Book Reviews

Seoung-Yong Hong and Jon M. Van Dyke (eds.), *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea* (Leiden/Boston: Martinus Nijhoff Publishers, 2009), Publications on Ocean Development, No. 65, xvi, 308 pp.

The 1982 United Nations Convention on the Law of the Sea (UNCLOS) has long and widely been regarded as "A Constitution for the Oceans," however, it is definitely not perfect. UNCLOS calls for cooperation between fishing nations and coastal nations for the conservation and optimum utilization of living marine resources in the exclusive economic zone and the high seas; it offers no strong mechanism to fulfill this goal. Thus came the 1995 Implementation Agreement for the Conservation and Management of Highly Migratory Fish Stocks and Straddling Fish Stocks (the UN Fish Stocks Agreement) to empower regional fisheries management organizations and/or arrangements with mandates to undertake needed tasks.

There are three provisions in UNCLOS having relevance with the protection of underwater culture heritage (UCH) or "objects of an archaeological and historical nature found at sea". However, UNCLOS as a whole provides vague or little guidance with respect to the rights that coastal states possess to deal with the protection and management of UCH in the EEZ, continental shelf and the Area, as well as means of cooperation between coastal states in whose waters the UCH is found and the identifiable owners of such UCH. Therefore, the United Nations Educational, Scientific and Cultural Organization (UNESCO) came into play and adopted an International Convention on the Protection of Underwater Cultural Heritage in 2001 to supplement and amend the relevant provisions in UNCLOS.

Part VIII Regime of Islands, or the single article thereof, Article 121, of UNCLOS creates more problems than it clarifies when states are at strife in their maritime claims and/or delimitation disputes over the legal status and the weight of insular features in the seas, such as tiny or semi-submerged rocks, reefs, banks, and shoals.

The above-mentioned are just a few prominent examples of the flaws of UNCLOS. They present a lot of issues, problems and lacunae for academics and practitioners to debate, dig in and explore. This is the reason why so many international meetings or seminars have been organized around the world to address issues arising from UNCLOS. (For example, The School of Law at the Trinity College Dublin organized an international conference on "Current Problematic Issues in the Law of the Sea" on 3–4 June 2010.) The book *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea* is one of the academic

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efforts in this regard, as it adds more thoughts and insights in the discussion of law of the sea issues.

This book is a collection of 13 chapters/articles selected from papers presented at international meetings on the law of the sea held in 2006 and 2007, co-organized by the Law of the Sea Institute based at the School of Law of the University of California at Berkeley and the Inha University at Incheon, Korea. The first two articles deal with problems of UNCLOS on maritime delimitation in a more generic sense: Chapter I on "Climate Change, Sea Level Rise and the Coming Uncertainty in Oceanic Boundaries: A Proposal to Avoid Conflict" by David D. Caron and Chapter II "The Trouble with Islands: The Definition and Role of Islands and Rocks in Maritime Boundary Delimitation" by Clive Schofield.

In his article, Caron argues convincingly that the ambulatory coastlines either as their nature or as a result of sea-level rise will encourage wasteful spending by states in solidifying their regressive baselines and lead to uncertainty in boundaries and hence conflict. Thus, states should move toward fixing ocean boundaries on the basis of presently accepted baselines. However, Caron's proposal will lead to unanswered issues of which Caron himself is aware. The fixation of baselines and ocean boundaries will inevitably detach such legal lines from their geographically ambulatory nature that will in turn create future international disputes about whether such lines are still valid if their geographical bases have been substantially changed or diminished (e.g., the probable total erosion of Japan's Okinotori rock or even certain low-lying western and central Pacific Island countries) and can no longer be accepted by neighboring states or the international community as a whole. Schofield recognizes in his article that "many disputes are associated with either sovereignty over islands or their treatment in the context of the delimitation of maritime boundaries." (p. 36) After examining some contentious cases, he observes that "[r]elevant state practice and the jurisprudence of international courts and tribunals may well help to clarity matters, but a definitive ruling on this issue has yet to eventuate." (p. 36) However, Schofield is optimistic in this regard by stating that "maritime disputes relating to islands are certainly capable of resolution, if the elusive but vital ingredient of political will can be found." (p. 37)

After the two opening articles, the book turns to six case studies with special relevance to the East Asia region (with the possible exception of Chapter V, or Masahiro Miyoshi's article, which is a generic rather than specific treatment), followed by two chapters focusing on Canada-U.S. international ocean law relations in the Northeast Pacific region and on U.S.-Mexico relations in the Gulf of Mexico, which are further followed by a chapter exploring the interaction between UNCLOS and the Antarctic Treaty System. These chapters constitute the bulk of the book, which the title partially, but primarily reflected – maritime boundary disputes and the law of the sea.

