

Restructuring the Maritime Order*

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Abstract

International maritime order which in recent years has been underpinned by the UN Convention on the Law of the Sea (UNCLOS) has been the foundation of the global peace and prosperity for the last centuries. Due to the rise of emerging maritime powers, such as China, and the expansion of maritime issues, however, the maritime order is currently under various challenges. This paper explores the new challenges existing on the tension between China and the Philippines, due to China's extraordinary demands in the South China Sea and dispute settlement mechanisms and the roles and jurisdiction of UNCLOS in biodiversity and sustainable use of resources. While the paper points out some limitations of the existing order, it also argues the importance of sustaining the existing maritime order based on UNCLOS with bringing out necessary reforms.

1. New challenges confronting the law of the sea

For centuries, the maritime order governing the world's oceans, which cover 70% of the earth's surface, consisted of a dual structure, divided between the narrow bands of territorial waters deemed necessary for the security of coastal states and the vast high seas beyond, which all countries were free to navigate and use as they saw fit. The law of the sea, which codifies this order, is one of the oldest fields of international law.

Freedom of navigation on the high seas for maritime trades was understood to be in the general interest of international community. Accordingly, the pirates who threatened this common good were regarded as "enemies of mankind" (*hostis humani generis*). As early as the seventeenth century, piracy was defined as an offense of "universal jurisdiction," punishable at the discretion of each state. More recently, however, international human rights law, which has developed significantly after World War II, has taken a stand on the enforcement of anti-piracy laws, calling for suspects to be brought before a judge within 48 hours of the initial detention where possible. In this way, one of the classic problems addressed by the law of the sea has emerged as a new human rights challenge.

Migration issues have led to similar tensions. The law of the sea imposes on ships of all nations a duty to rescue, if possible, any persons in distress whom they encounter at sea. This naturally includes the obligation to transport the distressed persons to a safe place. However, in recent times, a growing number of states have been evading their responsibility to protect distressed persons if they were found to be undocumented migrants or refugees on overcrowded boats. They do this by barring the entry of rescue ships into their territorial waters. The reason is that, once migrants enter a country's territorial water, they fall within the scope of the Convention

* This essay was originally published on *Kokusai Mondai* [International Affairs], No. 674, Sep. 2018

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Relating to the Status of Refugees, which requires contracting states to provide migrants with refugee hearings and prohibits them from returning refugees to a country in which they could face persecution (the principle of non-refoulement). With the law of the sea calling for rescue and protection of persons in distress, and international human rights law demanding that the distressed persons' rights be upheld, these states are responding by attempting to limit the spatial scope of their duty to protect human life (to their own territories, including territorial waters), bringing them into conflict with protection of the human rights of the individual. Underlying many of these new, twenty-first-century challenges, from the Somali piracy crisis to the flood of refugees from regions destabilized for a long time by the so-called Islamic State, is the failure of national governments—entrusted with safeguarding the lives, persons, and property of the people—to exercise effective control over their own territories.

2. UNCLOS and its elaboration via case law

Similar tensions surround the exploitation of marine resources in the East and South China Seas. The Chinese government, having embraced the goal of becoming a “great maritime power,” is determined not only to become a major naval power but also to secure their maritime interests. Having become the world's second largest economy, China needs marine resources to support its economic development. One focus of this drive is the East China Sea, where China and Japan have yet to agree on the delimitation between their exclusive economic zones (EEZs) and continental shelves. Despite the absence of an agreement, China has unilaterally pushed ahead with development of gas fields in a section of the East China Sea that lies on the Chinese side of the median line proposed under Japan's Act on Exclusive Economic Zone and Continental Shelf. As of this writing, Japan has confirmed the presence of 16 drilling structures in that area.

