

CENTER FOR OCEANS LAW AND POLICY

FREEDOM OF NAVIGATION AND GLOBALIZATION

Edited by

Myron H. Nordquist, John Norton Moore,
Robert C. Beckman, and Ronán Long



BRILL | NIJHOFF

Freedom of Navigation and Globalization

Edited by

Myron H. Nordquist
John Norton Moore
Robert C. Beckman
Ronán Long



BRILL
NIJHOFF

LEIDEN | BOSTON

Library of Congress Cataloging-in-Publication Data

Freedom of navigation and globalization / edited by Myron H. Nordquist [and three others].

pages cm.— (Center for oceans law and policy series ; v. 18)

ISBN 978-90-04-28407-4 (hardback : alk. paper)—ISBN 978-90-04-28408-1 (e-book) 1. Freedom of the seas. 2. Law of the sea. 3. Piracy—Law and legislation. 4. Maritime terrorism—Law and legislation.

5. Maritime terrorism—Prevention. 6. Merchant marine—Security measures. 7. Security, International. I. Nordquist, Myron H., editor.

KZA1348.F74 2015

341.4'5—DC23

2014032532

This publication has been typeset in the multilingual 'Brill' typeface. With over 5,100 characters covering Latin, IPA, Greek, and Cyrillic, this typeface is especially suitable for use in the humanities.

For more information, please see <http://www.brill.com/brill-typeface>.

ISBN 978-90-04-28407-4 (hardback)

ISBN 978-90-04-28408-1 (e-book)

Copyright 2015 by Koninklijke Brill NV, Leiden, The Netherlands.

Koninklijke Brill NV incorporates the imprints Brill, Brill Nijhoff and Hotei Publishing.

All rights reserved. No part of this publication may be reproduced, translated, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without prior written permission from the publisher.

Authorization to photocopy items for internal or personal use is granted by Koninklijke Brill NV provided that the appropriate fees are paid directly to The Copyright Clearance Center, 222 Rosewood Drive, Suite 910, Danvers, MA 01923, USA. Fees are subject to change.

This book is printed on acid-free paper.

Freedom of Navigation and Globalization

Center for Oceans Law and Policy

Series Editor

Myron H. Nordquist
John Norton Moore

VOLUME 18

The titles published in this series are listed at *brill.com/colp*

Seoul Papers

Freedom of Navigation and Globalization is part of a series of publications on oceans law and policy associated with the Center for Oceans Law and Policy, University of Virginia School of Law. This volume is based on presentations made 2–3 May, 2013, at the Center's 37th Annual Conference which was held in Seoul, Republic of Korea. The primary organizers of the Conference were the Virginia Center and the Korea Maritime Institute. Sponsors were the Centre for International Law, National University of Singapore; the South China Sea Institute, Xiamen University; and the National University of Ireland, Galway. Associate Sponsors were the Ministry of Oceans and Fisheries (Korea); the Korea Institute of Ocean Science & Technology; the Korea Coast Guard; the Faculty of Law, University of Bergen, Norway; and the International Law Department, US Naval War College.

Contents

Introduction	1
--------------	---

Setting the Context: A Globalized World	4
---	---

Tommy Koh

PART 1

Counter Piracy Operations—Asia

1 Combating Piracy and Armed Robbery in Southeast Asia: An Evolution in Cooperation	9
--	---

Tara Davenport

2 The Small But Magnificent Counter-Piracy Operations of the Republic of Korea	51
---	----

Youngjoo CHO

PART 2

Transnational Threats

3 Counter Proliferation Activities and Freedom of Navigation	71
--	----

Douglas Guilfoyle

4 Slipping the Net: Why Is It So Difficult to Crack Down on IUU Fishing?	88
---	----

Seokwoo Lee, Anastasia Telesetsky, and Clive Schofield

5 Regulation of Private Maritime Security Companies in International Law	120
---	-----

James Kraska

PART 3

Developments in Arctic Ocean

- 6 **Arctic Council Update** 139
 Ernst Nordtveit
- 7 **Communications between the Arctic States and North Pacific Asian
 States on the Arctic Issues** 150
 Jong Deog Kim and Anna Jane Choi

