

Marta Chantal Ribeiro  
Fernando Loureiro Bastos  
Tore Henriksen *Editors*

# Global Challenges and the Law of the Sea

 Springer

# Global Challenges and the Law of the Sea

Marta Chantal Ribeiro •  
Fernando Loureiro Bastos • Tore Henriksen  
Editors

# Global Challenges and the Law of the Sea

 Springer

*Editors*

Marta Chantal Ribeiro  
Faculty of Law  
University of Porto  
Porto, Portugal

Fernando Loureiro Bastos  
Faculty of Law  
University of Lisbon  
Lisbon, Portugal

Tore Henriksen  
Faculty of Law  
UiT The Arctic University of Norway  
Tromsø, Norway

ISBN 978-3-030-42670-5      ISBN 978-3-030-42671-2 (eBook)  
<https://doi.org/10.1007/978-3-030-42671-2>

© Springer Nature Switzerland AG 2020

This work is subject to copyright. All rights are reserved by the Publisher, whether the whole or part of the material is concerned, specifically the rights of translation, reprinting, reuse of illustrations, recitation, broadcasting, reproduction on microfilms or in any other physical way, and transmission or information storage and retrieval, electronic adaptation, computer software, or by similar or dissimilar methodology now known or hereafter developed.

The use of general descriptive names, registered names, trademarks, service marks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.

The publisher, the authors, and the editors are safe to assume that the advice and information in this book are believed to be true and accurate at the date of publication. Neither the publisher nor the authors or the editors give a warranty, expressed or implied, with respect to the material contained herein or for any errors or omissions that may have been made. The publisher remains neutral with regard to jurisdictional claims in published maps and institutional affiliations.

This Springer imprint is published by the registered company Springer Nature Switzerland AG.  
The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

# Foreword

It is an honour for me to write a foreword for this volume on Global Challenges and the Law of the Sea based on the contributions to the VIIth Colloquium of the International Association of the Law of the Sea (hereinafter “the AssIDMer”), held in Lisbon, Portugal, on 20–21 September 2018. I had the privilege of participating in this Colloquium of the AssIDMer, which was co-hosted by the University of Porto, the University of Lisbon and UiT the Arctic University of Norway.

The 1982 United Nations Convention on the Law of the Sea (hereinafter “UNCLOS” or “the Convention”) is one of the most complex international treaties that have ever been negotiated. While UNCLOS reaffirmed many provisions of customary international law codified in the 1958 Geneva Conventions, its main achievement was progressive development of international law. UNCLOS declares the seabed, ocean floor and their mineral resources beyond limits of national jurisdiction the common heritage of mankind and establishes the international regime governing activities in that area, introduces concepts of exclusive economic zone and archipelagic waters, clarifies the regime governing passage through straits used for international navigation, defines the legal regime of the continental shelf and establishes criteria to be used by coastal States in establishing the outer limits of their continental shelf, contains extensive provisions concerning the protection and preservation of the marine environment and provides for a mechanism, in the form of compulsory procedures entailing binding decisions, that is supposed to ensure compliance with the provisions of the Convention.

While UNCLOS represents the best effort on the part of international community of States to address governance issues that required solution at the time of its conclusion, the Convention did not resolve all of them. Consequently, while UNCLOS quite rightly is being called “Constitution for the oceans” and there is no doubt that conclusion of the Convention constituted a remarkable achievement, it should also be understood that its resulting oceans governance regime still has gaps which need to be addressed. This was clearly demonstrated by the fact that relatively shortly after the conclusion of UNCLOS, two implementing agreements had to be negotiated to supplement its provisions, namely the 1994 Agreement Relating to the

Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December and the 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.

It should also be understood that UNCLOS cannot provide and has never been intended to provide an answer to every problem that arises. UNCLOS is a framework convention. As a framework convention, which enjoys almost universal acceptance, it has proved to be a flexible instrument serving as a solid legal foundation for the further progressive development of the international law of the sea. UNCLOS therefore should be viewed as a solid foundation for international governance of maritime activities, which is an ongoing law-making process; as a platform on which new emerging issues relating to the international governance of activities in the oceans are to be addressed, gaps closed and deficiencies, if discovered, to be corrected.

For many years, oceans have been viewed as capable of supporting any human activity and their resources have been considered unlimited. In our days, it is universally recognized that increasing human activities are pushing the oceans to the limits of their ecological carrying capacity that marine resources are exhaustible and that urgent actions are to be taken to ensure their sustainable use. UNCLOS, which is now more than forty years old, does not address a number of emerging issues such as the conservation of biodiversity, CO<sub>2</sub> sequestration, the use of marine genetic resources, the issues arising in connection with global warming and rapidly increasing demand for energy sources. UNCLOS therefore needs to be supplemented by additional regulatory regimes to meet these new challenges.

The need for further regulatory regime supplementing the Convention was confirmed, when on 24 December 2017 the General Assembly of the United Nations by resolution A/RES/249 decided to convene an intergovernmental conference “to elaborate the text of an internationally legally binding instrument under the United Nations Convention for the Law of the Sea on the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction”.<sup>1</sup> Multiple complex issues that need to be resolved in this instrument were discussed at the VIIth Colloquium of the AssIDMer and presentations made in this regard are included in Part III of this volume.

The international community of States should seek solution to these emerging issues through the process of international governance within the framework of relevant existing institutions, first of all the United Nations, its agencies and related organizations that provide fora where States and other actors can engage in dialogues and negotiations which, if successful, should result in new norms and regulatory regimes supplementary to the one established by the Convention and facilitating its implementation.

---

<sup>1</sup>General Assembly resolution 72/249, A/RES/248, of 24 December 2017.

