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淺析商港法 第十八條條文修正

An interpretative overview of the amended provisions enlisted to Article 18 of the Commercial Harbor Administration Law



前言

商 港法於中華民國94年2月5日總統華總一義字第09400016881號令修正公布第18條條文，其修正重點將該條原列示之禁止行為條款中，針對第1項第2款採捕水產動、植物禁止規定，增列條文予以修正，以符合現實狀況避免行政機關之「禁止過當原則」¹。筆者就立法院相關文書綜整成文，論述該法條修正之精義，期對職司於港口安全檢查工作的海岸巡防機關同仁有所助益。

修正說明

依據立法院議案關係文書院總第454號委員提案5712號內容，該法提案修正之緣起乃在於近年來釣魚人口激增，雖有漁港增闢休閒育樂之功能，因為商港並未開放民眾垂釣，而民眾對能垂釣之處所仍嫌不足；各民間釣場又缺乏管理與安全措施，使釣客不顧危險在惡劣天氣下，或爬上消波塊、礁岩等危險地點釣魚，因此，每年均發生多件釣客意外落海之不幸事件，政府為此付出不少社會成本。

另商港法制訂該條之立法目的乃在維護港區之船隻航行安全以及港區之環境整潔防止污染考量下，全面禁止在港區內採捕水產動、植物。提案委員認為此規定未考量台灣各商港不同之地理條件，以及民眾缺乏適當垂釣處所的窘境，在維護公共利益與限制人民權利之權衡並不相當，顯已違反憲法保障人民權利之「比例原則」。

故爰提出該法第18條條文修正草案，以解決前述公私調和之問題。

Foreword

The Commercial Harbor Administration Law has had the provisions of Article 18 amended through a presidential order, ref. Presidential Hwa Zong I Yi No. 09400016881, on February 5, 2005, in which the main focus of the amendment lies in rephrasing the stipulations of banning the catching of aquatic animals and plants as enlisted under item 2, par 1 of the previous article through newly appended provisions that best supports the current situation and provides the administrative agencies with a principle from excessive banning¹. The author has recapped relevant Legislative Yuan documents into a concise account, which would explain the very essence of the legislative amendment in anticipation that this will enlighten Coast Guard Administration fellow workers when conducting harbor security inspection work.

Description of relevant amendments

As can be extrapolated from the content of the Legislative Yuan proposal bill, which pertains to a #5712 legislative proposal, ref. Legislative Archives Yuan Zong No. 454, the origin of the legislative amendment bill stems from the public's demand for additional fishing sites although commercial harbors are not open for public fishing amid an increase of the recreational fishing population in recent years and despite fishing ports had also be utilized to provide a recreational function. And in light that a large number of private-run fishing sites that tend to lack proper management and safety measures, it is not uncommon that recreational fishers would risk their lives fishing at hazardous sites, such as climbing on top of the wave breaker or reefs in nasty climatic conditions to fish, which not only result in many unfortunate incidents yearly of recreational fishers falling into the sea, but it also costs the government dearly in terms of social expenditure.

Moreover, the purpose of promulgating the provision to the Commercial Harbor Administration Law lies in inducting a complete ban against the act of catching aquatic animals and plants taken into account the need to maintain vessel navigation safety and keep the harbor environment neat and free of pollution. While the proposing law-makers reckon that the stipulation has not take into account varied geographical conditions at various commercial harbors across Taiwan, and the strapping situation how the public have no place to fish, arguing that the legal restriction has appeared inappropriate upon weighing public equity and restriction of citizen rights, and as an infringement to the principle of proportion in how the constitution is to serve to protect the rights of the people.

Hence, a draft bill for amending Article 18 of the harbor law has been put forth in an attempt to resolve the foresaid friction between the public sector and the private sector.

修正重點概述

本次修正重點係增訂第 18 條第 2 項條文，針對該條第 1 項第 2 款有關採捕水產動、植物禁止不合時宜的規定，增列第 2、3 項條文；第 2 項明定港口管理機關應開放港區部分處所，供民眾採捕水產動、植物活動²；第 3 項則授權商港管理機關基此訂定管理辦法以便於有效管理³。

此提案條文於交通委員會審查時提案委員與列席官員分持不同立場，就提案審查討論內容觀之，可洞悉幾點修法爭議：

一、商港法之立法目的乃在於商港為國家經貿門戶，為確保船貨安全、防杜走私、服務出入境旅客所需，必須予以管制維護港區作業安全以及防止污染而規範，蓋各類港口之設計及設施係對各型船舶出入、停泊、裝卸、保養、補給及其他相關作業而設置，其各項設施之功能並未依「釣魚」之需求而設計，若貿然開放而衍生包括海關作業及人命、國家安全等相關安全措施與問題豈為主管機關與管理機關所能盡負全責？尤其從今年 7 月 1 日起開始實施之美國反恐措施