The UN Convention on the Law of the Sea (UNCLOS) states that the delimitation of the EEZ and the continental shelf between states with opposite or adjacent coasts “shall be effected by agreement on the basis of international law . . . in order to achieve an equitable solution” (Article 74, paragraph 1 and Article 83, paragraph 1). It also requires that parties to a dispute exercise restraint, stipulating that “pending agreement as provided for in paragraph 1, the states concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement” (Article 74, paragraph 3 and Article 83, paragraph 3). In August 2006, before embarking on its unilateral gas exploration and development program in the East China Sea, China lodged a declaration with the Secretary General of the United Nations, stating that it would not accept the compulsory arbitration process provided for in Part XV of the Convention, Settlement of Disputes, to disputes relating to interpretation or application of the provisions in Article 74 and Article 83. In the Guyana-Suriname case awarded on September 17, 2007, under that same arbitration process, the court ruled that unilateral exploitation of oil and gas reserves in an undelimited maritime area constituted an action to “jeopardize or hamper the reaching of the final agreement” as well as a breach of the obligation to exercise restraint. In the light of this award, it seems clear that China's current activity in the East China Sea is in violation of UNCLOS.

In January 2013, the Philippines, making use of the aforesaid compulsory arbitration, brought a case against China, known as the South China Sea arbitration. Recognizing that China had opted out of arbitration on delimitation disputes, the Philippines did not seek a decision establishing the maritime boundary but instead brought an “entitlement dispute.” Specifically, it challenged the legality of China's “nine-dash line” on the grounds that the reefs and low-tide elevations, including the Spratly Islands, over which China exercised de facto administrative control could not by definition have their own territorial waters, EEZs or continental shelves. This approach overcame jurisdictional obstacles, and on July 12, 2016, the arbitral tribunal ruled that China has no

historical right based on the nine-dash line and was in violation of UNCLOS. In the same case, the arbitral tribunal took on the interpretation of Article 121, which deals with the legal definition of an island. Whether or not one agrees with the arbitral tribunal's interpretation, it does clarify the provision, which had previously been criticized as "intolerably imprecise" and "a perfect recipe for confusion and conflict." In this way, the judicial process is gradually developing and fleshing out the normative content of UNCLOS.

3. Biodiversity and sustainable use of resources beyond national jurisdiction

As a "living treaty," UNCLOS also develops and evolves its content through various implementing agreements elaborated in response to new issues and challenges.

The first UNCLOS "implementing agreement" was the 1994 Agreement Relating to Implementation of Part XI of the Convention, which established the International Seabed Authority. The second was the 1995 UN Fish Stocks Agreement, which elaborated on the UNCLOS principle of adopting a precautionary approach to the management of straddling and highly migratory fish stocks, embraced an ecosystem approach to management of those stocks (whose habitats span the artificial boundaries of the 200-mile EEZ), and introduced consistent conservation and management measures straddling in the EEZ and on the high seas. In addition, an intergovernmental conference established to negotiate a new UNCLOS implementing agreement was convened in the United Nations in September 2018.

Despite these developments in the twentieth century, the twenty-first century has witnessed the emergence of challenges that the drafters of UNCLOS never anticipated. One is the exploitation of marine genetic resources (MGRs). Another is the establishment of marine protected areas (MPAs).

At present, only a limited number of industrially advanced nations have access to marine genetic resources and entities capable of utilizing them. This has raised concerns among developing countries that the principle of freedom of the high seas will be applied to the exploitation and utilization of MGRs. The developing countries note that the ocean floor and its resources in areas beyond national jurisdiction are considered part of the common heritage of humankind, and they argue that the same should apply to marine organisms dwelling in those areas. Accordingly, they argue that, since MGRs from the deep seabed are the common heritage of humankind, any benefits from their use should be distributed fairly and equitably among members of the international community.