As pointed out by Patricia Birnie, Alan Boyle and Catherine Redgwell in their book on “International Law and the Environment”, the term “governance” when applied to the United Nations and its agencies implies rather less than global government, a task for which no international organization is equipped, but more the power to determine policy or initiate the process of international law-making. At the very least, it captures the idea of a community of States with responsibility for addressing common problems through a variety of political processes which are inclusive in character, and which to some degree embody a limited sense of collective interest, distinct in specific cases from the particular interests of individual States.<sup>2</sup>

In our days, conservation and sustainable use of many of ocean resources should be viewed as a matter of common concern. As noted by Birnie, Boyle and Redgwell, the concept of “common concern” implies that international community of States as a whole has a legitimate interest in such resources of global significance. It follows from the above that the international community of States has a common responsibility to ensure conservation and sustainable use of these resources and that individual States have legal obligation vis-a-vis the whole international community of States regarding the conservation and sustainable use of these resources and that such obligation can be enforced by or on behalf of that community of States.<sup>3</sup>

The VIIth Colloquium of the AssIDMer presented an excellent opportunity to look in detail at some of the global challenges that we face today in ocean governance. The presentations made at the Colloquium included in the present volume constitute a reach overview of recent developments in various areas of ocean affairs and provide their thorough analyses. They address the role of the international organizations in the implementation and development of the law of the sea (Part I) and the issue of protection and conservation of the areas beyond national jurisdiction (Part III).

As to “superpowers, international courts and the law of the sea”, an issue addressed in Part II of this volume, it was highlighted in one of my recent publications on the subject that judicial institutions constitute an integral element of this governance process by providing authoritative guidance on what the law of the sea is and by fostering the progressive development of international law. In this context, it is crucial that international courts and tribunals continue to offer to States an efficient and fair administration of justice that facilitates the peaceful and sustainable resolution of conflicts.

At the same time, there is the issue of use of international judicial proceedings by States for political purposes. It is important to recognize that such cases can place international courts and tribunals in a difficult position. The function of international judicial bodies is to assist the parties in the peaceful settlement of their disputes, not to aggravate disputes. Faced with politically motivated requests, it is incumbent

---

<sup>2</sup>P. Birnie, A. Boyle, C. Redgwell (2009) *International Law and the Environment*. Third Edition, Oxford University Press, pp. 152-154.

<sup>3</sup>*Id.*, pp. 203-204.

upon international judicial institutions to exercise self-restraint and to restrict themselves to passing judgement on a dispute only to the extent that the Convention and the States entrust them with jurisdiction. This does not mean that judicial bodies can sidestep their duty to pass comprehensive judgement on cases validly submitted to them. However, the need for judicial self-restraint where appropriate needs to be emphasized.<sup>4</sup>

I am confident that this volume constitutes an important contribution to efforts of international community to achieve a comprehensive fare governance of ocean affairs.

International Tribunal for the Law  
of the Sea, Hamburg, Germany  
New York, USA  
May 2019

Vladimir Golitsyn

---

<sup>4</sup>Golitsyn (2019) Adjudication of maritime disputes. In: Elvik G, Clifton M-J, Haas T, Lourenço L, Schwiesow K (eds) *The art of judicial reasoning, festschrift in honour of carl baudenbacher*. Springer International Publishing, Cham, pp 207–208.



# Preface

The international law of the sea is one of the most dynamic areas of contemporary international law. The radical transformation of international law of the sea that began in 1945 with the emergence of the legal concept of continental shelf did not end in 1982 with the conclusion of the negotiations on the United Nations Convention on the Law of the Sea. The ‘Constitution of the Oceans’, as a framework convention, provides adequate responses to the international legal regulation of a very diverse range of matters, but, at the same time, shows the limitations arising from the historical epoch in which it was negotiated. It should be stressed that a number of legal problems have arisen in recent decades which require innovative legal solutions and imply a balance between global interests, sovereign powers and the jurisdiction of coastal States. Relevant examples are the need to find regional and global legal responses to the preservation of marine biodiversity, the effects that the sea level rise could have on the terrestrial territory of States, on the demarcation lines of their spaces and on the forced displacement of their populations, the transformation of the Arctic frozen space into an ocean open to international navigation and the exploitation of living and non-living natural resources.

This book has been organized and structured as a contribution to the understanding of the tension arising from the need to provide innovative legal solutions to new and complex issues of a global scope and nature and the relevance of international legal concepts that were created and established by State practice when the sea was an endless space and timid progress was made regarding the conservation of living resources. The first readers of this volume are international lawyers interested in following the evolution of some important areas of international law of the sea, in particular the role played for its progressive development by international organizations and conflict resolution mechanisms as well as the current challenges and achievements on the conservation and sustainable use of areas beyond national jurisdiction. Considering the way in which chapters have been structured and written, it may be equally suited to readers interested in the academic literature on the functioning of international regimes applicable to the seas and oceans as well as

the distribution of power amongst international entities and States in maritime spaces.

The volume is based on the contributions that were initially presented at the VIIIth Colloquium of the AssIDMer (*International Association of the Law of the Sea*), which took place in Lisbon on 20–21 September 2018. The draft versions of the chapters were subject to peer review by members of the scientific committee of the Colloquium and renowned scholars before being approved for publication. The final version of the chapters is now presented, divided into three thematic parts. The first part includes a presentation of examples of the role of international organizations in ocean governance. It includes twelve chapters covering a very diverse set of matters, both materially and geographically, demonstrating the importance that the coordinated actions of States have in obtaining harmonized solutions for the pursuit of activities in maritime spaces in the fields of navigation, fisheries or maritime security. The second part involves the way in which conflict resolution mechanisms may be relevant to the understanding of the contents of the international law of the sea and the international legal framework for the action of the great maritime powers. It is composed of three chapters, examining stakeholders' role in dispute settlement, the position taken by China and the Russian Federation regarding international litigation in maritime spaces and how the South China Sea Award may be relevant to the debate on the international legal concepts of rock and island. The third part is an exposition of the way the question of environmental protection, conservation and sustainable use of areas beyond national jurisdiction is currently being discussed. The seven chapters of this part report on the progress of the ongoing negotiations for a new high sea international legal regime and the establishment and operationalization of environmental regimes in international maritime spaces.

