

Max-Planck-Institut für
ausländisches öffentliches Recht und Völkerrecht

Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 221

Holger Hestermeyer · Nele Matz-Lück
Anja Seibert-Fohr · Silja Vöneky (eds.)

Law of the Sea in Dialogue

Max-Planck-Institut für ausländisches
öffentliches Recht und Völkerrecht



Beiträge zum ausländischen
öffentlichen Recht und Völkerrecht

Begründet von Viktor Bruns

Herausgegeben von
Armin von Bogdandy · Rüdiger Wolfrum

Band 221

Holger Hestermeyer · Nele Matz-Lück
Anja Seibert-Fohr · Silja Vöneky
(eds.)

Law of the Sea in Dialogue

 Springer
the language of science

ISSN 0172-4770

ISBN 978-3-642-15656-4

e-ISBN 978-3-642-15657-1

DOI 10.1007/978-3-642-15657-1

Springer Heidelberg Dordrecht London New York

Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über <http://dnb.d-nb.de> abrufbar.

© by Max-Planck-Gesellschaft zur Förderung der Wissenschaften e.V., to be exercised by Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, Heidelberg 2011

Dieses Werk ist urheberrechtlich geschützt. Die dadurch begründeten Rechte, insbesondere die der Übersetzung, des Nachdrucks, des Vortrags, der Entnahme von Abbildungen und Tabellen, der Funksendung, der Mikroverfilmung oder der Vervielfältigung auf anderen Wegen und der Speicherung in Datenverarbeitungsanlagen, bleiben, auch bei nur auszugsweiser Verwertung, vorbehalten. Eine Vervielfältigung dieses Werkes oder von Teilen dieses Werkes ist auch im Einzelfall nur in den Grenzen der gesetzlichen Bestimmungen des Urheberrechtsgesetzes der Bundesrepublik Deutschland vom 9. September 1965 in der jeweils geltenden Fassung zulässig. Sie ist grundsätzlich vergütungspflichtig. Zuwiderhandlungen unterliegen den Strafbestimmungen des Urheberrechtsgesetzes.

Die Wiedergabe von Gebrauchsnamen, Handelsnamen, Warenbezeichnungen usw. in diesem Werk berechtigt auch ohne besondere Kennzeichnung nicht zu der Annahme, dass solche Namen im Sinne der Warenzeichen- und Markenschutz-Gesetzgebung als frei zu betrachten wären und daher von jedermann benutzt werden dürften.

Einbandentwurf: WMXDesign GmbH, Heidelberg

Gedruckt auf säurefreiem Papier

Springer ist Teil der Fachverlagsgruppe Springer Science+Business Media (www.springer.com)

Preface

“*Mare igitur proprium omnino alicujus fieri non potest, quia natura commune hoc esse non permittit, sed jubet*”¹ wrote Grotius in 1609. The law of the sea never was to be the same again. Many scholars have since dedicated all or part of their work to the law of the sea. Rüdiger Wolfrum is one of them, although he also worked intensively on international law in general, human rights, environmental law and the United Nations. As a scholar he dedicated part of his admirable energy to the law of the sea ever since he worked on his *Habilitationsschrift* on “The Internationalization of Common Spaces Outside National Jurisdiction”, published in 1984. His work as a practitioner equals his scholarly endeavors: from his participation in the Third U.N. Law of the Sea Conference as (alternate) representative of the German delegation and adviser to the Ministry of Economics to his now 14-year long tenure at the International Tribunal for the Law of the Sea, serving as its President from 2005 to 2008, he has seen the law of the sea develop and left his own mark on that development. This volume contains the proceeding of the seminar “Law of the Sea in Dialogue” held on December 4-5, 2009 at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg to honor Wolfrum’s work.

While fragmentation continues to loom large in international law debates, international regimes clearly touch on each other and increasingly overlap. The goal of the seminar was to reflect this growing interplay between international regimes and bring together scholars from different fields of international law. In an effort to stimulate a common dialogue on current global challenges which go beyond specific regimes, the focus of the conference was on those challenges resulting from global warming, the exploitation of the global commons and the new security threats that stem from the return with a vengeance of a threat almost as old as seafaring itself: piracy.

¹ “It is, then, quite impossible for the sea to be made the private property of any individual; for nature does not merely permit, but rather commands, that the sea shall be held in common.” H. Grotius, *Mare Liberum* (R. Feenstra ed., 2009), 64-65.

Tackling the issue of global warming *Christian Tomuschat* explores if and how rules on State responsibility could be made to bear on global warming. Concluding that these rules cannot adequately deal with the problems caused by global warming *Tomuschat* also examines the possibility of a different approach. *Michael Bothe* looks in-depth at the factual and legal interplay between global warming and the oceans. *Bothe* analyses the legal framework on all human activities relating to climate change and the oceans, ranging from vessel emissions to carbon storage in the seas. Turning back to the law of climate change proper, *Jutta Brunnée* discusses the “Copenhagen Accord” reached in December 2009 and the post-2012 climate regime. Her article identifies the principle of “common but differentiated responsibilities” as a key principle of the climate regime and fleshes out the meaning of that principle for Copenhagen and beyond. *Fred Morrison’s* contribution concludes the global warming section by facing head on one of the major concerns in the climate change regime: the reluctance of the United States to ratify treaties. He explains that reluctance with the difficulty in obtaining the Senate’s assent to ratification and discusses available alternatives to the ratification of a formal treaty.