Marine protected areas are not defined under the provisions of UNCLOS. Amid a growing need for steps to protect the marine environment and its biodiversity, individual countries have been taking steps to establish MPAs within their own territorial waters and EEZs, with each country establishing its own definition and regulatory regime in accordance with domestic law. The 1992 Convention on Biological Diversity incorporates the concept of protected areas to achieve its objectives, which include not only the conservation of biological diversity but also the "sustainable use of its components" (Article 1). The International Union for Conservation of Nature has established various categories of protected area, classified according to their management objectives, and it mentions "ecosystem services" in its definition of MPAs. Japan is promoting its own type of MPA that would maximize the potential role of ecosystem services, with the aim of both protecting and utilizing biological diversity.

On June 19, 2015, the UN General Assembly adopted a resolution (69/292) on "development of an international legally binding instrument under UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction." It calls for international negotiations to address, together and as a whole, marine genetic resources, including the sharing of benefits; area-based management tools, including marine protected areas; environmental impact assessments; and capacity building and transfer of marine technology. Thus the UN

campaign began to put together an international agreement on marine biological diversity beyond areas of national jurisdiction, or BBNJ. The effort began with the formation of a preparatory committee, which met four times between March 2016 and July 2017.

In the “non-paper on elements of a draft text” issued at the final meeting of the preparatory committee, the committee chair offered an extensive compilation of ideas, proposals, and options for a new agreement, including a host of matters on which the delegations had failed to reach any consensus. For example, with respect to the scope of the instrument, there was disagreement as to whether it should encompass just the seabed beyond national jurisdiction or both the seabed and high seas and whether it should apply only to *in-situ* MGRs (in their original habitat) or also to *ex-situ* resources (such as genetic material stored in gene banks and laboratories) and even *in-silico* resources (such as information in databases and resources created through computer simulations). Even more basically, opinion remains sharply divided as to whether the governing principle should be freedom of the high seas or the common heritage of humankind.

The first session of the Intergovernmental Conference (IGC) on BBNJ was held on September 4–17, 2018. At that time it was decided that three more sessions would be held by the first half of 2020. Prior to the first session, an organizational meeting was held in New York on April 16–18, 2018. Among the top agenda items at this initial meeting was the election of a president. The post went to Rena Lee of Singapore, Ambassador for Oceans and Law of the Sea Issues and Special Envoy of the Minister for Foreign Affairs, who had served as facilitator for capacity building and technology transfer on the preparatory committee. The delegates also exchanged views on the best way to structure the IGC’s deliberations, scheduled to begin the following September. It was agreed that the president would draft an “aid to discussions” paper in preparation for the first session to serve as a starting point for deliberations, but that she would not prepare a “zero draft,” which might have the effect of rushing the negotiations. President Lee subsequently prepared and submitted the President’s Aid to Discussions (A/CONF.232/2018/3).

Will the international community embark on a major restructuring of the existing maritime order, embracing the conservation and sustainable use of BBNJ as a new common goal of that order? Or will it rally around a solution that upholds the existing order, in accordance with the UN resolution on BBNJ (72/249) adopted on December 24, 2017, which “reaffirms that the work and results of the conference should be fully consistent with the provisions of the United Nations Convention on the Law of the Sea”? Only time will tell.

As the foundation of the maritime order, UNCLOS has taken the approach of dividing the oceans into discrete zones to determine the rights and obligations of coastal and inland states vis-à-vis those waters. It has also created separate regulatory regimes governing navigation, fishing, resource development, marine conservation, and scientific research. On the high seas, enforcement of regulations follows the flag state doctrine. Yet UNCLOS itself affirms the need for unified regulation in its preamble, which states that “the problems of ocean space are closely interrelated and need to be considered as a whole.” It was the inability of regional fishery authorities to control illegal, unreported, and unregulated (IUU) fishing on the high seas that led to the conclusion of the Agreement on Port State Measures, which expanded port states’ jurisdiction over foreign vessels engaged in illegal fishing. Here we see a new attempt to unify international marine regulation through a coordinated effort to keep illegally caught fish off the market.

As the IGC proceeds, it will bear close watching to see how the pursuit of new common goals, namely, the conservation and sustainable use of marine biodiversity, impacts the framework for separate regulatory regimes and how the existing maritime order is restructured as a result.