The editors of this volume express their gratitude to the *International Association of the Law of the Sea*, in the person of its President, Professor Giuseppe Cataldi, for the support given to the publication of this volume; to all peer reviewers for their dedication in contributing to the quality of diverse chapters; to the *Fundação Oceano Azul*, in the person of its President, Dr. José Soares dos Santos, and CEO Dr. Tiago da Pitta e Cunha; to the *Jebsen Centre for the Law of the Sea* (UiT the Arctic University of Norway); to the *Foundation for Science and Technology* (Portugal); to the *University of Porto* and to the *ICJP—Instituto de Ciências Jurídico-Políticas* (Faculty of Law of the University of Lisboa) for the earlier support given to the Colloquium which formed the basis for this volume.

Porto, Portugal  
Lisbon, Portugal  
Tromsø, Norway  
18 October 2019

Marta Chantal Ribeiro  
Fernando Loureiro Bastos  
Tore Henriksen

# Contents

<b>1</b>	<b>Introduction</b> . . . . .	<b>1</b>
	Giuseppe Cataldi	
<b>Part I The Role of the International Organizations in the Implementation and Development of the Law of the Sea</b>		
<b>2</b>	<b>Implementation of the Rules of the UNCLOS Through Universal and Regional Organizations</b> . . . . .	<b>9</b>
	Mariko Kawano	
<b>3</b>	<b>International Organizations and the Protection of the Marine Environment</b> . . . . .	<b>37</b>
	Pradeep A. Singh	
<b>4</b>	<b>The Arctic Ocean: Are We Ready to Govern a New Ocean?</b> . . . . .	<b>59</b>
	Timo Koivurova, Stefan Kirchner, and Pirjo Kleemola-Juntunen	
<b>5</b>	<b>Regional Fisheries Management Organizations</b> . . . . .	<b>81</b>
	Erik J. Molenaar	
<b>6</b>	<b>Considerations on Some Global Institutional Challenges Within the Context of the Conservation and Management of Marine Living Resources</b> . . . . .	<b>111</b>
	Fernando Correia Cardoso	
<b>7</b>	<b>Market-Based Measures Against Illegal, Unreported and Unregulated Fishing in Indonesian Waters</b> . . . . .	<b>121</b>
	Dita Liliansa	
<b>8</b>	<b>Sea-Level Rise in Relation to International Law: A New Topic for the United Nations International Law Commission</b> . . . . .	<b>145</b>
	Patrícia Galvão Teles	

<b>9</b>	<b>The Impact of UN Sanctions on Commercial Shipping Activities</b> . . . . .	159
	Richard L. Kilpatrick	
<b>10</b>	<b>Security Council’s Contribution to the Evolution of the Law of the Sea: Avant Garde or Self-Limitation?</b> . . . . .	177
	Kiara Neri	
<b>11</b>	<b>The Challenges of the Commission on the Limits of the Continental Shelf</b> . . . . .	191
	Aldino Santos de Campos	
<b>12</b>	<b>UN Food and Agriculture Organization: Exercising Legal Personality to Implement the UN Convention on the Law of the Sea</b> . . . . .	203
	Anastasia Telesetsky	
<b>13</b>	<b>Maritime Surveillance of the EU External Sea Borders: Extensive Approaches and Operational Challenges to the Principles of Coastal and Flag State Jurisdiction in Italy</b> . . . . .	221
	Marco Fantinato	
<b>Part II Superpowers, International Courts and the Law of the Sea: Challenges for the Global Oceans Regime</b>		
<b>14</b>	<b>Stakeholders in Dispute Settlement Under the UN Convention on the Law of the Sea</b> . . . . .	239
	Natalie Klein	
<b>15</b>	<b>The Legal Status of the São Pedro and São Paulo Archipelago in Light of Article 121 of UNCLOS and the South China Sea Arbitral Award: Uncontested Right to EEZ and Continental Shelf or Brazilian “Creeping Jurisdiction”?</b> . . . . .	263
	Victor Alencar Mayer Feitosa Ventura and Eduardo Cavalcanti Mello Filho	
<b>16</b>	<b>Implementing the Law of the Sea: Russia and Arbitrations Under Annex VII to UNCLOS</b> . . . . .	287
	Grant Kynaston and Rebecca Brown	
<b>Part III The Protection and Conservation of the Areas Beyond National Jurisdiction: Where Do We Stand?</b>		
<b>17</b>	<b>The Conservation and Sustainable Use of the Ocean in Areas Beyond National Jurisdiction: Where Do We Stand?</b> . . . . .	321
	Miguel de Serpa Soares	
<b>18</b>	<b>Regulating the Common Heritage of Mankind: Challenges in Developing a Mining Code for the Area</b> . . . . .	333
	Hannah Lily and Stephen E. Rody	

**19 Three Structural Pillars of the Future International Legally Binding Instrument on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction . . . . . 351**  
Catherine Blanchard, Otto Spijkers, and Wen Duan

**20 The European Union and the Future International Legally Binding Instrument on Marine Biodiversity Beyond National Jurisdiction . . . . . 379**  
Pascale Ricard

**21 The EU and the UN Legally-Binding Instrument on the Areas Beyond National Jurisdiction . . . . . 401**  
Luigimaria Riccardi

