



概論公海船旗國管轄制度

The Jurisdiction of Flag State on the High Seas

文 | 楊滢陵
Article | Yang Ying-ling

壹、引言

1982年《聯合國海洋法公約》（United Nations Convention on the Law of the Sea，簡稱《海洋法公約》）為部分習慣國際法之成文化，將沿海和海洋區域納入法律體系中，並管理主要海洋活動，故《海洋法公約》不僅得作為許多國際機制之基礎，亦為最廣泛運用的全球性條約之一。《海洋法公約》創設「專屬經濟區」(Exclusive Economic Zone)制度後，亦重新定義了「公海」(high seas)之範圍，並將「主權平等原則」(sovereign equality)與「公海自由原則」(principle of the freedom of the high seas)納入規範，故得視為習慣國際法中「公海船旗國管轄制度」之證據。

所謂「船旗國管轄」係指，除船旗國外，任何國家均不得對公海上之船舶行使管轄權，亦即公海船舶之管轄權專屬於船旗國所有。至於無國籍船舶，並非意味任何國家皆不得予以逮捕，而係所有國家軍艦均得於公海上加以逮捕，且不得享有外交保護；此外，無國籍船舶亦非不適用任何法律或管轄權，此時應適用船舶所有人國籍所屬國之法律。¹

台灣四面環海，海域面積遼闊遠大於陸地面積，而我國漁業發展成績斐然，為全球重要之遠洋漁業國家，具有龐大的遠洋船隊與先進的漁撈能力；換言

Part I. Preface

"United Nations Convention on the Law of the Sea" of 1982, abbreviated as Convention on the Law of the Sea (using the Convention hereinafter), is the codification of customary international law, which incorporates the coastal and ocean area into the system of laws, governs major activities on the sea; therefore, it shall be not only the base of many international systems but also one the global conventions applied widely. The Convention has created the system "Exclusive Economic Zone", and re-defines the ambit of the "high seas", and combines "sovereign equality" and "principle of the freedom of the high seas" into the specification; therefore, it shall be regarded as "the evidence of the flag state jurisdiction on the High Seas" in the customary international law.

"The flag State jurisdiction" means that individual state except for the flag state can execute the jurisdiction over the vessels on the high seas, that is, the right of jurisdiction over the vessels on the high seas exclusively belongs to the flag state. In the case of stateless vessels, it does not mean that there is on states can arrest them, conversely stateless vessels can be arrested by every warship on the high seas, and they can not assert diplomatic protection; in addition, it does not mean that there is on rule or jurisdiction over them, in such situation, they are supposed to apply to vessels owners' domestic law.¹

Taiwan is surrounded by the sea; her ocean area is much larger than her land. The fishing industry has been developed rapidly, which makes Taiwan become an important pelagic

之，公海乃我國重要漁場，公海船旗國管轄制度實與我國漁業及海域執法密不可分，故本文欲藉由筆者對國際法之淺見，扼要概述公海船旗國管轄制度之沿革及未來發展。

貳、公海船旗國管轄制度之沿革

十五世紀，西方各國逐漸重視海洋利用，此時認為公海是「無主物」，因而許多國家開始對特定海域主張主權或管轄權；當時對於公海自由原則採消極定義，即指在公海僅禁止國家之干預；由此得推出「公海自由使用」(the freedom of utilization)之結論。²十七世紀，荷蘭學者「格老修斯」(Hugo GROTIUS)提出「海洋自由論」(Mare Liberum)，目的在對抗葡萄牙為貿易利益而就海洋空間所為之主權主張。此後，關於公海利用產生「海洋封閉論」(Mare Clausum)與「海洋自由論」之爭辯。十八世紀，早期對廣大海域主張主權之行為，儼然為國際社會所揚棄，但並非表示國家不再對鄰接其海域一定距離內之水域主張為其管轄權所及，因而1920年代各國實踐逐漸確立「領海」與「公海」制度，前者為沿海國主權所及之區域，後者則不得為任何國家所占有或置於任何國家管轄權之下。³

