

# An Analysis and Assessment on the Rotterdam Rules in China's Marine Industry

*Prof. Si Yuzhuo*<sup>1</sup>, *Dr Zhang Jinlei*<sup>2</sup>  
Dalian Maritime University, China

In December 2008, the *UN Convention on the Contracts of International Carriage of Goods Wholly or Partly by Sea*, which is also known as the *Rotterdam Rules*, was adopted on the 67th session of the 63rd United Nations General Assembly. During the process of deliberation of the Rotterdam Rules drafts, organized by the United Nations Conference on Trade and Development (UNCITRAL), the Chinese delegations assigned by the Government had been fully involved in the whole process and played a significant role. After the Rules was adopted, the Chinese Government organized industrial assessment regarding the Rules promptly.<sup>3</sup> In general, attitudes in all walks of life in China on the Rules are very different at present.

## 1. The conclusion of assessment in shipping industry

The shipping industry, represented by large state-owned shipping enterprises, considered that the Rules had revolutionized the responsibility system of carriers deleting the error in navigation and fire fault exemption; extending the duty of seaworthiness through the whole voyage and increasing the limitation of liability greatly, and this would increase an unacceptable risk and impose a huge burden onto China's shipping industry, which would count against the development of China's ocean merchant fleet and her competitive position in the international shipping market. Accordingly, the effect of the Rules towards China's shipping industry may do more harms than good. Based on the above mentioned conclusions, they further believed that, the Government should take no action in pushing or accelerating the

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<sup>1</sup> Former president of Dalian Maritime University, Professor of maritime law, PhD supervisor; Member of Nominations Commission of CMI; Head of Chinese Government delegation for the deliberation of the *Drafts on the Contracts of International Carriage of Goods Wholly or Partly by Sea* by the UNCITRAL, expert member; Consultant of China Maritime Arbitration Commission; Vice-president of China Maritime Law Association; Chief Editor of Chinese Journal of Maritime Law Research .

<sup>2</sup> Law School of Dalian Maritime University, Lecturer of maritime law, LLB (Dalian Maritime University), LLM, PhD (Swansea University).

<sup>3</sup> The Ministry of Transport organized the assessment of the effects on shipping industry, port industry and other relevant industry in China of the Rotterdam Rules; the Ministry of Commerce organized the assessment of the effects on international trade in China of the Rotterdam Rules.

Rules coming into force neither shall we take the leading role in signing or acceding the Rules. China should not be anxious to accede the Rules, even after the Rules comes into force.<sup>4</sup>

### **Analysis of the assessment**

1). The attitude of the shipping industry on the Rules was mainly reflected in the change of the basis of liability of carriers. In particular, it was the dissatisfaction with deleting the error in navigation and fire fault exemption which changed the basis of liability of the carrier from incomplete fault liability system to complete fault liability system. However, the change of the basis of liability is the most substantial change of the Rules. Under the new situation of the development of international shipping as well as science and technology, it is the year-long pursuit goal of the international society to readjust the allocation of the risk between ship and cargo, reject the outdated and unreasonable exemption clauses stipulated in the existing Hague Rules and seek the balance of interest between different parties.

In the early twentieth century, the international shipping was the market for ships. Naturally, the Hague Rules protected the interests of ships more and the basis of liability and the burdens of proof were against cargoes.<sup>5</sup> Since the middle and late twentieth century, the international shipping market turned to be the market for cargoes gradually. The Group of 77, representing the interests of cargoes, adopted the Hamburg Rules by an overwhelming majority whose feature was protecting the interests of cargoes. Compared with the Hague Rules, the basis of liability and the burdens of proof prescribed in the Hamburg Rules were unfavorable to the carrier. The process of drafting the Rotterdam Rules is more a result of balancing the interests of ships and cargoes than a game between the two parties. The large trading states and large shipping states are now highly coincided at present. In consideration of the impartible

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<sup>4</sup> *Assessment report of the effects on China's Shipping industry of the Rotterdam Rules*, Rotterdam Rules Shipping Assessment Group, August 2010, at p 13; *The quantitative Assessment of the effects on China's Shipping industry of the Rotterdam Rules*, China Waterborne Transport Research Institute, August 2011, at pp 43-44.