**22 Solving the Potential Conflict: High Seas Marine Protected Areas and Sovereign Rights Over the Continental Shelf Beyond 200 Nautical Miles . . . . . 423**  
Inês Aguiar Branco

**23 North East Atlantic Marine Protected Areas Beyond National Jurisdiction. Geographical and Material Scope . . . . . 443**  
Marta Sobrido-Prieto

# About the Editors

**Marta Chantal Ribeiro** Assistant Professor of public law, with tenure, at the Faculty of Law, University of Porto and Principal Investigator at the Law of the Sea Research Group of the Interdisciplinary Centre of Marine and Environmental Research (CIIMAR, University of Porto)

**Fernando Loureiro Bastos** Associate Professor of public law at the Faculty of Law, University of Lisbon. Head of Research Group (HRG) on International and European Law of the Lisbon Centre for Research in Public Law. Director of Studies of the SPDI—Sociedade Portuguesa de Direito Internacional (Portuguese Branch of the International Law Association). Chairman of the Institute of Legal Cooperation of the Faculty of Law, University of Lisbon

**Tore Henriksen** Professor of law at the Faculty of Law, UiT the Arctic University of Norway (since 2008). Director of the Norwegian Centre for the Law of the Sea (previously K. G. Jebsen Centre for the Law of the Sea)

# Abbreviations

1995 FSA	Agreement for the Implementation of the Provisions of the UN 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
2030 Agenda	2030 Agenda for Sustainable Development
Abidjan Convention	Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region
ABMT	Area-based management tools
ABNJ	Areas Beyond National Jurisdiction
AC	Arctic Council
ACDS	ASEAN Catch Documentation Schemes
AEPS	Arctic Environmental Protection Strategy 1991
AG	Attorney General
AHWG	Ad Hoc OICP Working Group
AMSA	Arctic Marine Shipping Assessment
AMSP	Arctic Marine Strategic Plan and Unregulated Fishing
APEI	Areas of Particular Environmental Interest
APFIC	Asia-Pacific Fishery Commission
ASEAN	Association of Southeast Asian Nations
AWNJ	Areas within national jurisdiction
AWPPA	Arctic Waters Pollution Prevention Act
Barcelona Convention	Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean
BBNJ	Biodiversity Beyond National Jurisdiction
BIMCO	Baltic and International Maritime Council

Bucharest Convention	Convention on the Protection of the Black Sea against Pollution
BWM	International Convention for the Control and Management of Ships' Ballast Water and Sediments
CAMLR	Convention on the Conservation of Antarctic Marine Living Resources
CAO	Central Arctic Ocean
CB&TT	Capacity-Building and the Transfer of Marine Technology
CBD	Convention on Biological Diversity
CCAMLR	Commission for the Conservation of Antarctic Marine Living Resources
CCSBT	Commission for the Conservation of Southern Bluefin Tuna
CCZ	Clarion-Clipperton Fracture Zone
CEP	Caspian Environment Programme
CFMS	Conservation and management of fish stocks
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973
CLCS	Commission on the Limits of the Continental Shelf
CMS	Convention on the Conservation of Migratory Species of Wild Animals
COBSEA	Coordinating Body on the Seas of East Asia
COFI	FAO Committee on Fisheries
COLREGs	International Regulations for Preventing Collisions at Sea
COMAR	Common Foreign and Security Policy Working Party on the Law of the Sea
COMHAFAT-ATLAFCO	Ministerial Conference of Fisheries Cooperation among African States Bordering the Atlantic
COP	Conference of the Parties
COREP	Regional Commission of Fisheries of Gulf of Guinea
CPPS	Permanent Commission for the South Pacific
CRFM	Caribbean Regional Fisheries Mechanism
CS	Continental Shelf
CTMFM	Joint Technical Commission of the Maritime Front
DOALOS	United Nations Division for Ocean Affairs and the Law of the Sea
DPRK	Democratic People's Republic of Korea
East Asian Seas Action Plan	Action Plan for the Protection and Development of the Marine Environment and Coastal Areas of the East Asian Seas Region



EBSA	Ecologically or biologically significant marine area
ECCAS	Economic Community of Central African States
ECJ	Court of Justice of the European Union
EEZ	Exclusive Economic Zone
EFCA	European Fisheries Control Agency
EIA	Environmental impact assessment
EIS	Environmental impact statement
EMMP	Environmental Management and Monitoring Plan
EU	European Union
FAO	Food and Agricultural Organization of the United Nations
FAO Compliance Agreement	Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas of 1993
FAO PSMA	Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal Unreported and Unregulated Fishing of 2009
FCWC	Fishery Committee of the West Central Gulf of Guinea
FFA	Pacific Islands Forum Fisheries Agency
GATT	General Agreement on Tariffs and Trade
GESAMP	Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection
GFCM	General Fisheries Commission for the Mediterranean
HELCOM	Baltic Marine Environment Protection Commission—Helsinki Commission
HIMI	Heard Island and McDonald Islands
HR	High Representative for Foreign Affairs and Security Policy
HS	High seas
IAEA	International Atomic Energy Agency
IATTC	Inter-American Tropical Tuna Commission
Ibid.	Ibidem
ICCAT	International Commission for the Conservation of Atlantic Tunas
ICES	International Council for the Exploration of Seas
ICJ	International Court of Justice
ICP	United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea
ICRW	International Convention for the Regulation of Whaling 1946
Id.	Idem
IgC	Intergovernmental Conference

