remains doubtful whether it can cover the territorial airspace of other countries), and there are many ADIZs beyond the domestic FIRs of declaring States. In terms of applicable objects, the "voluntary identification procedures" are primarily specified to be applicable only to civil aircraft, and very few ADIZ rules mention that they are also applicable to foreign state aircraft. In relation to applicable situations, most ADIZ practices do not exclude the application of "merely transiting", and some ADIZ rules explicitly exclude it; further, in terms of identification means, most ADIZ rules have "flight plan requirements", about a half of declaring States have promulgated "position reporting requirements" and "radio requirements", and some State practices include "transponder requirements" or "Air Defense Clearance" requirements.

Thirdly, the practice of international organizations and the conduct of other actors are relatively clear, and they are worth referring to while judging the time period for the formation of a general practice. However, the question of assessing its "weight" still needs to be discussed. According to the Identification of Customary International Law, the practice of international organizations, in certain cases, also contributes to the formation, or expression, of rules of customary international law.[1] The practice of international organizations, when accompanied by *opinio juris*, may count as practice that gives rise or attests to rules of customary international law (subject matter falls within the mandate of the organizations).[2] In terms of ADIZs, ICAO has formulated and published several international standards and recommended practices concerning various aspects of civil aviation activities. The revised Annexes to the Chicago Convention in the early 21st century contains the "definition" and "recommended practices" for ADIZs. Although the "definition" in the Annexes is slightly flawed because it does not reflect all States' ADIZ practices, it vaguely outlines "majority" practices and is very helpful in the assessment of the "formation or expression" of "general practice" in this field. There are currently 193 contracting States to the Chicago Convention. The ICAO, established in accordance with the provisions of the Chicago Convention certainly has a "voice" in terms of the ADIZ practice affecting international civil aviation, and its "resolutions"[3] bear considerable "weight"[4], which may count as practice that gives

[1] Identification of customary international law, Conclusion 4, Commentary (3).
[2] Identification of customary international law, Conclusion 4, Commentary (5).
[3] Identification of customary international law, Conclusion 6, Commentary (7).
[4] According to the relevant commentary of the Identification of Customary International Law, "As a general rule, the more directly a practice of an international organization is carried out on behalf of its member States or endorsed by them, and the larger the number of such member States, the greater weight it may have in relation to the formation, or expression, of rules of customary international law." See Identification of customary international law, Conclusion 4, Commentary (7).

rise or attests to rules of customary international law.

The term "other actors" here refer to entities other than States and international organizations. As far as the ADIZ is concerned, "other actors" primarily refers to States' civil aviation that is required to comply with "special identification and/or reporting procedures". According to the Identification of Customary International Law, "the conduct of entities other than States and international organizations" does not contribute to the formation, or expression, of rules of customary international law, and may not serve as direct (primary) evidence of the existence and content of such rules, however, may have an indirect role in the identification of customary international law, by stimulating or recording the practice and acceptance as law (*opinio juris*) of States and international organizations.[1] Therefore, civil aviation's compliance with relevant ADIZ rules seems to have little "weight" in itself, but it can be used as "indirect" evidence reflecting State practice, or even "indirect" proof of the extent to which the ADIZ practice is "accepted as law" by governments with tacit or explicit consent.

3. Whether There Is Acceptance as Law (*opinio juris*)

Based on the above analysis on the "general practice" of ADIZs, it appears that, at best, the "existence" of "general practice" can be determined but its specific "content" cannot. Therefore, according to the "two-element approach", it is necessary to examine whether the vague "existence" of "general practice" is accompanied by "*opinio juris*". If it can be proved that it is "accepted as law", then the "existence" of the "customary international law rules" regarding ADIZs can be determined. The 'content', on the other hand, can be vaguely stated initially, and could be confirmed once international practice becomes more abundant). According to the Identification of Customary International Law, a rule of customary international law may be identified only when States recognize the binding nature of "general practice" and accept it as law.[2] In terms of ADIZs, it must be demonstrated on a case-by-case basis that the ADIZ-declaring States believe themselves "legally compelled or entitled to" promulgate its own ADIZ rules, and that the ADIZ-affected States have "a sense of legal obligation" when allowing their civil flights to comply with the relevant identification rules[3] (not out of a treaty obligation[4]).

On the basis of known practice, the ADIZ rules for States' civil aviation are not objects that are "legally free either to follow or to disregard". It is difficult to prove that all States are aware of the "general practice" of ADIZs and recognize that it is consistent with customary international law. Although it is only the conditions of "broad and representative acceptance, together with no or little objection" that need to be satisfied, it is nevertheless necessary to ascertain "evidence from which

[1] Identification of customary international law, Conclusion 4, Commentary (8).
[2] Identification of customary international law, Conclusion 9, Commentary (1).
[3] Identification of customary international law, Conclusion 9, Commentary (2).
[4] Identification of customary international law, Conclusion 9, Commentary (4).

acceptance of a given practice as law (*opinio juris*)"[1]. Forms of evidence of *opinio juris* are multiple, and include "statements and physical actions (as well as inaction) concerning the practice in question".[2] As far as the ADIZ is concerned, the relevant "statements and physical actions" of States that declared ADIZs after the United States and Canada in the 1950s are relatively clear, and this proves they believe they had a "legal right" to declare ADIZs in accordance with "general practice"[3] (although there are many disputes over the "content" of the operating rules among the declaring States). Most non-ADIZ States rarely issue "statements", "official publications" and "legal opinions"[4] that deal with "general practice" or "*opinio juris*" in the field – widespread "inaction" has long been more common.

Assuming that the practice of the US and Canada establishing ADIZs in the 1950s can be regarded as "general practice", then the "inaction" of other States in late 1950s (for example, as documented in the comments on the practice of ADIZ-affected States in the report of the International Law Commission during the first United Nations Conference on the Law of the Sea in 1958) can be regarded as "*opinio juris*". Even if there were reasons to claim ignorance of such practice prior to the first United Nations Conference on the Law of the Sea, it would be difficult to provide adequate reasons explaining why States did not take action and instead acquiesced to their civil aviation compliance with the ADIZ rules. Except in the early 1960s, when the Soviet Union publicly questioned the ADIZ designated by France, it seems that no State (that has not established an ADIZ) has publicly "opposed" another State's establishment of an ADIZ. Of course, the practice of ADIZs does not rest on the "rules" of the 1950s. With the subsequent establishment of ADIZs by several States and the introduction of new operating rules, the "content" of "general practice" in this field is also developing and changing – so much so that there are many "inconsistencies" among States' practices. In the 21st century, it can be summarized and "expressed" in the form of "resolutions" in the relevant Annexes of the Chicago Convention.

On a slightly different note than the widespread "inaction" of States that have not established ADIZs, some ADIZ-declaring States have publicly stated that they "do not recognize" a certain ADIZ due to disputes over the "content" of specific operating rules. For example, the United States

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1 Identification of customary international law, Conclusion 10, Commentary (1).

2 Identification of customary international law, Conclusion 10, Commentary (2).

3 Few ADIZ-declaring States cite international treaties as the basis for the establishment of ADIZs (only Bangladesh, for example, cited the Chicago Convention), on the contrary, they often do so based on domestic laws related to national security. However, the ADIZ-declaring States all believe that the establishment of an ADIZ does not violate international law (regardless of whether they have made such a clear statement, there seems to be no precedent for a ADIZ-declaring State to claim that the establishment of an ADIZ is contrary to international law). In the case of the first declaring States, such as the US, Canada and others that establish their ADIZs in the 1950s, it is obvious that their practice is not following "general practice", but may be said to be the creation of "general practice" (whether there is a violation of the Chicago Convention, it is worth studying). In terms of the actual actions of the declaring States after the 1960s, their establishment of ADIZs and promulgation of "special identification and/or reporting procedures" (A few countries, such as Indonesia, Cuba and Uruguay, have not promulgated specific "voluntary identification procedures") is in itself evidence of the vague "existence" of "general practice" of ADIZs and "acceptance as law" mentioned above.

4 Identification of customary international law, Conclusion 10, Commentary (3) & Commentary (4).

and Japan made statements on establishment of China's East China Sea ADIZ in 2013: without questioning China's "legal right" to establish the ADIZ, they questioned China's identification rules and argued that the identification rules were inconsistent with "general practice". Notably, they later clarified that their civil flights could abide by the identification rules promulgated by China. Such disputes over the "content" of the operating rules do not prevent States from confirming the vague "existence" of the "general practice" of ADIZs, nor from their "*opinio juris*" (even as evidence of emphasizing a country's "legal right" to establish an ADIZ).

ICAO "resolutions" can play an important role, but they should be made with a full understanding and comprehensive analysis of the practice of States, and be consistent with the "general practice". The term "resolution" here refers to resolutions, decisions and other acts adopted by international organizations or at intergovernmental conferences, whatever their designation and whether or not they are legally binding[1]. Although "resolutions" in themselves neither constitute a rule of customary international law, nor serve as conclusive evidence of its existence and content, they may have value in providing evidence of existing or emerging law and may contribute to the development of a rule of customary international law.[2] As regards ADIZs, "resolutions" adopted by ICAO (including its relevant bodies) are rare and are not legally binding. They are essentially "definitions" and "recommended practices", added in Annexes XV and IV to the Chicago Convention in the early 21st century. There is also Doc 10088, issued in 2021 under the authorization of the ICAO Secretary General. There is no "instant custom" arising from above ICAO "resolutions" [it has to be established that "the rule set forth in the resolution does in fact correspond to a general practice that is accepted as law (accompanied by *opinio juris*)"[3]], but they "may" merely assist in the determination of rules of customary international law by providing evidence of their existence and content. For example, they may serve as "evidence of the acceptance as law of such a rule by those States supporting the resolution"[4]. Although the "definition" of the ADIZ in the Annexes to the Chicago Convention cannot cover the practice of all ADIZs (such as the ADIZs of Indonesia, Cuba, and Uruguay[5]), it is basically consistent with the "general practice" formed before 2000, which reflects the "majority" practice of ADIZs. Therefore, as far as the ADIZ is concerned, its "general practice" is accompanied by "*opinio juris*", and at the beginning of the 21st century, the vague "existence" of relevant customary international law rules

[1] Identification of customary international law, Conclusion 12, Commentary (2).
[2] Identification of customary international law, Conclusion 12, Commentary (1).
[3] Identification of customary international law, Conclusion 12, Commentary (4).
[4] Identification of customary international law, Conclusion 12, Commentary (5).
[5] The practice of the three ADIZs does not exceed the upper limit of the "definition" but seems to have broken through its lower limit. The "definition" indicates that the State practice add "special identification and/or reporting procedures" to ATS procedures, but the three countries have not promulgated such additional "procedures". Instead, it is only a reminder of the risk of being intercepted by fighter jets within their ADIZs (This of course does not violate international law, and is very similar to the "danger zone"). In other words, the three countries have in fact waived their "legal rights" under the "rules of customary international law" in this field to attach "special identification and/or reporting procedures" aiming at States' civil flights.

can be proved (although its "content" is still disputed).

V. Conclusion

The purpose of most ADIZ-declaring States is mainly to safeguard their national security interests, and the legality relies on "the then accepted interpretation of the 'right of self-defense' by the nations of the world" and the fact that "the attitude adopted by the many foreign States affected was not one of protest; it was one of quiet compliance"[1]. Since the birth of ADIZs, some declaring States such as the United States have successfully compelled States' civil aviation to "tolerate and acquiesce" to their ADIZ rules, thus forming a "customary law in practice". Currently, there is no international convention that explicitly supports or prohibits the establishment of an ADIZ. In the absence of clear rules of customary international law and the prevailing differences and ambiguity in the practice of various States, the practice of the major powers is crucial to the formation of "international custom". As mentioned above with regards to the ADIZ, the vague "existence" of the "rules of customary international law" can be confirmed, but the "content" of its specific operating rules cannot be determined. Most known ADIZs are declared "unilaterally", and this declaring mode seems to have become the "greatest common divisor" regarding ADIZs. However, it is difficult to say that there is a "general practice" in many aspects of the specific operating procedures of ADIZs (for example, experts from different countries continue to debate about whether the ADIZ rules can be applied to "merely transiting" situations), it still needs to constantly develop and facilitate the formation of "*opinio juris*" with the practice of more ADIZ-declaring States confirming or revising the "international custom" concerned.

Translator: CHENG Lan

Editor (English): Arpita Goswami Sachdeva

[1] Ivan L. Head, *ADIZ, International Law, and Contiguous Airspace*, Alberta Law Review, No. 3, 1964, p. 182, 196.

境外案例(Overseas cases)

英国最高法院“Jean Elaine”游艇案《雅典公约》时效规定释义

任雁冰*

摘要：2012 年 8 月 14 日，W 先生租用 SFC 公司“Jean Elaine”游艇期间潜水时不幸身亡。2015 年 5 月 14 日，W 先生遗孀 D 女士以自身名义及其四岁幼子监护人名义对 SFC 公司提起诉讼。SFC 公司抗辩称该起诉已超过《雅典公约》第 16 条规定的两年时效且不存在中止或中断事由，应予驳回。本案由英国最高法院审结，案号：[2018] UKSC 52，认定 D 女士以自身名义提起的诉讼已超过时效，但以其幼子监护人名义提起的诉讼因存在时效期间中止事由未超过时效。是为“Jean Elaine”游艇案，法律论证路径如下：

（1）《雅典公约》是否已对英国生效及其效力范围？

（2）本案争议法律问题是否为《雅典公约》中时效问题？

（3）《雅典公约》时效相关规定是什么？

（4）《雅典公约》第 16 条第（3）款提到的时效期间中止和中断事由相关“案件受理法院所在地法”是什么？

（5）《雅典公约》第 16 条应当怎样解释？

（6）《雅典公约》第 16 条时效规定能否由公约讨论文本确定其含义？

（7）《雅典公约》第 16 条时效规定如何跨法域解释？

（8）《1973 时效和期间（苏格兰）法》第 18 条关于死者亲属因未成年而不计时效期间的规定是否适用于《雅典公约》第 16 条时效规定？

（9）D 女士作为其四岁幼子监护人于 2015 年 5 月 14 日起诉是否超过时效？

本案最终认定，一国法院不应将推迟计算时效期间理解为不属于《雅典公约》第 16 条第（3）款规定的“中止”。《雅典公约》第 16 条第（3）款指引法院去看国内法相关规定，而其第 18 条第（3）款规定不具有法律行为能力之情形不应计入时效期间，这就使得法院有权根据《雅典公约》第 16 条第（3）款中止计算第 16 条第（1）款和第（2）款规定的时效期间。但根据《雅典公约》第 16 条第（3）款中止时效期间计算的，不论如何不得超过该款规定的最长时效三年，自旅客应当离船之日起计算。

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因 W 先生离船时间不应晚于 2012 年 8 月 18 日，由此起算，最长时效至 2015 年 8 月 18 日届满。因此，D 女士于 2015 年 5 月 14 日作为其四岁幼子监护人起诉未超过《雅典公约》第 16 条规定时效。

关键词：海上加油；法律问题；学术交流

W 先生租用 SFC 公司经营的“Jean Elaine”游艇一星期，从 2012 年 8 月 11 日至 18 日。8 月 14 日，W 先生在潜水时不幸身亡。2015 年 5 月 14 日，W 先生遗孀 D 女士同时以自身名义及其四岁幼子监护人名义向 SFC 公司提起诉讼。

SFC 公司抗辩称该起诉已超过《雅典公约》第 16 条规定的两年时效且不存在中止或中断事由，应予驳回。本案最终由英国最高法院审结，案号：[2018] UKSC 52，认定 D 女士以自身名义提起的诉讼已过时效，但以其幼子监护人名义提起的诉讼存在时效期间中止事由未过时效。

是为“Jean Elaine”游艇案，法律论证路径如下。

1.《雅典公约》是否已对英国生效及其效力范围？

参判决第 6 节，按《1995 商业航运法》第 183 条，《雅典公约》已对英国生效。另外，《1987 海上旅客及其行李运输（国内运输）规定》（SI 1987/670）已将《雅典公约》适用范围扩展至国内海上旅客运输。

2. 本案争议法律问题是否为《雅典公约》中时效问题？

参判决第 3 节，SFC 抗辩称，按《雅典公约》，本案诉讼已超过时效，具体来说，若旅客在运输过程中死亡，则时效期间为两年，自其应当离船之日起算。按租船合同，W 先生应不晚于 2012 年 8 月 18 日离船。故本案时效已于 2014 年 8 月 18 日届满，D 女士于 2015 年 5 月 14 日起诉已超过时效。

3.《雅典公约》时效相关规定是什么？

参判决第 6 节，《雅典公约》第 16 条规定：

（1）因旅客伤亡或其行李毁损灭失而提起的任何损害赔偿，时效期间为两年。

（2）时效期间计算如下：

① 旅客受伤的，自其离船之日起算；

② 旅客在运输过程中死亡的，自其应当离船之日起算；旅客在运输过程中受伤后又在离船后死亡的，自其死亡之日起算，但此期间自其离船之日起不应超过三年；

③ 行李毁损灭失的，自旅客离船之日或者应当离船之日起算，以晚者为准。

（3）时效期间中止和中断事由适用案件受理法院所在地法，但在任何情况下按本公约提起的诉讼时效期间不得超过三年，自旅客离船或应当离船之日起计算，以晚者为准。

（4）尽管有本条第（1）、（2）和（3）款规定，时效期间可由承运人声明或者由当事人在诉因出现后协议延长。前述声明或协议应为书面形式。

4.《雅典公约》第 16 条第（3）款提到的时效期间中止和中断事由相关“案件受理法院所在地法”是什么？

参判决第 7 节，各方均认可苏格兰法律为《雅典公约》第 16 条第（3）款提到的时效期间中止和中断事由相关“案件受理法院所在地法”。

参判决第 12 节和第 34 节，苏格兰时效法体现于《1973 时效和期限（苏格兰）法》第 18 条，规定如下：

（1）本条适用于任何人身伤亡索赔诉讼。

（2）除本条第（3）和（4）款及本法第 19A 条另有规定外，不得提起本条适用的诉讼，除非其在三年内提起自：

① 死者死亡之日起算；或者

② 索赔人知道或应当知道(i)死者受伤可全部或部分归因于一种行为或过失以及(ii)被告为应对此行为或过失负责的人或其雇主或委托人之日起算，如此日期晚于死者死亡之日。

（3）若索赔人为死者亲属，该亲属由于未成年或意识不健全而不具有法律行为能力的期间不应计入本条第（2）款规定的期间。

5.《雅典公约》第 16 条应当怎样解释？

参判决第 13 至 16 节，如同许多国际运输公约一样，《雅典公约》旨在为此领域建立一种国际法典，通过统一国际规则逐步替代不同国内法。

解释国际公约时，一国法院须寻求其用语本义及其总体宗旨。这种路径与《1969 维也纳条约法公约》第 31 条第（1）款和第 32 条规定的解释路径一致。

由于国际条约中的规则将会在分属不同法律系统的许多国家法院适用，一国法院应采取国际化解释路径，尊重这种法律文件的国际化特征。如 Macmillan 勋爵在 Stag Line Ltd v Foscolo, Mango and Co Ltd [1932] AC 328 先例中所述，“由于这些规则必将经由外国法院审视，意欲实现统一化，其解释不应受国内先例严格限制；相反，相关规则用语应基于普遍认同的广泛原则解释”。

在 King 先例中，Hope 勋爵表示，国际公约“并非基于任何缔约国法律体系，旨在跨法域统一适用”，“其用语应以广泛原则解释以得出普遍接受的结论”。同样，Hobhouse of

Woodborough 勋爵在同一先例中也表示，国际公约统一化宗旨要求一国法院“将其对本国法律和外国法律的看法放在一边”，而专注于其“实际用语本义如何”。

6.《雅典公约》第 16 条时效规定能否由公约讨论文本确定其含义？

参判决第 17 至 18 节，《雅典公约》通过前的讨论文本无助于确定第 16 条时效规定确切含义。

7.《雅典公约》第 16 条时效规定如何跨法域解释？

参判决第 19 至 33 节，首先，不应仅按英国法中关于时效中止和中断的规定对《雅典公约》第 16 条规定进行解释。

其次，也不应仅按民法系统、普通法系统或者混合系统中时效相关规定分别对《雅典公约》第 16 条规定进行解释。

再次，即使在同属民法系统、普通法系统或者混合系统中的不同国家法律之间，对于诉讼时效中止和中断也存在不同规定。

总之，《雅典公约》第 16 条时效规定应按跨法域方式解释，并其用语适用广泛的原则进行普遍接受的合理解释。

8.《1973 时效和期间（苏格兰）法》第 18 条关于死者亲属因未成年而不计时效期间的规定是否适用于《雅典公约》第 16 条时效规定？

参判决第 35 至 49 节，《1973 时效和期间（苏格兰）法》第 18 条第（2）款规定了时效期间起算点，第（3）款规定了死者亲属因未成年或意识不健全而不应计算时效期间。这不存在推迟计算时效期间的问题，时效期间起算点仍按该法第 18 条第（2）款确定。若索赔人不具有法律行为能力之情形发生于时效期间起算前，虽然其不计入时效期间在客观上会产生推迟计算时效期间的效果，但法律机制并非如此。

不论如何，一国法院均不应将推迟计算时效期间理解为不属于《雅典公约》第 16 条第（3）款规定的“中止”。《雅典公约》第 16 条第（3）款指引法院去看国内法相关规定，而国内法第 18 条第（3）款规定不具有法律行为能力之情形不应计入时效期间，这就使得法院有权根据《雅典公约》第 16 条第（3）款中止计算第 16 条第（1）款和第（2）款规定的时效期间，即自 W 先生应当离船之日起两年。

最后，根据《雅典公约》第 16 条第（3）款中止时效期间计算的，不得超过该款规定的最长时效：“但在任何情况下按本公约提起的诉讼时效期间不得超过三年，自旅客离船或应当离船之日起计算，以晚者为准”。即便是国内法“中止”相关规定，也不得使此时效届满之日超过此最长时效。

9. D 女士作为其四岁幼子监护人于 2015 年 5 月 14 日起诉是否超过时效？

因 W 先生离船时间不应晚于 2012 年 8 月 18 日，由此起算，最长时效至 2015 年 8 月 18 日届满。因此，D 女士于 2015 年 5 月 14 日作为其四岁幼子监护人起诉未超过《雅典公约》第 16 条规定时效。