(ISPS)，要求各商港可能包括碼頭應有的保全措施，如何在安全考量及一般民眾的權益之間取得平衡，須經由協商始能取得共職。

二、商港法第 46 條規定對違反禁止採捕水產動、植物之行爲處負責人或行爲人新臺幣 9 萬元以上 90 萬元以下罰鍰，並得按

Abstract of amendment focuses

A main focus of the current round of legislative amendment lies in appending the provision of par 2 under Article 18, and enlisting the provisions of par 2 and par 3 addressing the outdated stipulations as cited under item 2, par 1 of the article pertaining to banning the catching aquatic animals and plants. Par 2 of the article clearly stipulates that harbor administration agencies are to open part of a harbor area for the public to conduct activities for catching aquatic animals and plants²; par 3 pertains to empowering commercial harbor administration agencies are to draft an administration measure based on this to ensure an effective management³.

At the legislature's Transportation Committee review, the propositioning lawmakers and the attending government offices have had a dispersed view toward the legislative proposal, and review the content of the legislative discussion could shed some light as to where the legislative amendment disputes lie :

I. The purpose of legislating the Commercial Harbor Administration Law lies in that commercial harbors are regarded as a nation's economic and trade gateway, to ensure the safety of cargo and ships, curtail



smuggling, and serving the needs of inbound and outbound passengers, there is a necessity to instigate control and uphold guidelines for enforcing harbor operational safety and prevention against pollution. Given that the design and facilities at various harbors are intended to support the coming and going of various ship models, berthing, loading and unloading of cargoes, repair and maintenance, supply replenishment and other related operations, none of the intended facilities have been designed to accommodate the needs of leisure fishers, and an abrupt deregulation could involve Customs

其情節責令拆除；再違反者，並得沒入其採捕之船、具、物料。另第48條亦規定對所處之罰鍰，經限期繳納，屆期不繳納者，依法移送強制執行。綜此規定對「偷釣」之微罪行爲，施以重罰似已違反上述「比例原則」而顯失均衡，實具檢討空間。

三、另禁止採捕水產動、植物之規定中，對所謂「採捕」之定義，是官民間一直爭執的問題，目前引用此二字之我國法令計有11條法規命令，檢視這些條文對「採捕」均未有明確解釋及定義，而問題之爭點在於「竿釣」是否屬採捕方法之一，截至目前為止各有關機關仍未對此有正式函釋，審查委員會之會議紀錄內容論及漁業署署長表示：「竿釣」應該不屬「採捕」範疇，然依漁業法第43條訂定之娛樂漁業管理辦法第14條對於娛樂漁業「採捕」水產動植物之方法，以竿釣、一支釣、曳繩釣爲限，亦指「竿釣」爲「採捕」方法之一。另漁業署養殖及沿近海漁業組回覆人民對漁港法第18條所指「採捕」定義之疑義案說明內文⁴，稱「採捕」之行爲包括以徒手、釣竿、垂釣、網具、潛水或其他器具採集、捕捉、獵取（含設網捕獵）水產動植物等行爲，均屬該條文規範範圍。故如何在現行禁止規定下，朝「有效管制，有限開放」的方向修法亦是此次修正重點。

四、就交通部立場而言在維持商港主要功能及實施保全下，對原提議案明定由商港管理機關「應」選定港區內部分安全之防波堤處所訂定管理辦法開放民衆採捕水產動、植物，有所窒礙難行之處，蓋唯恐若生人命安全問題是否又涉及國家賠償部分，實是非職司港務之管理機關所能承擔，而爲減少社會成本不當支出的修法美意，可預見未因此而減少與改善；另「安全之防波堤處所」是否爲即爲合適之「釣場」亦待認定，而非有水即有魚之心態；且所稱之「採捕」是否僅限於

operations and put human lives in jeopardy, as well as national security issues that are quite beyond the jurisdiction of the competent authority or administration agency. Particularly following the U.S.'s anti-terrorism measure, the ISPS effective July 1 this year, demanding that all commercial harbor to take up necessary security measures, it would call for negotiations to secure a consensus in terms of how best to balance the security concern versus protecting the equity of the general public.

II. Article 46 of the Commercial Harbor Administration Law stipulations that a proprietor or the instigator's act for violating the ban against catching aquatic animals and plants is punishable by a punitive fine ranging from NT\$90,000 up to NT\$900,000, and may order the trapping devices be dismantled depending on the severity; repeat offenders may have their catching vessel, devices and supplies confiscated. In addition, article 48 also stipulates that those who have levied with a punitive fine but failed to honor remitting it by due date are subject to mandatory execution as permitted by law. Capping how the stipulations penalize the misdemeanor of illegal fishing that levies a heavy penalty seems to have deviated from the foresaid principle of proportion to render it lopsided and leaves room for discussion.