歷經冗長爭議，現今通認：公海為「共有物」，不僅不屬於任何國家所有，同時不受任何國家管轄，且不得為任何國家主張主權之對象。《公海公約》第2條、《海洋法公約》第87條第1款、第89條確定此項基本原則。任何國家不得將公海任何一部分置於其國家主權之下，甚至不得置於其管轄權之下。職是，必然之結果為：「任何國家均無權利干涉另一國家船舶對公海之『合法使用』」。另外，衍生出次原則：「在公海上，除少數特殊情形外，⁴任何國家對懸掛其他國家旗幟之船舶，均不得進行管轄。」因此，原則上僅有船旗國始得對公海船舶行使立法與執行之「專屬管轄權」。⁵自船旗國公海管轄權制度確立以來，國際社會成員均共同遵守。⁶公海船舶之管轄權專屬於「船旗

fishery state globally; Taiwan has enormous pelagic fleets and advanced fishing capacity; the high seas are an important fishing field for Taiwan, the Jurisdiction of Flag State on the high seas is inseparable from the fishery and the maritime law enforcement of Taiwan. That is why the author of this text, depending on her knowledge about the international law, summarizes the evolution and the development in the future of the flag state jurisdiction on the high seas.

Part II. The Evolution of the Jurisdiction of Flag State on the High Seas

In 15th century, the western countries gradually paid attention to the utilization of the ocean; at that time, the high seas was regarded as "res nullius", therefore many countries claimed sovereignty and jurisdiction over specific sea areas; and the interpretation of the principle of freedom of high seas was narrowly, that is, all states were prohibited to intervene foreign vessels on the high seas; on the basis of such interpretation, the conclusion of the freedom of utilization came into being.² In 17th century, a Dutch scholar, Hugo Grotius, put forward "Mare Liberum", with the purpose to resist that Spain advocated sovereignty on the sea for trade benefits. With regard to the utilization of the high seas, the argument between "Mare Clausum" and "the freedom of the sea" appeared. In 18th century, the assertion of sovereignty in the past seemed to be discarded, which did not mean that states could not claim jurisdiction over certain distance of the sea which is adjacent to their territorial sea; as a result, in 1920s, the states practices gradually established the system of "territorial sea" and "high seas"; the territorial sea was under the sovereignty of the coastal state, and the high seas shall not be occupied by any state or under the sovereignty of any country.³

After a long controversy, it is agreed nowadays that the high seas is the property in common. The high seas is not possessed or controlled by any state, meanwhile, it shall not be objective of jurisdiction, which is confirmed as the basic principles in article 1 of "the Convention of the High Seas" and article 87.1 and article 89 of "the Convention on the Law of the Sea". Any state shall not put any part of the high seas under her sovereignty or jurisdiction. An inevitable result is that any state could not interfere with the legal utilization of the high seas of other states. "On the high seas, states shall not exercise jurisdiction over the vessels which fly other states flag, except for certain specific exceptional case derived from the basic principle as its sub-principle."⁴ Therefore, only the flag state can execute the exclusive jurisdiction (i.e. right of execution and legislative power) to the vessels on the high seas.⁵ Since the

國」(flag State)所有，現已成為國際海洋法之基石，且深植於「主權平等原則」與「公海自由原則」之上。⁷當代海洋法許多重要原則與概念深受早期習慣國際法影響，尤其是「公海捕魚自由原則」(the principle of the freedom of fishing in the high seas)，蓋二十世紀海洋法發展期間，主要在解釋與補充傳統國際法規則，鮮少創設新的法律概念或原則。因此，所有海洋法之現代發展皆與「公海自由原則」密切相關。⁸