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

中华人民共和国湿地保护法

（2021 年 12 月 24 日第十三届全国人民代表大会常务委员会第三十二次会议通过）

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第一章 总 则

第一条 为了加强湿地保护，维护湿地生态功能及生物多样性，保障生态安全，促进生态文明建设，实现人与自然和谐共生，制定本法。

第二条 在中华人民共和国领域及管辖的其他海域内从事湿地保护、利用、修复及相关管理活动，适用本法。

本法所称湿地，是指具有显著生态功能的自然或者人工的、常年或者季节性积水地带、水域，包括低潮时水深不超过六米的海域，但是水田以及用于养殖的人工的水域和滩涂除外。国家对湿地实行分级管理及名录制度。

江河、湖泊、海域等的湿地保护、利用及相关管理活动还应当适用《中华人民共和国水法》、《中华人民共和国防洪法》、《中华人民共和国水污染防治法》、《中华人民共和国海洋环境保护法》、《中华人民共和国长江保护法》、《中华人民共和国渔业法》、《中华人民共和国海域使用管理法》等有关法律的规定。

第三条 湿地保护应当坚持保护优先、严格管理、系统治理、科学修复、合理利用的原则，发挥湿地涵养水源、调节气候、改善环境、维护生物多样性等多种生态功能。

第四条 县级以上人民政府应当将湿地保护纳入国民经济和社会发展规划，并将开展湿

地保护工作所需经费按照事权划分原则列入预算。

县级以上地方人民政府对本行政区域内的湿地保护负责，采取措施保持湿地面积稳定，提升湿地生态功能。

乡镇人民政府组织群众做好湿地保护相关工作，村民委员会予以协助。

第五条　国务院林业草原主管部门负责湿地资源的监督管理，负责湿地保护规划和相关国家标准拟定、湿地开发利用的监督管理、湿地生态保护修复工作。国务院自然资源、水行政、住房城乡建设、生态环境、农业农村等其他有关部门，按照职责分工承担湿地保护、修复、管理有关工作。

国务院林业草原主管部门会同国务院自然资源、水行政、住房城乡建设、生态环境、农业农村等主管部门建立湿地保护协作和信息通报机制。

第六条　县级以上地方人民政府应当加强湿地保护协调工作。县级以上地方人民政府有关部门按照职责分工负责湿地保护、修复、管理有关工作。

第七条　各级人民政府应当加强湿地保护宣传教育和科学知识普及工作，通过湿地保护日、湿地保护宣传周等开展宣传教育活动，增强全社会湿地保护意识；鼓励基层群众性自治组织、社会组织、志愿者开展湿地保护法律法规和湿地保护知识宣传活动，营造保护湿地的良好氛围。

教育主管部门、学校应当在教育教学活动中注重培养学生的湿地保护意识。

新闻媒体应当开展湿地保护法律法规和湿地保护知识的公益宣传，对破坏湿地的行为进行舆论监督。

第八条　国家鼓励单位和个人依法通过捐赠、资助、志愿服务等方式参与湿地保护活动。

对在湿地保护方面成绩显著的单位和个人，按照国家有关规定给予表彰、奖励。

第九条　国家支持开展湿地保护科学技术研究开发和应用推广，加强湿地保护专业技术人才培养，提高湿地保护科学技术水平。

第十条　国家支持开展湿地保护科学技术、生物多样性、候鸟迁徙等方面的国际合作与交流。

第十一条　任何单位和个人都有保护湿地的义务，对破坏湿地的行为有权举报或者控告，接到举报或者控告的机关应当及时处理，并依法保护举报人、控告人的合法权益。

第二章　湿地资源管理

第十二条　国家建立湿地资源调查评价制度。

国务院自然资源主管部门应当会同国务院林业草原等有关部门定期开展全国湿地资源调

查评价工作，对湿地类型、分布、面积、生物多样性、保护与利用情况等进行调查，建立统一的信息发布和共享机制。

第十三条　国家实行湿地面积总量管控制度，将湿地面积总量管控目标纳入湿地保护目标责任制。

国务院林业草原、自然资源主管部门会同国务院有关部门根据全国湿地资源状况、自然变化情况和湿地面积总量管控要求，确定全国和各省、自治区、直辖市湿地面积总量管控目标，报国务院批准。地方各级人民政府应当采取有效措施，落实湿地面积总量管控目标的要求。

第十四条　国家对湿地实行分级管理，按照生态区位、面积以及维护生态功能、生物多样性的重要程度，将湿地分为重要湿地和一般湿地。重要湿地包括国家重要湿地和省级重要湿地，重要湿地以外的湿地为一般湿地。重要湿地依法划入生态保护红线。

国务院林业草原主管部门会同国务院自然资源、水行政、住房城乡建设、生态环境、农业农村等有关部门发布国家重要湿地名录及范围，并设立保护标志。国际重要湿地应当列入国家重要湿地名录。

省、自治区、直辖市人民政府或者其授权的部门负责发布省级重要湿地名录及范围，并向国务院林业草原主管部门备案。

一般湿地的名录及范围由县级以上地方人民政府或者其授权的部门发布。

第十五条　国务院林业草原主管部门应当会同国务院有关部门，依据国民经济和社会发展规划、国土空间规划和生态环境保护规划编制全国湿地保护规划，报国务院或者其授权的部门批准后组织实施。

县级以上地方人民政府林业草原主管部门应当会同有关部门，依据本级国土空间规划和上一级湿地保护规划编制本行政区域内的湿地保护规划，报同级人民政府批准后组织实施。

湿地保护规划应当明确湿地保护的目标任务、总体布局、保护修复重点和保障措施等内容。经批准的湿地保护规划需要调整的，按照原批准程序办理。

编制湿地保护规划应当与流域综合规划、防洪规划等规划相衔接。

第十六条　国务院林业草原、标准化主管部门会同国务院自然资源、水行政、住房城乡建设、生态环境、农业农村主管部门组织制定湿地分级分类、监测预警、生态修复等国家标准；国家标准未作规定的，可以依法制定地方标准并备案。

第十七条　县级以上人民政府林业草原主管部门建立湿地保护专家咨询机制，为编制湿地保护规划、制定湿地名录、制定相关标准等提供评估论证等服务。

第十八条　办理自然资源权属登记涉及湿地的，应当按照规定记载湿地的地理坐标、空

间范围、类型、面积等信息。

第十九条　国家严格控制占用湿地。

禁止占用国家重要湿地，国家重大项目、防灾减灾项目、重要水利及保护设施项目、湿地保护项目等除外。

建设项目选址、选线应当避让湿地，无法避让的应当尽量减少占用，并采取必要措施减轻对湿地生态功能的不利影响。

建设项目规划选址、选线审批或者核准时，涉及国家重要湿地的，应当征求国务院林业草原主管部门的意见；涉及省级重要湿地或者一般湿地的，应当按照管理权限，征求县级以上地方人民政府授权的部门的意见。

第二十条　建设项目确需临时占用湿地的，应当依照《中华人民共和国土地管理法》、《中华人民共和国水法》、《中华人民共和国森林法》、《中华人民共和国草原法》、《中华人民共和国海域使用管理法》等有关法律法规的规定办理。临时占用湿地的期限一般不得超过二年，并不得在临时占用的湿地上修建永久性建筑物。

临时占用湿地期满后一年内，用地单位或者个人应当恢复湿地面积和生态条件。

第二十一条　除因防洪、航道、港口或者其他水工程占用河道管理范围及蓄滞洪区内的湿地外，经依法批准占用重要湿地的单位应当根据当地自然条件恢复或者重建与所占用湿地面积和质量相当的湿地；没有条件恢复、重建的，应当缴纳湿地恢复费。缴纳湿地恢复费的，不再缴纳其他相同性质的恢复费用。

湿地恢复费缴纳和使用管理办法由国务院财政部门会同国务院林业草原等有关部门制定。

第二十二条　国务院林业草原主管部门应当按照监测技术规范开展国家重要湿地动态监测，及时掌握湿地分布、面积、水量、生物多样性、受威胁状况等变化信息。

国务院林业草原主管部门应当依据监测数据，对国家重要湿地生态状况进行评估，并按照规定发布预警信息。

省、自治区、直辖市人民政府林业草原主管部门应当按照监测技术规范开展省级重要湿地动态监测、评估和预警工作。

县级以上地方人民政府林业草原主管部门应当加强对一般湿地的动态监测。

第三章　湿地保护与利用

第二十三条　国家坚持生态优先、绿色发展，完善湿地保护制度，健全湿地保护政策支持和科技支撑机制，保障湿地生态功能和永续利用，实现生态效益、社会效益、经济效益相

统一。

第二十四条　省级以上人民政府及其有关部门根据湿地保护规划和湿地保护需要，依法将湿地纳入国家公园、自然保护区或者自然公园。

第二十五条　地方各级人民政府及其有关部门应当采取措施，预防和控制人为活动对湿地及其生物多样性的不利影响，加强湿地污染防治，减缓人为因素和自然因素导致的湿地退化，维护湿地生态功能稳定。

在湿地范围内从事旅游、种植、畜牧、水产养殖、航运等利用活动，应当避免改变湿地的自然状况，并采取措施减轻对湿地生态功能的不利影响。

县级以上人民政府有关部门在办理环境影响评价、国土空间规划、海域使用、养殖、防洪等相关行政许可时，应当加强对有关湿地利用活动的必要性、合理性以及湿地保护措施等内容的审查。

第二十六条　地方各级人民政府对省级重要湿地和一般湿地利用活动进行分类指导，鼓励单位和个人开展符合湿地保护要求的生态旅游、生态农业、生态教育、自然体验等活动，适度控制种植养殖等湿地利用规模。

地方各级人民政府应当鼓励有关单位优先安排当地居民参与湿地管护。

第二十七条　县级以上地方人民政府应当充分考虑保障重要湿地生态功能的需要，优化重要湿地周边产业布局。

县级以上地方人民政府可以采取定向扶持、产业转移、吸引社会资金、社区共建等方式，推动湿地周边地区绿色发展，促进经济发展与湿地保护相协调。

第二十八条　禁止下列破坏湿地及其生态功能的行为：

（一）开（围）垦、排干自然湿地，永久性截断自然湿地水源；

（二）擅自填埋自然湿地，擅自采砂、采矿、取土；

（三）排放不符合水污染物排放标准的工业废水、生活污水及其他污染湿地的废水、污水，倾倒、堆放、丢弃、遗撒固体废物；

（四）过度放牧或者滥采野生植物，过度捕捞或者灭绝式捕捞，过度施肥、投药、投放饵料等污染湿地的种植养殖行为；

（五）其他破坏湿地及其生态功能的行为。

第二十九条　县级以上人民政府有关部门应当按照职责分工，开展湿地有害生物监测工作，及时采取有效措施预防、控制、消除有害生物对湿地生态系统的危害。

第三十条　县级以上人民政府应当加强对国家重点保护野生动植物集中分布湿地的保护。任何单位和个人不得破坏鸟类和水生生物的生存环境。

禁止在以水鸟为保护对象的自然保护地及其他重要栖息地从事捕鱼、挖捕底栖生物、捡拾鸟蛋、破坏鸟巢等危及水鸟生存、繁衍的活动。开展观鸟、科学研究以及科普活动等应当保持安全距离，避免影响鸟类正常觅食和繁殖。

在重要水生生物产卵场、索饵场、越冬场和洄游通道等重要栖息地应当实施保护措施。经依法批准在洄游通道建闸、筑坝，可能对水生生物洄游产生影响的，建设单位应当建造过鱼设施或者采取其他补救措施。

禁止向湿地引进和放生外来物种，确需引进的应当进行科学评估，并依法取得批准。

第三十一条　国务院水行政主管部门和地方各级人民政府应当加强对河流、湖泊范围内湿地的管理和保护，因地制宜采取水系连通、清淤疏浚、水源涵养与水土保持等治理修复措施，严格控制河流源头和蓄滞洪区、水土流失严重区等区域的湿地开发利用活动，减轻对湿地及其生物多样性的不利影响。

第三十二条　国务院自然资源主管部门和沿海地方各级人民政府应当加强对滨海湿地的管理和保护，严格管控围填滨海湿地。经依法批准的项目，应当同步实施生态保护修复，减轻对滨海湿地生态功能的不利影响。

第三十三条　国务院住房城乡建设主管部门和地方各级人民政府应当加强对城市湿地的管理和保护，采取城市水系治理和生态修复等措施，提升城市湿地生态质量，发挥城市湿地雨洪调蓄、净化水质、休闲游憩、科普教育等功能。

第三十四条　红树林湿地所在地县级以上地方人民政府应当组织编制红树林湿地保护专项规划，采取有效措施保护红树林湿地。

红树林湿地应当列入重要湿地名录；符合国家重要湿地标准的，应当优先列入国家重要湿地名录。

禁止占用红树林湿地。经省级以上人民政府有关部门评估，确因国家重大项目、防灾减灾等需要占用的，应当依照有关法律规定办理，并做好保护和修复工作。相关建设项目改变红树林所在河口水文情势、对红树林生长产生较大影响的，应当采取有效措施减轻不利影响。

禁止在红树林湿地挖塘，禁止采伐、采挖、移植红树林或者过度采摘红树林种子，禁止投放、种植危害红树林生长的物种。因科研、医药或者红树林湿地保护等需要采伐、采挖、移植、采摘的，应当依照有关法律法规办理。

第三十五条　泥炭沼泽湿地所在地县级以上地方人民政府应当制定泥炭沼泽湿地保护专项规划，采取有效措施保护泥炭沼泽湿地。

符合重要湿地标准的泥炭沼泽湿地，应当列入重要湿地名录。

禁止在泥炭沼泽湿地开采泥炭或者擅自开采地下水；禁止将泥炭沼泽湿地蓄水向外排放，

因防灾减灾需要的除外。

第三十六条　国家建立湿地生态保护补偿制度。

国务院和省级人民政府应当按照事权划分原则加大对重要湿地保护的财政投入，加大对重要湿地所在地区的财政转移支付力度。

国家鼓励湿地生态保护地区与湿地生态受益地区人民政府通过协商或者市场机制进行地区间生态保护补偿。

因生态保护等公共利益需要，造成湿地所有者或者使用者合法权益受到损害的，县级以上人民政府应当给予补偿。

第四章　湿地修复

第三十七条　县级以上人民政府应当坚持自然恢复为主、自然恢复和人工修复相结合的原则，加强湿地修复工作，恢复湿地面积，提高湿地生态系统质量。

县级以上人民政府对破碎化严重或者功能退化的自然湿地进行综合整治和修复，优先修复生态功能严重退化的重要湿地。

第三十八条　县级以上人民政府组织开展湿地保护与修复，应当充分考虑水资源禀赋条件和承载能力，合理配置水资源，保障湿地基本生态用水需求，维护湿地生态功能。

第三十九条　县级以上地方人民政府应当科学论证，对具备恢复条件的原有湿地、退化湿地、盐碱化湿地等，因地制宜采取措施，恢复湿地生态功能。

县级以上地方人民政府应当按照湿地保护规划，因地制宜采取水体治理、土地整治、植被恢复、动物保护等措施，增强湿地生态功能和碳汇功能。

禁止违法占用耕地等建设人工湿地。

第四十条　红树林湿地所在地县级以上地方人民政府应当对生态功能重要区域、海洋灾害风险等级较高地区、濒危物种保护区域或者造林条件较好地区的红树林湿地优先实施修复，对严重退化的红树林湿地进行抢救性修复，修复应当尽量采用本地树种。

第四十一条　泥炭沼泽湿地所在地县级以上地方人民政府应当因地制宜，组织对退化泥炭沼泽湿地进行修复，并根据泥炭沼泽湿地的类型、发育状况和退化程度等，采取相应的修复措施。

第四十二条　修复重要湿地应当编制湿地修复方案。

重要湿地的修复方案应当报省级以上人民政府林业草原主管部门批准。林业草原主管部门在批准修复方案前，应当征求同级人民政府自然资源、水行政、住房城乡建设、生态环境、农业农村等有关部门的意见。

第四十三条　修复重要湿地应当按照经批准的湿地修复方案进行修复。

重要湿地修复完成后，应当经省级以上人民政府林业草原主管部门验收合格，依法公开修复情况。省级以上人民政府林业草原主管部门应当加强修复湿地后期管理和动态监测，并根据需要开展修复效果后期评估。

第四十四条　因违法占用、开采、开垦、填埋、排污等活动，导致湿地破坏的，违法行为人应当负责修复。违法行为人变更的，由承继其债权、债务的主体负责修复。

因重大自然灾害造成湿地破坏，以及湿地修复责任主体灭失或者无法确定的，由县级以上人民政府组织实施修复。

第五章　监督检查

第四十五条　县级以上人民政府林业草原、自然资源、水行政、住房城乡建设、生态环境、农业农村主管部门应当依照本法规定，按照职责分工对湿地的保护、修复、利用等活动进行监督检查，依法查处破坏湿地的违法行为。

第四十六条　县级以上人民政府林业草原、自然资源、水行政、住房城乡建设、生态环境、农业农村主管部门进行监督检查，有权采取下列措施：

（一）询问被检查单位或者个人，要求其对与监督检查事项有关的情况作出说明；

（二）进行现场检查；

（三）查阅、复制有关文件、资料，对可能被转移、销毁、隐匿或者篡改的文件、资料予以封存；

（四）查封、扣押涉嫌违法活动的场所、设施或者财物。

第四十七条　县级以上人民政府林业草原、自然资源、水行政、住房城乡建设、生态环境、农业农村主管部门依法履行监督检查职责，有关单位和个人应当予以配合，不得拒绝、阻碍。

第四十八条　国务院林业草原主管部门应当加强对国家重要湿地保护情况的监督检查。省、自治区、直辖市人民政府林业草原主管部门应当加强对省级重要湿地保护情况的监督检查。

县级人民政府林业草原主管部门和有关部门应当充分利用信息化手段，对湿地保护情况进行监督检查。

各级人民政府及其有关部门应当依法公开湿地保护相关信息，接受社会监督。

第四十九条　国家实行湿地保护目标责任制，将湿地保护纳入地方人民政府综合绩效评价内容。

对破坏湿地问题突出、保护工作不力、群众反映强烈的地区，省级以上人民政府林业草原主管部门应当会同有关部门约谈该地区人民政府的主要负责人。

第五十条　湿地的保护、修复和管理情况，应当纳入领导干部自然资源资产离任审计。

第六章　法律责任

第五十一条　县级以上人民政府有关部门发现破坏湿地的违法行为或者接到对违法行为的举报，不予查处或者不依法查处，或者有其他玩忽职守、滥用职权、徇私舞弊行为的，对直接负责的主管人员和其他直接责任人员依法给予处分。

第五十二条　违反本法规定，建设项目擅自占用国家重要湿地的，由县级以上人民政府林业草原等有关主管部门按照职责分工责令停止违法行为，限期拆除在非法占用的湿地上新建的建筑物、构筑物和其他设施，修复湿地或者采取其他补救措施，按照违法占用湿地的面积，处每平方米一千元以上一万元以下罚款；违法行为人不停止建设或者逾期不拆除的，由作出行政处罚决定的部门依法申请人民法院强制执行。

第五十三条　建设项目占用重要湿地，未依照本法规定恢复、重建湿地的，由县级以上人民政府林业草原主管部门责令限期恢复、重建湿地；逾期未改正的，由县级以上人民政府林业草原主管部门委托他人代为履行，所需费用由违法行为人承担，按照占用湿地的面积，处每平方米五百元以上二千元以下罚款。

第五十四条　违反本法规定，开（围）垦、填埋自然湿地的，由县级以上人民政府林业草原等有关主管部门按照职责分工责令停止违法行为，限期修复湿地或者采取其他补救措施，没收违法所得，并按照破坏湿地面积，处每平方米五百元以上五千元以下罚款；破坏国家重要湿地的，并按照破坏湿地面积，处每平方米一千元以上一万元以下罚款。

违反本法规定，排干自然湿地或者永久性截断自然湿地水源的，由县级以上人民政府林业草原主管部门责令停止违法行为，限期修复湿地或者采取其他补救措施，没收违法所得，并处五万元以上五十万元以下罚款；造成严重后果的，并处五十万元以上一百万元以下罚款。

第五十五条　违反本法规定，向湿地引进或者放生外来物种的，依照《中华人民共和国生物安全法》等有关法律法规的规定处理、处罚。

第五十六条　违反本法规定，在红树林湿地内挖塘的，由县级以上人民政府林业草原等有关主管部门按照职责分工责令停止违法行为，限期修复湿地或者采取其他补救措施，按照破坏湿地面积，处每平方米一千元以上一万元以下罚款；对树木造成毁坏的，责令限期补种成活毁坏株数一倍以上三倍以下的树木，无法确定毁坏株数的，按照相同区域同类树种生长密度计算株数。

违反本法规定，在红树林湿地内投放、种植妨碍红树林生长物种的，由县级以上人民政府林业草原主管部门责令停止违法行为，限期清理，处二万元以上十万元以下罚款；造成严重后果的，处十万元以上一百万元以下罚款。

第五十七条　违反本法规定开采泥炭的，由县级以上人民政府林业草原等有关主管部门按照职责分工责令停止违法行为，限期修复湿地或者采取其他补救措施，没收违法所得，并按照采挖泥炭体积，处每立方米二千元以上一万元以下罚款。

违反本法规定，从泥炭沼泽湿地向外排水的，由县级以上人民政府林业草原主管部门责令停止违法行为，限期修复湿地或者采取其他补救措施，没收违法所得，并处一万元以上十万元以下罚款；情节严重的，并处十万元以上一百万元以下罚款。

第五十八条　违反本法规定，未编制修复方案修复湿地或者未按照修复方案修复湿地，造成湿地破坏的，由省级以上人民政府林业草原主管部门责令改正，处十万元以上一百万元以下罚款。

第五十九条　破坏湿地的违法行为人未按照规定期限或者未按照修复方案修复湿地的，由县级以上人民政府林业草原主管部门委托他人代为履行，所需费用由违法行为人承担；违法行为人因被宣告破产等原因丧失修复能力的，由县级以上人民政府组织实施修复。