<sup>5</sup> The amount of limitation of liability stipulated in the Hague-Visby Rules is different with that of the Hague Rules. However, the liability system under the Hague-Visby Rules still belongs to the Hague system. Accordingly, the Hague-Visby Rules is called the Hague Rules in this article.

relevance between trade and shipping, more and more states have started to place great importance on the mutual development of trade and shipping. In modern mature economic units<sup>6</sup>, there are no pure shipping states or cargo owner states in existence. Under such circumstances, there is no practical significance to carry out any game between ships and cargoes. That is because, the states or regions who have the discourse power and more say-over during the drafting process of the Rules, such as the United States, EU, China, Japan, are all not solely representing the interests of cargoes or ships. On account of this, the Rotterdam Rules, which gives consideration to the interests of both ships and cargoes and adopts the basis of liability in the Hamburg Rules and the burdens of proof in the Hague Rules, is an embodiment of balance and compromise. Under the Chinese Maritime Code, the doctrine of liability fixation is the same as the doctrine prescribed in the Hague Rules and the burdens of proof is the same as in the Hamburg Rules, which could also be considered as a kind of balance and compromise. Therefore, regarding the basis of liability of carriers, the provisions of the Chinese Maritime Code are prescribed between the Hague Rules and the Hamburg Rules, but closer to the Hague Rules. The Rotterdam Rules is also stipulated between the Hague Rules and the Hamburg Rules, but closer to the Hamburg Rules. In another word, with regard to the basis of liability of carriers, there should be no greater obstacle for us to accept the Rotterdam Rules than the countries that are parties of the Hague Rules or Hague Visby Rules. Moreover, the basis of liability of carriers which determines the character of the convention is very the essence and core of the Rules.

2) The conclusion from the shipping industry assessment held the view that, "the abolition of the error in navigation would add an unbearable risk to the carriers". The researches made by scholars both at home and abroad showed that the abolition of the error in navigation would

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<sup>6</sup> According to the statistical data from the WTO, in 2009, the countries ranking at top ten of the world trade are the United States, China, Germany, Japan, France, Holland, the UK, Italy, Belgium and South Korea. The data is published at the website <http://www.wto.org/english/res-e/booksp-e/anrep-e/anrep09-e.pdf>. In 2010, the top ten countries/regions of fleet are Japan, Greece, Germany, China, the United States, Russia, Norway, Singapore, Holland and the UK. The data is published at the website <http://www.mapsofworld.com/world-top-ten/largest-merchant-shipping-fleets.html>. It could be concluded from the two rankings that, there is a big overlapping between large trading countries and large shipping countries and some countries are both large trading and shipping countries.

add 1% extra operating costs to the carriers.<sup>7</sup> In terms of law and economics, it could be analyzed that, raising the statutory standard of care is helpful to reduce human-factor accidents and increase the competitiveness.<sup>8</sup>

According to the quantitative assessment by research institutions of China, the Rotterdam Rules will have certain impact on China's shipping industry. In particular, it could cause an amount of 1.8-2.4 billion RMB operating costs to China's container liners which means the unit cost of full containers may increase by 3%-4%. Compared with foreign leading shipping companies, their unit cost of full containers may just increase only half that rate of China,<sup>9</sup> due to their high level of management. However, the equivalent capacity and market share of such cost disparity merely amounts to the capacity gap of one container ship with 8000 TEU every year, which accounts to 0.1% of the total capacity of China's international container liners. Therefore, the Rotterdam Rules has little influence on the market competitiveness of China's shipping industry, particularly to large liner shipping companies.

3) It should also be mentioned that the strict liability system for the carrier has been applied in the China's coastal and inlandwaters shipping for many years, which means that carriers are not entitled to advocate any error in navigations except for wars and force majeure nor are they entitled to package (unit) limitation of liability. Moreover, compared with ocean shipping

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<sup>7</sup> Xinping Zhang, "The shipping cost will be increased 0.5%~1.0%, if the immunity of navigation error is abolished." *A new trend of Carriage of Goods by Sea Act and China Maritime Law Review* Taipei: Ministry of Justice, 1979:22; Joseph C. Sweeney, "The cost will be increased 1~2% if deleted the immunity of navigation error." *The UNCITRAL Draft Convention on Carriage of Goods by Sea [J]*, Part I, 7 J. Mar. L. & Com. 69.(1975)