IGC	Intergovernmental conference on marine biodiversity of areas beyond national jurisdiction
IHO	International Hydrographic Organization
ILA	International Law Association
ILBI	International legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction
ILC	United Nations International Law Commission
ILM	International Legal Materials
IMCO	International Maritime Consultative Organization
IMO	International Maritime Organization
INPFC	International North Pacific Fisheries Commission
IOC	Intergovernmental Oceanographic Commission (of the UNESCO)
IOs	International organizations
IOSEA	Indian Ocean–South-East Asian Marine Turtle memorandum of understanding
IOTC	Indian Ocean Tuna Commission
IPHC	International Pacific Halibut Commission
IPOA-IUU	International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing
IRISL	Islamic Republic of Iran Shipping Lines
ISA	International Seabed Authority
ITLOS	International Tribunal for the Law of the Sea
IUCN	International Union for Conservation of Nature and Natural Resources
IUU	Illegal, unreported and unregulated Fishing
IWC	International Whaling Commission
JCPOA	Joint Comprehensive Plan of Action
Jeddah Convention	Convention for the Conservation of the Red Sea and the Gulf of Aden Environment
JNRFC	Joint Norwegian–Russian Fisheries Commission
Kuwait Convention	Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment from Pollution
LC/LP	London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 and the London Protocol 1996
Lima Convention	Convention for the Protection of the Marine Environment and Coastal Area of the Southeast Pacific

LTC	Legal and Technical Commission of the ISA
MARPOL	International Convention for the Prevention of Pollution from Ships
MEPC	Marine Environment Protection Committee (of the IMO)
MGRs/MGR	Marine genetic resources
MPAs/MPA	Marine protected area
MSC	Maritime Safety Committee (of the IMO)
MSR	Marine scientific research
NAFO	Northwest Atlantic Fisheries Organization
NAMMCO	North Atlantic Marine Mammal Commission
NASCO	North Atlantic Salmon Conservation Organization
NATO	North Atlantic Treaty Organization
NEAFC	North East Atlantic Fisheries Commission
NEAFC Convention	Convention on future multilateral cooperation in the North East Atlantic Fisheries
NGO	Non-governmental organisation
nm	Nautical miles
NOAA	National Oceanic and Atmospheric Administration
Noumea Convention	Convention for the Protection of the Natural Resources and Environment of the South Pacific Region
NOWPAP	Action Plan for the Protection, Management and Development of the Marine and Coastal Environment of the Northwest Pacific Action Plan
NPAFC	North Pacific Anadromous Fish Commission
NPFC	North Pacific Fisheries Commission
NPOA-IUU	National Plan of Action to Prevent, Deter and Eliminate IUU Fishing
OCS	Continental shelf beyond 200 nm
OICP	Open-ended Informal Consultative Process on Oceans and the Law of the Sea
OJ	Official Journal
OLDEPESCA	Latin American Organization for Fisheries Development
OSPAR	Convention for the Protection of the Marine Environment of the North-East Atlantic
OSPESCA	Central American Fisheries and Aquaculture Organization
P&I Clubs	Protection and Indemnity Clubs
P5+1	Permanent Five Members of the Security Council, and Germany, European Union
PERSGA	Regional Organization for the Conservation of the Environment in the Red Sea and Gulf of Aden

PICES	North Pacific Marine Science Organization
PPME	Protection and preservation of the marine environment
PrepCom	Preparatory Committee established by General Assembly resolution 69/292
PSC	Pacific Salmon Commission
PSM Agreement	Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing
PSSA	Particularly Sensitive Sea Areas
PT PBR	PT Pusaka Benjina Resources
REA	Regional arrangement for the protection and preservation of the marine environment
REC	Regional environmental convention
ReCAAP	Agreement on Combating Piracy and Armed Robbery against Ships in Asia
RECOFI	Regional Commission for Fisheries
REIO	Regional Economic Integration Organization
REMP	Regional Environmental Management Plan
REO	Regional organization for the protection and preservation of the marine environment
RFMA	Regional fisheries management arrangements
RFMOs/RFMO	Regional Fisheries Management Organizations
RFVR	Regional Fishing Vessels Record
RIO	Regional Integration Organization
ROPME	Regional Organization for the Protection of the Marine Environment
RPOA-IUU	Regional Plan of Action to Promote Responsible Fishing Practices including Combating IUU Fishing in the Region
RSP	Regional Seas Programmes
SADC	Southern African Development Community
SDG	Sustainable development goals
SEA	Strategic environmental assessment
SEAFDEC	Southeast Asian Fisheries Development Center
SEAFO	South East Atlantic Fisheries Organisation
SFRC	Sub-Regional Fisheries Commission
SHADE group	Shared Awareness and Deconfliction group
SIDS	Small island developing States
SIKPI	Surat Izin Kapal Pengangkut Ikan
SIOFA	Southern Indian Ocean Fisheries Agreement
SIPI	Surat Izin Penangkapan Ikan
SIUP	Surat Izin Usaha Perikanan

SOLAS	International Convention for the Safety of Lives at Sea
SPLOS	State Parties to the 1982 United Nations Convention on the Law of the Sea
SPRFMO	South Pacific Regional Fisheries Management Organisation
SWIOFC	South West Indian Ocean Fisheries Commission
Tehran Convention	Framework Convention for the Protection of the Marine Environment of the Caspian Sea
TEU	Treaty of the European Union
TFG	Transitional federal government, Republic of Somalia
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNCLOS	United Nations Convention on the Law of the Sea 1982
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFS Agreement	United Nations Agreement for the Implementation of the Provisions of the Convention relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNSC Res	United Nations Security Council Resolution
UNTS	United Nations Treaty Series
US	United States of America
UVI	Unique vessel identifier
VGFSF	Voluntary Guidelines for Catch Documentation Schemes
WCPFC	Western and Central Pacific Fisheries Commission Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean
WECAFC	Western Central Atlantic Fishery Commission
WG	Working group
Working Group	Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction
WTO	World Trade Organization