第六十条　违反本法规定，拒绝、阻碍县级以上人民政府有关部门依法进行的监督检查的，处二万元以上二十万元以下罚款；情节严重的，可以责令停产停业整顿。

第六十一条　违反本法规定，造成生态环境损害的，国家规定的机关或者法律规定的组织有权依法请求违法行为人承担修复责任、赔偿损失和有关费用。

第六十二条　违反本法规定，构成违反治安管理行为的，由公安机关依法给予治安管理处罚；构成犯罪的，依法追究刑事责任。

第七章　附　则

第六十三条　本法下列用语的含义：

（一）红树林湿地，是指由红树植物为主组成的近海和海岸潮间湿地；

（二）泥炭沼泽湿地，是指有泥炭发育的沼泽湿地。

第六十四条　省、自治区、直辖市和设区的市、自治州可以根据本地实际，制定湿地保护具体办法。

第六十五条　本法自 2022 年 6 月 1 日起施行。

全国法院涉外商事海事审判工作座谈会会议纪要

（2021 年 12 月 31 日最高人民法院发布）

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涉外商事部分

一、关于案件管辖

1.【排他性管辖协议的推定】涉外合同或者其他财产权益纠纷的当事人签订的管辖协议明确约定由一国法院管辖，但未约定该管辖协议为非排他性管辖协议的，应推定该管辖协议为排他性管辖协议。

2.【非对称管辖协议的效力认定】涉外合同或者其他财产权益纠纷的当事人签订的管辖协议明确约定一方当事人可以从一个以上国家的法院中选择某国法院提起诉讼，而另一方当事人仅能向一个特定国家的法院提起诉讼，当事人以显失公平为由主张该管辖协议无效的，人民法院不予支持；但管辖协议涉及消费者、劳动者权益或者违反民事诉讼法专属管辖规定的除外。

3.【跨境消费者网购合同管辖协议的效力】网络电商平台使用格式条款与消费者订立跨境网购合同，未采取合理方式提示消费者注意合同中包含的管辖条款，消费者根据民法典第四百九十六条的规定主张该管辖条款不成为合同内容的，人民法院应予支持。

网络电商平台虽已尽到合理提示消费者注意的义务，但该管辖条款约定在消费者住所地国以外的国家法院诉讼，不合理加重消费者寻求救济的成本，消费者根据民法典第四百九十七条的规定主张该管辖条款无效的，人民法院应予支持。

4.【主从合同约定不同管辖法院的处理】主合同和担保合同分别约定不同国家或者地区的法院管辖，且约定不违反民事诉讼法专属管辖规定的，应当依据管辖协议的约定分别确定管辖法院。当事人主张根据《最高人民法院关于适用<中华人民共和国民法典>有关担保制度的解释》第二十一条第二款的规定，根据主合同确定管辖法院的，人民法院不予支持。

二、关于诉讼当事人

5.【“有明确被告”的认定】原告对住所地在中华人民共和国领域外的被告提起诉讼，能够提供该被告存在的证明的，即符合民事诉讼法第一百二十二条第二项规定的“有明确的被告”。被告存在的证明可以是处于有效期内的被告商业登记证、身份证明、合同书等文件材料，不应强制要求原告就上述证明办理公证认证手续。

6.【境外公司的诉讼代表人资格认定】在中华人民共和国领域外登记设立的公司因出现公司僵局、解散、重整、破产等原因，已经由登记地国法院指定司法管理人、清算管理人、破产管理人的，该管理人可以代表该公司参加诉讼。

管理人应当提交登记地国法院作出的判决、裁定及其公证认证手续等相关文件证明其诉讼代表资格。人民法院应当对上述证据组织质证，另一方当事人仅以登记地国法院作出的判

决、裁定未经我国法院承认为由，否认管理人诉讼代表资格的，人民法院不予支持。

7.【外籍当事人委托公民代理的手续审查】根据民事诉讼法司法解释第五百二十八条、第五百二十九条的规定，涉外民事诉讼中的外籍当事人委托本国人为诉讼代理人或者委托本国律师以非律师身份担任诉讼代理人、外国驻华使领馆官员受本国公民委托担任诉讼代理人的，不适用民事诉讼法第六十一条第二款第三项的规定，无须提交当事人所在社区、单位或者有关社会团体的推荐函。

8.【外国当事人一次性授权的手续审查】外国当事人一次性授权诉讼代理人代理多个案件或者一个案件的多个程序，该授权办理了公证认证或者司法协助协定规定的相关证明手续，诉讼代理人有权在授权委托书的授权范围和有效期内从事诉讼代理行为。对方当事人以该诉讼代理人的授权未就单个案件或者程序办理公证认证或者证明手续为由提出异议的，人民法院不予支持。

9.【境外寄交管辖权异议申请的审查】当事人从中华人民共和国领域外寄交或者托交管辖权异议申请的，应当提交其主体资格证明以及有效联系方式；未提交的，人民法院对其提出的管辖权异议不予审查。

三、关于涉外送达

10.【邮寄送达退件的处理】人民法院向在中华人民共和国领域内没有住所的受送达人邮寄送达司法文书，如邮件被退回，且注明原因为“该地址查无此人”“该地址无人居住”等情形的，视为不能用邮寄方式送达。

11.【电子送达】人民法院向在中华人民共和国领域内没有住所的受送达人送达司法文书，如受送达人所在国法律未禁止电子送达方式的，人民法院可以依据民事诉讼法第二百七十四条的规定采用电子送达方式，但违反我国缔结或参加的国际条约规定的除外。

受送达人所在国系《海牙送达公约》成员国，并在公约项下声明反对邮寄方式送达的，应推定其不允许电子送达方式，人民法院不能采用电子送达方式。

12.【外国自然人的境内送达】人民法院对外国自然人采用下列方式送达，能够确认受送达人收悉的，为有效送达：

（一）向其在境内设立的外商独资企业转交送达；

（二）向其在境内担任法定代表人、公司董事、监事和高级管理人员的企业转交送达；

（三）向其同住成年家属转交送达；

（四）通过能够确认受送达人收悉的其他方式送达。

13.【送达地址的认定】在中华人民共和国领域内没有住所的当事人未填写送达地址确认书，但在诉讼过程中提交的书面材料明确载明地址的，可以认定该地址为送达地址。

14.【管辖权异议文书的送达】对涉外商事案件管辖权异议程序的管辖权异议申请书、答辩书等司法文书，人民法院可以仅在相对方当事人之间进行送达，但管辖权异议裁定书应当列明并送达所有当事人。

四、关于涉外诉讼证据

15.【外国法院判决、仲裁裁决等作为证据的认定】一方当事人将外国法院作出的发生法律效力的判决、裁定或者外国仲裁机构作出的仲裁裁决作为证据提交，人民法院应当组织双方当事人质证后进行审查认定，但该判决、裁定或者仲裁裁决认定的事实，不属于民事诉讼法司法解释第九十三条第一款规定的当事人无须举证证明的事实。一方当事人仅以该判决、裁定或者仲裁裁决未经人民法院承认为由主张不能作为证据使用的，人民法院不予支持。

16.【域外公文书证】《最高人民法院关于民事诉讼证据的若干规定》第十六条规定的公文书证包括外国法院作出的判决、裁定，外国行政机关出具的文件，外国公共机构出具的商事登记、出生及死亡证明、婚姻状况证明等文件，但不包括外国鉴定机构等私人机构出具的文件。

公文书证在中华人民共和国领域外形成的，应当经所在国公证机关证明，或者履行相应的证明手续，但是可以通过互联网方式核查公文书证的真实性或者双方当事人对公文书证的真实性均无异议的除外。

17.【庭审中翻译费用的承担】诉讼过程中翻译人员出庭产生的翻译费用，根据《诉讼费用交纳办法》第十二条第一款的规定，由主张翻译或者负有翻译义务的一方当事人直接预付给翻译机构，人民法院不得代收代付。

人民法院应当在裁判文书中载明翻译费用，并根据《诉讼费用交纳办法》第二十九条的规定确定由败诉方负担。部分胜诉、部分败诉的，人民法院根据案件的具体情况决定当事人各自负担的数额。

五、关于涉外民事关系的法律适用

18.【国际条约未规定事项和保留事项的法律适用】中华人民共和国缔结或者参加的国际条约对涉外民商事案件中的具体争议没有规定，或者案件的具体争议涉及保留事项的，人民法院根据涉外民事关系法律适用法等法律的规定确定应当适用的法律。

19.【《联合国国际货物销售合同公约》的适用】营业地位于《联合国国际货物销售合同公约》不同缔约国的当事人缔结的国际货物销售合同应当自动适用该公约的规定，但当事人明确约定排除适用该公约的除外。人民法院应当在法庭辩论终结前向当事人询问关于适用该公约的具体意见。

20.【法律与国际条约的一致解释】人民法院审理涉外商事案件所适用的中华人民共和国

法律、行政法规的规定存在两种以上合理解释的，人民法院应当选择与中华人民共和国缔结或者参加的国际条约相一致的解释，但中华人民共和国声明保留的条款除外。

六、关于域外法查明

21.【查明域外法的途径】人民法院审理案件应当适用域外法律时，可以通过下列途径查明：

（1）由当事人提供；

（2）由中外法律专家提供；

（3）由法律查明服务机构提供；

（4）由最高人民法院国际商事专家委员提供；

（5）由与我国订立司法协助协定的缔约相对方的中央机关提供；

（6）由我国驻该国使领馆提供；

（7）由该国驻我国使领馆提供；

（8）其他合理途径。

通过上述途径提供的域外法律资料以及专家意见，应当在法庭上出示，并充分听取各方当事人的意见。

22.【委托国际商事专家委员提供咨询意见】人民法院委托最高人民法院国际商事专家委员就审理案件涉及的国际条约、国际商事规则、域外法律的查明和适用等法律问题提供咨询意见的，应当通过高级人民法院向最高人民法院国际商事法庭协调指导办公室办理寄交书面委托函，写明需提供意见的法律所属国别、法律部门、法律争议等内容，并附相关材料。

23.【域外法专家出庭】当事人可以依据民事诉讼法第八十二条的规定申请域外法专家出庭。

人民法院可以就专家意见书所涉域外法的理解，对出庭的专家进行询问。经法庭准许，当事人可以对出庭的专家进行询问。专家不得参与域外法查明事项之外的法庭审理活动。专家不能现场到庭的，人民法院可以根据案件审理需要采用视频方式询问。

24.【域外法内容的确定】双方当事人提交的域外法内容相同或者当事人对相对方提交的域外法内容无异议的，人民法院可以作为域外法依据予以确定。当事人对相对方提交的域外法内容有异议的，人民法院应当结合质证认证情况进行审查认定。人民法院不得仅以当事人对域外法内容存在争议为由认定不能查明域外法。

25.【域外法查明不能的认定】当事人应当提供域外法的，人民法院可以根据案件具体情况指定查明域外法的期限并可依据当事人申请适当延长期限。当事人在延长期限内仍不能提供的，视为域外法查明不能。

26.【域外法查明费用】对于应当适用的域外法，根据涉外民事关系法律适用法第十条第一款的规定由当事人提供的，查明费用由当事人直接支付给查明方，人民法院不得代收代付。人民法院可以根据当事人的诉讼请求和具体案情，对当事人因查明域外法而发生的合理费用予以支持。

七、关于涉公司纠纷案件的审理

27.【境外公司内部决议效力的法律适用】在中华人民共和国领域外登记设立的公司作出的内部决议的效力，人民法院应当适用登记地国的法律并结合公司章程的相关规定予以审查认定。

28.【境外公司意思表示的认定】在中华人民共和国领域外登记设立的公司的董事代表公司在合同书、信件、数据电文等载体上签字订立合同的行为，可以视为该公司作出的意思表示，未加盖该公司的印章不影响代表行为的效力，但当事人另有约定或者登记地国法律另有规定的除外。

公司章程或者公司权力机构对董事代表权的限制，不得对抗善意相对人，但登记地国法律另有规定的除外。

29.【外商投资企业隐名投资协议纠纷】因外商投资企业隐名投资协议产生的纠纷，实际投资者请求确认其在外商投资企业中的股东身份或者请求变更股东身份，并提供证据证明其已实际投资且名义股东以外的其他股东认可实际投资者的股东身份的，对其诉讼请求按照以下方式处理：

（1）外商投资企业属于外商投资准入负面清单禁止投资领域的，人民法院不予支持；

（2）外商投资企业属于外商投资准入负面清单以外投资领域的，人民法院应当判决由名义股东履行将所持股权转移登记至实际投资者名下的义务，外商投资企业负有协助办理股权转移登记手续的义务；

（3）外商投资企业属于外商投资准入负面清单限制投资领域的，人民法院应当判决由名义股东履行将所持股权转移登记至实际投资者名下的义务，并协助外商投资企业办理报批手续。判决可以同时载明，不履行报批手续的，实际投资者可自行报批。

因相对人已从名义股东处善意取得外商投资企业股权，或者实际投资者依据前款第 3 项报批后未获外商投资企业主管机关批准，导致股权变更事实上无法实现的，实际投资者可就隐名投资协议另行提起合同损害赔偿之诉。

八、关于涉金融纠纷案件的审理

30.【独立保函止付申请的初步实体审查】人民法院审理独立保函欺诈纠纷案件时，对当事人提出的独立保函止付申请，应当根据《最高人民法院关于审理独立保函纠纷案件若干问

题的规定》第十四条的规定进行审查，并根据第十二条的规定就是否存在欺诈的止付事由进行初步实体审查；应当根据第十六条的规定在裁定中列明初步查明的事实和是否准许止付申请的理由。

31.【信用证通知行过错及责任认定】通知行在信用证项下的义务为审核确认信用证的表面真实性并予以准确通知。通知行履行通知义务存在过错并致受益人损失的，应当承担相应的侵权责任，但赔偿数额不应超过信用证项下未付款金额及利息。受益人主张通知行赔偿其在基础合同项下所受损失的，人民法院不予支持。

32.【外币逾期付款利息】外币逾期付款情形下，当事人就逾期付款主张利息损失时，当事人有约定的，按当事人约定处理；当事人未约定的，可以参照中国银行同期同类外币贷款利率计算。

九、关于申请承认和执行外国法院判决案件的审理

33.【审查标准及适用范围】人民法院在审理申请承认和执行外国法院判决、裁定案件时，应当根据民事诉讼法第二百八十九条以及民事诉讼法司法解释第五百四十四条第一款的规定，首先审查该国与我国是否缔结或者共同参加了国际条约。有国际条约的，依照国际条约办理；没有国际条约，或者虽然有国际条约但国际条约对相关事项未作规定的，具体审查标准可以适用本纪要。

破产案件、知识产权案件、不正当竞争案件以及垄断案件因具有较强的地域性、特殊性，相关判决的承认和执行不适用本纪要。

34.【申请人住所地法院管辖的情形】申请人申请承认外国法院判决、裁定，但被申请人在我国境内没有住所地，且其财产也不在我国境内的，可以由申请人住所地的中级人民法院管辖。

35.【申请材料】申请人申请承认和执行外国法院判决、裁定，应当提交申请书并附下列文件：

（1）判决书正本或者经证明无误的副本；

（2）证明判决已经发生法律效力的文件；

（3）缺席判决的，证明外国法院合法传唤缺席方的文件。

判决、裁定对前款第 2 项、第 3 项的情形已经予以说明的，无需提交其他证明文件。

申请人提交的判决及其他文件为外文的，应当附有加盖翻译机构印章的中文译本。

申请人提交的文件如果是在我国领域外形成的，应当办理公证认证手续，或者履行中华人民共和国与该所在国订立的有关国际条约规定的证明手续。

36.【申请书】申请书应当载明下列事项：

（1）申请人、被申请人。申请人或者被申请人为自然人的，应当载明其姓名、性别、出生年月、国籍、住所及身份证件号码；为法人或者非法人组织的，应当载明其名称、住所地，以及法定代表人或者代表人的姓名和职务；

（2）作出判决的外国法院名称、裁判文书案号、诉讼程序开始日期和判决日期；

（3）具体的请求和理由；

（4）申请执行判决的，应当提供被申请人的财产状况和财产所在地，并说明该判决在我国领域外的执行情况；

（5）其他需要说明的情况。

37.【送达被申请人】当事人申请承认和执行外国法院判决、裁定，人民法院应当在裁判文书中将对方当事人列为被申请人。双方当事人都提出申请的，均列为申请人。

人民法院应当将申请书副本送达被申请人。被申请人应当在收到申请书副本之日起十五日内提交意见；被申请人在中华人民共和国领域内没有住所的，应当在收到申请书副本之日起三十日内提交意见。被申请人在上述期限内不提交意见的，不影响人民法院审查。

38.【管辖权异议的处理】人民法院受理申请承认和执行外国法院判决、裁定案件后，被申请人对管辖权有异议的，应当自收到申请书副本之日起十五日内提出；被申请人在中华人民共和国领域内没有住所的，应当自收到申请书副本之日起三十日内提出。

人民法院对被申请人提出的管辖权异议，应当审查并作出裁定。当事人对管辖权异议裁定不服的，可以提起上诉。

39.【保全措施】当事人向人民法院申请承认和执行外国法院判决、裁定，人民法院受理申请后，当事人申请财产保全的，人民法院可以参照民事诉讼法及相关司法解释的规定执行。申请人应当提供担保，不提供担保的，裁定驳回申请。

40.【立案审查】申请人的申请不符合立案条件的，人民法院应当裁定不予受理，同时说明不予受理的理由。已经受理的，裁定驳回申请。当事人不服的，可以提起上诉。人民法院裁定不予受理或者驳回申请后，申请人再次申请且符合受理条件的，人民法院应予受理。

41.【外国法院判决的认定标准】人民法院应当根据外国法院判决、裁定的实质内容，审查认定该判决、裁定是否属于民事诉讼法第二百八十九条规定的“判决、裁定”。

外国法院对民商事案件实体争议作出的判决、裁定、决定、命令等法律文书，以及在刑事案件中就民事损害赔偿作出的法律文书，应认定属于民事诉讼法第二百八十九条规定的“判决、裁定”，但不包括外国法院作出的保全裁定以及其他程序性法律文书。

42.【判决生效的认定】人民法院应当根据判决作出国的法律审查该判决、裁定是否已经发生法律效力。有待上诉或者处于上诉过程中的判决、裁定不属于民事诉讼法第二百八十九

条规定的“发生法律效力的判决、裁定”。

43.【不能确认判决真实性和终局性的情形】人民法院在审理申请承认和执行外国法院判决、裁定案件时，经审查，不能够确认外国法院判决、裁定的真实性，或者该判决、裁定尚未发生法律效力的，应当裁定驳回申请。驳回申请后，申请人再次申请且符合受理条件的，人民法院应予受理。

44.【互惠关系的认定】人民法院在审理申请承认和执行外国法院判决、裁定案件时，有下列情形之一的，可以认定存在互惠关系：

（1）根据该法院所在国的法律，人民法院作出的民商事判决可以得到该国法院的承认和执行；

（2）我国与该法院所在国达成了互惠的谅解或者共识；

（3）该法院所在国通过外交途径对我国作出互惠承诺或者我国通过外交途径对该法院所在国作出互惠承诺，且没有证据证明该法院所在国曾以不存在互惠关系为由拒绝承认和执行人民法院作出的判决、裁定。

人民法院对于是否存在互惠关系应当逐案审查确定。

45.【惩罚性赔偿判决】外国法院判决的判项为损害赔偿金且明显超出实际损失的，人民法院可以对超出部分裁定不予承认和执行。

46.【不予承认和执行的事由】对外国法院作出的发生法律效力的判决、裁定，人民法院按照互惠原则进行审查后，认定有下列情形之一的，裁定不予承认和执行：

（一）根据中华人民共和国法律，判决作出国法院对案件无管辖权；

（二）被申请人未得到合法传唤或者虽经合法传唤但未获得合理的陈述、辩论机会，或者无诉讼能力的当事人未得到适当代理；

（三）判决通过欺诈方式取得；

（四）人民法院已对同一纠纷作出判决，或者已经承认和执行第三国就同一纠纷做出的判决或者仲裁裁决。

外国法院作出的发生法律效力的判决、裁定违反中华人民共和国法律的基本原则或者国家主权、安全、社会公共利益的，不予承认和执行。

47.【违反仲裁协议作出的外国判决的承认】外国法院作出缺席判决后，当事人向人民法院申请承认和执行该判决，人民法院经审查发现纠纷当事人存在有效仲裁协议，且缺席当事人未明示放弃仲裁协议的，应当裁定不予承认和执行该外国法院判决。

48.【对申请人撤回申请的处理】人民法院受理申请承认和执行外国法院判决、裁定案件后，作出裁定前，申请人请求撤回申请的，可以裁定准许。

人民法院裁定准许撤回申请后，申请人再次申请且符合受理条件的，人民法院应予受理。

申请人无正当理由拒不参加询问程序的，按申请人自动撤回申请处理。

49.【承认和执行外国法院判决的报备及通报机制】各级人民法院审结当事人申请承认和执行外国法院判决案件的，应当在作出裁定后十五日内逐级报至最高人民法院备案。备案材料包括申请人提交的申请书、外国法院判决及其中文译本、人民法院作出的裁定。

人民法院根据互惠原则进行审查的案件，在作出裁定前，应当将拟处理意见报本辖区所属高级人民法院进行审查；高级人民法院同意拟处理意见的，应将其审查意见报最高人民法院审核。待最高人民法院答复后，方可作出裁定。

十、关于限制出境

50.【限制出境的适用条件】《第二次全国涉外商事海事审判工作会议纪要》第 93 条规定的“逃避诉讼或者逃避履行法定义务的可能”是指申请人提起的民事诉讼有较高的胜诉可能性，而被申请人存在利用出境逃避诉讼、逃避履行法定义务的可能。申请人提出限制出境申请的，人民法院可以要求申请人提供担保，担保数额一般应当相当于诉讼请求的数额。

被申请人在中华人民共和国领域内有足额可供扣押的财产的，不得对其采取限制出境措施。被限制出境的被申请人或其法定代表人、负责人提供有效担保或者履行法定义务的，人民法院应当立即作出解除限制的决定并通知公安机关。

海事部分

十一、关于运输合同纠纷案件的审理

（一）海上货物运输合同

51.【托运人的识别】提单或者其他运输单证记载的托运人与向承运人或其代理人订舱的人不一致的，提单或者其他运输单证的记载对于承托双方仅具有初步的证明效力，人民法院应当结合运输合同的订立及履行情况准确认定托运人；有证据证明订舱人系接受他人委托并以他人名义或者为他人订舱的，人民法院应当根据海商法第四十二条第三项第 1 点的规定，认定该“他人”为托运人。

52.【实际承运人责任的法律适用】海商法是调整海上运输关系的特别法律规定，应当优先于一般法律规定适用。就海上货物运输合同所涉及的货物灭失或者损坏，提单持有人选择仅向实际承运人主张赔偿的，人民法院应当优先适用海商法有关实际承运人的规定；海商法没有规定的，适用其他法律规定。

