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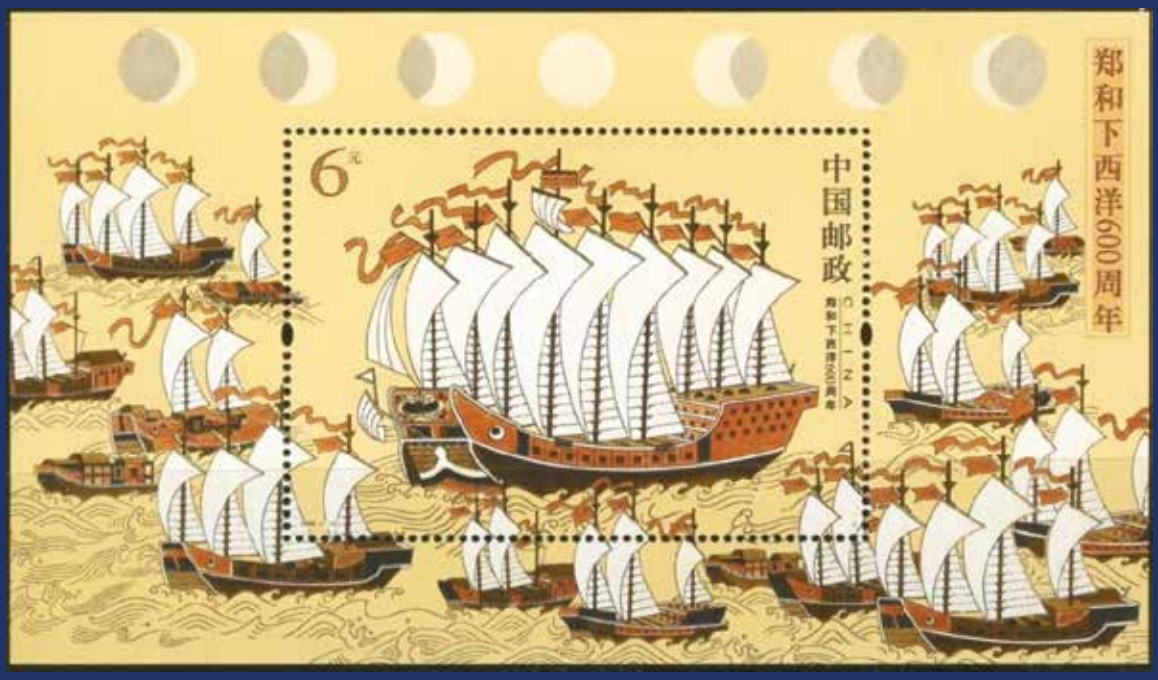
PAPERS OF THE INTERNATIONAL ASSOCIATION OF THE LAW OF THE SEA

LAW AND SECURITY ALONG THE 21ST CENTURY MARITIME SILK ROAD



Edited by
ANDREA CALIGIURI
STEFANO POLLASTRELLI

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TABLE OF CONTENTS

Preface ..…… 1
GIUSEPPE CATALDI

PART I
EXPLAINING THE NEW MARITIME SILK ROAD

1. An Introduction to the 21st Century Maritime Silk Road
from the Perspective of the Law of the Sea ……..…...…...… 9
ANDREA CALIGIURI

2. China's Commitment to Maritime Affairs ……...…… 27
GIANLUCA SAMPAOLO – FRANCESCA SPIGARELLI

3. Threats to Sea-Lane Security:
Maritime Piracy, Seizure of Ships and Persons ……...… 37
CARMEN TELESCA

4. Protection of the Marine Environment and Maritime Safety
in Areas under National Jurisdiction …… 53
NATHALIE ROS

5. The Future Treaty on Marine Biological Diversity
Beyond National Jurisdiction, Protected Areas and
Freedom of Navigation in the Context of the "Maritime Silk Road" ……..……. 65
TRPIMIR M. ŠOŠIĆ

6. Maritime Silk Road Initiative and Energy Security ……. 79
ANDREA PRONTERA

PART II
SEAPORTS AND PORT-RELATED INFRASTRUCTURE MANAGEMENT ALONG
THE NEW MARITIME SILK ROAD

1. Maritime routes, transport infrastructures and investment relationships
between European Union and China: recent developments and
evolutionary trends in a legal perspective …… 91
LORENZO SCHIANO DI PEPE

2. Financial Assistance for Waterways and Ports:
The EU Rules on State Aid and Foreign Direct Investment and

their Effects on the Development of Maritime Silk Road in Europe ……..…….. 104
GIANLUCA CONTALDI

3. Special Economic Zones (SEZs):
Innovative Models to Accelerate Economic Growth of Local Communities …….…... 113
GIUSEPPE RIVETTI – FRANCESCA MORONI

4. Croatian Legal Framework for Port Security:
Case Study of the Port of Rijeka ….…….…….. 126
IGOR VIO

5. The Management and Security of the Port of Koper (Slovenia) and
the New Maritime Silk Road …….. 141
MITJA GRBEC – BORIS JERMAN

PART III
MANAGING THE RISKS ALONG THE NEW MARITIME SILK ROAD:
SELECTED LEGAL ISSUES

1. Maritime Contracts and Private International Law:
Between Party Autonomy and Uniform Law ……..… 161
FABRIZIO MARONGIU BUONAIUTI

2. Security of the Intellectual Property Rights:
Effectiveness of the Greater China Customs' Enforcement …….. 176
FEDERICA MONTI

3. Insurance Risks and New Maritime Silk Road:
A Historical Perspective …….…… 191
MONICA STRONATI

4. Maritime Insurance against Acts of Terrorism ……..…… 205
ALEXANDRE DE SOVERAL MARTINS

5. Civil Liability in the Field of Maritime Traffic:
The Case of Unmanned Vessels ……..… 216
ENRICO ANTONIO EMILIOZZI

Preface

The important, I would say epochal, initiative of the Chinese government that goes by the name of Belt and Road Initiative (BRI), and in particular, as far as we are concerned here its more intrinsically maritime aspect, that is the 21st Century Maritime Silk Road (MSR), raises a series of questions and interests in any scholar approaching the issue, to which the authors of this volume attempt to give some answers.

