

Wen Duan, *The International Legal Regime Relating to Marine Protected Area in Areas Beyond National Jurisdiction: Identifying and Addressing Gaps* (Leiden and Boston: Brill Nijhoff, 2022), 396 pp.

When asked at the start of his tenure as Prime Minister what was the greatest challenge his government faced, U.K. Prime Minister Harold MacMillan famously replied “Events, my dear boy events.” Those sentiments could equally apply to the work of a scholar seeking to write about legal regimes relating to Marine Protected Areas (MPAs) in Area’s Beyond National Jurisdiction (‘ABNJ’) just as negotiations for the *Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity beyond National Jurisdiction* (the ‘*BBNJ Treaty*’) were reaching their conclusion. A work seeking to examine the potential gaps in existing legal regimes relating to MPAs for the protection of biodiversity in areas beyond national jurisdiction (‘ABNJ’) and the ideal text of a treaty to address those gaps written while the *BBNJ Treaty* was under negotiation, ran the risk of becoming outdated as soon as the *BBNJ Treaty* negotiations were concluded.

Fortunately, the author of *The International Legal Regime Relating to Marine Protected Area in Areas Beyond National Jurisdiction: Identifying and Addressing Gaps* was clearly alert to this potential risk. Despite being in press as the *BBNJ Treaty* negotiations concluded, this book is still useful in expanding our understanding of why the *BBNJ Treaty* provisions relating to MPAs are needed. Much of the content of this book will therefore remain useful and relevant to future discussions in academia and in diplomatic and policy circles on this topic well after the ink has dried on the *BBNJ Treaty* and it has entered into force.

The book is a revised version of the authors PhD thesis submitted to Utrecht University in December 2020 and defended in May 2021. It has subsequently been revised and reflects developments in the *BBNJ Treaty* negotiations up until December 2021. While some parts of the book have rapidly been overtaken by events in the form of the *BBNJ Treaty*, overall there is still much in this study which offers valuable insight on the topic of MPAs in ABNJ.

The main question the book seeks to address is “how can the ‘participatory’, ‘competence’ and ‘geographical’ gaps in the international legal regime related to the establishment and management of MPA’s’ in areas beyond national jurisdiction be addressed?” The book approaches this central research question through its examination of several sub-questions:

- “1. What are the legal bases and procedures for the establishment and management of MPAs in ABNJ, and what are their implications?
2. How can gaps in the legal regime relating to MPAs in ABNJ be addressed under existing international law?:
 - a. How can the issue of *pacta tertiis*-relating to the participatory gap be addressed under existing international law?
 - b. How can the lack of comprehensiveness, coherence and consistency-relating to the competence and geographical gaps-be addressed under existing international law?

3. How can the different options for the future [BBNJ Treaty] that have been proposed during the [BBNJ] negotiations contribute to addressing participatory, competence and geographical gaps?"

In answering these questions, the book is broken into seven Chapters- six chapters of analysis and one concluding chapter that draws together analysis and conclusions from the other chapters. Chapter 1 introduces the topic by first examining definitions of MPAs including those posited by the International Union for the Conservation of Nature ('IUCN'), as well as numerous definitions adopted by various treaty bodies and intergovernmental organisations. It also touches upon the definition contained in the First draft negotiating text of BBNJ Treaty which with some modification subsequently became Article 1(9) of the BBNJ Treaty. While the BBNJ Treaty definition was slightly modified in the final text the authors analysis in this introductory section of the book is useful because it helps define the scope of the research, research questions and the structure of the rest of the book.

Chapter 2 then provides a detailed description and analysis of existing regional legal regimes through which MPAs have been created in ABNJ. While there have been no MPAs established in ABNJ under global legal regimes to date, this chapter provides a detailed examination of all MPAs that have been established under regional treaty regimes. It examines the Convention on Antarctic Marine Living Resources ('CAMLR Convention'); the Madrid Protocol to the Antarctic Treaty; the Convention for the Protection of the Marine Environment of the North-East Atlantic (the 'OSPAR Convention') and the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (the 'Barcelona Convention') and the associated Protocol Concerning Specially Protected Area and Biological Diversity in the Mediterranean (the 'SPA Protocol').

Each of these treaties have been examined extensively in the previous literature. However, what I think is particularly interesting and useful about this chapter (which builds on the existing literature) is this authors analysis in the depth of the existing procedures for the establishment and management of MPAS in ABNJ under these regional treaties, as well as the shortcomings of these procedures and the implications of those shortcomings. The main strength of this chapter then is the level of detail contained in the analysis of specific treaties. This will be a useful starting point for future studies of MPAs at the regional level and each of the specific treaty regimes.

In the following chapter the author then goes on to examine the general obligations in respect to marine environmental protection and conservation of living resources which are relevant to the discussion of MPAs in ABNJ. Principally this focused on examination of State obligations under articles 117-118, 192, 194(5), 197 of the 1982 United Nations Convention on the Law of the Sea ('UNCLOS') and Article 8(a) of the 1992 Convention on Biological Diversity ('CBD'). While the authors analysis of these provisions was in large part technically correct in law, I was less than convinced by the central thesis of this chapter that these general obligations imply that a State has "a right to establish MPAs in ABNJ in order to protect the marine environment in ABNJ or conserve the marine living resources of the high seas". The author at points seems to constructively interpret these provisions way beyond existing state practice and the conventional views of previous analysis to fit this argument. But in the end the author does go on to concede that this does not mean States necessarily have a "duty to establish MPAs in ABNJ", preferring instead to argue States may have a "due diligence obligation to cooperate

with other States to protect and preserve the marine environment in ABNJ through the establishment of MPAs.”