53.【承运人提供集装箱的适货义务】根据海商法第四十七条有关适货义务的规定，承运人提供的集装箱应符合安全收受、载运和保管所装载货物的要求。

因集装箱存在缺陷造成箱内货物灭失或者损坏的，承运人应当承担相应赔偿责任。承运人的前述义务不因海上货物运输合同中的不同约定而免除。

54.【“货物的自然特性或者固有缺陷”的认定】海商法第五十一条第一款第九项规定的“货物的自然特性或者固有缺陷”是指货物具有的本质的、固有的特性或者缺陷，表现为同类货物在同等正常运输条件下，即使承运人已经尽到海商法第四十八条规定的管货义务，采取了合理的谨慎措施仍无法防止损坏的发生。

55.【货损发生期间的举证】根据海商法第四十六条的规定，承运人对其责任期间发生的货物灭失或者损坏负赔偿责任。请求人在货物交付时没有根据海商法第八十一条的规定提出异议，之后又向承运人主张货损赔偿，如果可能发生货损的原因和区间存在多个，请求人仅举证证明货损可能发生在承运人责任期间，而不能排除货损发生于非承运人责任期间的，人民法院不予支持。

56.【承运人对大宗散装货物短少的责任承担】根据航运实践和航运惯例，大宗散装货物运输过程中，因自然损耗、装卸过程中的散落残漏以及水尺计重等的计量允差等原因，往往会造成合理范围内的短少。如果卸货后货物出现短少，承运人主张免责并举证证明该短少属于合理损耗、计量允差以及相关行业标准或惯例的,人民法院原则上应当予以支持，除非有证据证明承运人对货物短少有不能免责的过失;如果卸货后货物短少超出相关行业标准或惯例，承运人又不能举证区分合理因素与不合理因素各自造成的损失，请求人要求承运人承担全部货物短少赔偿责任的，人民法院原则上应当予以支持。

57.【“不知条款”的适用规则】提单是承运人保证据以交付货物的单证，承运人应当在提单上如实记载货物状况，并按照记载向提单持有人交付货物。根据海商法第七十五条的规定，承运人或者代其签发提单的人，在签发已装船提单的情况下没有适当方法核对提单记载的，可以在提单上批注，说明无法核对。运输货物发生损坏，承运人依据提单记载的“不知条款”主张免除赔偿责任的，应当对其批注符合海商法第七十五条规定情形承担举证责任；有证据证明货物损坏原因是承运人违反海商法第四十七、第四十八条规定的义务，承运人援引“不知条款”主张免除其赔偿责任的，人民法院不予支持。

58.【承运人交付货物的依据】承运人没有签发正本提单，或者虽签发正本提单但已收回正本提单并约定采用电放交付货物的，承运人应当根据运输合同约定、托运人电放指示或者托运人以其他方式作出的指示交付货物。收货人仅凭提单样稿、提单副本等要求承运人交付货物的，人民法院不予支持。

59.【承运人凭指示提单交付时应合理谨慎审单】正本指示提单的持有人请求承运人向其交付货物，承运人应当合理谨慎地审查提单。承运人凭背书不连续的正本指示提单交付货物，

请求人要求承运人承担因此造成损失的，人民法院应予支持，但承运人举证证明提单持有人通过背书之外其他合法方式取得提单权利的除外。

60.【承运人对货物留置权的行使】提单或者运输合同载明“运费预付”或者类似性质说明，承运人以运费尚未支付为由，根据海商法第八十七条对提单持有人的货物主张留置权的，人民法院不予支持，提单持有人与托运人相同的除外。

61.【目的港无人提货的费用承担】提单持有人在目的港没有向承运人主张提货或者行使其他权利的，因无人提取货物而产生的费用和风险由托运人承担。承运人依据运输合同关系向托运人主张运费、堆存费、集装箱超期使用费或者其他因无人提取货物而产生费用的，人民法院应予支持。

62.【无单放货纠纷的举证责任】托运人或者提单持有人向承运人主张无单放货损失赔偿的，应当提供初步证据证明其为合法的正本提单持有人、承运人未凭正本提单交付货物以及因此遭受的损失。承运人抗辩货物并未被交付的，应当举证证明货物仍然在其控制之下。

63.【承运人免除无单放货责任的举证】承运人援引《最高人民法院关于审理无正本提单交付货物案件适用法律若干问题的规定》第七条规定，主张不承担无单放货的民事责任的，应当提供该条规定的卸货港所在地法律，并举证证明其按照卸货港所在地法律规定，将承运到港的货物交付给当地海关或者港口当局后已经丧失对货物的控制权。

64.【无单放货诉讼时效的起算点】根据《最高人民法院关于审理无正本提单交付货物案件适用法律若干问题的规定》第十四条第一款的规定，正本提单持有人以无单放货为由向承运人提起的诉讼，时效期间为一年，从承运人应当向提单持有人交付之日起计算，即从该航次将货物运抵目的港并具备交付条件的合理日期起算。

65.【集装箱超期使用费标准的认定】承运人依据海上货物运输合同主张集装箱超期使用费，运输合同对集装箱超期使用费有约定标准的，人民法院可以按照该约定确定费用；没有约定标准，但承运人举证证明集装箱提供者网站公布的标准或者同类集装箱经营者网站公布的同期同地的市场标准的，人民法院可以予以采信。

根据民法典第五百八十四条规定的可合理预见规则和第五百九十一条规定的减损规则，承运人应当及时采取措施减少因集装箱超期使用对其造成的损失，故集装箱超期使用费赔偿额应在合理限度之内。人民法院原则上以同类新集装箱市价 1 倍为基准确定赔偿额，同时可以根据具体案情适当浮动或者调整。

66.【请求集装箱超期使用费的诉讼时效】承运人在履行海上货物运输合同过程中将集装箱作为运输工具提供给货方使用的，应当根据海上货物运输合同法律关系确定诉讼时效；承运人请求集装箱超期使用费的诉讼时效期间为一年，自集装箱免费使用期届满次日起开始计

算。

67.【港口经营人不能主张承运人的免责或者责任限制抗辩】根据海商法第五十八条、第六十一条的规定，就海上货物运输合同所涉及的货物灭失、损坏或者迟延交付提起的诉讼，有权适用关于承运人的抗辩理由和限制赔偿责任规定的为承运人、实际承运人、承运人和实际承运人的受雇人或者代理人。在现有法律规定下，港口经营人并不属于上述范围，其在港口作业中造成货物损失，托运人或者收货人直接以侵权起诉港口经营人，港口经营人援用海商法第五十八条、第六十一条的规定主张免责或者限制赔偿责任的，人民法院不予支持。

（二）多式联运合同

68.【涉外多式联运合同经营人的“网状责任制”】具有涉外因素的多式联运合同，当事人可以协议选择多式联运合同适用的法律；当事人没有选择的，适用最密切联系原则确定适用法律。

当事人就多式联运合同协议选择适用或者根据最密切联系原则适用中华人民共和国法律，但货物灭失或者损坏发生在国外某一运输区段的，人民法院应当根据海商法第一百零五条的规定，适用该国调整该区段运输方式的有关法律规定，确定多式联运经营人的赔偿责任和责任限额，不能直接根据中华人民共和国有关调整该区段运输方式的法律予以确定；有关诉讼时效的认定，仍应当适用中华人民共和国相关法律规定。

（三）国内水路货物运输合同

69.【收货人的诉权】运输合同当事人约定收货人可直接向承运人请求交付货物，承运人未向收货人交付货物或者交付货物不符合合同约定，收货人请求承运人承担赔偿责任的，人民法院应予受理；承运人对托运人的抗辩，可以向收货人主张。

70.【合同无效的后果】没有取得国内水路运输经营资质的承运人签订的国内水路货物运输合同无效，承运人请求托运人或者收货人参照合同约定支付违约金的，人民法院不予支持。

没有取得国内水路运输经营资质的出租人签订的航次租船合同无效，出租人请求承租人或者收货人参照合同约定支付滞期费的，人民法院不予支持。

71.【内河船舶不得享受海事赔偿责任限制】海商法第十一章关于海事赔偿责任限制规定适用的船舶应当为海商法第三条规定的海船，不适用于内河船舶。海船的认定应当根据船舶检验证书记载的航行能力和准予航行航区予以确认，内河船舶的船舶性质及其准予航行航区不因船舶实际航行区域而改变。

十二、关于保险合同纠纷案件的审理

72.【不定值保险的认定及保险价值的举证责任】海上保险合同仅约定保险金额，未约定保险价值的，为不定值保险。保险事故发生后，应当根据海商法第二百一十九条第二款的规

定确定保险价值。

海上保险合同没有约定保险价值，被保险人请求保险人按照损失金额或者保险金额承担保险赔偿责任，保险人以保险价值高于保险合同约定的保险金额为由，主张根据海商法第二百三十八条的规定承担比例赔偿责任的，应当就保险价值承担举证责任。保险人举证不能的，人民法院可以认定保险金额与保险价值一致。

73.【超额保险的认定及举证责任】海上保险合同明确约定了保险价值，保险事故发生后，保险人以保险合同中约定的保险金额明显高于保险标的的实际价值为由，主张根据海商法第二百一十九条第二款的规定确定保险价值，就超出该保险价值部分免除赔偿责任的，人民法院不予支持；但保险人提供证据证明，被保险人在签订保险合同时存在故意隐瞒或者虚报保险价值的除外。

海上保险合同没有约定保险价值，保险事故发生后，保险人主张根据海商法第二百一十九条第二款的规定确定保险价值，并以保险合同中约定的保险金额明显高于保险价值为由，主张对超过保险价值部分免除保险赔偿责任的，人民法院应予支持。但被保险人提供证据证明，保险人在签订保险合同时明知保险金额明显超过根据海商法第二百一十九条第二款确定的保险价值的除外。

74.【与共同海损分摊相关的海上保险赔偿请求权的诉讼时效】因分摊共同海损而遭受损失的被保险人依据保险合同向保险人请求赔偿的诉讼时效，应当适用海商法第二百六十四条的规定，诉讼时效的起算点为保险事故（共同海损事故）发生之日。

涉及海上保险合同的共同海损分摊，被保险人已经申请进行共同海损理算，但是在诉讼时效期间的最后六个月内，因理算报告尚未作出，被保险人无法向保险人主张权利，属于被保险人主观意志不能控制的客观情形，可以认定构成诉讼时效中止。中止时效的原因消除之日，即理算报告作出之日起，时效期间继续计算。

75.【沿海、内河保险合同保险人代位求偿权诉讼时效起算点】沿海、内河保险合同保险人代位求偿权的诉讼时效起算日应当根据法释（2001）18 号《最高人民法院关于如何确定沿海、内河货物运输赔偿请求权时效期间问题的批复》规定的诉讼时效起算时间确定。

十三、关于船舶物权纠纷案件的审理

76.【就海上货物运输合同产生的财产损失主张船舶优先权的法律适用】承运人履行海上货物运输合同过程中，造成货物灭失或者损坏的，船载货物权利人对本船提起的财产赔偿请求不具有船舶优先权。碰撞船舶互有过失造成船载货物灭失或者损坏的，船载货物权利人可以根据海商法第二十二条第一款第五项的规定向对方船舶主张船舶优先权。

77.【就海上旅客运输合同产生的财产损失主张船舶优先权的法律适用】承运人履行海上

旅客运输合同过程中，造成旅客行李灭失或者损坏的，旅客对本船提起的财产赔偿请求不具有船舶优先权。碰撞船舶互有过失造成旅客行李灭失或者损坏的，旅客可以根据海商法第二十二条第一款第五项的规定向对方船舶主张船舶优先权。

78.【挂靠船舶的扣押】挂靠船舶登记所有人的一般债权人，不属于民法典第二百二十五条规定的“善意第三人”，其债权请求权不能对抗挂靠船舶实际所有人的物权。一般债权人申请扣押挂靠船舶后，挂靠船舶实际所有人主张解除扣押的，人民法院应予支持。

对挂靠船舶享有抵押权、留置权和船舶优先权等担保物权的债权人申请扣押挂靠船舶，挂靠船舶实际所有人主张解除扣押的，人民法院不予支持，有证据证明债权人非善意第三人的除外。

十四、关于海事侵权纠纷案件的审理

79.【同一事故中当事船舶适用同一赔偿限额】同一事故中的当事船舶的海事赔偿限额，有适用海商法第二百一十条第一款规定的，无论其是否申请设立海事赔偿责任限制基金或者主张海事赔偿责任限制，其他从事中华人民共和国港口之间货物运输或者沿海作业的当事船舶的海事赔偿责任限额也应适用该条规定。

80.【单一责任限制制度的适用规则】海商法第二百一十五条关于“先抵销，后限制”的规定适用于同类海事请求。若双方存在非人身伤亡和人身伤亡的两类赔偿请求，不同性质的赔偿请求应当分别抵销，分别限制。

81.【养殖损害赔偿的责任承担】因船舶碰撞或者触碰、环境污染造成海上及通海可航水域养殖设施、养殖物受到损害的，被侵权人可以请求侵权人赔偿其由此造成的养殖设施损失、养殖物损失、恢复生产期间减少的收入损失，以及为排除妨害、消除危险、确定损失支出的合理费用。养殖设施损失和收入损失的计算标准可以依照或者参照《最高人民法院关于审理船舶油污损害赔偿纠纷案件若干问题的规定》的相关规定。

被侵权人就养殖损害主张赔偿时，应当提交证据证明其在事故发生时已经依法取得海域使用权证和养殖许可证；养殖未经相关行政主管部门许可的，人民法院对收入损失请求不予支持，但被侵权人举证证明其无需取得使用权及养殖许可的除外。

被侵权人擅自在港区、航道进行养殖，或者未依法采取安全措施，对养殖损害的发生有过错的，可以减轻或者免除侵权人的赔偿责任。

十五、关于其他海事案件的审理

82.【清污单位就清污费用提起民事诉讼的诉权】清污单位受海事行政机关指派完成清污作业后，清污单位就清污费用直接向污染责任人提起民事诉讼的，人民法院应予受理。

83.【用人单位为船员购买工伤保险的法定义务】与船员具有劳动合同关系的用人单位为

船员购买商业保险的，并不因此免除其为船员购买工伤保险的法定义务。船员获得用人单位为其购买的商业保险赔付后，仍然可以依法请求工伤保险待遇。

84.【同一船舶所有人的船舶相互救助情况下的救助款项请求权】同一船舶所有人的船舶之间进行救助，救助方的救助款项不应被取消或者减少，除非其存在海商法第一百八十七条规定的情形。

85.【船员劳务纠纷的举证责任】船员因劳务受到损害，向船舶所有人主张赔偿责任，船舶所有人不能举证证明船员自身存在过错，人民法院对船员关于损害赔偿责任的诉讼请求应予支持；船舶所有人举证证明船员自身存在过错，并请求判令船员自担相应责任的，人民法院对船舶所有人的抗辩予以支持。

86.【基金设立程序中的管辖权异议】利害关系人对受理设立海事赔偿责任限制基金申请法院的管辖权有异议的，应当适用海事诉讼特别程序法第一百零六条有关期间的规定。

87.【光船承租人因经营光租船舶产生债务在光船承租人或者船舶所有人破产时的受偿问题】因光船承租人而非船舶所有人应负责任的海事请求，对光租船舶申请扣押、拍卖，如果光船承租人进入破产程序，虽然该海事请求属于破产债权，但光租船舶并非光船承租人的财产，不属于破产财产，债权人可以通过海事诉讼程序而非破产程序清偿债务。

因光船承租人应负责任的海事请求而对光租船舶申请扣押、拍卖，且该海事请求具有船舶优先权、抵押权、留置权时，如果船舶所有人进入破产程序，请求人在破产程序开始后可直接向破产管理人请求从船舶价款中行使优先受偿权，并在无担保的破产债权人按照破产财产方案受偿之前进行清偿。

88.【船舶所有人破产程序对船舶扣押与拍卖的影响】海事法院无论基于海事请求保全还是执行生效裁判文书等原因扣押、拍卖船舶，均应当在知悉针对船舶所有人的破产申请被受理后及时解除扣押、中止拍卖程序。

破产程序之前当事人已经申请扣押船舶，后又基于破产程序而解除扣押的，有关船舶优先权已经行使的法律效果不受影响。船舶所有人进入破产程序后，当事人不能申请扣押船舶，属于法定不能通过扣押行使船舶优先权的情形，该类期间可以不计入法定行使船舶优先权的一年期间内。船舶优先权人在船舶所有人进入破产程序后直接申报要求从产生优先权船舶的拍卖价款中优先受偿，且该申报没有超过法定行使船舶优先权一年期间的，该船舶优先权所担保的债权应当在一般破产债权之前优先清偿。

因扣押、拍卖船舶产生的评估、看管费用等支出，根据法发[2017]2 号《最高人民法院关于执行案件移送破产审查若干问题的指导意见》第 15 条的规定，可以从债务人财产中随时清偿。

89.【海上交通事故责任认定书的不可诉性】根据《中华人民共和国海上交通安全法》第八十五条第二款“海事管理机构应当自收到海上交通事故调查报告之日起十五个工作日内作出事故责任认定书，作为处理海上交通事故的证据”的规定，海上交通事故责任认定行为不属于行政行为，海上交通事故责任认定书不宜纳入行政诉讼受案范围。海上交通事故责任认定书可以作为船舶碰撞纠纷等海事案件的证据，人民法院通过举证、质证程序对该责任认定书的证明力进行认定。

仲裁司法审查部分

十六、关于申请确认仲裁协议效力案件的审查

90.【申请确认仲裁协议效力之诉案件的范围】当事人之间就仲裁协议是否成立、生效、失效以及是否约束特定当事人等产生争议，当事人申请人民法院予以确认，人民法院应当作为申请确认仲裁协议效力案件予以受理，并针对当事人的请求作出裁定。

91.【申请确认仲裁协议效力之诉与仲裁管辖权决定的冲突】根据《最高人民法院关于确认仲裁协议效力几个问题的批复》第三条的规定，仲裁机构先于人民法院受理当事人请求确认仲裁协议效力的申请并已经作出决定，当事人向人民法院提起申请确认仲裁协议效力之诉的，人民法院不予受理。

92.【放弃仲裁协议的认定】原告向人民法院起诉时未声明有仲裁协议，被告在首次开庭前未以存在仲裁协议为由提出异议的，视为其放弃仲裁协议。原告其后撤回起诉，不影响人民法院认定双方当事人已经通过诉讼行为放弃了仲裁协议。

被告未应诉答辩且缺席审理的，不应视为其放弃仲裁协议。人民法院在审理过程中发现存在有效仲裁协议的，应当裁定驳回原告起诉。

93.【仲裁协议效力的认定】根据仲裁法司法解释第三条的规定，人民法院在审查仲裁协议是否约定了明确的仲裁机构时，应当按照有利于仲裁协议有效的原则予以认定。

94.【“先裁后诉”争议解决条款的效力认定】当事人在仲裁协议中约定争议发生后“先仲裁、后诉讼”的，不属于仲裁法司法解释第七条规定的仲裁协议无效的情形。根据仲裁法第九条第一款关于仲裁裁决作出后当事人不得就同一纠纷向人民法院起诉的规定，“先仲裁、后诉讼”关于诉讼的约定无效，但不影响仲裁协议的效力。

95.【仅约定仲裁规则时仲裁协议效力的认定】当事人在仲裁协议中未约定明确的仲裁机构，但约定了适用某仲裁机构的仲裁规则，视为当事人约定该仲裁机构仲裁，但仲裁规则有相反规定的除外。

96.【约定的仲裁机构和仲裁规则不一致时的仲裁协议效力认定】当事人在仲裁协议中约

定内地仲裁机构适用《联合国国际贸易法委员会仲裁规则》仲裁的，一方当事人以该约定系关于临时仲裁的约定为由主张仲裁协议无效的，人民法院不予支持。

97.【主合同与从合同争议解决方式的认定】当事人在主合同和从合同中分别约定诉讼和仲裁两种不同的争议解决方式，应当分别按照主从合同的约定确定争议解决方式。

当事人在主合同中约定争议解决方式为仲裁，从合同未约定争议解决方式的，主合同中的仲裁协议不能约束从合同的当事人，但主从合同当事人相同的除外。

十七、关于申请撤销或不予执行仲裁裁决案件的审查

98.【申请执行仲裁裁决案件的审查依据】人民法院对申请执行我国内地仲裁机构作出的非涉外仲裁裁决案件的审查，适用民事诉讼法第二百四十四条的规定。人民法院对申请执行我国内地仲裁机构作出的涉外仲裁裁决案件的审查，适用民事诉讼法第二百八十一条的规定。

人民法院根据前款规定，对被申请人主张的不予执行仲裁裁决事由进行审查。对被申请人未主张的事由或其主张事由超出民事诉讼法第二百四十四条第二款、第二百八十一条第一款规定的法定事由范围的，人民法院不予审查。

人民法院应当根据民事诉讼法第二百四十四条第三款、第二百八十一条第二款的规定，依职权审查执行裁决是否违反社会公共利益。

99.【申请撤销仲裁调解书】仲裁调解书与仲裁裁决书具有同等法律效力。当事人申请撤销仲裁调解书的，人民法院应予受理。人民法院应当根据仲裁法第五十八条的规定，对当事人提出的撤销仲裁调解书的申请进行审查。当事人申请撤销涉外仲裁调解书的，根据仲裁法第七十条的规定进行审查。

100.【境外仲裁机构在我国内地作出的裁决的执行】境外仲裁机构以我国内地为仲裁地作出的仲裁裁决，应当视为我国内地的涉外仲裁裁决。当事人向仲裁地中级人民法院申请撤销仲裁裁决的，人民法院应当根据仲裁法第七十条的规定进行审查；当事人申请执行的，根据民事诉讼法第二百八十一条的规定进行审查。

101.【违反法定程序的认定】违反仲裁法规定的仲裁程序、当事人选择的仲裁规则或者当事人对仲裁程序的特别约定，可能影响案件公正裁决，经人民法院审查属实的，应当认定为仲裁法第五十八条第一款第三项规定的情形。

102.【超裁的认定】仲裁裁决的事项超出当事人仲裁请求或者仲裁协议约定的范围，经人民法院审查属实的，应当认定构成仲裁法第五十八条第一款第二项、民事诉讼法第二百四十四条第二款第二项规定的“裁决的事项不属于仲裁协议的范围”的情形。