# Chapter 1

## Introduction



**Giuseppe Cataldi**

**Abstract** AssIDMer was established, in 2001, exactly for the purpose of promoting research activities on issues relating to the Law of the Sea by academics, civil servants and legal practitioners. It is an honor, therefore, for its President, to make some general points on the topic of “Global Challenges and the Law of the Sea”, which are meant to constitute a basic background premise to the chapters that follow. First of all, the maritime issues herein discussed illustrate the vitality of the Law of the Sea, even if an element that can be considered common to many current issues of this topic is the rapid aging of international legal instruments available. Secondly, a free and open maritime order based on the rule of law must be considered as a cornerstone for the stability and prosperity of the international community; this implies that the old unilateralist ethics of the “creeping jurisdiction” must today give way to the demands of co-operation imperatives that are functionally necessary for the common interests of the international community. Finally, protection of marine environment and resources is an emerging key priority at global level; in particular, it has to be stressed that the deep sea represents the world’s largest environment: though largely unexplored, it provides for one of the highest levels of biodiversity on our planet and for a wide variety of ecosystem services.

It is an honor for the President of the “*International Association of the Law of the Sea*” (AssIDMer), to write a brief Introduction to this volume, in which most of the chapters enclosed reproduce the papers submitted at the Association’s seventh ordinary Colloquium, which took place in Lisbon in September 2018.

The intention, in the following pages, is simply to make some general points on the topic of “*Global Challenges and the Law of the Sea*” which came to mind after reading the thorough and interesting chapters herein contained. The general points, which are meant to constitute a basic background premise to the specific developments that will be provided below in the volume, are as follows:

---

G. Cataldi (✉)

University of Naples “L’Orientale”, Department of Human and Social Sciences, Napoli, Italy  
e-mail: [gcataldi@unior.it](mailto:gcataldi@unior.it)

- (a) The maritime issues herein discussed illustrate the vitality of the Law of the Sea. For a long time, it was wrongly believed that with the entry into force of the United Nations Convention on the Law of the Sea (UNCLOS), research and debate on the issue, so intense during the years of the Third United Nations Conference on the Law of the Sea, were old-fashioned and obsolete, the codification having provided all the necessary answers. If we go through recent books, articles and proceedings on the Law of the Sea, we can see that the younger generations of European internationalists seem to have long forgotten the subject. They appear to have left it to their older Professors, preferring more fashionable themes, such as environmental law, human rights and international criminal law. On the contrary, practice has shown the inaccuracy of the assumptions underlying this behavior and it is therefore appropriate that younger generations of researchers deal with and study this area of International Law. It is a comforting sign of a change in attitude that the editors have been able to obtain quality contributions to this volume from so many young researchers.
- (b) There is one element that can be considered common to many current issues of the Law of the Sea: the rapid aging of international legal instruments available. First of all, we still have the habit of talking about UNCLOS as the “new Law of the Sea”, even though it was opened for signature nearly 40 years ago, while during this same period the structure and the very composition of the international community have undergone profound changes following phenomena that have marked an era: the fall of the Berlin Wall, the existence of new technological instruments in what is called “globalization”, the birth of the World Trade Organization, an increased sensitivity to the demands of the individual vis-à-vis States and multinational companies, the events of 11 September 2001, disasters such as Chernobyl or Fukushima, the so called “Arab Spring” and the consequent migration issues. All these occurrences necessarily determined the birth and development of a series of new and unforeseen problems which must be addressed by legal instruments forged in and for a different historical-political context. It is worth noting, for example, that biological diversity, and therefore the need for its protection, is nearly absent in UNCLOS, which takes into consideration the “conservation of biological resources” for the sole purpose of ensuring its optimal use based on the criterion of maximum sustainable exploitation (maximum sustainable yield—UNCLOS, Arts 61 and 62). The notion of biodiversity has been included in the international legal system since the last decade of the twentieth century, with the adoption of the UN Convention on Biological Diversity (UN, 1992).
- (c) A free and open maritime order based on the rule of law is a cornerstone for the stability and prosperity of the international community. It is therefore crucially important that freedom of navigation, connectivity among regions and cooperation on capacity building is ensured among all coastal States. The different nature of criminal activities at sea calls for a diversified response and a comprehensive analysis of all its aspects. The continued instability in several areas of the Middle East, Africa and Asia has resulted in an unprecedented displacement of people on a global level and an increased influx of migrants and refugees in

Europe, especially through its South-eastern and Mediterranean borders. The management of the migration crisis is a complex process that requires significant capacities and cooperation/coordination amongst several stakeholders (humanitarian aid and civil protection actors, EU and UN agencies, NGOs involved on day-to-day management of the migration crisis, national authorities).