III. In addition, with regard to stipulations banning the catching of aquatic animals and plants, the definition of the so-called catching has long been an issue disputed between the government officials and the private sector. Currently, there are 11 legal provisions that refer to this wording, yet a closer examination yields no clear-cut interpretation or definition that the cited legal provisions attempt to define the meaning of catching, and the dispute focus remains whether fishing with a fishing pole would constitute as one of the means of catching. So far no agency has come up with a formal documented interpretation, while the review committee's meeting log has cited what the head of the Fishery Administration has said, "Fishing by fishing pole should not fall under the scope of catching.", but is subject to leisure fishing as bound by Fishery law article 43, and as per leisure fishing as means for catching aquatic animals and plants as defined by Leisure Fishery law article 14, where the devices are limited to single fishing pole, drag pole, which however does refer to pole fishing as one of the means of catching. In addition, the Fishery Administration's reply to marine farming and near coast fishing citing article 18 of the Fishing Harbor Administration law that the definition of catching in describing the text of a suspicious case has cited the act of catching to include that by bare hand, fishing pole, bait fishing, net fishing, diving, or gathering, catching, hunting by other devices, including trapped using fishing net for aquatic animals and plants, all of which would fall under the scope of the legal guideline. Hence how best to brace toward an effective control and limited de-regulation under the current banning regulations is also a focus point for the current legislative amendment⁴.

IV. From the Ministry of Transportation and Communications' standpoint in maintaining commercial harbors' primary functions and security enforcement, what the previous proposal has clearly cited that the harbor administration agency ought to select certain safe breakwater areas within a commercial harbor and draft a man-



「竿釣」在提案條文並未明確規定，即使由管理辦法規範，在因時因地之現實情形下，亦可能與目前尚未修正之農漁業相關法規競合，而是否能適用一體解釋尚有爭議！經會議協商後，將原提案修正範圍限縮賦予各商港管理機關之「行政裁量」，在不妨害港區作業、安全及不造成污染之區域（指商港區域內），「得」與登記有案之相關社團協商相關措施，公告開放民眾禁止「採捕水產動、植物」之規定，而進行「垂釣」活動；該條文之通過之版本始送交立法院三讀通過。

agement act for deregulating the sites for the public to catch aquatic animals and plants does present difficulties in actual enforcement, notwithstanding the issues whether safety of lives involves national compensation, which does go beyond the jurisdiction of the harbor administration agency, whereas the good intention of the legislative amendment in a move to reduce misspending of social cost is foreseeable that it will not be diminished or improved. Moreover, the issue revolving around safe breakwater areas automatically constitute as ideal fishing sites is also debatable, rather than taking to the mentality that there must be fish where there is water. Besides, does the so-called catching is limited only to pole fishing, which has not been clearly defined in the legislative amendment bill, and even if it is stipulated in the management act, under realistic circumstances, it could run against the relevant farming and fishery laws that have not yet been amended, and remains debatable whether it applies to all circumstances. Following rounds of negotiations, it has been agreed upon that the scope of the previous amendment bill be narrowed down to an administrative judgment by the competent harbor administration agency, which may negotiate relevant measures with registered community organizations and publicly announce the



結語

港口安全檢查工作乃我海岸巡防機關依法掌理事項之一，雖然港埠之安全管理本署非為管理機關，然有關人民因海岸活動所生之意外事件（如意外落水）救助亦為我海巡機關責無旁貸依法應執行事項及義務，對此法令之修正我等同仁須瞭解該條文之精髓，期能於修法後熟諳法令之規定，配合主管機關及管理機關在合乎法治原則下落實依法行政，保障人民權益，維護民衆安全。（作者現任職海岸巡防總局人員研習中心）

deregulation of banning the public from catching aquatic animals and plants, by conducting pole fishing; and the passing of this provision of the amendment bill would then be forward to the Legislative Yuan for the third reading.

Recapitulation

As harbor security inspection work remains one of the categories of work that falls under Taiwan's Coast Guard Administration as empowered by law, though not as an agent directly responsible for harbor security, but the accidental incidents of general public activities, such as accidental fall into the sea arisen from the people's shore activities, it is however the obligation and responsibility of the Coast Guard Administration to render necessary assistance. With regard to the legislative amendment bill, all administration associates need to be aware of the every essence of the legislative provisions in anticipation that all would be familiar with the law following the amendment, and be able to support the competent government authorities and administration agencies to fully enforce the law as bound by a lawful principle, protect public equity, and enhance public safety.