仲裁裁决在查明事实和说理部分涉及仲裁请求或者仲裁协议约定的仲裁事项范围以外的内容，但裁决项未超出仲裁请求或者仲裁协议约定的仲裁事项范围，当事人以构成仲裁法第

五十八条第一款第二项、民事诉讼法第二百四十四条第二款第二项规定的情形为由，请求撤销或者不予执行仲裁裁决的，人民法院不予支持。

103.【无权仲裁的认定】作出仲裁裁决的仲裁机构非仲裁协议约定的仲裁机构、裁决事项系法律规定或者当事人选择的仲裁规则规定的不可仲裁事项，经人民法院审查属实的，应当认定构成仲裁法第五十八条第一款第二项、民事诉讼法第二百四十四条第二款第二项规定的“仲裁机构无权仲裁”的情形。

104.【重新仲裁的适用】申请人申请撤销仲裁裁决，人民法院经审查认为存在应予撤销的情形，但可以通过重新仲裁予以弥补的，人民法院可以通知仲裁庭重新仲裁。

人民法院决定由仲裁庭重新仲裁的，通知仲裁庭在一定期限内重新仲裁并在通知中说明要求重新仲裁的具体理由，同时裁定中止撤销程序。仲裁庭在人民法院指定的期限内开始重新仲裁的，人民法院应当裁定终结撤销程序。

仲裁庭拒绝重新仲裁或者在人民法院指定期限内未开始重新仲裁的，人民法院应当裁定恢复撤销程序。

十八、关于申请承认和执行外国仲裁裁决案件的审查

105.【《纽约公约》第四条的理解】申请人向人民法院申请承认和执行外国仲裁裁决，应当根据《纽约公约》第四条的规定提交相应的材料，提交的材料不符合《纽约公约》第四条规定的，人民法院应当认定其申请不符合受理条件，裁定不予受理。已经受理的，裁定驳回申请。

106.【《纽约公约》第五条的理解】人民法院适用《纽约公约》审理申请承认和执行外国仲裁裁决案件时，应当根据《纽约公约》第五条的规定，对被申请人主张的不予承认和执行仲裁裁决事由进行审查。对被申请人未主张的事由或者其主张事由超出《纽约公约》第五条第一款规定的法定事由范围的，人民法院不予审查。

人民法院应当根据《纽约公约》第五条第二款的规定，依职权审查仲裁裁决是否存在裁决事项依我国法律不可仲裁，以及承认和执行仲裁裁决是否违反我国公共政策。

107.【未履行协商前置程序不违反约定程序】人民法院适用《纽约公约》审理申请承认和执行外国仲裁裁决案件时，当事人在仲裁协议中约定“先协商解决，协商不成再提请仲裁”的，一方当事人未经协商即申请仲裁，另一方当事人以对方违反协商前置程序的行为构成《纽约公约》第五条第一款丁项规定的仲裁程序与各方之间的协议不符为由主张不予承认和执行仲裁裁决的，人民法院不予支持。

108.【违反公共政策的情形】人民法院根据《纽约公约》审理承认和执行外国仲裁裁决案件时，如人民法院生效裁定已经认定当事人之间的仲裁协议不成立、无效、失效或者不可

执行，承认和执行该裁决将与人民法院生效裁定相冲突的，应当认定构成《纽约公约》第五条第二款乙项规定的违反我国公共政策的情形。

109.【承认和执行程序中的仲裁保全】当事人向人民法院申请承认和执行外国仲裁裁决，人民法院受理申请后，当事人申请财产保全的，人民法院可以参照民事诉讼法及相关司法解释的规定执行。申请人应当提供担保，不提供担保的，裁定驳回申请。

十九、仲裁司法审查程序的其他问题

110.【仲裁司法审查裁定的上诉和再审申请】人民法院根据《最高人民法院关于仲裁司法审查若干问题的规定》第七条、第八条、第十条的规定，因申请人的申请不符合受理条件作出的不予受理裁定、立案后发现不符合受理条件作出的驳回申请裁定、对管辖权异议作出的裁定，当事人不服的，可以提出上诉。对不予受理、驳回起诉的裁定，当事人可以依法申请再审。

除上述三类裁定外，人民法院在审理仲裁司法审查案件中作出的其他裁定，一经送达即发生法律效力。当事人申请复议、提出上诉或者申请再审的，人民法院不予受理，但法律、司法解释另有规定的除外。

二十、关于涉港澳台商事海事案件的参照适用

111.【涉港澳台案件参照适用本纪要】涉及香港特别行政区、澳门特别行政区和台湾地区的商事海事纠纷案件，相关司法解释未作规定的，参照本纪要关于涉外商事海事纠纷案件的规定处理。

凡例：

1.法律文件名称中的“中华人民共和国”省略，如《中华人民共和国民法典》简称民法典；

2.《中华人民共和国仲裁法》，简称仲裁法；

3.《中华人民共和国海商法》，简称海商法；

4.《中华人民共和国涉外民事关系法律适用法》，简称涉外民事关系法律适用法；

5.《关于向国外送达民事或商事诉讼文书和非诉讼文书海牙公约》，简称《海牙送达公约》；

6.《承认及执行外国仲裁裁决公约》，简称《纽约公约》；

7.《中华人民共和国民事诉讼法》（2021 修正），简称民事诉讼法；

8.《中华人民共和国海事诉讼特别程序法》，简称海事诉讼特别程序法；

9.《最高人民法院关于适用<中华人民共和国民事诉讼法>的解释》,简称民事诉讼法司法

解释;

10.《最高人民法院关于适用<中华人民共和国仲裁法>若干问题的解释》,简称仲裁法司法解释。

将不具有涉外因素的争议交由境外仲裁机构仲裁，仲裁条款无效

张振安*

一、案例概要

无涉外因素提交境外仲裁机构仲裁。本案中申请人请求认定仲裁条款无效，理由是本案无涉外因素，双方将无涉外因素的争议提交境外仲裁机构，不符合法律规定。法院经审查认为，由于仲裁管辖权系法律授予的权力，而我国法律没有规定当事人可以将不具有涉外因素的争议交由境外仲裁机构仲裁，故当事人约定将有关争议提交香港国际仲裁中心仲裁没有法律依据，涉案仲裁条款应当认定无效。

审理法院：天津市第一中级人民法院

案号：（2021）津 01 民特 11 号

裁判日期：2021.08.16

发布日期：2021.12.31

申请人：天津市垃圾分类处理中心

被申请人：天津大马南方环保工程有限公司

二、案件背景

1.天津市垃圾分类处理中心申请称：请求确认案涉双方《天津市潘楼生活垃圾中转站运营合同》中的仲裁条款无效。事实和理由：

（1）案涉双方均是依照中华人民共和国法律设立的法人单位，住所地均在天津市，双方合同所涉及的标的及权利义务履行均发生在中华人民共和国境内，本案无涉外因素，双方将无涉外因素的争议提交境外仲裁机构，不符合法律规定；

（2）案涉《天津市潘楼生活垃圾中转站运营合同》涉及垃圾处理特许经营，《最高人民法院关于审理行政协议案件若干问题的规定》规定，政府特许经营协议属于行政协议，行政协议约定仲裁条款的，人民法院应认定条款无效。

故，请求法院确认合同中的仲裁条款无效。

2.被申请人天津大马南方环保工程有限公司辩称：

（1）《天津市潘楼生活垃圾中转站运营合同》约定的仲裁条款系双方当事人的真实意思

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表示，内容不违反法律、行政法规的强制性规定，合法有效。当事人在合同中约定的适用于解决合同争议的准据法，不能用来确定涉外仲裁条款的效力。案涉双方对于仲裁条款效力的准据法没有约定，根据《最高人民法院关于适用<中华人民共和国仲裁法>若干问题的解释》第十六条规定，应适用仲裁地的法律，故本案应使用香港《仲裁条例》的规定来认定仲裁条款的效力，仲裁条款有效；

（2）《最高人民法院关于审理行政协议案件若干问题的规定》于 2015 年 5 月 1 日实施，在此之前订立的行政协议发生纠纷的，适用当时的法律、行政法规及司法解释，案涉合同签订于 2004 年，按照当时的法律和司法解释，无任何明确的规定指明此类协议属于行政协议；

（3）本案具有涉外因素，天津大马南方环保工程有限公司的实际控制人为马来西亚南方环保管理技术有限公司，公司的经营决策、最终利益归属等均与境外股东关联密切。

3.法院查明：

天津市垃圾分类处理中心系中华人民共和国天津市市容环境管理委员会下属的事业单位，天津大马南方环保工程有限公司系依据中华人民共和国法律成立的中外合作经营企业，住所地为天津市西青区南河工业区。

2004 年 10 月 31 日，双方签订《天津市潘楼生活垃圾中转站运营合同》，约定天津市垃圾分类处理中心将天津市潘楼生活垃圾中转站的运营权授予天津大马南方环保工程有限公司，运营期限为 21 年，天津大马南方环保工程有限公司同意以 4000 万元人民币购买中转站的运营权。合同第二十一条管辖法律，约定，本运营合同的订立、效力、解释、履行和争议的解决均受中华人民共和国法律管辖。但是，如果对于与本运营合同有关的特定事项，没有可以适用的中国法律，则应参考一般国际惯例。合同第二十二条争议解决，约定，对于任何因执行本运营合同而产生的或与本运营合同相关的争议，如果在一方收到另一方关于该争议的通知之日起 90 日内，双方无法通过协商解决该争议，则任何另一方均可将该争议提交香港国际仲裁中心仲裁。该合同的签订地为天津。

现案涉双方对《天津市潘楼生活垃圾中转站运营合同》的履行产生争议，2020 年 10 月 17 日，天津大马南方环保工程有限公司向香港国际仲裁中心申请仲裁。2021 年 1 月 4 日，天津市垃圾分类处理中心向我院申请确认仲裁协议无效。

（4）法院认定

本案被申请人住所地位于天津市西青区，天津市垃圾分类处理中心申请确认仲裁协议无效，我院有管辖权。案涉双方在《天津市潘楼生活垃圾中转站运营合同》中订立的仲裁条款，约定有关争议事项提交香港国际仲裁中心仲裁，但双方当事人均为中国法人，标的物在中国境内，合同也在中国境内订立和履行，无涉外民事关系的构成要素，该合同不属于涉外合同。

该合同及所包含的仲裁条款所适用法律，无论当事人是否做出明确约定，均应确定为中国法律。由于仲裁管辖权系法律授予的权力，而我国法律没有规定当事人可以将不具有涉外因素的争议交由境外仲裁机构仲裁，故当事人约定将有关争议提交香港国际仲裁中心仲裁没有法律依据，涉案仲裁条款应当认定无效。

综上，依照《中华人民共和国仲裁法》第十七条第一项、二十条规定，裁定如下：确认申请人天津市垃圾分类处理中心与被申请人天津大马南方环保工程有限公司签订的《天津市潘楼生活垃圾中转站运营合同》中约定的仲裁条款无效。

三、案例评析

1.涉外因素的认定

关于涉外因素的认定标准，《民通意见》第 178 条、《关于适用〈中华人民共和国民事诉讼法〉若干问题的意见》第 304 条均有规定，主要围绕主体、标的物和法律事实三项因素进行认定。《关于适用<中华人民共和国涉外民事关系法律适用法>若干问题的解释（一）》进一步完善，增设兜底条款“可以认定为涉外民事关系的其他情形”，为涉外因素认定的发展预留空间。《关于适用<中华人民共和国涉外民事关系法律适用法>若干问题的解释（一）》第 1 条规定，“民事关系具有下列情形之一的，人民法院可以认定为涉外民事关系：（一）当事人一方或双方是外国公民、外国法人或者其他组织、无国籍人；（二）当事人一方或双方的经常居所地在中华人民共和国领域外；（三）标的物在中华人民共和国领域外；（四）产生、变更或者消灭民事关系的法律事实发生在中华人民共和国领域外；（五）可以认定为涉外民事关系的其他情形”。这一认定标准亦可见于《民诉法解释》（2022 年修正）第五百二十条。在“黄金置地”一案中，上海市第一中级人民法院指出“西门子公司与黄金置地公司虽然都是中国法人，但注册地均在上海自贸试验区区域内，且其性质均为外商独资企业，由于此类公司的资本来源、最终利益归属、公司的经营决策一般均与其境外投资者关联密切，故此类主体与普通内资公司相比具有较为明显的涉外因素”，“本案合同的履行因涉及自贸试验区的特殊海关监管措施的运用，与一般的国内买卖合同纠纷具有较为明显的区别”，“本案合同关系符合《涉外法律适用法司法解释》第一条第五项规定的‘可以认定为涉外民事关系的其他情形’，故系争合同关系具有涉外因素”。

2.无涉外因素争议境外仲裁的禁止

《仲裁法》并未对无涉外因素争议能否提交境外仲裁机构进行仲裁作出明确规定。一般认为，禁止无涉外因素争议境外仲裁的法律依据主要是《合同法》和《民诉法》。《合同法》第 128 条规定“涉外合同的当事人可以根据仲裁协议向中国仲裁机构或者其他仲裁机构申请

仲裁”。《民诉法》（2021 年修正）第 278 条规定，“涉外经济贸易、运输和海事中发生的纠纷，当事人在合同中订有仲裁条款或者事后达成书面仲裁协议，提交中华人民共和国涉外仲裁机构或者其他仲裁机构仲裁的，当事人不得向人民法院起诉”。最高院在〔2012〕民四他字第 2 号复函中进一步指出，“由于仲裁管辖权系法律授予的权力，而我国法律没有规定当事人可以将不具有涉外因素的争议交由境外仲裁机构或者在我国境外临时仲裁，故本案当事人约定将有关争议提交国际商会仲裁没有法律依据”。在“朝来新生”一案中，北京市第二中级人民法院指出“本案……不具有涉外因素，故不属于我国法律规定的涉外合同……因此，《合同书》中关于如发生纠纷可以向大韩商事仲裁院提出诉讼进行仲裁的约定违反了《中华人民共和国民事诉讼法》、《中华人民共和国仲裁法》的相关规定，该仲裁条款无效”。《仲裁法》第十七条第（一）项规定“有下列情形之一的，仲裁协议无效：（一）约定的仲裁事项超出法律规定的仲裁范围的”，并不涉及无涉外争议境外仲裁的情形。也正因此，本案例法院依据《仲裁法》第十七条第一项认定仲裁条款无效，就依据本身而言，似乎仍有进一步的讨论空间。

中国法院首次单独以法律互惠作为承认与执行外国判决中互惠原则的认定标准——兼评 Spar Shipping AS 诉大新华物流控股（集团）有限公司（2018）沪 72 协外认 1 号案

王喆*

2022 年 3 月，上海海事法院经最高人民法院批准后作出裁定，确认一英国高等法院的判决可以在中华人民共和国被承认和执行。这是中国法院首次承认英国商事判决，也是首次在承认与执行外国判决时单独以法律互惠作为认定互惠关系的基础。本案体现了《全国法院涉外商事海事审判工作座谈会会议纪要》第 44 条内容，标志着我国对外国判决的承认与执行的主动性“更上一层楼”。

一、案情[1]

申请人挪威船公司 Spar Shipping AS 向被申请人 Grand China Shipping (Hong Kong） Co. 出租了三艘散货船，双方签署了三份船舶期租合同，被申请人向申请人提供了三份履约担保函。由于被申请人持续不履行合同义务，申请人依据合同约定向英国高等法院提起诉讼，英国高等法院判决被申请人承担申请人的本金和利息共计逾三千七百万美元，上诉法院也维持此判决。2018 年申请人向具有管辖权的上海海事法院提出申请，请求承认上述英国判决。2022 年 3 月 17 日，上海海事法院在经最高人民法院批准，裁定该英国的民事判决在中国具有法律拘束力。

根据《民事诉讼法》的规定，人民法院应“依照中华人民共和国缔结或者参加的国际条约，或者按照互惠原则进行审查”[2]，裁定是否承认外国判决的效力。本案中，中英未签订包含承认、执行外国判决内容的国际公约，因而本案的判决关键在于中英在民商事判决的承认与执行上是否构成互惠。最终，上海海事法院对涉案英国法院判决予以承认，认为虽然英国法院不存在承认中国法院判决的先例，但是“《民事诉讼法》在规定互惠原则时并没有将之限定为必须是相关外国法院先行承认我国法院民商事判决，我国法院作出的民商事判决可以得到该外国法院的承认和执行即可认为双方存在互惠。”

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[1] 因本案生效裁判文书尚未公布，与本案案情相关的内容主要参考海通律师事务所：《中国法院首次承认英国法院商事判决》，载海通律师事务所网站，2022 年 3 月 24 日，https://www.haitonglawyer.com/news/598.html；以及徐晨玉，杨创奇：《破冰之案！中国法院首次承认英国商事法院判决》，载微信公众号“律商 Legal Insights”，2022 年 6 月 10 日。

[2] 《民事诉讼法》（2021 修正）第二百八十九条。

二、评析

（一）外国法院判决承认与执行中互惠的标准从事实互惠转向法律互惠。

近年来，我国法院依据互惠原则，先后裁定承认与执行新加坡[1]、美国[2]、韩国[3]等国家的民商事判决，标志着我国以更加积极的态度承认与执行外国判决。但上述案件均以判决作出国存在承认执行我国判决的先例——这一严格的事实互惠作为是否存在互惠关系的认定标准。本案则以我国与英国存在法律互惠作为承认与执行外国判决的标准，认为“《民事诉讼法》在规定互惠原则时并没有将之限定为必须是相关外国法院先行承认我国法院民商事判决，我国法院作出的民商事判决可以得到该外国法院的承认和执行即可认为双方存在互惠”，实现了从事实互惠到法律互惠的转变。然而这种转变并不是一蹴而就的，2021 年 7 月上海市第一中级人民法院审理的 Solar 公司诉 SD 公司案是依据法律互惠承认与执行外国判决的第一案[4]，该案审理法院认为：“我国最高人民法院与新加坡最高法院之间签署过《备忘录》，其中载明我国法院可以在互惠基础上承认与执行新加坡法院的判决，新加坡法院可以根据普通法的规定执行中国法院的判决。这表明我国与新加坡之间存在法律互惠，在同等情况下我国作出的民商事判决可以得到新加坡法院的承认和执行。”但此案审理时已存在新加坡法院承认与执行我国判决的先例，因而无法将其作为单独以法律互惠为承认与执行外国判决中互惠原则标准的案例。本案（“挪威船公司案”）中，申请人认为现已存在英国法院承认与执行我国判决的先例，即英国法院在 Spliethoff’s Bevrachtingskantoor BV（西特福船运公司）与中国银行股份有限公司案中作出的[2015] EWHC 999 (Comm)号判决，法院对此观点并未采纳，反而直接依据法律互惠承认与执行英国判决。因此，本案是首次单独以法律互惠作为认定互惠原则的标准，既符合《涉外商事海事审判工作座谈会会议纪要》第 44 条第 1 款[5]的要求，又体现出我国在承认和执行外国判决的积极态度。

（二）外国法院判决承认与执行中互惠标准转变经历了从保守到主动的发展过程

关于互惠的认定，我国经历了漫长的发展过程。我国 1991 年《民事诉讼法》第二百六十

[1] 江苏省南京市中级人民法院民事裁定书，（2016）苏 01 协外认 3 号。

[2] 湖北省武汉市中级人民法院，（2015）鄂武汉中民商外初字第 00026 号民事裁定书。

[3] 山东省青岛市中级人民法院民事裁定书，（2018）鲁 02 协外认 6 号民事裁定书。

[4] （2019）沪 01 协外认 22 号案件相关内容主要参考：孙佳佳，肖宇彤：《【嘉美·视点】“法律互惠”的初次落地？|从首例依据“法律互惠”承认和执行新加坡判决案说起》，载知乎，2021 年 11 月 25 日，https://zhuanlan.zhihu.com/p/437535543。

[5] 《涉外商事海事审判工作座谈会会议纪要》第 44 条第 1 款规定：“人民法院在审理申请承认和执行外国法院判决、裁定案件时，有下列情形之一的，可以认定存在互惠关系：（1）根据该法院所在国的法律，人民法院作出的民商事判决可以得到该国法院的承认和执行；（2）我国与该法院所在国达成了互惠的谅解或者共识；（3）该法院所在国通过外交途径对我国作出互惠承诺或者我国通过外交途径对该法院所在国作出互惠承诺，且没有证据证明该法院所在国曾以不存在互惠关系为由拒绝承认和执行人民法院作出的判决、裁定。人民法院对于是否存在互惠关系应当逐案审查确定。”

八条[1]就规定了互惠原则，但并未对其具体适用进行明确规定。从上世纪九十年代到 2015 年左右，实践中主要依据事实互惠，即“要求相关申请承认与执行的外国法院有承认和执行中国法院判决的先例事实存在。”[2]典型案例是俄罗斯国家交响乐团诉北京国际音乐家协会案。[3]这种“不主动”的处理方式可能导致外国法院认为中国拒绝承认该国法院判决，因而也拒绝承认中国判决，当事人只能通过在申请执行国另行起诉等方式来维护自己的合法权益。[4]这显然不符合承认与执行外国判决制度促进国际民商事秩序正常运行的目的，不仅不能保护当事人的正当利益，也不利于中国判决“走出去”。自 2015 年起，我国承认与执行外国判决逐渐变得“主动”。2015 年《最高人民法院关于人民法院为“一带一路”建设提供司法服务和保障的若干意见》第二部分提出“要在沿线一些国家尚未与我国缔结司法协助协定的情况下，根据国际司法合作交流意向、对方国家承诺将给予我国司法互惠等情况，可以考虑由我国法院先行给予对方国家当事人司法协助，积极促成形成互惠关系，积极倡导并逐步扩大国际司法协助范围。”突破了司法实践中适用的事实互惠，与“一带一路”沿线国家实质上形成了“法律互惠”。2021 年 12 月 31 日最高人民法院下发了《全国法院涉外商事海事审判工作座谈会会议纪要》，第九部分第 44 条对互惠关系的认定进行了详细规定，并强调“根据该法院所在国的法律，人民法院作出的民商事判决可以得到该国法院的承认和执行。”表明对于未缔结国际公约的外国判决的承认与执行不再以外国有承认我国判决的先例作为认定互惠的标准，而是以外国法律来判断我国判决是否可以被该国承认与执行作为标准，避免上述事实互惠的弊端。本案也是《会议纪要》的重要体现，虽然我国不是判例法国家，《会议纪要》也并非我国的法律渊源，但本案裁定是经过最高人民法院批准后作出的，对其他需依据互惠原则承认与执行外国判决的案件有重要参考意义。此外，我国对互惠的认定逐渐出现采用“推定互惠”的趋势。2017 年第二届中国——东盟大法官论坛《南宁声明》在实存互惠（法律互惠、事实互惠）的基础上更进一步，规定“尚未缔结有关外国民商事判决承认和执行国际条约的国家，在承认与执行对方国家民商事判决的司法程序中，如对方国家的法院不存在以互惠为理由拒绝承认和执行本国民商事判决的先例，在本国国内法允许的范围内，即可推定与对方国家之间存在互惠关系。”即在不能证明外国确有不承认和执行内国判决时，推定互惠关系的存在，进一步减少拒绝承认与执行外国判决的情况。