參、公海船旗國管轄制度之發展

由於缺乏超國家組織管理公海區域，因而船旗國管轄模式遂成為規範公海活動之主要方式。船舶與其船旗國之連結在於，當船舶位於公海時，船旗國之內國法和國際法上權利與義務自動適用於公海範圍。儘管《海洋法公約》未對「船旗國」與「船旗國管轄」作出定義，但仍得以一般概念予以理解，即船旗國係指一艘船舶之國籍所屬國，且該船有權懸掛其國籍所屬國之旗幟，而此船舶之國籍所屬國即為船旗國；1986年《聯合國船舶註冊條件公約》(The United Nations Convention on the Conditions for Registration of Ships)亦對船旗國為相同定義。船旗國管轄得視為船旗國概念之延伸，意指無論船舶身處何方均受船旗國管轄。事實上，船旗國管轄制度之目的，即在使位於國家管轄水域外之船舶活動受其法規拘束。職是，就公海活動之管理與控制而言，船旗國扮演十分重要角色。

關於船旗國管轄性質，學說容有爭議。有主張將船舶視為國家領土之延伸者，亦即將船舶視為船旗國之「浮動島嶼」(a floating island)或「浮動領土」(a floating territory)；有論者認為基於海上船舶通商便利之要求，應由船旗國管轄，且此亦為各國所默認；⁹另有認為，之所以賦予船旗國專屬管轄權，乃是公海性質使然，蓋公海雖不屬於任何國家，但並非無法律狀態，而係由所有國家共同管轄，即在特定情形下非船旗國亦得行使管轄權。¹⁰

system of the flag state jurisdiction was established, all members of international community have comply with this legal system.⁶ The jurisdiction of vessels on the high seas exclusively belongs to its flag state has become the foundation of the international law of the sea, and planted deeply into "sovereign equality" and "the principle of freedom of high seas."⁷ Many principles and concepts of the contemporary law of the sea are influenced deeply by the early customary international law, especially "the principle of the freedom of fishing in the high seas." Generally, during the process of development of the law of the sea, it mainly focused on interpretation and supplement to the principles of the customary international law, and seldom created new principles or concepts; therefore, all the contemporary developments of the law of the sea are closely related to "the principle of freedom of high seas."⁸

Part III. The development of the Jurisdiction of Flag State on the High Seas

In virtue of lack of supernational organizations to govern the activities on the high seas, the system of flag state jurisdiction becomes the major mean to regulate the activities on the high seas. When the vessel positioned on the high seas, the law of its flag state and the duty and rights in international law automatically applicable on the high seas. Although Convention of the Law of the Sea does not give definition to "flag state" and "the jurisdiction of flag state," we can realize these concepts in general way; that is, flag state means the state that the nationality of the vessel belongs to, and the vessel has the right to fly the flag of the state, which the nationality of the vessel belongs to. The Flag State was defined as the same in "The United Nations Convention on the Conditions for Registration of Ships" (1986). The Jurisdiction of Flag State can be regarded as the extension of the concept of flag state, which means that the vessel shall be governed by its flag state wherever it is. In fact, the purpose of the system of flag state jurisdiction is to regulate the activities of the vessels out the waters of the state by its laws and regulations. The flag state plays a significant role in administering and controlling the activities on the high seas.

With regard to characteristic of the jurisdiction of flag state, international layers have many arguments. Someone regards vessel as the extension of state territory, in other words, they take vessels as "a floating island" or "a floating territory of flag state"⁹; some people argue that the vessel shall be administered by the flag state for consideration of convenient requirements of commerce, and this argument is recognized by all states; otherwise someone suppose that the characteristic of the high seas is the main reason why flag state possesses

除從理論檢視外，亦得從實際面加以討論。原則上，船旗國與其船舶間具有一定關連性，船旗國藉由授與船舶國籍而獲得管理與控制權，舉凡船旗國之內國法均對該船舶產生拘束力；其次，船旗國擁有最完整之資源得確保船上秩序，因而無論船舶駛往何處，船旗國管轄權皆不會改變。職是，即使船舶位於公海，船旗國仍得對之行使管轄權。換言之，將公海管轄權專屬於船旗國所享有誠屬「功能取向」，無非在於藉此以確保海洋秩序和維持航運之暢通。

一、國際法規範

《公海公約》與《海洋法公約》就海洋生物資源之開發、海洋運輸等建立全球性法律架構，是以船旗國得規範其船舶在公海之活動；《公海公約》與《海洋法公約》第七部分相關規定，則為船旗國最低限度之權利與義務，亦即船旗國對於其船舶之管理與控制至少須符合此等規定，且得為更嚴格之規範。