PART 4

Energy Security and Sealanes

- 8 **Institutional Building for Maritime Security in Southeast Asia: The
 Role of ASEAN** 163
 Hao Duy Phan
- 9 **Freedom of Navigation and the Chinese Straight Baselines in the
 South China Sea** 190
 Kuen-chen FU
- 10 **The Cooperative Mechanism in the Straits of Malacca and
 Singapore** 196
 Leonardo Bernard

PART 5

Balancing Marine Environment and Freedom of Navigation

- 11 **European Law and Policy Review: Striking a Balance between
 Ecosystem Considerations and Navigation Rights under the Marine
 Strategy Framework Directive, the Law of the Sea Convention and the
 Draft Directive on Maritime Spatial Planning** 221
 Ronán Long

- 12 **Responsibility of Flag States for Pollution of the Marine Environment:
The Relevance of the UNCLOS Dispute Settlement Regime** 257
Robert C. Beckman

- 13 **Cooperative Environmental Mechanisms for the South
China Sea** 278
Shichun WU

PART 6

Marine Data Collection

- 14 **Marine Data Collection: US Perspectives** 285
J. Ashley Roach
- 15 **Global Ocean Challenges** 303
Stephen A. Macko

Introduction

On May 2 and 3, 2013, the Center for Oceans Law and Policy (COLP) and the Korea Maritime Institute (KMI) were the primary co-organizers of a conference in Seoul, Republic of Korea, on the theme of Freedom of Navigation and Globalization. Sponsors of the program were the Centre for International Law, National University of Singapore (CIL); the National University of Ireland, Galway; and the South China Sea Institute, Xiamen University, China. Associate Sponsors were the Ministry of Oceans and Fisheries (Korea); the Korea Institute of Ocean Science & Technology; the Korea Coast Guard; the Faculty of Law, University of Bergen, Norway; and the International Law Department, US Naval War College.

We are pleased to present in this volume the papers which resulted from this conference. The opening address was delivered by Professor/Ambassador Tommy Koh, who, among many other things, was the President of the Third United Nations Conference on the Law of the Sea. Tommy emphasizes four pillars of globalization: world environment, international trade, freedom of navigation, and the 1982 Convention on the Law of the Sea (UNCLOS).

Part I focuses on counter piracy operations in Asia with a paper presented by Tara Davenport, at that time with CIL and now a post graduate student at Yale. Tara reports on the co-operative measures taken within the Southeast Asia region to combat piracy and armed robbery against ships. She explores the weaknesses in the international legal regime, examines contemporary practices and their limitations, and urges the need to generate political will to move regional cooperation forward. Next, RADM Youngjoo Cho highlights the historical activities of the Republic of Korea navy in countering piracy and outlines its counter piracy operations in Somalia. He concludes with a review of the lessons learned from the operations and suggests that the real solution is to rehabilitate Somalia as a strong maritime country.

In Part II, Professor Douglas Guilfoyle of University College London addresses counter proliferation activities and freedom of navigation. He notes that attempts to change the positive law dealing with maritime interdiction of Weapons of Mass Destruction (WMD) are limited and perhaps not practical given the difficulties of containing the proliferation of both WMD and conventional weapons by sea. In their paper, three authors—Seokwoo Lee, Anastasia Telesetsky and Clive Schofield—tackle the question of why it is so difficult to crack down on Illegal, Unreported and Unregulated (IUU) fishing throughout the world's oceans. They assess the impact and scale of IUU fishing, review its history and recent developments in detail, and suggest how to crack down on

the problem with better incentive structures to protect marine fisheries globally. James Kraska in the next paper explores the regulation of private maritime security companies in dealing with transnational threats. The International Maritime Organization (IMO) mostly deferred to flag States on this issue as well as to ship-owners in authorizing the carriage and use of firearms for use in self-defense, a topic surrounded by legal ambiguity.

The discussion of developments in the Arctic Ocean in Part III includes an update on the activities of the Arctic Council by Professor Ernst Nordtveit of the University of Bergen, Faculty of Law. He describes the organization and work of the Council, the framework of its legal regime, new activities such as navigation in a changing environment, and recent decisions of the Council pertaining to permanent observer status. Jong Deog Kim and Anna Jane Choi of the Strategy Research Division, KMI, look at cooperative measures taken by China, Japan and Korea particularly with respect to science in the Arctic. They conclude with concrete suggestions for enhancing stronger communications between North Pacific Asian States.