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[1] 1991 年《民事诉讼法》第二百六十八条规定：“人民法院对申请或者请求承认 和执行的外国法院作出的发生法律效力的判决、裁定，依照中华人民共和国缔结或者参加的国际条约，或者按照互惠原则进行审查后，认为不违反中华人民共和国法律的基本原则或者国家主权、安全、社会公共利益的，裁定承认其效力，需要执行的，发出执行令，依照本法的有关规定执行。违反中华人民共和国法律的基本原则或者国家主权、安全、社会公共利益的，不予承认和执行。”

[2] 张雪：《“一带一路”倡仪下互惠原则在承认与执行外国判决中的适用》，载《全面推进依法治国的地方实践（2021 卷）》，第 245-254 页，DOI:10.26914/c.cnkihy.2022.013820。

[3] 北京市第二中级人民法院，（2004）二中民特字第 928 号判决书。

[4] 张先君：《“一带一路”背景下外国民商事判决承认和执行中推定互惠原则的适用》，载《人民司法（应用）》2021 年第 1 期，第 62 页。

本案不仅是我国对英国判决的首次承认，更是我国首次单独以法律互惠作为承认与执行外国判决中互惠原则的标准，标志着我国法院承认与执行外国判决的主动性提升。这不仅有利于保护申请人利益，也有利于我国的判决在外国获得承认与执行。本案裁决也体现了《会议纪要》精神，将成为承认与执行外国判决中认定互惠关系的重要参考。

中华人民共和国水下文物保护管理条例

（1989 年 10 月 20 日中华人民共和国国务院令第 42 号发布
根据 2011 年 1 月 8 日《国务院关于废止和修改部分行政法规的决定》第一次修订
2022 年 1 月 23 日中华人民共和国国务院令第 751 号第二次修订）

第一条　为了加强水下文物保护工作的管理，根据《中华人民共和国文物保护法》的有关规定，制定本条例。

第二条　本条例所称水下文物，是指遗存于下列水域的具有历史、艺术和科学价值的人类文化遗产：

（一）遗存于中国内水、领海内的一切起源于中国的、起源国不明的和起源于外国的文物；

（二）遗存于中国领海以外依照中国法律由中国管辖的其他海域内的起源于中国的和起源国不明的文物；

（三）遗存于外国领海以外的其他管辖海域以及公海区域内的起源于中国的文物。

前款规定内容不包括 1911 年以后的与重大历史事件、革命运动以及著名人物无关的水下遗存。

第三条　本条例第二条第一款第一项、第二项所规定的水下文物属于国家所有，国家对其行使管辖权；本条例第二条第一款第三项所规定的水下文物，遗存于外国领海以外的其他管辖海域以及公海区域内的起源国不明的文物，国家享有辨认器物物主的权利。

第四条　国务院文物主管部门负责全国水下文物保护工作。县级以上地方人民政府文物主管部门负责本行政区域内的水下文物保护工作。

县级以上人民政府其他有关部门在各自职责范围内，负责有关水下文物保护工作。

中国领海以外依照中国法律由中国管辖的其他海域内的水下文物，由国务院文物主管部门负责保护工作。

第五条　任何单位和个人都有依法保护水下文物的义务。

各级人民政府应当重视水下文物保护，正确处理经济社会发展与水下文物保护的关系，确保水下文物安全。

第六条　根据水下文物的价值，县级以上人民政府依照《中华人民共和国文物保护法》有关规定，核定公布文物保护单位，对未核定为文物保护单位的不可移动文物予以登记公布。

县级以上地方人民政府文物主管部门应当根据不同文物的保护需要，制定文物保护单位和未核定为文物保护单位的不可移动文物的具体保护措施，并公告施行。

第七条　省、自治区、直辖市人民政府可以将水下文物分布较为集中、需要整体保护的水域划定公布为水下文物保护区，并根据实际情况进行调整。水下文物保护区涉及两个以上省、自治区、直辖市或者涉及中国领海以外依照中国法律由中国管辖的其他海域的，由国务院文物主管部门划定和调整，报国务院核定公布。

划定和调整水下文物保护区，应当征求有关部门和水域使用权人的意见，听取专家和公众的意见，涉及军事管理区和军事用海的还应当征求有关军事机关的意见。

划定和调整水下文物保护区的单位应当制定保护规划。国务院文物主管部门或者省、自治区、直辖市人民政府文物主管部门应当根据保护规划明确标示水下文物保护区的范围和界线，制定具体保护措施并公告施行。

在水下文物保护区内，禁止进行危及水下文物安全的捕捞、爆破等活动。

第八条　严禁破坏、盗捞、哄抢、私分、藏匿、倒卖、走私水下文物等行为。

在中国管辖水域内开展科学考察、资源勘探开发、旅游、潜水、捕捞、养殖、采砂、排污、倾废等活动的，应当遵守有关法律、法规的规定，并不得危及水下文物的安全。

第九条　任何单位或者个人以任何方式发现疑似本条例第二条第一款第一项、第二项所规定的水下文物的，应当及时报告所在地或者就近的地方人民政府文物主管部门，并上交已经打捞出水的文物。

文物主管部门接到报告后，如无特殊情况，应当在 24 小时内赶赴现场，立即采取措施予以保护，并在 7 日内提出处理意见；发现水下文物已经移动位置或者遭受实际破坏的，应当进行抢救性保护，并作详细记录；对已经打捞出水的文物，应当及时登记造册、妥善保管。

文物主管部门应当保护水下文物发现现场，必要时可以会同公安机关或者海上执法机关开展保护工作，并将保护工作情况报本级人民政府和上一级人民政府文物主管部门；发现重要文物的，应当逐级报至国务院文物主管部门，国务院文物主管部门应当在接到报告后 15 日内提出处理意见。

第十条　任何单位或者个人以任何方式发现疑似本条例第二条第一款第三项所规定的水下文物的，应当及时报告就近的地方人民政府文物主管部门或者直接报告国务院文物主管部门。接到报告的地方人民政府文物主管部门应当逐级报至国务院文物主管部门。国务院文物主管部门应当及时提出处理意见并报国务院。

第十一条　在中国管辖水域内进行水下文物的考古调查、勘探、发掘活动，应当由具有考古发掘资质的单位向国务院文物主管部门提出申请。申请材料包括工作计划书和考古发掘

资质证书。拟开展的考古调查、勘探、发掘活动在中国内水、领海内的，还应当提供活动所在地省、自治区、直辖市人民政府文物主管部门出具的意见。

国务院文物主管部门应当自收到申请材料之日起 30 日内，作出准予许可或者不予许可的决定。准予许可的，发给批准文件；不予许可的，应当书面告知申请人并说明理由。

国务院文物主管部门在作出决定前，应当征求有关科研机构和专家的意见，涉及军事管理区和军事用海的还应当征求有关军事机关的意见；涉及在中国领海以外依照中国法律由中国管辖的其他海域内进行水下文物的考古调查、勘探、发掘活动的，还应当报国务院同意。

第十二条　任何外国组织、国际组织在中国管辖水域内进行水下文物考古调查、勘探、发掘活动，都应当采取与中方单位合作的方式进行，并取得许可。中方单位应当具有考古发掘资质；外方单位应当是专业考古研究机构，有从事该课题方向或者相近方向研究的专家和一定的实际考古工作经历。

中外合作进行水下文物考古调查、勘探、发掘活动的，由中方单位向国务院文物主管部门提出申请。申请材料应当包括中外合作单位合作意向书、工作计划书，以及合作双方符合前款要求的有关材料。拟开展的考古调查、勘探、发掘活动在中国内水、领海内的，还应当提供活动所在地省、自治区、直辖市人民政府文物主管部门出具的意见。

国务院文物主管部门收到申请材料后，应当征求有关科研机构和专家的意见，涉及军事管理区和军事用海的还应当征求有关军事机关的意见，并按照国家有关规定送请有关部门审查。审查合格的，报请国务院特别许可；审查不合格的，应当书面告知申请人并说明理由。

中外合作考古调查、勘探、发掘活动所取得的水下文物、自然标本以及考古记录的原始资料，均归中国所有。

第十三条　在中国管辖水域内进行大型基本建设工程，建设单位应当事先报请国务院文物主管部门或者省、自治区、直辖市人民政府文物主管部门组织在工程范围内有可能埋藏文物的地方进行考古调查、勘探；需要进行考古发掘的，应当依照《中华人民共和国文物保护法》有关规定履行报批程序。

第十四条　在中国管辖水域内进行水下文物的考古调查、勘探、发掘活动，应当以文物保护和科学研究为目的，并遵守相关法律、法规，接受有关主管部门的管理。

考古调查、勘探、发掘活动结束后，从事考古调查、勘探、发掘活动的单位应当向国务院文物主管部门和省、自治区、直辖市人民政府文物主管部门提交结项报告、考古发掘报告和取得的实物图片、有关资料复制件等。

考古调查、勘探、发掘活动中取得的全部出水文物应当及时登记造册、妥善保管，按照国家有关规定移交给由国务院文物主管部门或者省、自治区、直辖市人民政府文物主管部门

指定的国有博物馆、图书馆或者其他国有收藏文物的单位收藏。

中外合作进行考古调查、勘探、发掘活动的，由中方单位提交前两款规定的实物和资料。

第十五条　严禁未经批准进行水下文物考古调查、勘探、发掘等活动。

严禁任何个人以任何形式进行水下文物考古调查、勘探、发掘等活动。

第十六条　文物主管部门、文物收藏单位等应当通过举办展览、开放参观、科学研究等方式，充分发挥水下文物的作用，加强中华优秀传统文化、水下文物保护法律制度等的宣传教育，提高全社会水下文物保护意识和参与水下文物保护的积极性。

第十七条　文物主管部门、公安机关、海上执法机关按照职责分工开展水下文物保护执法工作，加强执法协作。

县级以上人民政府文物主管部门应当在水下文物保护工作中加强与有关部门的沟通协调，共享水下文物执法信息。

第十八条　任何单位和个人有权向文物主管部门举报违反本条例规定、危及水下文物安全的行为。文物主管部门应当建立举报渠道并向社会公开，依法及时处理有关举报。

第十九条　保护水下文物有突出贡献的，按照国家有关规定给予精神鼓励或者物质奖励。

第二十条　文物主管部门和其他有关部门的工作人员，在水下文物保护工作中滥用职权、玩忽职守、徇私舞弊的，对直接负责的主管人员和其他直接责任人员依法给予处分；构成犯罪的，依法追究刑事责任。

第二十一条　擅自在文物保护单位的保护范围内进行建设工程或者爆破、钻探、挖掘等作业的，依照《中华人民共和国文物保护法》追究法律责任。

第二十二条　违反本条例规定，有下列行为之一的，由县级以上人民政府文物主管部门或者海上执法机关按照职责分工责令改正，追缴有关文物，并给予警告；有违法所得的，没收违法所得，违法经营额 10 万元以上的，并处违法经营额 5 倍以上 15 倍以下的罚款，违法经营额不足 10 万元的，并处 10 万元以上 100 万元以下的罚款；情节严重的，由原发证机关吊销资质证书，10 年内不受理其相应申请：

（一）未经批准进行水下文物的考古调查、勘探、发掘活动；

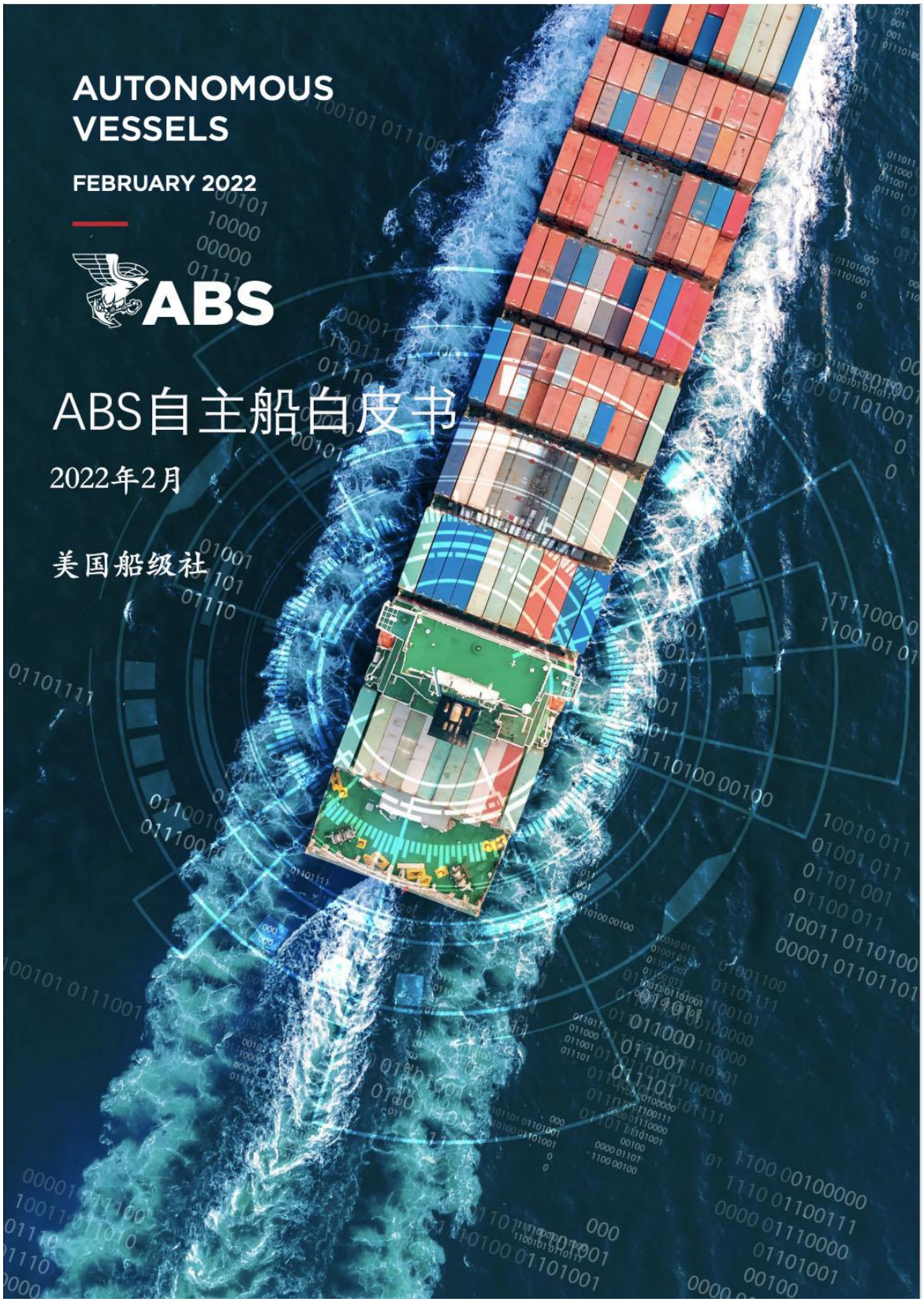
（二）考古调查、勘探、发掘活动结束后，不按照规定移交有关实物或者提交有关资料；

（三）未事先报请有关主管部门组织进行考古调查、勘探，在中国管辖水域内进行大型基本建设工程；

（四）发现水下文物后未及时报告。

第二十三条　本条例自 2022 年 4 月 1 日起施行。

美国船级社 ABS 自主船白皮书



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第一章 引 言

在过去的三年中，海上自主技术的发展取得了很大进步。世界各国正在进行的自主技术试验项目已经取得阶段性进展，相关利益方展开了新的合作。作为向前迈进的重要一步，国际海事组织（IMO）完成了海上自主水面船（MASS）监管范围界定工作。

关于海上自主问题的讨论倾向于以统一的标准看待船舶。然而，这可能不适用于自主船舶的独特性。技术和监管的挑战会因船舶的类型和大小而有所不同。

“海事英国”提议将海上自主水面船分为五类：

MASS 等级	特性	备注
超轻	总长度 < 7m	*源自 MCA 高速船规范，其中 ∇ = 排水量，以 m3 与设计水线相对应
轻型	总长度 ≥7m 至 <13m	
小型	长度总 ≥13m 至 <24m	
大型	长度 ≥24m	
高速	运行速度 V 不小于 V = 7.19 ∇ 1/6 节	

表 1：海上自主水面船系统（MASS）中的 MASS 等级

《英国海上自主水面船行业行为准则和实践规范》

这种分类对讨论自主船很有帮助。总长度小于 24m 的船舶由于其尺寸[1] 操作通常仅限于国内或港口水域。小型船舶的敏捷性、使用场景（通常用于监测和非货物运输任务）和更简单的机械/设备配置，降低了自主技术应用的技术和监管的复杂性。

上表中，归类为“大型”的船舶，由于其技术和监管复杂性增加，风险随之增加。本白皮书的重点是“大型”船舶。

海洋领域的自主技术发展涵盖船舶设计和运营的所有方面。它还为彻底重置和重新思考船舶设计提供了机会。

本文梳理了 IMO 法规制定的最新进展，并提出了自主船舶的主要关键目标要求。

结合最近的项目经验，本文研究了自主技术的实施和运营中的相关问题。

第二章 IMO、MASS 监管范围界定情况

2021 年 5 月，制定自主操作规则的关键项目——IMO 海上自主水面船（MASS）监管范围界定工作完成。然而，这并不是旅程的结束。相反，它的结束标志着 IMO 向起草管理自主

[1] 1974 年《国际海上人命安全公约》（SOLAS 1974）不适用于 500 总吨以下的货船。《国际防止船舶造成污染公约》（MARPOL）不适用于小于 150 总吨的油轮和小于 400 总吨的其他船舶。

操作的要求迈出了重要一步。

第一节 背 景

注意到该行业自主技术发展的步伐，IMO 认识到有必要为自主操作制定积极的法规。

2017 年 2 月，海上安全委员会 98 届会议（MSC 98）通过了关于开展监管范围界定工作的决议，以确定如何在 IMO 公约中增加 MASS 安全、可靠和无害环境运行的提案[2]。

为促进监管范围界定工作的进程，MASS 自主程度分类如下：

• 一级：具有自动化流程和决策支持的船舶

船上船员操作和控制船上系统和功能。一些操作可能是自动化的，有时是无人监督的，但船上的船员随时准备好进行控制。

• 二级：船上有船员的遥控船

船舶由远程遥控进行控制和操作。船员可以在船上控制和操作船上的系统和功能。

• 三级：船上没有船员的遥控船舶

船舶由远程遥控进行控制和操作。船上没有船员。

• 四级：完全自主的船舶

船舶操作系统能够自行决策和决定行动。

监管范围界定工作分两步进行。第一步，审查 IMO 公约以确定适用于 MASS 的条款，并确定相关条款是否需要修改或适应 MASS 操作。

第二步是分析和确定解决 MASS 操作的最合适方法，以确定是否需要修改现有公约或制定新的专门公约来解决 MASS 操作问题。

监管范围界定工作原定于在 2020 年 11 月的 MSC 102 会议上完成。但是，由于新冠疫情，该工作被推迟，最终于 2021 年 5 月的 MSC 103 会议上完成[3]。

IMO 的法律委员会（LEG）和便利运输委员会（FAL）正在对其职责范围内的公约进行监管范围界定工作。法律委员会已完成其职责内的范围界定工作，而便利运输委员会的范围界定工作仍在进行中，预计将于 2022 年完成[4]。

第二节 范围界定工作的成果

通过对海上安全委员会（MSC）职责范围内的公约的审查，界定工作确定了 11 个共同潜在的空白和/或主题，这些空白和/或主题需要予以解决，以推进制定自主运营法规[3]。

已确定的潜在空白和主题如下：

• 船长、船员或负责人等术语的含义；

• 远程控制站/中心；

• 作为船员的远程操作员；

• 关于手动操作、向驾驶台发出警报的规定；

• 要求工作人员采取行动的规定（火灾、货物泄漏应急、船上维保等）；

• 船上的证书和手册；

• 连通性、网络安全；

• 值班；

• MASS 在 SAR（搜索和救援）中的含义；

• 船上提供的和与安全运行所需的信息；

• 术语。

从这份清单中，IMO 确定了四个潜在的空白和/或主题作为高优先级的问题，这些问题贯穿了 IMO 的关键公约，并可能需要政策的决定来予以推动。

（1）船长、船员或负责人的含义

完全自主和无人驾驶船舶使人们注意到船长、船员或负责人在船上的关键作用。船长、船员或负责人的角色被提及并处于许多要求的核心。然而，为了制定自主操作的要求，明确他们的定义和确定他们的角色至关重要。

（2）远程控制站/中心

可以预见，自主船舶将由位于岸基的远程控制站/中心监控或控制。IMO 指出，这是 IMO 公约的一个新概念，需要进一步深入研究和审议。

（3）作为船员的远程操作员

除了远程控制站/中心的问题，还有远程操作员监控或控制自主船舶所需的资格、职责和角色的问题。IMO 应该要求远程操作员具备合格的船员资质，还是应该“被视为”船员？

（4）术语

IMO 的海事公约已经有序的运行了数十年。术语在各种公约中都有定义。但是，没有单独的数据库。由于自主发展对海事公约的整个架构都有独特的影响，因此，缺乏一致、统一的术语将是一个潜在的混淆来源。

第三节 未来的工作

在监管范围界定工作结束后，IMO 认为应着手制定自主操作要求，并在 2025 年之前发布。在此之前，IMO 将制定一些过渡性的临时指南，包括已于 2019 年 6 月 14 日发布的《MASS 试航临时指南（MSC.1/Circ.1604）》。