依《公海公約》第6條與《海洋法公約》第92條規定，位於公海之船舶，其管轄權專屬於船旗國，且依據《公海公約》第5條與《海洋法公約》第94條規定，船旗國必須對其船舶確實有效行使在行政、科技及社會事項上之管轄和控制。關於公海生物資源之養護，依《海洋法公約》第119條第1款第1項、第2項、第117條及第118條規定，各國應相互合作共同養護公海生物資源，故船旗國必須確保船舶於公海之活動會遵守全球性、區域或分區域之相關養護管理措施。就海洋環境之保護和保全而言，根據《海洋法公約》第十二部分規定，各國負有保護和保全海洋環境之義務，且應採取一切必要措施以確保在其管轄和控制下之活動，不會對其他國家及其環境造成污染與損害，解釋上當然包括船舶在公海所進行之活動。此外，《海洋法公約》第217條特別加諸船旗國就來自船舶污染之執行責任，此即第92條和第94條規定之船旗國一般義務；而第217條規定之目的在於加強與促進船旗國執行制度之效力。¹¹

1993年《促進公海漁船遵守國際養護與管理措施協定》(Agreement to Promote Compliance with International Conservation and Management

the exclusive jurisdiction, although the high seas are not possessed by any state and not in the condition of no laws, it shall be administered by all states, and in the particular cases, it can also be administered by the non-flag states.¹⁰

It could be examined both in theory and in practice, in principle, there are certain connections between the vessel and flag state: the flag state obtains the rights to control and administer the vessel through conferring the nationality to the vessel, and all the domestic laws are applicable to the vessel; the jurisdiction of flag state shall not be changed wherever the vessel is, because flag state has the most comprehensive resources to guarantee the order aboard. Even if the vessel is on the high seas, the vessel flag state shall also execute the jurisdiction over the vessel. In other words, the jurisdiction of the high seas exclusive belongs to flag state merely a function-oriented, the purpose is to keep the order on the sea and maintain navigation unhindered.

(I) Regulations of International Law

The global legal structure for the exploration of marine biological resources and marine transportation et cetera were established by "Convention of the High Seas" and "Convention on the Law of the Sea", consequently, flag state shall regulate the activities of its vessels on the high seas; the lowest standards of obligations and rights of flag state are stated by the relative rules in the seventh part of "Convention of the High Seas" and "Convention on the Law of the Sea", in other words, flag state shall administer and control its vessels in accordance with these regulations at least, meanwhile flag state shall stipulate much stricter.

According to the article 6 of "Convention of the High Seas" and the article 92 of "Convention on the Law of the Sea", the jurisdiction of the vessel positioned on the high seas exclusively belongs to the flag state. According to the article 5 of "Convention of the High Seas" and the article 94 of "Convention on the Law of the Sea", the flag state is obliged to assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship. According to the article 119.1(a), article 117 and article 118 of Convention on the Law of the Sea, all states shall cooperate with other states to conserve the living resources of the high seas, therefore the flag state is obliged to ensure its vessels' activities on the high seas would comply with global, regional or sub-regional measures for conservation and management of living resources. As for conservation and management of marine environment, according to the part 12 of "Convention on the Law of the Sea",

Measures by Fishing Vessels on the High Seas) (簡稱《促進協定》(the Compliance Agreement)) 不僅針對「換旗」(reflagging)問題為規定，更加強船旗國對管理和控制其漁船在公海捕魚時之行為責任，以達有效養護與管理公海生物資源之目的。《促進協定》前言揭示，對於有權懸掛其旗幟之漁船，船旗國未符合其協定責任時，即構成對養護與管理措施之嚴重損害；且就有權懸掛其旗幟之漁船在公海違反養護與管理措施所進行之活動，船旗國須對該等行為負責。

