



Ocean Law and Policy: 20 Years under UNCLOS

A Law of the Sea Institute Publication

Edited by

**Harry N. Scheiber, Carlos Esposito,
James Kraska, and Moon-Sang Kwon**

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Ocean Law and Policy

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Since 1965 the conferences and publications of the Law of the Sea Institute—originally a chartered body founded at the University of Rhode Island, later long headquartered at the University of Hawai'i, and since 1992 a research unit of the University of California, Berkeley, School of Law—has provided one of the ocean community's most important venues for the debate of ocean law and policy development. The present volume continues in this splendid tradition, being the latest in our LOSI publication series issued by the Nijhoff/Brill house. In the course of the book's planning, editing, and development for publication, many debts have been incurred by the Berkeley LOSI staff and myself as LOSI director. It is a pleasure to acknowledge them here.

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Introduction

*Harry N. Scheiber**

The Law of the Sea Institute is privileged to bring to publication this collection of important studies of ocean law and policy, providing searching analyses of developments under the UN Convention on the Law of the Sea (UNCLOS) during the two decades since it went into force. As shown in several chapters here, in many respects the success of UNCLOS has been greater than hoped; its provisions have entered into, or form, customary international law. In other regards, the dramatic advances of science, technology, and initiatives (private and public sector alike) have generated new issues and previously unappreciated possibilities for expanding the scope of UNCLOS and the regulatory regimes that were envisioned when the Convention was originally opened for ratifications in 1982.

This volume is divided into four parts. Part 1 deals with a set of prominent challenges and responses to ocean resources management. The approach is openly ambitious, as it covers analysis of regional actors' policies and practices regarding marine living resources and underwater cultural heritage, particularly the experience of EU and East Asian nations, but it also embraces more general views on global issues, such as the effects of climate change and sea level rise.

In Chapter 1, Ronán Long addresses the question of whether stakeholder participation in European Union regulatory regimes are legitimately seen as "new wine in new wineskins." Long indicates how the EU's common fisheries policy (CFP) is rooted in European treaties and springs from regulations promulgated by secondary legislation to conserve, manage and develop marine living resources. In recent years the CFP has shifted toward an emphasis upon achieving an ecosystem-based approach to the management of fisheries. Long explores the original scope and ongoing problems of ecosystem management, giving close analysis of the prominent emerging issue of recent years as to whether the CFP reform successfully decentralizes management and empowers stakeholders without introducing excessive barriers to the realization of overall goals. His deeply researched explanations of the institutional fragmentations, divergent objectives of the numerous interests identified as relevant

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stakeholders (fishing industries, regional and national regime structures and actors, scientists and managers, and environmental NGOs) is unique in the literature and one may fairly term it a "book-within-a-book"! Long concludes that the reformed CFP has the potential to strengthen the effective role and defined responsibilities of industry in the management and conservation of marine living resources.

Part 1 advances further the theme of coastal State resource management with a chapter by Katy Seto on West Africa and the New European Common Fisheries Policy. Her chapter complements Long's examination of the EU CFP by considering how it has historically affected fisheries in West Africa. The West African states are some of Europe's closest neighbors, and the waters comprising their Exclusive Economic Zones (EEZs) are some of the most productive fishing grounds being worked by European fleets. Combined CFP policies have led to a range of consequences, from degraded habitat and diminished stocks to conflicts between domestic and foreign fishers, and thus have stymied local economies. Seto seeks to sort how the recently enacted reforms to the CFP may alter or perpetuate trends in this complex relationship.

In Chapter 3, Davor Vidas examines what climate change means for international law of the sea and global geopolitics in an age of geographic instability along the coasts. He bases his analysis on the concept of "the Anthropocene" that is now gaining currency in the field of earth science. Coastlines now form the key objective circumstance for generation of rights of states to maritime zones. With variable (and shrinking) coastlines that are being affected by global climate change, however, profound re-examination of international law may be required to recast such concepts as the legitimacy of existing territorial claims and even basic notions of human rights. In 2009, the International Commission on Stratigraphy established the Anthropocene Working Group (WG), tasked with examining the stratigraphic basis for the Anthropocene as a distinctive, new epoch in geological history. Findings of this Working Group could raise awareness of the human impact on the Earth System, and thereby prompt new reflections on today's social structures, including the basic premises as to coastal geography and, more generally, as to international law and the law of the sea.