Jon M. Van Dyke writes on disputes over islands and maritime boundaries in East Asia in Chapter III, which provides readers with a thorough, informative

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and valuable review of the current situation in the region. In Section IX of his article "The South China Sea," Van Dyke raises nine issues/questions with respect to the Spratly Islets, such as "Sovereignty Issues: Who owns the Spratlys?" and "Do any of the Spratly Islets have the capacity under Article 121 to Generate EEZs or continental shelves?" The reoccurrence of the same issues/questions in other articles only highlights the difficulty of solving these issues and the ineffectuality of UNCLOS in providing unequivocal guidance to solve these issues. Van Dyke points out, like Schofield, that it is up to the countries involved that perceive it is in their political and economic interest to resolve the issues with permanent solutions. Thus, states' political will matters.

The different views and positions between the People's Republic of China (PRC) and Japan toward the delimitation of the EEZ and continental shelf of the East China Sea have contributed to a long-standing source of maritime conflicts between the two countries. The PRC asserts that the legal regimes for the EEZ and continental shelf are separate from each other, and the natural prolongation principle should be applied to the delimitation of the continental shelf, while Japan insists to use the median line principle in delimiting the East China Sea. In Chapter IV, Ji Guoxing examines these different positions and proposes approaches for the settlement of Sino-Japanese delimitation disputes.

As indicated previously, Masahiro Miyoshi looks into the maritime boundary delimitation issue from a more generic perspective in Chapter V, entitled "Some Thoughts on Maritime Boundary Delimitation," rather than dealing with any specific maritime dispute cases in the East Asia region. His article tries to highlight some essential points of jurisprudence of international arbitral and judicial tribunals dealing with maritime boundary delimitation, with his personal belief that "[t]he basic role of lawyers is to expound the correct rules or principles of law, rather than act as the mouthpiece for their government." (p. 118) Thus, Miyoshi's article seems misplaced, and it would be better if it appeared as one of the preceding chapters.

Seokwoo Lee takes an historic perspective, or inter-temporal law perspective to be more precise, to look at territorial disputes in Asia in Chapter VI, "Intertemporal Law, Recent Judgments and Territorial Disputes in Asia." "Almost all Asian countries are involved in territorial and boundary disputes with their neighboring countries. Regional stability in Asia is still heavily influenced by the legacy of colonialism and is partly dependent on the outcome of ongoing territorial disputes in which former colonizing countries take part as disputants." (p. 120) Lee penetratively observes, "Although the claimants for ownership of the disputed territories often rely on ancient historical sources for support, much of the uncertainty surrounding territorial disputes is a by-product of the post-World War II boundary decisions and territorial dispositions. The controversies in question did not arise as independent territorial disputes within East Asian countries, but are reflections of the legacies of post-war decision-making." (p. 121) Given that this observation is so real to the countries and peoples of East Asia, but so rare in western literature in the

field, Lee's mental exercise on and approach to the issues deserves the attention of readers.

In Chapter VII on "Some Legal Aspects of Territorial Disputes over Islands," Kentaro Serita, a Japanese scholar, starts his article by extending his personal apology to the Koreans for the Japanese colonial rule and sharing the feelings of deep remorse and heartfelt apology with Japanese Prime Ministers Murayama and Koizumi toward the peoples and nations of Asia for their tremendous damage and suffering due to Japanese colonial rule and aggression before he discusses the territorial dispute between Japan and Korea over the Take-Shima/Dokdo islets. (p. 137) A spirit of humanity pervades the beginning of the article, and the rest is quite legalistic. Other than the significance of the "critical date" to a territorial dispute, Serita also attaches great importance on historic facts in appraising the relative strength of opposing claims. However, Serita does not argue further which claim is having more strength than the other based on his line of reasoning.

Another issue having caused recent attention is the legality of Japan's claimed maritime zones (EEZ, continental shelf and extended continental shelf beyond 200 NM) and jurisdiction around the Okinotori, a tiny insular feature in the western Pacific and north of Palau, due to a dispute over the legal status of such features that involves the understanding and interpretation of Article 121(3) of UNCLOS with respect to the distinction between a rock and an island. Yuan-huei Song examines this recent dispute, analyzes the UNCLOS provision, and reviews relevant judicial decisions, state practices, and scholarly opinions in Chapter VIII, "Okinotorishima: A 'Rock' or an 'Island? Recent Maritime Boundary Controversy between Japan and Taiwan/China." His conclusion is that Okinotori is an island, however, it cannot generate a 200-NM EEZ, and thus the arrest of a Taiwanese fishing vessel in the Japanese-claimed EEZ is in violation of international law. It would benefit curious readers if Song's sound legal analysis could further lead to some policy recommendations with respect to the approaches that Taiwan/China or the rest of international community could take in dealing with such a dispute.

The following three chapters turn the focus of the book from the western Pacific to issues occurring in the North Pacific, the Gulf of Mexico, and the Antarctic regions.