《促進協定》第3條更進一步強化船旗國責任，要求船旗國應有效管轄與控制有權懸掛其旗幟之漁船，並確保其遵守國際養護與管理措施。

為促進與加強《海洋法公約》有關養護與管理跨界魚群及高度洄游魚群之規定，於1995年通過《執行1982年12月10日〈聯合國海洋法公約〉有關養護與管理跨界魚群及高度洄游魚群規定之協定》(Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks) (簡稱《1995魚群協定》(1995 UN Straddling Fish Stocks Agreement))。

《1995魚群協定》第18條第2款規定，除非國家得對懸掛其旗幟之船舶有效行使控制權，否則不准許國家授權懸掛其旗幟之船舶於公海從事捕魚活動；第18條第3款則明列船旗國對其船舶應採取之措施。再者，亦加諸船旗國確保懸掛其船舶，無論身在何處，均會遵守區域性養護與管理措施之義務、調查違反相關措施船舶之義務、若有足夠證據顯示其違法情事，則應儘速提起訴訟、若確定船舶嚴重違反如是措施，則在所有制裁執行完畢前，不准其再於公海從事捕魚活動。¹²

《1995魚群協定》更進一步規定對於違法船舶所為之懲罰必須夠嚴厲，以有效保證其不會再違反。最後，《1995魚群協定》課予船旗國對於合理認為在公海之漁船曾在一國管轄區域內有未經授權而從事捕魚之情形，而在沿海國請求下應予以調查之義務。就公海生物資源之養護與管理而言，《1995魚群協定》賦予船旗國較《海洋法公約》更具「強制性」之義務。¹³

states have obligation to protect and preserve marine environment, and states shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, including activities of vessels on the high seas. In addition, article 217 of Convention on the Law of the Sea particularly provided that flag states are in charge of enforcement obligation for the pollution from their vessels, this is general obligation of flag states proved in article 92 and 94 of Convention on the Law of the Sea, and the purpose of article 217 is to enhance and promote the efficiency of enforcement of flag states.¹¹

The 1993 "Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas" (the Compliance Agreement) both provided for the re-flagging and enhance the responsibility of flag states to administer and control the behaviors of its fishing vessels on the high seas, in order to manage and conserve the biological resources in the high seas. The preface of "the Compliance Agreement" reveals, when flag states do not comply with their responsibilities in the Agreement, it would constitute seriously against the conservation and management measures, at the same time, flag states shall responsible for their vessels activities which are violation of conservation and management measures in the high seas.. The article 3 of "the Compliance Agreement" strengthens the responsibilities of flag states, it provides that flag states are asked to efficiently administer and control the fishing vessels with their flags and ensure that they would obey international conservation and management measures for living resources in the high seas.

In order to advance and enhance the regulations of "Convention on the Law of the Sea" relating to conservation and management of straddling fish stocks and highly migratory fish stocks, in 1995, "Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks" (hereinafter 1995 UN Straddling Fish Stocks Agreement) was adopted. According to article 18.2 of "1995 UN Straddling Fish Stocks Agreement," a state shall authorize the use of vessels flying its flag for fishing on the high seas only where it is able to exercise effectively its responsibilities in respect of such vessels under the Convention and this Agreement; article 18.3 provide that Measures to be taken by a State in respect

二、公海船旗國管轄制度之缺失

(一) 船旗國怠於規範或控制

雖國際法已賦予船旗國許多管理和控制其船舶之責任，然在實踐上並非如此完美，蓋船旗國會基於一些理由而未遵守國際規則。首先，船旗國可能未加入、簽署或批准公海生物資源養護與管理之相關公約，縱使有加入、簽署或批准，其可能未將相關規則轉化為內國法。其次，船旗國亦可能怠於對違法船舶行使行政與司法管轄權，造成實質上未遵守國際規則之情形。再者，在公海違法之船舶，船旗國可能欠缺調查機制，而無法獲得或保存違法行為之證據，以致不得對違法船舶提起司法程序。最後，由於「權宜旗」(flag of convenience)問題氾濫，造成船旗國與懸掛其旗幟之船舶往往缺乏「真實聯繫」(genuine link)，以致無法有效規範與管理船舶之行為，此亦造成船旗國對於管理與控制該等船舶始終消極。¹⁴