Mariano Aznar, author of Chapter 4, assesses the 2001 Convention for the Protection of Underwater Cultural Heritage (UCH) against the backdrop of UNCLOS. Some ambiguities that reside in the Convention text, taken together with strong differences of interest in the global community as to the allocation of rights to culturally important—often of high monetary values—vessels and artistic artifacts lost at sea, have impeded the progress of implementation. The author provides a finely textured comparison of UNCLOS and UCH, indicating

the high stakes that are involved in finding a path to resolution of outstanding national and interest-group differences that are obstructing the path to more universal ratifications. In addition to assessing the full dimensions of the of the juxtaposition of UNCLOS and UCH, Professor Anzar raises a set of questions in depth regarding the legal status of sunken State vessels and the phenomenon of creeping coastal State jurisdiction.

The theme of underwater cultural heritage is further developed in Chapter 5, by Seong Wook Park and Chang Soo Choe, who are concerned with the topic from the standpoint of Korea's current laws and outstanding points of contention regarding new directions for policy. Park and Choe consider Korea's experience with UCH, which entered into force in 2009. Korea still lacks a legal framework for the management and protection of its underwater cultural heritage, even though it is surrounded by water on three sides and has a rich underwater cultural heritage. Korea nonetheless has made progress to protect this cultural heritage through the 2010 Law on the Protection and Investigation of Buried Cultural Property. The authors suggest the new law misses the opportunity to better define the concept of underwater cultural heritage, and it fails to address issues needing resolution, such as warships and other government ships and military aircraft found underwater, the scope of temporal limits, and ownership of, and jurisdiction for, underwater cultural heritage. The authors call for a new Korean legal framework that would include standardization of recovery criteria and the specification of procedures and measures to prevent illicit recovery or export.

Part 2 consists of six chapters that address new concepts of maritime security law throughout Europe, Africa, America, Asia and Australia. This Part also offers substantive analysis of a broad series of topics, such as how to address civil disobedience in the maritime domain, piracy at sea, and liability for wrongful acts committed by private military and security companies on board ships.

Chapter 6, by co-editor James Kraska, analyzes civil disobedience in light of established ocean law. The author considers the legal treatment of the Sea Shepherd Conservation Society in the aftermath of its protests against Japanese whaling ships and Greenpeace's campaign against offshore oil development in the Arctic. These types of aggressive civil disobedience raise questions about appropriate boundaries between two bodies of international law—viz., international human rights norms that reflect the rights of all people to exercise free expression, and the principles of good order and safety at sea embodied in the international law of the sea. Kraska suggests that there is a key difference between laws regulating protest on land and protest at sea. Efforts to address civil disobedience on land unfold within clear boundaries of sovereignty

and jurisdiction, and they typically involve the timely intervention of police authorities to separate protesters from other citizens in order to preserve public safety and order, while also protecting the right of free expression to make demands on the polity. In contrast, civil disobedience at sea occurs under conditions and areas of authority shared by more than one state, so competence to prescribe and enforce rules are shared. Frustration on both sides is palpable and can lead to violence.

Kamal-Deen Ali contributes Chapter 7, on the response to piracy in the Gulf of Guinea. Ali, a naval officer and ocean law scholar, recounts the growing set of general international rules to address piracy in West Africa, including United Nations Security Council Resolutions 2018 (2011) and 2039 (2012) and the Code of Conduct for the Repression of Illicit Activities at Sea in June 2013 at Yaoundé, Cameroon. These instruments build on the basic regime for suppression of maritime piracy in UNCLOS, and supplement the classic law enforcement approach by also addressing underlying politico-economic drivers of maritime crime in West Africa.

Chapter 8, by Vasco Becker-Weinberg, explores some of the issues associated with one response to maritime piracy—the employment of privately contracted armed security personnel. His chapter, focused on liability for wrongful acts by private military and security companies on board ships, lays out a set of important questions regarding the use of force by such companies, with regard to corporate civil liability for wrongful acts. Various PMSCs have been successful in suppressing piracy in the Western Indian Ocean and are used in the Gulf of Guinea as well, but not without controversy. Flag state, coastal, and port state jurisdiction are all in play against a background of—and often in tension with—basic UNCLOS provisions and a set of larger international law concepts. Moreover, even where carrying weapons on board and where the use of force is authorized by international law and guidelines, there remains the difficulty in harmonizing human rights standards and penal regimes. Becker-Weinberg concludes that victims of wrongful action can seek both criminal and civil penalties against PMSCs, although there is not a comprehensive system for doing so.

The maritime security laws and policies of Australia, India, Singapore, and South Africa are evaluated in Chapter 9, contributed by Bimal N. Patel. Ever since the attacks of 9/11, maritime security has become a central focus in the development of maritime law more generally. The 2008 UN Secretary-General Report on Oceans and the Law of the Sea identified seven specific maritime security threats: piracy, terrorism, illicit trafficking in arms and WMD, narcotic drugs, smuggling and trafficking of persons, IUU fishing and damage to the marine environment. Like the earlier chapters in this volume on the African