The topic of energy security and sealanes is taken up in Part IV of this book. Hao Duy Phan, a Senior Research Fellow at CIL, begins with an examination of institutional building within ASEAN for maritime security in Southeast Asia. His paper's emphasis is on an overview of the activities and initiatives conducted pursuant to the ASEAN maritime security framework including its sectoral bodies. He concludes with recommendations for a stronger framework to strengthen regional cooperation for maritime security to better equip ASEAN to assist its Member States. Professor Kuen-chen Fu of Shanghai Jiao Tong University next compares freedom of navigation and the straight baseline system of China in the South China Sea. He believes there is actually no real issue of freedom of navigation in the South China Sea region today but that China could avoid theoretical obstacles to freedom of navigation in the future by unilaterally establishing internal waters and designating sea lanes to allow transit by foreign vessels and aircraft. Leonardo Bernard, a Research Fellow at CIL, covers the cooperative efforts of Indonesia, Malaysia, and Singapore to enhance navigational safety and environmental protection in the Straits of Malacca and Singapore. He analyzes the work achieved by the littoral States and identifies several challenges in improving the effectiveness of the present cooperative mechanisms.

Part V of this book is addressed to the seminal issue of balancing the protection of the marine environment and freedom of navigation. Professor Ronán Long of the National University of Ireland, Galway, reviews European law and policy which is designed to strike a balance between ecosystem consid-

erations and navigation rights under European Union's (EU) Marine Strategy Framework Directive. The EU Directive applies the ecosystem approach, but given the importance of the interests, the author states that the European Parliament Committee tasked with giving a second reading ought to insert an express provision that provides that EU States are to preserve the freedom of navigation in UNCLOS as such States implement maritime spatial planning and coastal management strategies. The Director of CIL, Robert Beckman, then addresses the issue of whether the dispute settlement regime in UNCLOS and the 2001 International Law Commission (ILC) *Articles on the Responsibility of States for Internationally Wrongful Acts* can be used to hold flag States legally responsible for pollution violations. His thesis is that the provisions of UNCLOS establish clear obligations on flag States with respect to pollution of the marine environment and with the ILC Articles create effective mechanisms for holding errant States responsible for breaches of their international obligations. The last paper in Part IV is by the President of the National Institute for South China Sea Studies, China. Dr. WU evaluates the current mechanisms in the South China Sea marine environment, notes that disputes are an obstacle to cooperation and affirms that freedom of navigation and a healthy marine environment are in the common interest of all States.

Marine Data Collection is covered in Part VI, the final subject dealt with in this volume. Captain J. Ashley Roach, JAGC, USN (retired) discusses what marine scientific research is and identifies what marine scientific research is and is not subject to Part XIII of UNCLOS. Ash spent many years in the US Department of State dealing with his topic and this paper is one of the best reviews available of the various categories and subcategories and their attendant legal consequences. Given the lack of agreed definitions of the various methods for marine data collection, this paper provides important clarifications to promote further understanding. The last paper in the book is distinguished by its scientific focus. Professor Stephen A. Macko, Department of Environmental Studies, University of Virginia, outlines global challenges such as global warming, rising sea level and changes in the ice over in the Polar Regions. He discusses loss of coastal zones, decomposition of methane hydrates, and ocean acidification while deploring the limited base of scientific knowledge.

Conference PowerPoints are available at <http://www.virginia.edu/colp/annual-conference.html>

Setting the Context: A Globalized World

Tommy Koh

According to our good friend, Myron Nordquist, the theme of this conference is freedom of navigation and globalization. I would like to touch on three points: (i) how globalization has transformed the world we live in; (ii) the freedom of navigation as an enabler of globalization; and (iii) UNCLOS as the guarantor of the freedom of navigation.

Globalized World

A good friend, Kishore Mahbubani, has recently published his fourth book. It is titled, *The Great Convergence: Asia, the West and the Logic of One World*. In the second chapter of the book, Mahbubani argues convincingly that, for the first time in human history, we live in a single interdependent world. Although globalization has its detractors, I hold the view that, on balance, it has done more good than harm. The globalized world has four pillars, namely, the environmental pillar, the economic pillar, the technological pillar and the pillar of common human aspirations.