- (d) Unfortunately, we are currently witnessing an exacerbation of interstate conflicts. In Europe, sovereign tendencies and the crisis of multilateralism are tangible evidence, but elsewhere too we are not witnessing any steps forward on the path of cooperation. Concerning in particular the Law of the Sea, the question of the South China Sea is the best (but not the only) example. Unilateralist interpretations of institutions such as the Exclusive Economic Zone (EEZ) or the right of innocent passage are increasing, as are, unfortunately, unilateral initiatives that are contrary to UNCLOS as well as the United Nations Charter and international customary law. Once again, the hope is that cooperation, especially through joint initiatives for the exploitation of living or mineral wealth, can be affirmed for the benefit of local communities as well as of the entire international community. For example, we must ask whether the delimitation of marine spaces is always necessary or if, in the interest of coastal communities, another option could be more appropriate as a first choice, namely the joint exploitation of resources or, if this is difficult, cooperation on specific issues such as the protection of the marine environment, marine scientific research, the fight against terrorism, without prejudice to States' respective claims. Delimitation does not make much sense, in other words, when it comes to delimiting resources rather than communities. Unfortunately, the desire to assert sovereign power imposes other priorities. The old unilateralist ethics of the "creeping jurisdiction" that historically underlies the Law of the Sea, in our opinion, must today give way to the demands of co-operation imperatives that are functionally necessary for the common interests of the international community, including optimal management of resources, safeguarding navigation and international trade, preservation and protection of the marine environment, management of migratory flows, the fight against piracy, terrorism and transnational crime.
- (e) Protection of marine resources is an emerging key priority at global level, with food security in much of the developing as well as developed world dependent on stopping the decline in fish stocks driven by overfishing and climate change. It is estimated that about one-fifth of all fish taken from our oceans have been fished illegally or lack any control, as a result of widespread illegal, unreported and unregulated (IUU) fishing. The economic development and welfare of island and coastal nations world-wide is threatened both by IUU fishing and illegal trafficking of every sort. Illegal fishing also exacerbates the problem of overfishing, because IUU vessels frequently operate in marine protected areas (MPAs) where a total fishing ban has been imposed. Indeed, as in marine nursery areas, within MPAs fishing activities are often banned all year round. In the past decade Satellite-based maritime surveillance has proven its potential to contribute efficiently to maritime surveillance, but there is much scope for improvement



regarding its integration in Law enforcement sectors, such as IUU fishing and monitoring of illegal fishing vessels.

- (f) The degradation of the marine environment also presents crucial security challenges in terms of disruption of national economies, potential displacement of people, degeneration of national identities and the crucially important aspect of loss of lives. The rising of sea levels, sea water acidification and global warming require scientific research and capacity building, effective and robust legislation/regulations, tailored incentives, education and communication plans as well as the creation of robust partnerships among academia, industry, public institutions and regulatory bodies. Advanced monitoring systems are crucial to understand the dynamics of the planet and the changes that are taking place.
- (g) The deep sea represents the world's largest environment; nevertheless, and though largely unexplored, it provides for one of the highest levels of biodiversity on our planet and for a wide variety of ecosystem services. Some of these ecosystem services are unique, irreplaceable, and play a key role in sustaining human well-being. Unfortunately, due to technological development and the depletion of shallow-water resources, deep sea ecosystems are being increasingly exploited and, unexpectedly, greatly affected by anthropogenic stressors and climate change. In addition, once impacted, the costs for the restoration of deep-sea ecosystems are much higher than those estimated for shallow-water ones.

These are only some of the “Global Challenges” presently at stake. Indeed, while the present global socio-economic situation and its ongoing trends do not allow for inefficiencies and fragmented approaches, and even though in recent years the dialogue between scholars and decision-makers has significantly progressed, there are still numerous barriers and bottlenecks that need to be progressively removed, notably cultural differences and institutional barriers. In general, scientists construct theories and refine conceptual models over time based on rigorous methodological approaches to withstand the highest degrees of public scrutiny and criticism, while in the world of decision-making, science is just one point of view, frequently not the most influential, and the need for decisions is immediate. The time has come to overcome these barriers. This would have several and very relevant added values: speed up the process, streamline resources, promote socio-economic development, assure use and advancement of knowledge, encourage more robust decisions, provide more resources to research and innovation. Stakeholders and civil society will benefit greatly from such cooperation. AssIDMer was established, in 2001, exactly for this purpose. The idea is to promote research activities on issues relating to the Law of the Sea by academics, civil servants and legal practitioners. The objective is to set up an independent institution in order to develop a dynamic legal community of lawyers involved in matters regarding the Law of the Sea and to promote cooperative links among experts all around the globe. In expanding its efforts to contribute to the development of the international Law of the Sea, AssIDMer values research, symposia and publications such as this prolific and highly noteworthy volume.

**Giuseppe Cataldi** Professor of international law in the University of Napoli “L’Orientale”. Coordinator of the European Network Jean Monnet “MAPS” (Migration and Asylum Policy Systems). He is the President of the International Association for the Law of the Sea (AssIDMer), author and editor of many articles and books on international law and European Union Law issues. EMUNI Management Board Member (former Senate Member). Cofounder and co-director of “Diritti umani e diritto internazionale”, co-director of ‘The Italian Yearbook of International Law’. Member of the Italian Society of International Law (Vice-President, 2012–2013) and of the Société française de droit international.

**Part I**  
**The Role of the International Organizations**  
**in the Implementation and Development**  
**of the Law of the Sea**

# Chapter 2

## Implementation of the Rules of the UNCLOS Through Universal and Regional Organizations



**Mariko Kawano**

**Abstract** Under the United Nations Convention on the Law of the Sea (UNCLOS), international cooperation through universal, regional, or subregional organizations is particularly important for the purpose of the implementation of the rules concerning the conservation and management of the fish stocks (CMFS) and the protection and preservation of the marine environment (PPME). There were numerous international organizations or conventional arrangements for these purposes even before the UNCLOS. However, since the adoption of the UNCLOS, by considering the new development of scientific and technological knowledge and recognizing the needs of new legal rules and approaches to respond to them, new organizations and arrangements have been established both for CMFS and for PPME. Moreover, the organizations and arrangements prior to the UNCLOS have been reviewed or replaced by new mechanisms. The universal organizations contribute to the development of new legal rules and provide the mechanisms for coordination and enhancement of the function of regional organizations and arrangements. Today, various and complicated overlap and interaction can be noted between the legal rules concerning CMFS and those concerning PPME. Marine living resources are considered to constitute a part of the marine environment and various principles and approaches of international environmental law are introduced to the measures for CMFS. Under these circumstances, the cooperation between the organizations for CMFS and those for PPME may contribute to the coordination and harmonization of the legal rules concerning these different but closely related matters.