<sup>8</sup> Robert Cooter, Thomas Ulen, *Law and Economics*, Jun Zhang and others (translated), SDX Joint Publishing Company, Shanghai, (1994), at p 494. Once one party meets the statutory standard, he can extricate himself from the responsibility for the accident cost. Once his responsibility is extricated, there is no motivation for this party to take any preventive measures. This will lead to the situation that in order to divest himself of responsibility for accident cost, one party would meet the statutory standard exactly and shift the rest of responsibility for the accident cost onto the other party. In the circumstances of error in navigation exemption, the proportion of human-factor accidents in all marine accidents will be increasingly high. Under the complete fault liability system, the motivation of the carriers to reduce the human-factor accidents rate will be greatly increased. An assessment report from one company advocated that the error in navigation exemption should be maintained on the ground of the increasing rate of the human-factor accidents. However, being just opposite to this conclusion, from the perspective of law and economics, it is necessary to abolish the error in navigation exemption.

<sup>9</sup> *The quantitative Assessment of the effects on China's Shipping industry of the Rotterdam Rules*, China Waterborne Transport Research Institute, August 2011, at p 41.

companies, most companies in China which engaged China's coastal and inlandwaters shipping are small and medium sized enterprises. The condition of the ships owned or operated by those companies and the quality of their crew members are no comparison to those of the vessels engaged in international transportation. Accordingly, it is far more difficult for them to obtain the P& I insurance covers than the ocean shipping companies. That is to say, their risk resistance capacity is much weaker than the latter. Notwithstanding, rather than being perished, the coastal and inlandwaters shipping in China has advanced briskly in past years. Therefore, this perspective indicates that some shipping companies in China might have been worried too much about the abolition of the error in navigation and the fire fault exemption.

4) In the long run, due to the abolition of the error in navigation and the fire fault exemption by the Rotterdam Rules and the extension of the duty of seaworthiness through the whole voyage, it is inevitable for carriers to reinforce management to their ships, crew and companies as well as accelerate the decommission of old ships and low tech ships in order to reduce the rate of accidents caused by fault. It is undoubtedly favorable to promote the development of China's shipping industry and change the current absurd situation faced by the industry that the China's shipping industry only has quantity rather than quality which results in the lack of capability in joining a high end market. This also compliances with the basic requirement of the government strategy to build China into world power in shipping. As some scholars pointed out, "the fleets of main modern shipping countries, such as the United States , France, Greece, Denmark and Holland, can bear the technical norms and the amount of limitation and the fleets of China have to bear it too. Otherwise, Chinese fleets would lose the qualification to compete with those fleets."<sup>10</sup>

## 2. The conclusion of assessment in cargo owners

The attitudes on the Rotterdam Rules of the other interested party, the cargo owners engaged

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<sup>10</sup> Shijian Mo, *Rational options for China's role in the development of international shipping market order at the Rotterdam Age*, Annual of China Maritime Law, 2011 (1), at p 40. (Annual of China Maritime Law has been changed to quarterly publication since 2009 and renamed as Chinese Journal of Maritime Law from 2012.)

in import and export trade, whose interests would be directly affected by the Rules, are rather complex. On the one hand, while the Rotterdam Rules increases the liabilities of carriers, it also weighs the burdens of proof on cargo owners. On the other hand, the export trade in China mainly focuses on FOB trade, but the interests of the consignor under FOB trade are not considered well enough under the Rules. Some stipulations are even regarded as the terms under which FOB sellers are put at a disadvantage. Some people even holds the opinion that, "China may become the largest victim under the Rotterdam Rules."<sup>11</sup> Therefore, the relevant party representing the interests of cargo owners criticized the Rotterdam Rules and they are not so sure about whether China should accede to the Rules.<sup>12</sup>