(二) 藉由「撤旗」(flagging out)或「換旗」規避控制

實踐上，不斷出現撤旗或換旗之現象，此對船旗國管轄有效性造成嚴重減損。一般認為撤旗或換旗問題與權宜旗有關，蓋均未對在其國家註冊之船舶為有效的行政管理，以及不具有對在其國家註冊之船舶規範與執行必要海上標準的能力。此等問題統稱為「開放註冊」(open registries)；開放註冊係指准許外國船舶和受外國控制之船舶基於權宜與方便目的而予以註冊之國家¹⁵。開放註冊行為之出現得追溯至1920年代，隨後於二次大戰迅速發展，主要目的為藉「開放註冊」作為利用中立法和規避所有內國法規(包括賦稅、財政、社會、勞工、污染、與安全等標準)之方法；而開放註冊國大多為發展中國家，其願意開放給所有船舶註冊之主因在於獲取規費，此亦說明何以開放註冊國多為發展中國家，以及何以此等國家無法勝任促進與執行相關國際規則之責任。

of vessels flying its flag. Moreover, it posed flag state the duty to ensure compliance by vessels flying its flag with subregional and regional conservation and management measures for straddling fish stocks and highly migratory fish stocks wherever the vessel is, flag state shall investigate the vessel which violate of the measures; if there is enough proof on the illegal action of the vessel violation of the measures, legal proceedings shall be instituted against the vessel; if the commitment are seriously, the vessel shall not be permitted to fish on the high seas before all the sanctions have been imposed completely.¹² "1995 UN Straddling Fish Stocks Agreement" also stipulates that the punishment upon the fishing vessel against the law must be so severe that it shall not violate the measures once again.¹³ Finally, "1995 UN Straddling Fish Stocks Agreement" provides that Where there are reasonable grounds for believing that a vessel on the high seas has been engaged in unauthorized fishing within an area under the jurisdiction of a coastal State, the flag State of that vessel, at the request of the coastal State concerned, shall immediately and fully investigate the matter. Compared with "Convention on the Law of the Sea," "1995 UN Straddling Fish Stocks Agreement" gives the flag state more compulsive duty to conserve and manage the living resources in the high seas.

(II) Disadvantages of the System of Flag State Jurisdiction on the High Seas

1. The Flag State Has No Motivation in Regulating or Controlling

Although the international law grants the flag state many duties and responsibilities to administrate and control its vessels, practically it is not so perfect, and there are some reasons why the flag state would not obey these international rules. Firstly, flag states might not join in, sign or approve the relative conventions of conservation and management of living resources in the high seas; even if they did, they might not introduce these principles into their domestic law. Secondly, flag states are lazy to execute jurisdiction to the vessel against the law. Thirdly, the flag states lack the survey system, which makes it difficult for them to obtain and keep the proof, so that there is no way to institute legal proceedings against the vessel. Finally, "flags of convenience" have overflowed, which results in that flag states often lack "genuine link" with the vessels, so that flag states can not regulate and manage the vessel, and flag states are dispirited to manage the vessel.¹⁴

肆、結語

儘管公海船旗國管轄制度已成為習慣國際法，但隨著公海漁業之發展，卻不斷遭受挑戰，蓋出現越來越多准許非船旗國政府執法船舶在公海行使不同程度警察或強制行動之條約。其中部分條約僅規定登臨權與檢查權，例如1965年《美蘇關於馬蹄蟹協定》(1965 U.S. – U.S.S.R. Agreement Relating to King Crab)、1967年《北大西洋漁業活動公約》(1967 North Atlantic Fishing Operations Convention)、1978年《西北大西洋漁業組織公約》(1978 Northwest Atlantic Fisheries Organization (NAFO) Convention)、1994年《中白令海公約》(1994 Central Bering Sea Convention)；亦有部分條約進一步規定捉拿與逮捕權，例如1882年《關於規範北海漁業警察公約》(1882 Convention for Regulating the Police of the North Sea Fisheries)、1952年《北太平洋公海漁業公約》(1952 North Pacific High Seas Fisheries Convention)、1957年《北太平洋海狗公約》(1957 North Pacific Fur Seal Convention)、1992年《北太平洋溯河性魚類種群公約》(1992 North Pacific Anadromous Stocks Convention)。儘管如此，上述公約或條約仍未提及非船旗國得起訴犯罪行為人之權利，甚至有些條約更直接明定僅有船旗國始得予以審判並施以懲罰。¹⁶