Four Pillars of Globalization

The fact that we live in one world environmentally is best demonstrated by the threat of global warming and climate change. The problem is real and it cannot be solved by any one country alone. It can only be solved by the collective

* Professor Tommy Koh is Ambassador-At-Large at the Ministry of Foreign Affairs, Chairman of the Centre for International Law and Rector of Tembusu College at the National University of Singapore. He is the Co-Chairman of the China-Singapore Forum, the India-Singapore Strategic Dialogue and the Japan-Singapore Symposium. He was Singapore's Permanent Representative to the United Nations in New York for 13 years. He was Ambassador to the United States of America for six years. He was also the President of the Third UN Conference on the Law of the Sea (1981–82). He chaired the Preparatory Committee for and the Main Committee at the Earth Summit. He has served as the UN Secretary General's Special Envoy to Russia, Estonia, Latvia and Lithuania. He was also Singapore's Chief Negotiator for the USA Singapore Free Trade Agreement. He has chaired two dispute panels for the WTO.

action of all the nations of the world. I regret to say that it is not clear whether we will have the political will to agree on a new legally binding agreement to replace the Kyoto Protocol, which expired in 2013. The fact that we live in one world economically was brought home vividly to us when the crisis on Wall Street in 2008 was quickly transmitted across the Atlantic and caused a crisis in Europe and, as a result, the world economy was in danger of going over the cliff. In this regard, the G20, of which South Korea is a member, has played a significant role. Nothing better demonstrates the fact that we live in one world technologically than the power of mobile telephony and the wonders of the information and communication industry. The Internet has made the Korean singer, Psy, into a global icon. We are also united by certain common aspirations, such as, to achieve a decent standard of living, to be treated with humanity and to live under the rule of law.

International Trade Drives Globalization

One of the drivers of the global economy is international trade. Trade has lifted more developing countries out of poverty than foreign aid. Trade has enabled the people of the world to access goods and services no matter where the producers are located. For example, it is because of trade that Samsung Galaxy is sought after by the young people all over the world. It is because of trade that Apple's iPhone and iPad are essentially produced, not in America but, at Foxcom's factories in southern China.

Freedom of Navigation Lifeblood of Shipping Industry

We often forget that over 90 per cent of international trade is sea-borne. It is ships, not aircraft, which carry most of our trade in goods. Shipping takes place within a framework of laws and rules. A fundamental value is freedom of navigation. A ship may safely navigate through the territorial area, contiguous zone and the Exclusive Economic Zone of any coastal State and the high sea in order to arrive at its destination. A ship may enter a port, discharge its cargo and leave. Freedom of navigation is the lifeblood of the shipping industry. It is a global public good. It is in the interests of all countries to uphold it. It is in the interests of no country to interfere with the freedom of navigation. Asian countries are highly dependent on trade for their prosperity. We are therefore a stakeholder in protecting the freedom of navigation.

UN Convention on the Law of the Sea

My third and final point is that the 1982 Convention on the Law of the Sea (UNCLOS) is the authoritative law on the law of the sea. The Convention represents a carefully negotiated package of balances between the rights and interests of the coastal State, on the one hand, and the rights and interests of the international community, on the world. In December 2012, I had the privilege of speaking to the UN General Assembly, on the occasion of the 30th anniversary of the opening for signature of the Convention. There was a consensus that the Convention has served the world well. We agreed that the Convention embodies the modern law of the sea. It has brought order and peace. We should faithfully abide by the Convention. We should refrain from under-mining it by deviating from it in our domestic laws and practices. We should also refrain from adopting a selective approach towards the Convention, i.e., choosing to abide by the provisions we like and ignore those we do not like. As the former President of UNCLOS III, I would like to appeal to all states and to scholars on the law of the sea, to comply faithfully with the Convention. I would also like to express the hope that when states disagree with one another, on the interpretation and application of the Convention, and if such disputes cannot be resolved by negotiation, they will refer such disputes to compulsory arbitration or adjudication under Part XV of the Convention. It is better to settle the disputes peacefully and in accordance with the law than to settle them by other means.

PART 1

Counter Piracy Operations—Asia

∴