第三章 基于目标的自主船舶框架

为实现完全自主船舶的运营，海运业需要对自主船舶的设计进行监管。如上所述，这是

IMO 的一项持续努力。本白皮书提出了对完全自主船舶从头开始设计和构建的基于目标的框架。

基于审查了适用于船舶设计的关键公约中包含的要求的意图，即：

- 1974 年《国际海上人命安全公约》（SOLAS，1974 年，经修订），和
- 《国际防止船舶造成污染公约》（MARPOL）。

从这项研究中，我们确定了以下高级安全目标：

- 保持推进；
- 保持船舶安全；
- 防止进水；
- 保持航行安全；
- 遇险通信；
- 满足环保要求；
- 提供持续监控和态势感知；
- 保持指挥与决策系统；
- 保持货物安全；
- 与远程控制中心保持通信。

第一节　保持推进

第一个目标是船舶能够始终保持其推进能力。在失去推进力的情况下，船舶应能够在没有外部援助的情况下快速重新启动推进装置。

为实现这一目标，推进系统和辅助设备的设计、建造和装备应提供：

- 电力连续性；

• 坚固、可靠或冗余的推进系统。

第二节 保持船舶安全

保持船舶安全的目标须从多方面进行考虑：

（1）供电的持续性

船上电力的连续性对于推进辅助系统、控制和通信系统的保障运行至关重要。船舶的发电和配电应坚固可靠。必要时，应考虑启动备用电力系统。

（2）管理火灾风险

目前的规定是船上有船员以协助消防工作。对于不配备船员的完全自主船舶，船舶的防火概念、消防概念将不得不脱离当前的传统概念，进行重新审视、重新定义和重新设计。

（3）管理船上机器

当完全自主船舶发生机器故障时，没有船员在船解决，船载机器和系统必须设计得可靠耐用。监测机器安全运行的功能将更加被重视，以便在问题出现之前予以预测和解决。对于关键性的机器，可能必须在设计中增加一套备用系统。

（4）防止未经授权的数据接入或人员登船

对于没有船员的完全自主船舶而言，这一问题将变得更加重要。船舶的设计必须能够防止未经授权的数据进入或人员登船。

第三节 防止进水

进水是船舶安全的一个关键问题。需要解决以下领域的问题：

（1）舱底水系统和海阀操作

这些系统的操作将需要高度自动化或自主处理，以处理可能积聚在船内的水，并确保船体的各个舱室都不会破裂。

（2）通风口

船舶上的通风口对于机器的安全操作和船员居住是必要的。但在自主船的设计中，可能需要重新考虑通风口的数量。尽管由于自主船上没有船员，某些空间可能不需要通风口，但设计时应考虑船舶在维保或检查期间的人员登船。

通风口也是海水的进入口。通风口的关闭/打开装置可能需要自动化和监控。

第四节 保持航行安全

保持船舶航行安全的目标，不仅需要分析船舶自身系统，还需要分析本船舶与他船的相互作用，以及本船的环境和海况情况。

为实现这一目标，船舶应能够：

• 在发生故障时保持操舵能力；

• 按照《国际海上避碰规则》（COLREG，1972 年修订）原则进行航行；

• 根据 COLREG 原则和当地要求，不断向周围船舶传达其意图；

• 接收并理解来自周围船舶的通讯；

• 监控环境状况；

• 向周围船舶传达航行遇险情况。

第五节　遇险通信

当自主船处于紧急情况或遇险情况时，应能够将其险情传达给其他人，包括：

• 自己的远程操作员/控制中心；

• 附近的船舶；

• 相关港口或沿海国当局。

这是为了责任方得以迅速做出反应以保护其资产，并提醒周围的船舶，以便他们意识到并最小化可能即将发生的碰撞事故。

险情包括：

• 失去推进力或限制操纵；

• 防水保护失效（即进水时）；

• 火灾；

• 失去导航能力；

• 失去与岸基控制站的通信。

第六节　满足环保要求

不应忽视自主船对环境的影响。因此，自主船舶应满足 MARPOL 公约要求目标。包括以下要求：

• MARPOL 附则 I（防止油类污染的规定）；

• MARPOL 附则 IV（防止船舶污水污染的规定）。

完全自主船舶将不会运载 MARPOL 附则 II（散装有毒液体物质）和附则 III（包装形式的有害物质）所涵盖的货物。

除了 MARPOL 附则 I 和附则 IV 之外，自主船舶还应遵守与防止污染有关的当地船旗国或港口国的要求。

应当建立完全自主船舶的报告程序，以满足监管合规的提交要求。

第七节　提供持续监控和态势感知

在没有船员来监控和维护船舶机器时，持续的监控和态势感知能力对于自主船来说至非常重要。这些能力能够保证自主船舶执行任务，并将船舶和关键系统的状况通知远程操作员。

至少应持续监测以下内容：

• 推进、发电和配电系统；

• 安全/损坏控制；

• 稳定性和压载控制（完好和损坏）；

• 结构完整性和完好性；

• 导航和定位（地理定位）；

• 环境监管报告；

• 正常运行和修复操作；

• 网络安全。

第八节　保持指挥和决策系统

自主船最关键的系统是它的中央指挥决策系统。执行以下关键功能：

• 观察和分析周围环境；

• 做出决策；

• 执行决策，并向各个组成系统发出指令；

• 与远程操作站通信。

因此，中央指挥决策系统的持续和正确运行是船舶安全运行的关键。

在其设计中，三个关键因素必不可少：

• 备用（冗余）；

• 可靠性；

• 网络安全。

第九节　保持货物安全

自主船要能够保证其所载货物的安全。货物的储存和系固方式应使船舶和环境不处于危险状态。根据所载货物的不同，监测货物的方法可能需要被考虑。

第十节 与远程操控中心保持通信

对于船舶监督和安全管理而言，船舶始终保持与远程控制中心的通信至关重要。

此外，船舶应能够与其他船舶、引航站、港口控制中心、乘客或运输队进行通信。

对于完全自主和无人驾驶的船舶，外部各方可能必须与远程控制中心的操作员进行通信。

第四章 应解决/考虑的关键性问题

第一节 远程控制中心

可以预见，自主和远程控制的船舶将由远程控制中心进行监控或控制。这是海洋和近海操作领域的一个新概念，围绕它而进行的问题和考虑因素需要被研究。

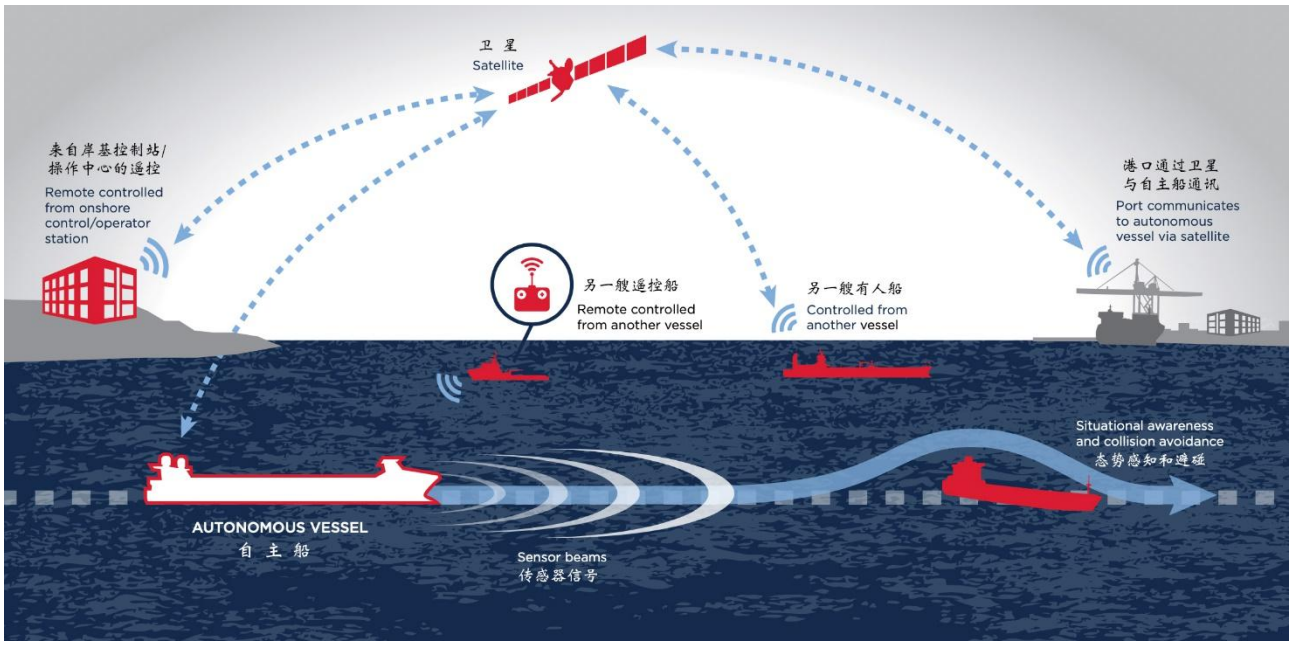


图 1：自主和远程控制操作情景

以下是可预见的远程控制中心所担任的角色[5]：

- 自主船各方面的航行规划，例如导航航路点的设置和船舶机械的配置；
- 监控航行进程；
- 保持态势感知；
- 船上机械和船体/结构的健康监测；
- 异常和紧急情况的响应；
- 在港口或沿海国家的水域中与其通信并共享信息，例如与港口的 VTS（船舶交通服务）系统联络；
- 与周围船舶通信；
- 不同操作模式之间的控制切换。

远程操作有多种配置。远程控制中心/操作站可以位于岸基或在另一艘船舶上。远程控制

/操作站可以监控和控制多艘船舶。

1.技术

（1）通信和连接

• 自主船和远程控制中心之间持续可靠的通信和连接是一个关键的推动因素。

• 通信需要是双向的、准确的、可扩展的，并得到多个系统的支持——创建冗余并最大限度地降低风险。船舶与远程控制/操作站之间通信通道的可靠性对于安全操作至关重要。

（2）增强现实（AR）技术

• 远程操作员远离船舶，操作员的态势感知能力会降低。利益相关者和监管机构的主要担忧是：降低的态势感知会对航行安全产生不利影响吗？为了达到同等水平的安全和航行效率，远程操作员应具备的最低态势感知程度是多少？

• 在这种背景下，AR 技术将有助于缩小感知与现实之间的差距。

• AR 是一种允许在现实环境中叠加数字内容（图像、声音、文本）的技术。

• AR 已开始在该领域得到应用。例如，AR 与蜂窝网络连接相结合，使远程控制中心的操作员能够远程监控和指导拖船的操作[6]。

2.技能和能力

远程操作员将是远程控制/操作站的核心。他们的技能和能力是支持自主和/或远程控制安全操作的重要因素。目前，《国际船员培训、发证和值班公约》（STCW）对船员的教育、培训和经验（海上服务）提出了明确的要求。对于岸基人员以及船舶管理，《国际船舶安全营运和防止污染管理规则》（ISM）规定了船舶安全管理和操作的要求[7]。

R.Saha 先生确定了远程操作员履行未来角色所必需培养的三项关键能力：

• 系统理解；

• 沟通和技术知识；

• 海事技能。

监管知识、导航能力和基础工程知识是必要的（见图 2）。此外，数据分析表明：

• 在培训和教育中拓展使用模拟器，增设实习期，可以有效地为远程操作员做好准备

• 在初始阶段，经验丰富的值班员是未来远程操作员的首选[7]。

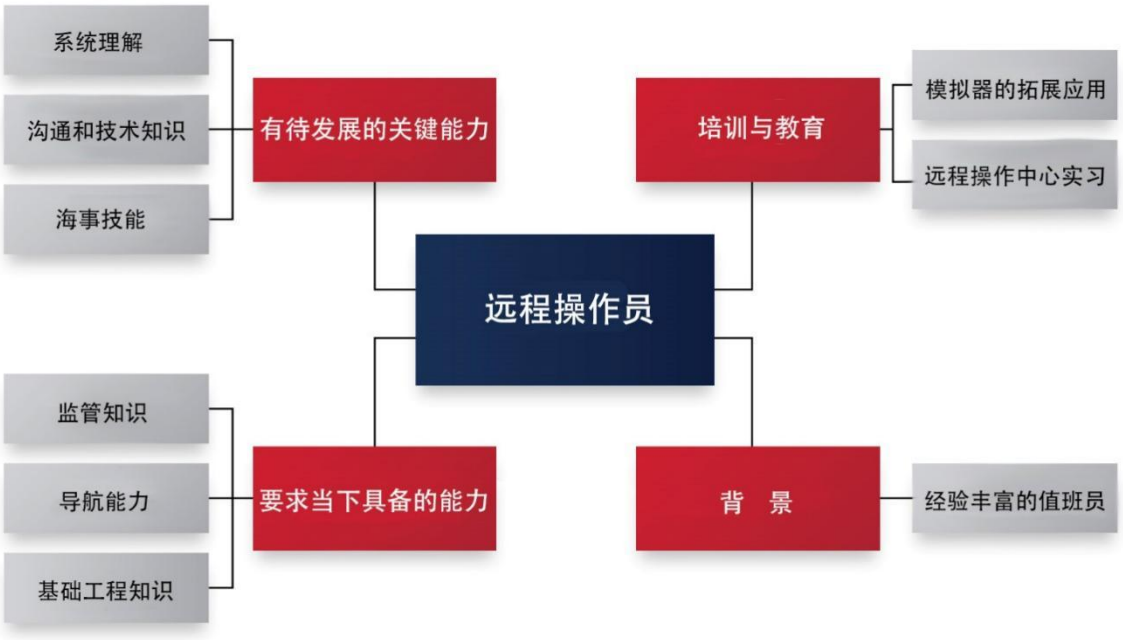


图 2：远程操作员必备的能力[7]

远程操作员所需的技能和能力，需要进一步进行研究和开发。目前，考虑到船员具备船舶操作所需的大部分技能和经验，第一批远程操作员很可能是船员。当前技能与未来所需知识技能之间的差距需要被确定，以提高当前船员的技能，来完成这项工作以及自主和远程控制操作所产生的其他新工种。

第二节 连通性

船舶与执行监测和控制的远程控制中心之间的连通，对自主和远程控制功能非常重要，需要考虑各种因素，例如带宽、数据完整性、可靠性和延迟。应验证数据的完整性，并及时恢复损坏或无效的数据。与船舶的数据连接应具有很好的鲁棒性，并具有故障恢复能力。对于风险较高的自主或远程控制功能，即使网络性能下降或连接完全断开，也不会损害这些功能。网络延迟应满足特定自主或远程控制的功能和性能需求。

目前有两种主要的通信方法，即蜂窝网络和卫星网络，它们分别用于沿海和远洋服务。

蜂窝网络依靠基站提供通信覆盖。因此，其范围受限于基站的可用性，因此只能连接到靠近岸边的船舶。相反，卫星网络没有这样的限制，通过卫星和地面站的结合，卫星网络可以覆盖全球，因此是连接远岸船舶的唯一选择。

尽管蜂窝网络受距离所限，但它的延迟通常低于卫星网络，因为卫星网络的传输要经历从卫星到船舶很远的距离。高轨道上的卫星比低轨道上的卫星具有更高的延迟[8]。

自主船比一般的导航需求需要更大的数据交换量，以用于状态和操作监控以及操作目的。通信设备还应具有足够的数据容量以满足功能和性能要求。可承载的数据量取决于网络频率，

频率越高，可承载的数据越多。

目前最常见的蜂窝网络是“长期演进技术”（LTE），它接近但不是真正的 4G 网络[9]。频带大约在 450Mhz-5GHz。5G 网络是下一代通信协议，其低频段约为 410MHz-7GHz，高频段约 24.25GHz-52.6GHz[10]。

卫星网络的频段，L 频段可低至 1GHz，Ku 频段可高至 12GHz，Ka 频段可高至 27GHz [11]，与 5G 蜂窝网络有类似的频率范围。

实施过程中还应考虑连接速度以及性能是否会受到环境条件和海上交通的影响。蜂窝网络和卫星网络可以达到相近的速度，但卫星网络通常成本更高。带宽还取决于某个覆盖区域（例如繁忙港口附近）的船舶数量或其他带宽共享者。可以通过更好的蜂窝网络基础设施和更多的卫星网络来改善拥挤区域的缓慢数据速度。

5G 蜂窝技术的出现为自主和远程控制操作创造了有趣的可能。5G 的速度高达每秒 10Gb，有可能比 4G 快 100 倍。与大约 200 毫秒的 4G 延迟相比，它的延迟率也显着降低，仅为 1 毫秒。[12]这对于自主和远程控制技术的发展很有意义，因为随着传感器的增加，船与岸之间交换的数据量预计会增加。低延迟对于机器控制也至关重要。然而，5G 蜂窝技术的缺点是覆盖范围小于 4G 技术。5G 技术基于超高频电波，这些电波传播距离不会很远。[13]建立 5G 网络需要大量的基站投资，这在港口水域可能难以实施。尽管如此，有可能在邻近的船舶之间利用本地移动自组织 5G 网络来实现彼此之间的快速数据交换。[14]

第三节　船上配员

船舶配员的优化（或在某些情况下，配员减少）是自主发展的关键驱动因素之一，但它也可能是最具挑战性的问题[15]。

《联合国海洋法公约》（UNCLOS）第 94 条第（4）款（b）项要求所有船舶“应当由具有适任资格的船长和高级船员所操控”。SOLAS、MARPOL、STCW 和其他各种公约假定船长在船并有人值班[15][16]。

对无人操作的社会广泛接受以及传统船员职业的消失或重新分配，这一讨论至关重要。一些主要的海事利益相关者就自主船对港口运营的影响以及失业的可能性提出了担忧[17]。

自主技术需要克服的法律、监管和社会挑战需要经历一些时间。与此同时，智能和自主技术已经到来，重点是确保这些技术的安全实施。

第四节　模拟测试

软件支持使自主和远程控制功能得以实现。为了按照预期并安全地交付这些功能，软件的质量和可靠性至关重要。此外，底层算法可能无法被理解和被直接验证。在高级自动化、自主和远程控制功能中，软件和算法的验证存在许多问题，例如：我们如何定义可靠性？我

们如何跟踪和评估软件做出的决策？我们如何监督正确的行为以实现信任和控制学习？我们如何判定软件发生故障时的法律责任？

自主和远程控制功能故障会对任务、性能或安全产生严重的后果。因此，应对它们进行全面彻底的测试和验证，以防止出现潜在的故障，涵盖正常和异常操作条件下的综合性的、多元化的和关键的情况。

传统的验证方法通常成本高、耗时长、在可重现的场景中受限，并且在出现不可接受的行为时存在风险。

为了提高可靠性并避免灾难性故障，可以使用系统层级（system-level）预验证方法来测试软件，它通过模拟虚拟世界来完成，以在应用之前发现故障并修复它们。

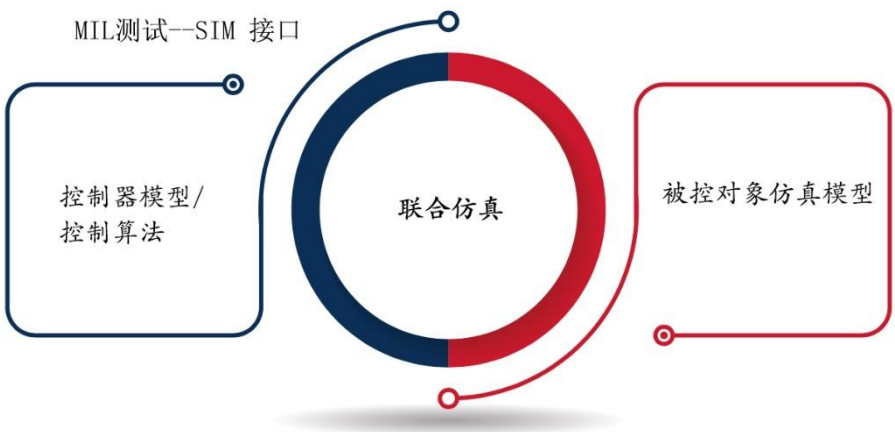
模型在环（MIL，Model-in-the-Loop）、软件在环（SIL，Software-in-the-Loop）和硬件在环（HIL，Hardware-in-the-loop）仿真技术，已广泛用于基于模型的设计（MBD，Model-Based Design），在航空航天、军事和汽车行业中可用于自主和远程控制功能。

1.模型在环（MIL）仿真

模型在环测试旨在验证控制算法逻辑并确保其满足要求。在这个阶段，控制器模型和被控对象模型在同一仿真空间中创建。控制器和被控对象模型相互独立。这两个模型之间的交互通过联合仿真算法进行。联合仿真算法调节它们的交互和时间同步。模型在环的模拟和测试完全在虚拟环境中执行，无需任何物理组件。模型在环测试的重点是验证控制算法，并确保控制器和被控对象之间的交互满足系统要求。

模型在环的优势：

- 允许在开发阶段早期进行测试。
- 即使某些部分尚未物理实现，也可以对新设计的系统进行测试--这些部分是模拟的。
- 可以改变模拟系统的特性以表示替代配置——这比更改物理组件更方便。



2.软件在环（SIL）仿真

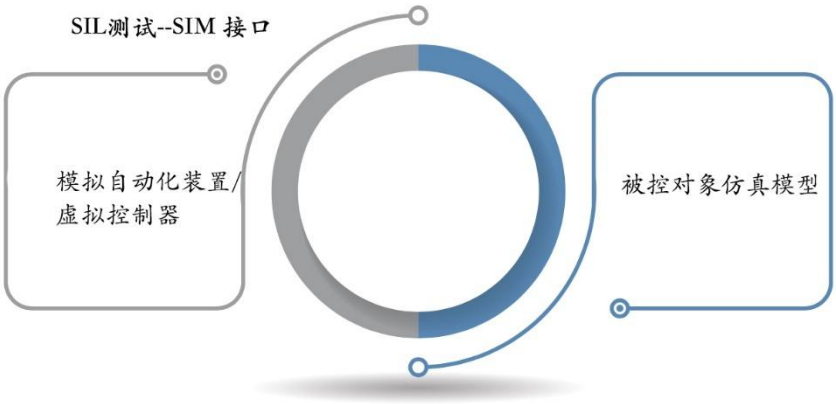
软件在环测试类似于模型在环，都是在虚拟和仿真环境中执行，但软件在环关注于可在目标平台上运行的控制器代码。在软件在环中，虚拟（仿真）控制器用于模拟实际硬件。