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註釋

註 1 即為「比例原則」，或稱「過當禁止原則」。

註 2 商港法第十八條第二項提案內容：「商港管理機關於不妨害港區安全及污染港區之限度內，應選定港區內部分安全之防波堤處所，開放民衆採捕水產動、植物。」

註 3 商港法第十八條第三項提案內容：「前項商港開放採捕水產動、植物管理辦法，由交通部定之。」

註 4 <http://www.fa.gov.tw/board/ViewArtical.php>

Footnote:

1. This pertains to the principle of proportion, or principle of excessive ban.

2. The content of the proposal for enlisting par 2 of Article 18 of the Commercial Harbor Administration Law, "The commercial harbor administration agencies are to select part of the safe breakwater area within the harbor that would be open to the public for catching aquatic animals and plants under the requisite of without jeopardizing harbor safety or polluting the harbor".

3. The Content of the proposal for enlisting par 3 of Article 18 of the Commercial Harbor Administration Law, "The specific management measure for the foresaid commercial harbor deregulation for the catching of aquatic animals and plants is to be defined by the Ministry of Transportation and Communications".

4. HYPERLINK "<http://www.fa.gov.tw/board/ViewArticle.php>"



Annexed table: A table of comparison on revised provisions of Article 18 of the Commercial Harbor Administration Law

Provisions passed through the third reading	<p>Within a commercial harbor area, the following conducts are banned,</p> <ol style="list-style-type: none"> 1.To anchor at the area where seabed cables or seabed pipelines pass. 2.To catch aquatic animals and plants. 3.To raise oysters and other aquatic products. 4.To engage in other acts that may jeopardize harbor safety or pollution the harbor area. <p>The foresaid item 2 stipulates that the harbor administration agency may negotiate relevant measures with registered community organizations to publicly announce the deregulation for the public to engage in pole fishing without jeopardizing the harbor operations, safety, or causing pollution to the area.</p>
Proposed provisions to be amended	<p>Within a commercial harbor area, the following conducts are banned,</p> <ol style="list-style-type: none"> 1.To anchor at the area where seabed cables or seabed pipelines pass. 2.To catch aquatic animals and plants. 3.To raise oysters and other aquatic products. 4.To engage in other acts that may jeopardize harbor safety or pollution the harbor area. <p>The harbor administration agency is to select safe breakwater areas within a commercial harbor and to open the areas for the public to engage in pole fishing without jeopardizing the harbor area's safety, or polluting the harbor area.</p> <p>The Ministry of Transportation and Communications is to define a management act for the foresaid commercial harbor deregulating for public catching of aquatic animals and plants.</p>
Current provisions	<p>Within a commercial harbor area, the following conducts are banned,</p> <ol style="list-style-type: none"> 1.To anchor at the area where seabed cables or seabed pipelines pass. 2.To catch aquatic animals and plants. 3.To raise oysters and other aquatic products. 4.To engage in other acts that may jeopardize harbor safety or pollution the harbor area.
Relevant description	<p>Lawmaker's proposal:</p> <ol style="list-style-type: none"> 1. As a nation surrounded by the sea on all four sides, yet many military or political restrictive measures adopted in the past have stripped the Taiwanese people their right to engage in maritime activities. In recent years, amid the increasing fishing population, the lack of commercial harbors deregulated for public fishing, coupled with the lack of proper management and safety precautions, has sent many fishers to engage in risky acts of climbing up the breakwater or reefs in nasty climatic conditions to fish, which often result in a number of unfortunate incidents on a yearly basis, which the government needs to pay a substantial social cost. 2.Under par 2, article 18 of the current Commercial Harbor Administration Law that levies a complete ban against catching aquatic animals and plants within a commercial harbor area taken into account vessel navigation safety within a harbor and harbor environmental cleanliness, yet the complete ban has not taken into account varied geographical conditions throughout Taiwan's commercial harbors, and the dire situation of the public's lacking proper places to engage in fishing, where the imbalance between maintaining public equity and restricting the people's rights has ominously violate the principle of excessive banning. 3.One of the lawmaker reckons that as the breakwater areas at various commercial harbors in Taiwan have offered rather safe equipment, and empowering the harbor administration agency, coupled with a proper management act, would poise to deregulate fishing sites that would also excel the tourism industry, add job opportunities, and resolve the issue of mediating the disputes between the government and the private sector, hence item 2 and item 3 have been enlisted as shown in the amended provisions. <p>The review committee:</p> <p>Under the principle of addressing safety and an adequate level of deregulation, upon negotiations, the review committee has decided to enlist item 2, which stipulates that the harbor administration agency may negotiate relevant measures with registered community organizations to publicly announce the deregulation for the public to engage in pole fishing without jeopardizing the harbor operations, safety, or causing pollution to the area.</p>