Chapter 4 is then devoted to the question of whether the establishment and management of MPAs in ABNJ under existing treaty regimes can have a legal effect on third states. Analysis of this question begins with consideration of the implications of the freedom of the high seas “for the legal effects of the establishment of MPAs in ABNJ on third States” and the related question of how far freedom of the high seas is constrained by the obligation of due regard. Here again the discussion of these legal principles is technically sound and draws on the works of key primary and secondary sources of law. This discussion then sets the scene for an extensive discussion of the implications of the *pacta tertiis* principle which as the author correctly observes at the outset “can be considered as a legal barrier for the legal effects on third states of the establishment of MPAs in ABNJ.” Having conceded that key point early on the author then curiously goes on to attempt to mount an argument for “qualifications to the *pacta tertiis* principle” that suggest “the existence of the *pacta tertiis* principle does not mean that it is impossible for the establishment of MPAs in ABNJ under specific treaties to have third party effects.” In this regard, the author then considers four possible legal bases for obligations to be imposed on third States not party to a specific treaty: (1) General obligations under UNCLOS and the CBD; (2) Customary International Law; (3) Where such treaties are part of what may be characterized as objective regimes; and (4) Regime interaction. These arguments I found less than compelling. Space constraints do not permit a detailed critique here but two obvious points stand out. Firstly, if existing general obligations under UNCLOS and CBD provisions could overcome the *pacta tertiis* principle then why is the BBNJ Treaty even needed? Surely if restrictions on activities within MPAs could be made binding on third states through a mix of UNCLOS, the CBD and regional treaties, why have states instead opted to establish a whole new multilateral mechanism for the creation of MPAs under the BBNJ Treaty?

Discussion in Chapter 4 also picks up on the now largely discredited and unhelpful concept of objective regimes in international law. This discussion attempts to argue for obligations imposed on non-state parties to regional treaties with respect to MPAs in ABNJ established under these treaty regimes. Like most scholars who have gone before analysis in this part canvases the works of Waldock and the International Law Commission as well as the discussion of obligations *erga omnes* by the International Court of Justice in the judgment in the *Barcelona Traction Case* to introduce the concept of objective regimes. Curiously the author concludes very quickly (and correctly) that “the concept of “objective regime” cannot be found in any existing treaty or convention and is a highly controversial concept.” This is perhaps where discussion of objective regimes should have ended, if indeed it should even have been commenced. But instead after those comments in the next nine pages the author attempts to examine the less than convincing arguments that the CAMLR Convention, the Madrid Protocol to the Antarctic Treaty and the SPA Protocol under the Barcelona Convention can be characterised as objective regimes. After conducting that analysis, the author ultimately concludes that none of them are objective regimes, concluding therefore they provide no assistance in overcoming the *pacta tertiis* principle. The objective regimes discussion I think was an unnecessary distraction given objective regimes is now a largely discredited concept in international law.

Chapter five goes on to consider regime interactions in respect of MPAs in ABNJ in detail. A particular focus of this chapter is in answering the question of “whether these regime interactions are sufficient to ensure the comprehensiveness, coherence and consistency of the practice of MPAs in ABNJ”. The chapter begins by providing a useful definition of regime interaction drawing in large part on the respected works of Young and Schram Stokke and others. The chapter then goes on to examine regime interaction in relation to MPAs in the context of the OSPAR Convention and other treaty regimes and with international organization including, inter alia, OSPAR and the CBD; OSPAR and the International Maritime Organisation; OSPAR and the International Seabed Authority; MPASs under the Madrid Protocol to the Antarctic Treaty, CAMLR and several others. This was an interesting and largely well argued chapter, although I did think at points the author was under the impression that treaty secretariats had a writ-large power to conclude collaboration agreements between treaty regimes which is rarely the case. Treaty Secretariats are rarely granted such powers without the explicit consent of States.

Nonetheless, Chapter 6 then goes on to draw on the analysis in earlier sections of the book and in essence discusses what might be the optimal outcome from the BBNJ Treaty negotiations. This begins with a very brief outline of the history of the BBNJ Treaty negotiations (up until December 2021) and a brief summary of the then current Status of negotiations. The discussion then turns to focus on key issues under the negotiations: future MPAs in ABNJ and the operation of the BBNJ Treaty; the relationship between the BBNJ Treaty and UNCLOS; the meaning of the requirement not to undermine UNCLOS and other existing legal instruments; the relationship between MPAs under the BBNJ Treaty and rights and obligations of adjacent coastal states; the process in relation to the establishment of MPAs; institutional mechanisms for the establishment of MPAs; identifications of areas for MPAs; procedures for the establishment of MPAs; implementation; monitoring and review of MPAs established under the BBNJ Treaty. Given the BBNJ Treaty was still a work in progress this was always going to be the most difficult chapter for the author to write. Given those circumstances the chapter is nonetheless an interesting discussion of all the options still up for negotiation at that time. Perhaps another follow up study could consider to what extent the issues canvases by the author have been addressed or ignored by the final text of the BBNJ Treaty.

Conducting research and writing about a treaty under negotiation always presents challenges, not the least is the extent to which the final text matches the draft treaty you are examining. Despite these challenges this book provides an interesting analysis of the existing and future international legal regime relating to MPAs in ABNJ. While in part I disagree with the authors analysis, this is clearly a work of significant depth and considered critical analysis. It is without doubt a worthwhile addition to any law library that seeks to establish a comprehensive collection of scholarly works on the law of the sea.

David Leary

Professor, Faculty of Law, University of Technology Sydney,
Sydney, Australia.