2. Escaping from Control by flagging out or Re-flagging

In practice, "re-flagging" and "flagging out" occur constantly, which reduce the efficiency of the jurisdiction of the flag state. Generally, re-flagging and flagging out are considered to be related with flag of convenience, because this can not manage the vessel or execute the jurisdiction over the vessel. These situations are generally called as "the open registry", which means that some states accept the registration of the vessel that is from foreign state or controlled by the foreign state.¹⁵ "The open registry" began in 1920s, and developed rapidly during the World War II, with the purpose to escape from the domestic laws and regulations (the standard of tax, finance, society, labor, pollution and safety); most open registry states are developing countries, why they accept all vessels is that they can charge fee from vessels. That is why the developing countries often did so, and why they are not capable to promote and execute the international regulations.

Part IV. Conclusion

Although the system of the flag state jurisdiction has been a customary international law; but with the development of fishery on the high seas, it is challenged constantly: more and more conventions permit non- flag state to execute the police right or coercive actions in various degrees. Some of these conventions only provide boarding and inspection rights, such as, 1965 "U.S. – U.S.S.R. Agreement Relating to King Crab", "1967 North Atlantic Fishing Operations Convention", 1978 "Northwest Atlantic Fisheries Organization (NAFO) Convention" and 1994 "Central Bering Sea Convention", also some provide arrest right, such as 1882 "Convention for Regulating the Police of the North Sea Fisheries", 1952 "North Pacific High Seas Fisheries Convention", 1957 "North Pacific Fur Seal Convention" and 1992 "North Pacific Anadromous Stocks Convention"; meanwhile, the right to prosecute for a criminal is not mentioned by the conventions and treaties said above, and even some treaties stipulate more directly and clearly that only the flag state can judge and punish the criminal.¹⁶

At present, although many conventions illustrate that non-flag states shall execute on the high seas more or less, and also requires that the vessel shall reasonably be found to infringe regulations of the convention, and then could be boarded and

現今，雖許多條約均有非船旗國得於公海行使不同程度執法行動之規定，然往往亦要求必須合理認為該船舶涉嫌違反公約相關規定時，始得予以登臨與檢查。因此，無論過去或既存條約均顯示一種趨勢：在執行國際間均接受之措施方面，條約開啟船旗國管轄原則之例外，蓋許多條約均准許非船旗國登臨與檢查懸掛締約國旗幟之船舶，甚至更規定非船旗國得捉拿或逮捕懸掛締約國旗幟之船舶。惟上述指稱之多邊條約，其適用範圍侷限於特定區域之漁業活動或特定魚種之捕撈活動，且此等賦予非船旗國較大權利之多邊條約大多為雙邊條約，或僅有少數重要漁業國家簽署；另一方面，從條約適用範圍觀之，此等多邊條約均為區域性條約。綜上所述，縱使國家實踐顯示對於公海船旗國管轄制度有所突破，惟事實上，非船旗國管轄權之範圍仍有無法衝破的界限，即專屬於船旗國所享有之審判權與懲罰權。

(本文作者為臺灣大學法律碩士生)

inspected. Therefore, a trend of past or current conventions: in terms of the execution of the measure accepted internationally, except for the conventions providing the exceptions for the system of the flag state jurisdiction, non- flag states are permitted to board and inspect the vessel with the flag of the contracting states by many provisions of conventions, and even non- flag states are required to arrest the vessel with the flag of the contracting states. However, the multilateral treaties mentioned above, which are applicable for a certain area or certain kinds of fishing activities; most of these are bilateral treaties and endow non- flag states with greater power, or signed by a few important fishery states only; on the other hand, in terms of the convention application scope, these multilateral treaties are regional treaties. In summary, even if the state practice shows some breakthroughs on the system of the flag state jurisdiction, but in fact, there some bourns of the scope of non- flag state jurisdiction are impossible to innovate, which are judgment and punishment rights exclusively belonging to the flag state.