软件在环的优势：

• 虚拟验证控制策略，不危及人命或机器，而是使用真实的控制器代码。

• 通过在设计过程的早期排除错误，来降低成本。

• 使用“虚拟时间”功能，即减慢或加快时间，可在几分钟或几秒内快速完成，这对于需要花费数小时的故障排除或模拟的真实过程非常有帮助。



3.硬件在环（HIL）仿真

硬件在环的主要目标是验证硬件和软件在现实环境中的集成。在这个阶段，控制器软件完全安装到最终控制系统中。被控对象组件要么是一个真实的硬件，要么是一些在实时计算机上运行的软件，具有物理信号模拟，以使控制器相信它正在真实的被控对象场景中使用。控制器软件通过称为仿真装置的硬件设备连接到被控对象仿真模型。

硬件在环的优势：

• 基于虚拟化控制系统在线验证控制器逻辑策略。

• 增强或比较从现场测量的数据与模拟数据。

• 通过系统数字孪生模型进行模拟预测，并结合现场获取的真实数据。

4.建模和模拟软件

建模被控对象模型和控制系统模型已广泛应用于基于模型的设计（MBD）方法，在航空航天、军事和汽车行业领域。有多种支持此功能的商用工具/软件可用。

第五节　网络安全

现有的船舶和海上装置都配备了高度自动化的设备。近年来，行业已将安全重点从传统的船体、机械和电气领域扩展到软件和网络安全领域。操作安全很大程度上取决于软件的设计操作和船舶的操作技术（OT）系统不会受到外部干扰（无论是否恶意）。

自主和远程控制操作通过卫星网络或蜂窝网络进行持续通信，这大大增加了船舶或海上装置的网络脆弱性。

网络安全不能再被视为自主讨论的外围，而必须处于核心。

由于网络事件的影响，网络安全现在是海事利益相关者关注的前沿和中心。为实现自主和远程控制操作，需要对网络安全的整个生态系统进行综合考虑，包括来自船舶的船上系统、通信系统、远程控制/操作站系统、远程操作员和其他接口系统，如港口船舶交通系统（VTS）和其他服务提供商。

第六节 人工智能（AI）和机器学习（ML）

人工智能（AI）是一种创建智能系统的技术，该智能系统的目标是模拟人类智能。机器学习（ML）是人工智能的一个子领域，它使机器能够从过去的历史数据中学习，而无需明确编程。人工智能和机器学习技术正越来越多地应用于智能和自主功能。

例如，不同的回归算法已被用于预测船舶的运行参数，比如所需的主机功率[18]；深度学习已被用于船舶识别和跟踪[19]；强化学习（RL）和神经网络（NN）已被用于船舶路径规划和优化[20]。

机器学习算法首先需要大量数据的导入，将这些数据集的预处理是机器学习的关键步骤。机器学习需要高质量的数据。因此，通常需要一个合适的数据和物联网（IoT）架构，来定义和促进从不同来源收集、过滤、标准化、预处理和合并通用平台中的数据，并检查其质量。[21]。

尽管众所周知，机器学习在定义模糊的领域中取得了成功，但人工智能软件可能包含神经网络学习过程中引入的错误[20]。例如，Katz 分析了下一代无人驾驶飞机机载防撞系统的深度神经网络实现，发现该系统有几个逻辑要求不成立，以及一些可能导致错误防撞动作的对抗性扰动[22]。因此，这是行业应该关注并努力为人工智能和机器学习技术构建验证和验证框架的重要领域。

第五章 法规方面

在缺乏自主船舶设计和运营的国际法规的情况下，船旗国和港口当局提出了允许在其水域试验自主技术的框架和指南[23][24]。

除了《MASS 试航临时指南》（IMOMSC.1/Circ.1604）外，船旗国主管部门还依托于《批准各种 IMO 文书中规定的替代品和等效物的指南》（IMOMSC.1/Circ.1455）[24]。那些打算使用自主技术代替符合 IMO 要求的船东/经营人，可能需要证明其替代方法符合上述指南中要求的意图。

第六章 结 论

围绕自主开发的讨论已经开始形成实际形式。了解和提出解决方案以实现自主技术实际使用和实施的各种项目，有的已经完成，有些仍在进行中。尽管如此，该行业仍面临着必须克服的复杂挑战和障碍。

IMO 的 MASS 监管范围界定工作的结束以及随后为制定国际法规前进方向的努力是一个良好的进展。虽然未来依然面临重大挑战，但这是一个很好的迹象，表明行业看到了自主技术的价值，并且它有可能改善海上运营和安全。

随着业界努力制定自主船设计和的法规和要求，本文根据当前常见法规中包含的要求意图提出了一个基于目标的框架。这充分利用了构成这些法规基础的丰富经验。从正在进行的自主技术试验和项目中，一些关键问题已经浮出水面。其中一些问题与自主船舶难以满足当前要求有关，而一些问题对于海运业来说是新出现的。为了允许采用自主技术和运营，正在为自主船舶设计和运营而制定的法规必须解决这些问题。

第七章　ABS 支持性文件

《ABS 自主和远程控制功能指南》于 2021 年 7 月发布，针对更广泛的基于风险的框架提供了基于目标和规定性要求的组合，以指导船舶和海上装置自主和远程控制功能的实施。

ABS 可协助船东、运营商、造船商、设计师和供应商利用上述指南中的原则，以及 ABS《认证新技术指南》和《审查和批准新概念指南》。

附录 I——参考资料

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ABS《自主和远程控制功能》

ABS《船舶和海上装置智能功能指南》

ABS 白皮书——《减少海上设施配员》

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附录 II——缩略语

AI 人工智能

AR 增强现实

FAL 便利运输委员会

COLREG 1972 年国际海上避碰规则公约

HIL 硬件在环

IMO 国际海事组织

ISM 《国际船舶安全营运和防止污染管理规则》

LEG 法律委员会

LTE 长期演进技术

MASS 海上自主水面船

MARPOL 《国际防止船舶造成污染公约》

MBD 基于模型的设计

MCA 海事和海岸警卫队，英国

MIL 模型在环

ML 机器学习

MSC 海上安全委员会

NN 神经网络

OOW 值班员

OT 运维技术

PLC 可编程逻辑控制器

UNCLOS 《联合国海洋法公约》

SAR 搜索和救援

SIL 软件在环

SOLAS 《国际海上人命安全公约》

STCW 《国际船员培训、发证和值班公约》

VTS 船舶交通服务

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ABS

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地名管理条例

中华人民共和国国务院令

第 753 号

《地名管理条例》已经 2021 年 9 月 1 日国务院第 147 次常务会议修订通过，现予公布，自 2022 年 5 月 1 日起施行。

总理　李克强

2022 年 3 月 30 日

第一章　总　则

第一条　为了加强和规范地名管理，适应经济社会发展、人民生活和国际交往的需要，传承发展中华优秀文化，制定本条例。

第二条　中华人民共和国境内地名的命名、更名、使用、文化保护及其相关管理活动，适用本条例。

第三条　本条例所称地名包括：

（一）自然地理实体名称；

（二）行政区划名称；

（三）村民委员会、居民委员会所在地名称；

（四）城市公园、自然保护地名称；

（五）街路巷名称；

（六）具有重要地理方位意义的住宅区、楼宇名称；

（七）具有重要地理方位意义的交通运输、水利、电力、通信、气象等设施名称；

（八）具有重要地理方位意义的其他地理实体名称。

第四条　地名管理应当坚持和加强党的领导。县级以上行政区划命名、更名，以及地名的命名、更名、使用涉及国家领土主权、安全、外交、国防等重大事项的，应当按照有关规定报党中央。

地名管理应当有利于维护国家主权和民族团结，有利于弘扬社会主义核心价值观，有利于推进国家治理体系和治理能力现代化，有利于传承发展中华优秀文化。

地名应当保持相对稳定。未经批准，任何单位和个人不得擅自决定对地名进行命名、更

名。

第五条　地名的命名、更名、使用、文化保护应当遵守法律、行政法规和国家有关规定，反映当地地理、历史和文化特征，尊重当地群众意愿，方便生产生活。

第六条　县级以上人民政府应当建立健全地名管理工作协调机制，指导、督促、监督地名管理工作。

第七条　国务院民政部门（以下称国务院地名行政主管部门）负责全国地名工作的统一监督管理。

国务院外交、公安、自然资源、住房和城乡建设、交通运输、水利、文化和旅游、市场监管、林业草原、语言文字工作、新闻出版等其他有关部门，在各自职责范围内负责相关的地名管理工作。

县级以上地方人民政府地名行政主管部门负责本行政区域的地名管理工作。县级以上地方人民政府其他有关部门按照本级人民政府规定的职责分工，负责本行政区域的相关地名管理工作。

第八条　县级以上地方人民政府地名行政主管部门会同有关部门编制本行政区域的地名方案，经本级人民政府批准后组织实施。

第二章　地名的命名、更名

第九条　地名由专名和通名两部分组成。地名的命名应当遵循下列规定：

（一）含义明确、健康，不违背公序良俗；

（二）符合地理实体的实际地域、规模、性质等特征；

（三）使用国家通用语言文字，避免使用生僻字；

（四）一般不以人名作地名，不以国家领导人的名字作地名；

（五）不以外国人名、地名作地名；

（六）不以企业名称或者商标名称作地名；

（七）国内著名的自然地理实体名称，全国范围内的县级以上行政区划名称，不应重名，并避免同音；

（八）同一个省级行政区域内的乡、镇名称，同一个县级行政区域内的村民委员会、居民委员会所在地名称，同一个建成区内的街路巷名称，同一个建成区内的具有重要地理方位意义的住宅区、楼宇名称，不应重名，并避免同音；

（九）不以国内著名的自然地理实体、历史文化遗产遗址、超出本行政区域范围的地理实体名称作行政区划专名；

（十）具有重要地理方位意义的交通运输、水利、电力、通信、气象等设施名称，一般应当与所在地地名统一。

法律、行政法规对地名命名规则另有规定的，从其规定。

第十条　地名依法命名后，因行政区划变更、城乡建设、自然变化等原因导致地名名实不符的，应当及时更名。地名更名应当符合本条例第九条的规定。

具有重要历史文化价值、体现中华历史文脉的地名，一般不得更名。

第十一条　机关、企业事业单位、基层群众性自治组织等申请地名命名、更名应当提交申请书。申请书应当包括下列材料：

（一）命名、更名的方案及理由；

（二）地理实体的位置、规模、性质等基本情况；

（三）国务院地名行政主管部门规定应当提交的其他材料。

行政区划的命名、更名，应当按照《行政区划管理条例》的规定，提交风险评估报告、专家论证报告、征求社会公众等意见报告。其他地名的命名、更名，应当综合考虑社会影响、专业性、技术性以及与群众生活的密切程度等因素，组织开展综合评估、专家论证、征求意见并提交相关报告。

第十二条　批准地名命名、更名应当遵循下列规定：

（一）具有重要历史文化价值、体现中华历史文脉以及有重大社会影响的国内著名自然地理实体或者涉及两个省、自治区、直辖市以上的自然地理实体的命名、更名，边境地区涉及国界线走向和海上涉及岛屿、岛礁归属界线以及载入边界条约和议定书中的自然地理实体和村民委员会、居民委员会所在地等居民点的命名、更名，由相关省、自治区、直辖市人民政府提出申请，报国务院批准；无居民海岛、海域、海底地理实体的命名、更名，由国务院自然资源主管部门会同有关部门批准；其他自然地理实体的命名、更名，按照省、自治区、直辖市人民政府的规定批准；

（二）行政区划的命名、更名，按照《行政区划管理条例》的规定批准；

（三）本条第一项规定以外的村民委员会、居民委员会所在地的命名、更名，按照省、自治区、直辖市人民政府的规定批准；

（四）城市公园、自然保护地的命名、更名，按照国家有关规定批准；

（五）街路巷的命名、更名，由直辖市、市、县人民政府批准；

（六）具有重要地理方位意义的住宅区、楼宇的命名、更名，由直辖市、市、县人民政府住房和城乡建设主管部门征求同级人民政府地名行政主管部门的意见后批准；

（七）具有重要地理方位意义的交通运输、水利、电力、通信、气象等设施的命名、更名，

应当根据情况征求所在地相关县级以上地方人民政府的意见，由有关主管部门批准。

第十三条　地名命名、更名后，由批准机关自批准之日起 15 日内按照下列规定报送备案：

（一）国务院有关部门批准的地名报送国务院备案，备案材料径送国务院地名行政主管部门；

（二）县级以上地方人民政府批准的地名报送上一级人民政府备案，备案材料径送上一级人民政府地名行政主管部门；

（三）县级以上地方人民政府地名行政主管部门批准的地名报送上一级人民政府地名行政主管部门备案；

（四）其他有关部门批准的地名报送同级人民政府地名行政主管部门备案。

第十四条　按照本条例规定，县级以上人民政府或者由县级以上地方人民政府地名行政主管部门批准的地名，自批准之日起 15 日内，由同级人民政府地名行政主管部门向社会公告；县级以上人民政府其他有关部门批准的地名，自按规定报送备案之日起 15 日内，由同级人民政府地名行政主管部门向社会公告。

第三章　地名使用

第十五条　地名的使用应当标准、规范。

地名的罗马字母拼写以《汉语拼音方案》作为统一规范，按照国务院地名行政主管部门会同国务院有关部门制定的规则拼写。

按照本条例规定批准的地名为标准地名。

标准地名应当符合地名的用字读音审定规范和少数民族语地名、外国语地名汉字译写等规范。

第十六条　国务院地名行政主管部门统一建立国家地名信息库，公布标准地名等信息，充分发挥国家地名信息库在服务群众生活、社会治理、科学研究、国防建设等方面的积极作用，提高服务信息化、智能化、便捷化水平，方便公众使用。

第十七条　县级以上地方人民政府地名行政主管部门和其他有关部门之间应当建立健全地名信息资源共建共享机制。

第十八条　下列范围内必须使用标准地名：

（一）地名标志、交通标志、广告牌匾等标识；

（二）通过报刊、广播、电视等新闻媒体和政府网站等公共平台发布的信息；

（三）法律文书、身份证明、商品房预售许可证明、不动产权属证书等各类公文、证件；

（四）辞书等工具类以及教材教辅等学习类公开出版物；

（五）向社会公开的地图；

（六）法律、行政法规规定应当使用标准地名的其他情形。

第十九条　标准地名及相关信息应当在地名标志上予以标示。任何单位和个人不得擅自设置、拆除、移动、涂改、遮挡、损毁地名标志。

第二十条　县级以上地方人民政府应当加强地名标志的设置和管理。

第二十一条　直辖市、市、县人民政府地名行政主管部门和其他有关部门应当在各自职责范围内，依据标准地名编制标准地址并设置标志。

第二十二条　标准地名出版物由地名机构负责汇集出版。其中行政区划名称，由负责行政区划具体管理工作的部门汇集出版。

第四章　地名文化保护

第二十三条　县级以上人民政府应当从我国地名的历史和实际出发，加强地名文化公益宣传，组织研究、传承地名文化。

第二十四条　县级以上人民政府应当加强地名文化遗产保护，并将符合条件的地名文化遗产依法列入非物质文化遗产保护范围。

第二十五条　县级以上地方人民政府地名行政主管部门应当对本行政区域内具有重要历史文化价值、体现中华历史文脉的地名进行普查，做好收集、记录、统计等工作，制定保护名录。列入保护名录的地名确需更名的，所在地县级以上地方人民政府应当预先制定相应的保护措施。

第二十六条　县级以上地方人民政府应当做好地名档案管理工作。地名档案管理的具体办法，由国务院地名行政主管部门会同国家档案行政管理部门制定。

第二十七条　国家鼓励公民、企业和社会组织参与地名文化保护活动。

第五章　监督检查

第二十八条　上级人民政府地名行政主管部门应当加强对下级人民政府地名行政主管部门地名管理工作的指导、监督。上级人民政府其他有关部门应当加强对下级人民政府相应部门地名管理工作的指导、监督。

第二十九条　县级以上人民政府地名行政主管部门和其他有关部门应当依法加强对地名的命名、更名、使用、文化保护的监督检查。

县级以上人民政府应当加强地名管理能力建设。

第三十条　县级以上人民政府地名行政主管部门和其他有关部门对地名管理工作进行监督检查时，有权采取下列措施：

（一）询问有关当事人，调查与地名管理有关的情况；

（二）查阅、复制有关资料；

（三）对涉嫌存在地名违法行为的场所实施现场检查；

（四）检查与涉嫌地名违法行为有关的物品；

（五）法律、行政法规规定的其他措施。

县级以上人民政府地名行政主管部门和其他有关部门依法行使前款规定的职权时，当事人应当予以协助、配合，不得拒绝、阻挠。

第三十一条　县级以上人民政府地名行政主管部门和其他有关部门在监督检查中发现地名的命名、更名、使用、文化保护存在问题的，应当及时提出整改建议，下达整改通知书，依法向有关部门提出处理建议；对涉嫌违反本条例规定的有关责任人员，必要时可以采取约谈措施，并向社会通报。

第三十二条　县级以上人民政府地名行政主管部门和其他有关部门可以委托第三方机构对地名的命名、更名、使用、文化保护等情况进行评估。

第三十三条　任何单位和个人发现违反本条例规定行为的，可以向县级以上地方人民政府地名行政主管部门或者其他有关部门举报。接到举报的部门应当依法处理。有关部门应当对举报人的相关信息予以保密。

第六章　法律责任

第三十四条　县级以上地方人民政府地名批准机关违反本条例规定进行地名命名、更名的，由其上一级行政机关责令改正，对该批准机关负有责任的领导人员和其他直接责任人员依法给予处分。

第三十五条　县级以上地方人民政府地名批准机关不报送备案或者未按时报送备案的，由国务院地名行政主管部门或者上一级人民政府地名行政主管部门通知该批准机关，限期报送；逾期仍未报送的，对直接责任人员依法给予处分。

第三十六条　违反本条例第四条、第九条、第十条、第十二条规定，擅自进行地名命名、更名的，由有审批权的行政机关责令限期改正；逾期不改正的，予以取缔，并对违法单位通报批评。

第三十七条　违反本条例第十八条规定，未使用或者未规范使用标准地名的，由县级以上地方人民政府地名行政主管部门或者其他有关部门责令限期改正；逾期不改正的，对违法单位通报批评，并通知有关主管部门依法处理；对违法单位的法定代表人或者主要负责人、直接负责的主管人员和其他直接责任人员，处 2000 元以上 1 万元以下罚款。

第三十八条　擅自设置、拆除、移动、涂改、遮挡、损毁地名标志的，由地名标志设置、维护和管理部门责令改正并对责任人员处 1000 元以上 5000 元以下罚款。

第三十九条　第三方机构对地名的命名、更名、使用、文化保护等情况出具虚假评估报告的，由县级以上地方人民政府地名行政主管部门给予警告，有违法所得的，没收违法所得；情节严重的，5 年内禁止从事地名相关评估工作。

第四十条　公职人员在地名管理工作中有滥用职权、玩忽职守、徇私舞弊行为的，依法给予处分。

第七章　附　则

第四十一条　各国管辖范围外区域的地理实体和天体地理实体命名、更名的规则和程序，由国务院地名行政主管部门会同有关部门制定。

第四十二条　纪念设施、遗址的命名、更名，按照国家有关规定办理。

第四十三条　国务院地名行政主管部门可以依据本条例的规定，制定具体实施办法。

第四十四条　本条例自 2022 年 5 月 1 日起施行。

《海洋法律与政策》稿约

《海洋法律与政策》(Marine Law and Policy)，国际刊号：2709-3948,电子刊号：2710-1738，是大海法领域中英双语对照的优秀国际学术期刊。本刊秉承实事求是的精神，力求刊发海内外与海洋法律、海洋政策相关的一切优秀研究成果，热忱欢迎广大专家、学者不吝赐稿，兹立稿约如下:

一、鼓励英文著述，同一学术水准稿件，英文著述将优先录用。

二、来稿形式不限，学术专论、评论、判解研究、译作等均可,篇幅长短不拘，不考虑稿件作者的身份和以往学术经历，只有学术水准和学术规范的要求。

三、来稿须同一语言下未曾在任何纸质和电子媒介上发表。稿件请注明作者姓名、学位、工作单位、职务、职称、研究领域和通讯方式等。来稿必复，编辑部将在收到来稿后两个月内安排匿名审稿。超过 3 个月未接到录用通知者，可自做他用。来稿一律不退，请作者自留底稿。

四、译作请附寄原文，并附作者或出版者的翻译书面授权许可。译者须保证译本未侵犯作者或出版者的任何权利，并在可能的损害产生时自行承担损害赔偿责任。《海洋法律与政策》编辑部及其任何成员不承担由此产生的任何责任。

五、欢迎对本刊所刊文章进行转载摘登和结集出版,但应尊重原作者依照《中华人民共和国著作权法》享有的权利，并在转载时注明“转自《海洋法律与政策》20xx 年第 x 期”和原作者、译校者姓名，同时书面通知本刊编辑部。

六、为扩大本刊及作者的知识信息交流渠道，本刊将陆续加入 Westlaw China、北大法宝、台湾华艺、维普、中国知网、超星法源、读秀、Heinonline 等中外数据库，除非作者在来稿时特别声明，否则即视为同意《海洋法律与政策》拥有以非专有方式向第三方授予己刊作品电子出版权、信息网络传播权和数字化汇编、复制权，以及向《中国社会科学文摘》《高等学校文科学术文摘》和中国人民大学书报复印资料等文摘类刊物推荐转载己刊作品的权利。

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《海洋法律与政策》编辑

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2. Potential contributors are expected to provide their personal information, including name, degree, occupation, and contact information;

3. Contributors should strictly follow the format for academic writings;

4. If the submission is a translation from other professionals, the origina1paper and a written authorization issued by the original author or publisher are also required;

5. Authors are responsible for the content of their contributions, unless otherwise declared; however, the Editorial Board has the discretion to edit the textual details;

6. Submissions are subject to double-blind peer review within two months of submission;

7. Authors of selected papers will be paid in a lump-sum and the electronic version of the Journal will be offered to each author;

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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.。

Jürgen Habermas, Between Facts and Norms: Contribution to a Discourse Theory of Law and Democracy, translated by William Rehg, MIT Press, 1996, p.330-336.

（四）英文网页

Stephen McDonell, When China Began Streaming Trials Online, BBC NEWS (Sept. 30, 2016),

https://www.bbc.com/news/blogs-china-blog-37515399.

（五）其他

英文案例的引用方式， 因不同国家、不同法院、不同案例报告系统而有所区别。基本格式为

Natural Resources Defense Council v. Gorsuch, 685 F.2d 718 (D.C. Cir. 1982); Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

*详细可请参考中国法学会法学期刊研究会出版的《法学引注手册 2019》。

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