Ted McDorman in Chapter IX, "Canada-U.S. International Ocean Law Relations in the North Pacific: Disputes, Agreements and Cooperation," looks into the principal ocean law disputes, as well as cooperation and agreement cases between these two North American neighbors in the North Pacific region. McDorman wittily characterizes the ocean law or "salt water" relationship between these two neighbors as being on an "even keel" (p. 196), due to the reason that they "have often found ways to 'agree to disagree' … and proceed in pragmatic ways to overlook the international legal disputes" and "[c]ooperation, coordination, and some benign neglect of disputed matters are fundamental characteristics of the Canada-US 'salt water' relationship." This observation

can be enlightening to other countries in dealing with their bi- or multi-lateral "salt water" relationship.

Chapter X, "Maritime Boundary Delimitation and Cooperative Management of Transboundary Hydrocarbons in the Ultra-Deepwaters of the Gulf of Mexico," by Richard J. McLaughlin examines the bilateral interactions between the U.S. and Mexico in their exploitation of oil and gas in the Gulf of Mexico, and in the "Western Gap" (an area falling beyond the 200-NM EEZ or national jurisdiction of both countries) in particular. This case involves issues like bilateral maritime delimitation of the (outer) continental shelf *vis-à-vis* the recommendations made by the Commission on the Limits of the Continental Shelf and cooperation for resource exploitation in a semi-enclosed sea. With a view to developing a more effective cooperative scheme on transboundary shared resource exploitation in the Gulf of Mexico, McLaughlin advocates the model Puerto Vallarta Draft Treaty for consideration by the two Governments (pp. 226–227). He has also raised some politically difficult recommendations to the two governments, including accession to UNCLOS by the U.S., clarifying or reforming Mexican Constitution or domestic laws prohibiting foreign exploitation of its natural resources, and clarification of U.S. laws having relevance to the future cooperation activities. This article may be illuminating to other nations encountering a similar situation, such as China/Taiwan and Japan on the hydrocarbon resource exploration and exploitation in the East China Sea.

UNCLOS and the Antarctic Treaty System are two separate international treaty regimes, but they have their converging points. Without referring to legal theory and practice that "*lex specialis derogate legi generali*," or "the more specific law has precedence over the general law or a law governing a specific subject matter (*lex specialis*) overrides a law which only governs general matters (*lex generalis*)," (in this case UNCLOS is a general law dealing with all issues relating to oceans and the seas, while the Antarctic Treaty is a specific law dealing specifically with Antarctic issues), or "*lex posterior derogate legi priori*," or "a later law overrules an earlier law" (UNCLOS was signed on 10 December 1982, while the Antarctic Treaty was signed on 1 December 1959), one can easily perceive that states' rights and jurisdiction in the EEZ, on the continental shelf, high seas, and in marine environmental protection and marine scientific research enshrined in UNCLOS all have relevance with the relevant provisions contained in the various international instruments of the Antarctic Treaty System. Chapter XI, "The Law of the Sea Convention and the Antarctic Treaty System: Constraints or Complementarity?" by Marcus Haward should be interesting to readers with its attractive title. However, Haward spent too much effort in presenting these two international treaty regimes and not enough on the convergence of the two regimes, nor provided definitive answers to the inquiries as the title alluded to.

The last two chapters deal with UNCLOS-related subjects without geographical elements. Chapter XII, "The Contribution of the International Tribunal for the Law of the Sea to International Law" by Helmut Tuerk, a judge

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and incumbent Vice-President of the Tribunal, presented Tribunal-related factual information, including the history, jurisdiction, composition and structure of the Tribunal, as well as different categories of various cases that the Tribunal has considered. In the end, Tuerk defended the Tribunal's non-impressive record of work in terms of the relative paucity of cases brought before the Tribunal by its youth and tried to ward off criticism about the Tribunal's unnecessary existence and risking a fragmentation of international law by a different mindset or perspective of his own.

Chapter XIII, "The *Tomimaru* Case: Confiscation and Prompt Release" by Bernard H. Oxman mostly examines an application for prompt release of a fishing vessel, the *Tomimaru*, filed by Japan with the Tribunal against Russian detainment. This is a purely legal analysis of an ITLOS judicial decision. The observations or analyses made by Oxman are instructive for nations that may file similar applications with the Tribunal or that may be involved in similar cases on the issue of "detaining State's duty of prompt release of foreign violating fishing vessels on bond *vs.* detaining State's enforcement powers of confiscating fishing vessel in question" or "whether confiscation extinguishing the duty to release the vessel on bond."

As a whole, this book maintains the style and quality of Nijhoff 's "Publications on Ocean Development." As a collection of articles written by different authors, regardless of how distinguished these authors are, it shares the same non-imputable imperfection with other similar edited books – lacking a common thematic thread and a universal intellectual quality running through the entire book. However, most articles are fairly informative and some enlightening. They can attract the attention of scholars and practitioners alike who are either keen to grasp the situation and development in particular geographical and legal areas or eager to find certain guidance under similar circumstances.

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