

Carlos Espósito, James Kraska, Harry N. Scheiber and Moon-Sang Kwon (eds.), *Ocean Law and Policy: 20 Years under UNCLOS* (Brill – Nijhoff, Leiden – Boston, 2017), 469 pp.

The volume in review contains the proceedings of an international conference held in 2014 in Madrid under the sponsorship of the Law of the Sea Institute. Most of the papers focus on the United Nations Convention on the Law of the Sea (Montego Bay, 1982; UNCLOS) and directly or indirectly address the thorny question whether this successful codification treaty, which mostly corresponds to customary international law, is appropriate to meet a number of factual or legal developments that have taken place after its adoption and were not foreseen or completely foreseen by the negotiators.

An obvious example of factual post-UNCLOS concern is sea-level rise. Davor Vidas (“International Law at the Convergence of Two Epochs: Sea-Level Rise and the Law of the Sea for the Anthropocene”) moves from the word “anthropocene”, as referred to the present epoch, in which humans have acquired the capacity to destabilize the natural Earth system. Sea-level rise is the consequence of global warming, which, in its turn, is the consequence of the increased consumption of fossil fuels by humans. This contains the potential for new types of tension in the relations between States, which cover also law of the sea. As the UNCLOS drafters did not foresee substantial variations in coastal geography, it is now difficult to handle a phenomenon that has the potential to alter the “stability” of maritime limits, be they the baseline of the territorial sea, as determined by low-water mark, or the maritime boundary between adjacent or opposite States, as determined by the equidistance line between relevant base-points. Kerrylee Rogers and Clive Schofield (“Responding to Changing Coasts: The Need for Fixed and Flexible Limits and Boundaries in the Face of Sea-Level Rise”) point out how the effects of sea-level rise extend beyond environmental aspects to social and economic impacts. As it is not possible to assess with precision the scope, scale and pace of future sea-level rise, more dynamic and flexible legal and policy models are needed.

Linked to global warming is the question of ocean fertilization. Due to their colossal volume, the oceans have a great capability for the storage of CO₂, the main greenhouse gas. The intentional introduction of iron in the upper ocean (ocean fertilization) stimulates the growth of phytoplankton, which photosynthesizes CO₂ and retains carbon in its cells. In 2013 the Protocol to the Convention on the prevention of marine pollution by dumping of wastes and other matter (London, 1996) was amended to provide a regulatory mechanism for ocean iron fertilization and other marine geoengineering activities. However, as explained in the paper by Sherry P. Broder (“International Governance of Ocean Fertilization and Other Marine

Geoengineering Activities”), there continue to be many serious unresolved questions that demand additional analysis and work.

The issue of marine biodiversity beyond national jurisdiction is addressed in the contribution by Yasuko Tsuru (“Institutional Interplay between Marine Biodiversity beyond National Jurisdiction – A New Agreement?”). Now the United Nations General Assembly has taken the decision to convene an intergovernmental conference to elaborate the text of an international legally binding instrument in this regard (Resolution 72/249 of 24 December 2017). However, after the first session of the conference, the situation is still very close to what is noticed in the paper: States and institutions “are not clear on how to address the biodiversity problem, especially the ‘institutional deficit’ regarding marine genetic resources”. This could lead to devastating consequences for humankind.

New challenges for the international oceans order are likely to come also from the development of navigation routes in Arctic waters, given the different positions held by some Arctic coastal States, on the one hand, and some States more linked to navigational freedoms, on the other. Said Mahmoudi (“Arctic Navigation: Reflections on the Northern Sea Route”) reaches the conclusion that, despite the formal position of the countries that continue to emphasize the international status of the Northern Sea Route waters, the Russian Federation has in fact consolidated in a definitive manner its legal claim on such waters.

The adoption in 2001, within the framework of UNESCO, of the Convention on the protection of the underwater cultural heritage is an example of legal development having taken place after the UNCLOS signature. In his contribution (“The Legal Protection of Underwater Cultural Heritage: Concerns and Proposals”), Mariano J. Aznar makes a commendable effort to explain why the 2001 UNESCO convention is consistent with the relevant UNCLOS provisions, as the former translates, perhaps with some “constructive ambiguities”, the general principles embodied in the latter. Another paper (“Protection and Management Policy of Underwater Cultural Heritage in Korea” by Seoung Wook Park and Chang Soo Choe) suggests improvements in the Korean domestic legislation to strengthen the protection of underwater cultural heritage. The inclusion of these two papers in the part of the volume devoted to “managing ocean resources” may be criticized by those who are inclined to give priority to the cultural and non-economic character of this kind of “resources”.

Security issues are largely addressed in the volume. Protest and civil disobedience on the high seas can be the source of conflicts between the need for good order and safety in maritime activities and the international right of free expression, which is central to participatory democracy. As shown by James Kraska (“The Laws of Civil Disobedience in the Maritime Domain”), the reconciliation of different bodies of law—law of the sea and human rights law—is not an easy task, also because incidents of marine protest fall in most cases under the

jurisdiction of several States (it is sufficient to think of cases that have involved those who protest at sea against whaling or seabed drilling activities). The paper brings several elements in support of the balanced view that “the right to free expression is not absolute and may be impeded, but interference in the freedom of expression is not unlimited”. Vasco Becker-Weinberg (“Flag States’ Liability for Wrongful Acts by Private Military and Security Companies on Board Ships”) rightly emphasizes that, while private military and security companies are private actors, flag States have the obligation to control and exercise due diligence with respect to services rendered by such companies on board ships flying their flag, particularly in cases where human rights abuses are likely. Nilufer Oral (“Black Sea Security under the 1936 Montreux Treaty”) explains why substantial changes in the convention regulating passage of merchant and military ships through the Turkish Straits would risk unsettling a consolidated security framework.