## **Analysis of the assessment**

### **1) Issues regarding allocation of burdens of proof**

Compared with the Hamburg Rules, the Rotterdam Rules does weight the burdens of proof on the cargo owners. According to the Hamburg Rules, the carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery and it's presumed that the loss of or damage to the goods or delay in delivery was so caused unless he can prove that it was not due to his fault except for loss of or damage to the goods or delay in delivery caused by fire which should be proved by the claimants (Article 5). Under the Rotterdam Rules, 15 exemption perils are regulated by Paragraph 3 of Article 17. The claimants shall prove there are faults of the carriers and the carriers can only exercise their rights of exemption when the claimants failed to prove the carriers' faults. Such allocation of the burdens of proof is very similar as the Hague Rules. Paragraph 2 of Article 4 stipulated 17 exemptions among which the 17th exemption states that, the carrier is exempt from liabilities if loss of or damage to cargoes are not caused by the actual fault or privity of the carriers. However, the carriers should bear the burdens of proof if they wish to rely on such exemptions. It follows that, the

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<sup>11</sup> Qingsheng Xia, *Effects on the seller (consignor) of the Rotterdam Rules*, Annual of China Maritime Law, 2010(2), at p 43.

<sup>12</sup> The assessment of the effects on the cargo owners of the Rotterdam Rules was organized by China University of Political Science and Law Maritime Law Center, which was commissioned by Department of treaty and Law of Ministry of Commerce. There has not been assessment report published yet. The conclusions of the assessments were scattered in relevant articles.

carriers are free from proving the 1st to the 16th exemptions, while claimants should prove there are faults of the carriers.

The above allocation of burdens of proof stipulated by the Rotterdam Rules aims to balance the change of the basis of liability fixation for the carriers. In other words, the Rotterdam Rules is not the same as the Hamburg Rules which provided the presumed fault principle of liability fixation, that is to say, the carrier should bear all the burdens of proof except fire.

## **2) Issues regarding the protection of rights of FOB seller**

During the process of drafting the convention, the Chinese delegation tried to seek particular protection for FOB seller but failed to obtain the supports from the majority of the delegates. The fundamental reason was that our request was beyond the scope adjusted by the law of transportation. The protection of rights of FOB sellers is the issue stipulated under the trade law. Analyzing from the perspective of contract law theory, FOB sellers is not a party of the contract of carriage, so he does not have any right nor shoulder the obligation under the contract of the carriage. Therefore, it lacks legal ground to request the convention to protect those who are not parties of the contracts of carriage.

In consideration of the above concern raised by China and other relevant countries, the Rotterdam Rules forms the concept of documentary shipper. It's a big progress compared with the Hague Rules and Hague Visby Rules. In compared with the Hamburg Rules, the rights and obligations of the documentary shippers are much more explicit. According to the Rotterdam Rules, as long as FOB sellers raise their awareness of risks and add corresponding terms in the sales contracts to protect their own interests, the problems concerned by Chinese cargo owners are not inevitable.

## **3. The conclusion of assessment in port industry**

Since the Rotterdam Rules forms the concept of "maritime performing party" under which the port operator who is engaged in receiving/delivering, loading/discharging, handling, stowing,

keeping, caring for and other relevant operations during the transportation of cargoes from port to port, under the supervision, control or requirement of carriers, could be deemed as a maritime performing party,<sup>13</sup> the legal status of port operators is clear and definite. What's more, the port operators are also entitled to the rights of defense and limitation of liability stipulated by the Rules. Therefore, the reaction on the Rotterdam Rules from port industry in China is overwhelmingly favorable.<sup>14</sup>

### **Analysis of the assessment**

1) Under the Hague Rules, the duties of carriers before loading and after discharging need to be agreed between the two parties since the Rules only regulates the carriage of goods by sea during the period between loading and discharging. The Hague Rules dose not regulate obligations/rights of port operators and there is no concept of actual carrier under the Rules. The obligations/rights of the actual carrier who undertakes transportation in ocean shipping section are stipulated with carriers through the subject of ships. The Hamburg Rules solved the problems of the actual marine transportation which was not undertaken by carrier but by the party who had been entrusted by the carrier. Such responsible party took the place of the ships under the Hague Rules. However, the Hamburg Rules is not clear as to whether the stipulations about the actual carriers could be applied to port operators. Accordingly, there are different understandings of actual carriers in our judicial practice. In some maritime courts decisions, it was held that port operators shall be subject to the Contract Law and the Civil Code but not the Chinese Maritime Code and they are not entitled to the limitation of liability.<sup>15</sup> In other judgments, it was held that port operators are subject to the Chinese Maritime Code and as the employee of carriers, the Himalaya clause should be applied and they are entitled

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<sup>13</sup> In the liner shipping, regulated by the Rotterdam Rules, the port operators are engaged in substantial operations, such as the loading/discharging of containers, the handling/storage of containers/goods, the receiving and delivering of goods and etc. These operations are all assigned by the carriers.