Gerhard Hafner opens the discussion on the global commons. He provides an overview over different regimes usually associated with the commons and examines to what extent existing commons regimes under international law meet a set of design rules for successful common resource management institutions established by *Ostrom et al.*, identifying challenges for the future. *Tullio Treves* picks up the ball, analyzing ways to engage international courts and tribunals in the protection of the common heritage of mankind, in particular in the law of the sea. He identifies categories of disputes that may involve the notion of the common heritage of mankind, discusses jurisdiction and standing under UNCLOS and pinpoints shortcomings in the judicial protection of the common heritage under the current regime.

Mahnoush Arsanjani and *Michael Reisman* shift the focus to security issues in their article on East African piracy and the defense of world public order. They describe the current legal and factual situation with respect to piracy and evaluate techniques for the protection of public order, conceiving of the piracy problem as one of the restoration and maintenance of public order, rather than just a legal issue. *Thomas Mensab* presents the legal issues surrounding piracy, starting from the traditional legal position and going over legal and factual problems raised by new forms of piracy. Finally, he considers and evaluates proposals to tackle piracy. The volume is concluded by *Jochen Frowein’s* contribu-

tion discussing action against arms shipment on the seas in violation of Security Council resolutions or otherwise threatening international peace and security. Using as an example two recent cases, in which German ships transporting arms were intercepted, the article analyzes possible legal grounds for such interceptions ranging from Security Council authorization to the Proliferation Security Initiative, specific treaties authorizing boarding and the Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation.

The editors would like to thank Marlitt Brandes for her editorial assistance, Kate Elliot for performing the native speaker check and the publishing staff at the Max Planck Institute, in particular Dr. Christiane Philipp, for their dedicated work.

Holger Hestermeyer, Nele Matz-Lück, Anja Seibert-Fohr, Silja Vöneky

Table of Contents

Global Warming

Christian Tomuschat

Global Warming and State Responsibility	3
---	---

Michael Bothe

Measures to Fight Climate Change – A Role for the Law of the Sea?	31
--	----

Jutta Brunnée

An Agreement in Principle? The Copenhagen Accord and the Post-2012 Climate Regime	47
--	----

Fred L. Morrison

The Reluctance of the United States to Ratify Treaties.....	73
---	----

Exploitation and Use of the Global Commons

Gerhard Hafner

The Division of the Commons? The Myth of the Commons: Divide or Perish.....	91
--	----

Tullio Treves

Judicial Action for the Common Heritage.....	113
--	-----

Law of the Sea and Security

Mahnoush H. Arsanjani/ W. Michael Reisman

East African Piracy and the Defense of World Public Order	137
---	-----

Thomas A. Mensab

Piracy at Sea – a New Approach to an Old Menace.....	161
--	-----

Jochen Abr. Frowein

The Security Council and the Security on the Seas	179
---	-----

List of Contributors

Arsanjani, Mahnoush H.

Former Director, Codification Division of Office of Legal Affairs, United Nations; Associated Member of the Institut de Droit International

Bothe, Michael

Professor (*em.*) of Public Law, Public International Law and European Law, Faculty of Law, J.W. Goethe University Frankfurt/Main

Brunnée, Jutta

Professor of Law and Metcalf Chair in Environmental Law, Faculty of Law, University of Toronto

Frowein, Jochen Abr.

Professor (*em.*) of Constitutional and Public International Law, Faculty of Law, Heidelberg University; Director (*em.*) Max Planck Institute for Comparative Public Law and International Law; former Vice-President of the European Commission of Human Rights; Member of the Institut de Droit International

Hafner, Gerhard

Professor (*em.*) of Public International Law and European Law at the Institute of International Law and International Relations, Faculty of Law, University of Vienna; Member of the Institut de Droit International

Mensah, Thomas A.

Former Judge and President of the International Tribunal for the Law of the Sea; Member of the Institut de Droit International

Morrison, Fred L.

Popham Haik Schnobrich/Lindquist and Vennum Professor of Law,
University of Minnesota

Reisman, W. Michael

Myres S. McDougal Professor of International Law, Yale Law School;
Member of the Institut de Droit International

Tomuschat, Christian

Professor (*em.*) of Public International Law, Faculty of Law, Humboldt
University Berlin; former member and president of the International
Law Commission; Member of the Institut de Droit International

Treves, Tullio

Professor of International Law, University of Milan; Judge of the Inter-
national Tribunal for the Law of the Sea; Member of the Institut de
Droit International

Global Warming

Global Warming and State Responsibility

*Christian Tomuschat**

A. Introduction

Global warming has become an undeniable fact.¹ It has the potential to threaten life on this planet. Until a few years ago, even knowledgeable authors called the results of the many negative forecasts by climate specialists into doubt. It seems that such objections have eventually receded in quantity as well as in quality.² That climate change is to be traced back to human activity must be accepted as a simple truth which can no longer be talked away. The only remaining question seems to be whether the planet earth finds itself at the same time in a natural cycle that pursues its course independently of man-made causes. This lack of definitive certainty places heavy obstacles into the path to coordinated measures suited to combat deleterious and even disastrous developments. Only if the diagnosis is clear and irrefutable will it be possible for humankind to launch a comprehensive program designed to avert the worst consequences of a phenomenon that is of unparalleled com-

* Text of a presentation made on 4 December 2009, i.e. before the Copenhagen UN Conference on Climate Change.

¹ See the Fourth Assessment Report of the Intergovernmental Panel on Climate Change: Climate Change 2007 – Synthesis Report, 72, available at <http://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_synthesis_report.htm>.

² It is significant in this regard that the American Petroleum Institute, which was still starkly challenging the notion of climate change in 2002, see references given by D. Culley, *Global Warming, Sea Level Rise and Tort*, 8 *Ocean and Coastal Law Journal* 91, at 101-102 (2002), has completely turned round, see the article “Climate Change”, 8 October 2009, available at <<http://www.api.org/ehs/climate/index.cfm>>.