Security issues are also discussed under a regional perspective in the contributions by Kamal-Deen Ali (“Anti-Piracy Responses in the Gulf of Guinea: Addressing the Legal Deficit”), Seokwoo Lee and Hee Eun Lee (“The Conceptualization and Construction of a Northeast Asian Maritime Security Architecture: Might Europe Serve as a Model?”) and Bimal N. Patel (“Eight Dimensions of Maritime Security Law and Practice among Member States of the Indian Ocean Rim Association”), where the author remarks that the States in question, like vast majority of developing countries, believe more in their exclusive interests than in the importance of a collective and inclusive approach.

Despite the promising title that seems to lead to general considerations on how best to move forward, the paper by Assunção Cristas (“One Cannot Change the Wind, but One Can Always Adjust the Sail: The Role of Legal Framework in Developing a Blue Economy”) focuses on the special case of the Portuguese framework law on marine spatial planning and management (Law No. 17 of 10 April 2014). The law envisages two types of spatial planning instruments (situation plans and allocation plans). In any case, it is a very interesting enactment, considering that Portugal, also due to its Atlantic islands, is entitled to a quite large exclusive economic zone (about 1,700,000 km², corresponding to 18 times the land area of the country). Thought-provoking considerations on marine spatial planning can be found, *inter alia*, in the contribution by Clive Schofield on “Ever More Lines in the Sea: Advances in the Spatial Governance of Marine Space”. The author moves from the present “dissatisfaction with traditional, generally sector-specific approaches to ocean governance, giving rise to sustained calls for more cross-cutting, coordinated and ideally integrated oceans management frameworks”. In this regard, he points out that the objective of marine spatial planning is not necessarily to replace well established sector-oriented management approaches but rather to offer strategic planning with a view to improving decision-making, thereby delivering more

rational and harmonised uses of marine space, ideally eliminating overlaps, clashes and conflicts and identifying co-development opportunities". This may lead to the conclusion that the present fragmentation of the sea in different jurisdictional zones (maritime internal waters, territorial sea, exclusive economic zone, high seas, seabed beyond the limits of national jurisdiction) is not totally incompatible with marine spatial planning at the international level.

A departure from the UNCLOS-oriented scope of the volume may be noticed in the inclusion of two contributions devoted to the European Union (EU) fisheries policy ("Stakeholder Participation in the European Common Fisheries Policy: Shifting the Legal Paradigm towards Rights and Responsibilities" by Ronán Long and "West Africa and the New European Common Fisheries Policy: Impacts and Implications" by Katherine Seto). As Long's paper remarks, within world fisheries, the EU common fisheries policy is a unique case, seeking to manage the stocks in an integrated manner, irrespective of the maritime boundaries of Member States, on the basis of the objective of maximum sustainable yield and more recent concepts, such as the ecosystem approach and the precautionary principle. However, fisheries in Europe have been in a constant cycle of decline and crises, being affected by lack of environmental, economic and social sustainability, complexity of legislative framework and poor public image. The reform process that resulted in EU Regulation 1380/2013 aimed at vesting stakeholders, in particular the fishing industry, with additional rights and responsibilities. The paper elaborates on what else could be done towards a more effective natural resource stewardship, for instance the adoption of a rights-based approach characterized by individual transferable quotas and fishermen property rights. As far as the external EU fisheries policy is concerned, fisheries along the coast of West African States are particularly significant, because of their proximity to Europe, former colonial ties and limited domestic demand for high-value fish products. Strong criticism to the EU external fisheries policy can be found in Seto's remark that it was designed to maximize employment from the European fishing sector and ensure supply of fish to the European market, while reducing fishing pressure in European waters. This has led to in the 1990s to unsustainable exploitation of West African waters, lack of monitoring, control and surveillance, impairment of developing economies, food insecurity and inconsistencies with the EU policies on environment and development. In other words, displacing the European fleets from European to West African waters has simply shifted declines from European to West African stocks. While the 2013 reform, based on maximum sustainable yield, encourages a shift towards conservation objectives, its effects on West African fisheries remain insufficient, due to the lack of the scientific information needed to set maximum sustainable yield and the lack of enforcement capacity by coastal States.

The paper ("Standard of Review in the Law of the Sea: Reflections from the Bench") by Jin-Hyun Paik, a judge and the present president of the International Tribunal for the Law of the

Sea (ITLOS), touches upon the fundamental balance of power between States and international judicial institutions, asking how intensely should an international court review the decisions of national authorities. This is a question that typically occurs in cases where States are called to comply with flexible, open-ended or indeterminate international provisions, leaving a substantial room for discretion. The author's answer is that courts are entitled to a relatively high standard of review, in order to allow a uniform interpretation and application of the relevant law of the sea provisions and to avoid that the same obligation means different things to different States. "UNCLOS and Non-Party States before the International Court of Justice" is the subject addressed by Tullio Treves, a former ITLOS judge. The UNCLOS, which *per se* is not binding on non-parties, includes several provisions that correspond to customary international law and, as such, do create rights and obligations also for non-parties. The paper discusses the peculiarities of cases in which non-parties to the UNCLOS were involved, such as *Qatar v. Bahrain*, *Nicaragua v. Colombia* and *Peru v. Chile*.

The volume does not provide clear-cut answers to the question on whether the UNCLOS is fully equipped to address all the developments that have taken place after its adoption and, of course, it would have been impossible to do so (incidentally, a paper on the UNCLOS flexibility to changes and improvements in the light of the practice of "implementation agreements" would have been a useful addition to the collection). Nevertheless, the contributions included in volume offer to the readers many notable considerations that can help them to make their own documented opinions on many UNCLOS aspects and nuances.

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