### 1 Introduction

The United Nations Convention on the Law of the Sea (UNCLOS), contains various general and framework rules and requires the States concerned to substantiate the appropriate rules for their implementation. As international cooperation is essential

---

M. Kawano (✉)  
Waseda University, Faculty of Law, Tokyo, Japan  
e-mail: [mkawano@waseda.jp](mailto:mkawano@waseda.jp)

for this purpose, the Preamble emphasizes its importance and various provisions set out the obligation to cooperate. The forms of cooperation in those provisions vary. While some provide for direct cooperation between or among the States concerned and some others require all States to cooperate for the specific purpose,<sup>1</sup> there are many provisions that set out the obligation to cooperate directly or through international organizations, on a regional as well as universal basis.<sup>2</sup>

This chapter focuses on the activities undertaken by universal and regional organizations to fulfil the obligations to cooperate in the matters of the conservation and management of fish stocks, hereafter referred to as “CMFS,” and the protection and preservation of the marine environment, hereafter referred to as “PPME”. These two matters are specifically taken up for the following three reasons. First, relevant chapters concerning these two matters only set out frameworks and general rules and, thus, their substantive and actual implementation fully depends on international cooperation through universal, regional or subregional organizations,<sup>3</sup> which are mechanisms to respond to the differing circumstances and needs of respective regions. Second, in response to the significant development of scientific knowledge and technologies since the adoption of the UNCLOS, there have been developments in the substantive rules and measures. The activities of universal, regional or subregional organizations in these matters may flexibly change in accordance with those developments. Third, although the UNCLOS sets out the rules concerning these two matters in different parts, there is various and complicated overlap and interaction between the rules and approaches in relation to these two matters. Their relationships significantly reflect the current circumstances of the law of the sea.

In Sect. 2, the precedents of international courts and tribunals are analyzed to examine the phenomenon of the overlap of matters concerning CMFS and those concerning the PPME. Then, in Sects. 3 and 4, the mechanisms of regional organizations for CMFS and the PPME are respectively examined and their differences are stated.

In this chapter the term “organization” is defined as an institution established by a legally binding convention concluded among more than two States and constituted by at least one internal organs endowed with certain competence and functions set out by the convention, while the word “arrangement” is defined as an institution that lacks a formal structure equivalent to an “organization” but is designated with certain functions to facilitate international cooperation among States sharing common

---

<sup>1</sup>For example, Art. 43 sets out the obligation to cooperate between the user States and States bordering a strait in the establishment and maintenance in the strait of necessary navigational and safety aids or other improvements in aid of international navigation and for the prevention, reduction and control of pollution from ships, and Article 100 provides for the obligation of all the Parties to cooperate in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.

<sup>2</sup>For example, Art. 69 and 70 provide for the obligation to cooperate on a bilateral, subregional or regional basis to ensure the interests of land-locked States and geographically disadvantaged States.

<sup>3</sup>While the rules concerning CMRS are principally provided in Parts V and VII, Part XII sets out those concerning the PPME.

interests.<sup>4</sup> The terms “region” and “regional” include “subregion” and “sub-regional,” and not only mean a group of States that are geographically close but also a group of States that share certain common interests.

## 2 CMFS and the PPME Under the UNCLOS in International Courts and Tribunals

Before examining the activities of universal and regional organizations, it may be worthwhile to sum up the phenomena of the overlapping of matters concerning CMFS and those concerning the PPME in the precedents of international courts and tribunals.

In the *Southern Bluefin Tuna* cases, the International Tribunal for the Law of the Sea (ITLOS) stated that “the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment.”<sup>5</sup> The ITLOS confirmed this view in its advisory opinion in the *SRFC* case<sup>6</sup> and stated its findings that the duty to cooperate in the prevention of pollution of the marine environment under Part XII of the UNCLOS and general international law in its Order in the *Mox Plant* case “extends also to cases of alleged IUU fishing activities.”<sup>7</sup>

The dispute in the *Chagos Marine Protected Area Arbitration* essentially reflects the overlap of these matters. In its fourth submission, Mauritius argued the compatibility of the designation of Marine Protected Area (MPA) by the United Kingdom with the provisions in the UNCLOS.<sup>8</sup> Both Parties raised the arguments based on the provisions relating to fishing activities and the PPME. Regarding the jurisdiction of the Arbitral Tribunal, the Parties referred the interpretation of Article 297(1) (c) setting out the compulsory jurisdiction to the dispute concerning the PPME and Article 297(3)(a), excluding the compulsory jurisdiction in the disputes concerning fishery resources. The Arbitral Tribunal concluded that it had jurisdiction only regarding the fourth submission of Mauritius, in which Mauritius argued the compatibility of the Marine Protected Area established by the United Kingdom with the UNCLOS. In the context of the arguments on the jurisdiction of the Tribunal, while Mauritius based the jurisdiction in accordance with Article 297(1) (c) regarding the dispute concerning the protection of the marine environment, the

---

<sup>4</sup>Schermers and Blokker (2018), pp. 33–51; Sands et al. (2009), pp. 15–16. The author draws insights from Boisson-Chazournes (2010).

<sup>5</sup>*Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, p. 295, para. 70.

<sup>6</sup>*Request for Advisory Opinion submitted by the Sub-Regional Commission*, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 37, para. 120.

<sup>7</sup>*Id.*, p. 43, para. 140.

<sup>8</sup>Mauritius’ made four submissions and the Tribunal found it had jurisdiction only to the fourth one. *Chagos Marine Protected Area (Republic of Mauritius v. The United Kingdom of Great Britain and Northern Ireland)*, Arbitral Award of 18 March 2015, paras. 323.