(The author is currently with the College of Law, National Taiwan University of Master)

參考資料：

- 1 HAIJIANG YANG, JURISDICTION OF THE COASTAL STATE OVER FOREIGN MERCHANT SHIPS IN INTERNAL WATERS AND THE TERRITORIAL SEA (2006); ROSEMARY GAIL RAYFUSE, NON-FLAG STATE ENFORCEMENT IN HIGH SEAS FISHERIES (2004)
- 2 FRANCISCO ORREGO VICUÑA, THE CHANGING INTERNATIONAL LAW OF HIGH SEAS FISHERIES 4 (1999)
- 3 姜皇池 (2004), 《國際海洋法 (上冊)》, 台北: 學林
- 4 此等情形大多由雙邊或多邊條約來建立
- 5 《公海公約》與《海洋法公約》
- 6 常設國際法院在《蓮花號案》(S.S. Lotus Case)中指出: 「在公海上的船舶, 除船旗國外, 不受任何當局管轄。根據公海自由原則, 亦即在公海中並不存在任何國家領土主權, 沒有國家可以對外國船舶行使任何種類的管轄權。」 (Case of the S.S. Lotus (Fr. V. Turk.), 1927 P.C.I.J. (ser. A) No.9, at 25 (Sept. 27))
- 7 Robert C. F. Reuland, Interference with Non-National Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction, 22 VAND. J. TRANSNAT'L L. 1161, 1164 (1989)
- 8 FRANCISCO ORREGO VICUÑA, 前揭註2, 頁3-4; ROBIN WARNER, PROTECTION THE OCEANS BEYOND NATIONAL JURISDICTION: STRENGTHENING THE INTERNATIONAL LAW FRAMEWORK 28 (2009)
- 9 倪征日奧著 (1964), 《國際法中的司法管轄問題》, 頁27-28, 北京: 世界知識出版社
- 10 Andrew W. Anderson, Jurisdiction over Stateless Vessels on the High Seas: An Appraisal under Domestic and International Law, 13 J. MARITIME L. & COMM. 323, 336 (1982)
- 11 蓋早期就海洋污染所締結之條約 (如1954年《防止油類污染海洋國際公約》(International Convention for the Prevention of Pollution of the Sea by Oil)) 無法確保航行國會全面遵守相關規定。(ROBIN WARNER, 前揭註8, 頁56-57)
- 12 《1995魚群協定》
- 13 Moritaka Hayashi, The 1995 Agreement on the Conservation and Management of Straddling and Highly Migratory Fish Stocks: Significance for the Law of the Sea Convention, 29 OCEAN & COASTAL MANAGEMENT 51, 60-61 (1995); TORE HENRIKSEN, GEIR HONNELAND & ARE SYDNES, LAW AND POLITICS IN OCEAN GOVERNANCE: THE UN FISH STOCKS AGREEMENT AND REGIONAL FISHERIES MANAGEMENT REGIMES 45-47 (2006)
- 14 Budislav Vukas & Davor Vidas, Flags on Convenience and High Seas Fishing: The Emergence of a Legal Framework, in GOVERNING HIGH SEAS FISHERIES: THE INTERPLAY OF GLOBAL AND REGIONAL REGIMES 54-59 (Olav Schram Stokke ed., 2001).
- 15 Tina Garmon, International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11th, 27 TUL. MAR. L. J. 257, 267 (2002-2003)
- 16 Moritaka Hayashi, Enforcement by Non-Flag States on the High Seas Under the 1995 Agreement on Straddling and Highly Migratory Fish Stocks, 9 GEO. INT'L ENV'T'L L. 1, 9-10 (1996-1997)