<sup>14</sup> *Assessment of the effects on the shipping strategic policy for China ports of the Rotterdam Rules*, China Waterborne Transport Research Institute, July 2011, at p 21; *Assessment report of the effects on the port operator of the Rotterdam Rules*, Rotterdam Rules Port Assessment Group, October 2010

<sup>15</sup> In *Bank of China Group Insurance Company Ltd. v. Shanghai Jiaoyun Container Dev Co. Ltd. (2001)*, in which the truck transportation in ports caused the damages of the containers, Shanghai Maritime Court held that the Chinese Maritime Code should not be applied. See Yuzhuo Si, *Maritime Law Monograph*, China Renmin University Press (2nd ed. September 2010), at p162.



to the limitation of liability.<sup>16</sup> The author's point of view is that, in accordance with the Chinese Maritime Code, port operators are actual carriers and they are not only entitled to passive rights, such as defense and limitation of liability, but also to active rights, such as right of claim, time for suit and etc.<sup>17</sup>

Based on the definition of actual carrier in the Hamburg Rule, the Rotterdam Rules further confirms and completes the system of actual carrier. Paragraph 7 of Article 1 of the Rotterdam Rules states, "Maritime performing party means a performing party to the extent that it performs or undertakes to perform any of the carrier's obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship. An inland carrier is a maritime performing party only if performs or undertakes to perform its services exclusively within a port area." It has been clearly defined here that port operators belong to maritime performing party. The rights and obligations of a maritime performing party are stipulated under Article 19 of the Convention, which states that, "A Maritime performing party is subject to the obligations and liabilities imposed on the carrier under this Convention and is entitled to the carrier's defenses and limits of liability as provided for in this Convention..."

2) The stipulation of maritime performing party under the Rotterdam Rules is a win-win method. For the claimants, the Convention provides another contact litigation subject apart from carrier and such situation is in favour of their claims; for the port operators, their legal status has been cleared under the Rules and they are entitled to the carriers' defenses and limits of liability. Accordingly, there should be no obstacles for port operators to accept the Rotterdam Rules.

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<sup>16</sup> In *Shenyang mining machinery (Group) import and Export Corporation v. Hyundai Merchant Marine (2001)*, Dalian Maritime Court held that, Wantong Logistics Company, engaged in the storage operations in contain yards, was the employee of Hyundai Merchant Marine and was entitled to right of defense and limitation of liability of the carriers stipulated in the Chinese Maritime Code. See *Dalian Maritime Court Civil Judgment Commercial No. 246*, which was published at the website. <http://www.ccmt.org.cn>

<sup>17</sup> See Yuzhuo Si, *Maritime Law Monograph*, China Renmin University Press (2nd ed. September 2010), at pp 163-165.

## 4. Attitude in academe

During the process of discussion and after the Rules was adopted, Chinese scholars have carried on a thorough and comprehensive research into the Rotterdam Rules. Generally speaking, there are mainly three different attitudes toward the Rules among Chinese scholars at present: some scholars support their strong positive attitude and consider that the Rules helps to fulfill the government's strategic target to build China into world power in shipping, and the Rules is an advanced international convention that keeps abreast of the times, so China should accede to the Rules in a proper time;<sup>18</sup> some scholars adopt a hard-line stance against the Rules and think that it is very difficult for the Rules to be widely approved by international society and come into force so China should not accede to it;<sup>19</sup> there are also some scholars who strike a medium attitude and they believe that the scope adjusted by the Rotterdam Rules is beyond those of the past international conventions on carriage of goods by sea which will bring a significant effect. China should pay close heed to the attitudes of other countries, carry out intensive researches and make a discreet decision on whether the Government should ratify the Rotterdam Rules basing on a comprehensive assessment and evaluation of it.<sup>20</sup>

### Analysis of the assessment

It is natural to have different opinions as to the Convention. It takes a long process to understand such a complicated international convention, especially when there are strong different voices in China's marine industry, and it's impossible to require a unified attitude from all scholars. However, the following phenomenon is noteworthy:

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<sup>18</sup> See Yuzhuo Si, *Evaluation and prospects of the Rotterdam Rules*, Annual of China Maritime Law, 2009 (1-2), at p 3; Yuzhuo Si, *A Century Convention for Goods Carriage By Sea—Again Comments on Rotterdam Rules*, Law Science Magazine, 2012 (6), Hai Li, *The Rotterdam Rules: a cherishable opportunity for the unification of the law*, Annual of China Maritime Law, 2010 (1), at p 11; Shijian Mo, *Rational options for China's role in the development of international shipping market order at the Rotterdam Age*, Annual of China Maritime Law, 2011 (1) at p 34;

<sup>19</sup> Zengjie Zhu, *Evaluation on the Rotterdam Rules*, Annual of China Maritime Law, 2009 (1-2), at p 9; Zengjie Zhu, *Re-evaluation on the Rotterdam Rules*, Chinese Journal of Maritime Law (previously named as Annual of China Maritime Law), 2012(1), at p 7; Yongjian Zhang, *How to evaluate the Rotterdam Rules*, Annual of China Maritime Law, 2010(1), at p 15; Qingsheng Xia, *Effects on the seller (consignor) of the Rotterdam Rules*, Annual of China Maritime Law, 2010(2), at p 30.

<sup>20</sup> Liying Zhang, *Effects on the cargo owners of the Rotterdam Rules—The attitude to the Rotterdam Rules of the Chinese cargo owners*, Assessment of the effects on the cargo owners of the Rotterdam Rules organized China University of Political Science and Law Maritime Law Center commissioned by Department of treaty and Law of Ministry of Commerce

There is no corresponding responses from international society as to the against voice about the Rotterdam Rules in China. For instance, among the strongest criticism, one is the dissatisfaction about the abolition of the error in navigation from the shipowners in China. However, no intense dissatisfaction about such change has been heard in the international shipping industry until present. Even people who are against the Rotterdam Rules consider that, “the only saving grace in the basis of liability is the deletion of the error in navigation defence which was long overdue given advances in technology.”<sup>21</sup> The other one is the voice of disapproval from the cargo owners in China who believe that the Convention has not provided any effective protection for FOB seller. However, some maritime society who has always filed a strong dissent against the Convention, has never alleged such a reason to criticize the Convention.

## 5. Conclusions

Until present, the Chinese Government has not formed a unified and clear attitude towards the Rotterdam Rules, particularly on the delicate issue regarding whether China should accede to the Rules and when it might happen. Such situation is caused by the different attitudes in practice and academe.

Under such circumstances, it is logical for the Government to be cautious and responsible.

The main conclusions of mine are as follows,

**Firstly**, due to the limitations on the assessment in marine industry and the complexity of the Convention contents, it is very difficult for practitioner to comprehend the essence of the Convention precisely. Therefore, all parties concerned should deepen their research and study

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<sup>21</sup> Jose M. Alcantara, Barry Oland, Douglas G. Schmitt, Frazer Hunt, Kay Pysden, William Tetley C.M., Q.C., Svante O. Johansson, Professor Jan Ramberg and Julio Vidal: *“Particular concerns with regard to the Rotterdam Rules”*: *“The only saving grace is the disappearance of the error in navigation defence which was long overdue for removal given advances in technology.”*

on the Rules continuously and make further assessment on the effect and incidence from the Rules in shipping, trade and other relevant industries in China, on the basis of accurate understanding of the Convention contents and from the standpoint of a state. The decision of whether the Government should accede to the Rules should be made on the overall consideration of both advantages and disadvantages.

**Secondly**, we should pay close attention to the attitudes and actions of other countries, the countries with developed shipping and/or trade and the countries maintaining close trade exchanges with us in particular, so to take corresponding measures.

**Thirdly**, the Rotterdam Rules is the crystalization of ten-years hard work of the International society and it is a contemporary, modern and advanced international convention. Unifying the legal regime of international multi-modal transport of goods through such a centurial convention, will be undoubtedly a result worth anticipating, not only for the entire international society but also for China. None of the international conventions, of course, could reach the acme of perfection and the progressiveness of the Rules cannot be denied because of its defects or flaws. As large predominant shipping and trading state, China should accede to the Rotterdam Rules in a proper time.

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