Among the many questions that will be addressed, it is worth highlighting here the ones that seem to us to be the most important, the ones that are at the root of every other problem.

1. The first issue, without any doubt, is the following question: is the MSR initiative functional to the establishment of Chinese hegemony in Asia and to Chinese desire to extend its reach into other regions of the world?

The MSR between China and Europe connects coastal countries, involving different religions, cultures and customs. It cannot be denied that the main concern, not only on at political level but also simply on the part of public opinion, especially (but not only) in Europe, is the fear that this ambitious project to open up borders and trade barriers, which is so fascinating from the point of view of “virtuous globalization”, may in fact prove to be just a 'Trojan horse' for China's political, cultural, commercial and military expansion. Concerning in particular MSR, one must consider the impressive and rapid development of the Chinese navy, together with the whole process of investments abroad in the port infrastructure sector put in place by Chinese government. The role of COSCO Shipping Corporation Limited also raises many concerns in Western business and trade circles. COSCO plays an essential role in the MSR, as it actively participates in the MSR to explore new shipping routes while deploying more than 260 container ships with the capacity of 1.7 million TEUs, covering nearly 200 main shipping routes along the MSR countries and region. At the same time, however, some strong guarantees can function for port State and coastal State in order to avoid dangers, as implementation of anti-monopoly law, or defense of welfare protection laws for employees assuring respect for specific ethnic, gender and other issues during employment in the host country. In general, the important issue is the respect of standards set by local law, concerning environment, labor conditions, and mainly cultural identity. As for the civil and commercial disputes, the implementation of the international conventions and maritime laws such as The Hague Rules, Hamburg Rules, and Rotterdam Rules is an efficient way to avoid and eliminate disputes. The challenge is to achieve a win-win situation, increasing development for all, and lowering costs at the same time. The potential is huge, the opportunity is great, but the burden of proof of shared benefits remains on the Chinese authorities.

2. Let's come to the second issue, which can be synthetized in the following question: which kind of international maritime order is envisaged by MSR?

The BRI was elevated by the Communist Party of China (CPC) to the constitutional level following its fourth anniversary in October 2017. It is significant that China's engagement to uphold existing international maritime order, mentioned in China's 2017 BRI White Paper, came only one year after Chinese rejection of the 2016 ruling by the International Court of Arbitration in The Hague in the case *The Philippines v. China* concerning the South China Sea (or Oriental Sea). The framework is further complicated by the fact that while China has ratified in 1996 the United Nations Convention on the Law of the Sea (UNCLOS), the United States, which constantly calls on China to observe the rules of international maritime law, has not yet ratified it. It is a fact that UNCLOS, the "Constitution for the Oceans", is widely recognized as largely reproductive of general international law, and therefore, in many cases, its provisions are also opposable to States that are not Contracting Parties to it. Therefore, in principle, all ocean-related activities generating from the MSR projects in the cooperation between China and other countries are subject to UNCLOS rules, and on whoever wants to deny its application lies the burden of proof of its incompatibility with customary law. It should be remembered, however, and this is no small matter, that all activities of a military nature remain outside the scope of UNCLOS, with the exception of exercises, in respect of which, as is well known, there is a very sharp difference of opinion between Western states and Asian and African states, since the latter would like to include in the powers of the coastal state in the areas of jurisdiction also the power to exclude such activities by foreign states. This is part of the wider dispute between Western states and China over the EEZ regime. In fact, there is no doubt that China, in this respect no differently from the majority of the coastal countries of Asia and Africa, tends to attribute to itself powers in its EEZ that are proper to sovereignty in the territorial sea. In particular, China rejects the idea of free navigation, claiming to subject the transit of warships to prior authorization. This is contrary to the relevant provisions of UNCLOS. On the other hand, in our opinion, the US operations of "showing the flag" in the Chinese EEZ, clearly intended to provoke a reaction, are not to be shared either. If there is a dispute, it should be addressed and resolved using the instruments available under international law.

Shipping is indispensable to the world, as 90 per cent of global trade is carried by maritime transport. All nations, and in particular, coastal and island states, have a strong reliance on seaborne trade. There is no doubt that the entire international legal regime of maritime navigation is subject to opposing interpretations between States, and this is a fact that should not be underestimated in the context of the MSR. This is true not only in the case of EEZ, as already mentioned, but also for international straits. In the last decades of the last century the generalized extension of territorial waters up to the twelve-mile limit led to a considerable multiplication in the number of straits falling within the territorial sea of coastal states. The complete subjection of about two thirds of international straits to coastal sovereignty clearly resulted in a progressive restriction of the

spaces subject to full freedom of navigation, replaced by the more limited right of innocent passage. Hence the reconsideration of the matter at the Third UN Conference on the Law of the Sea. Part III of UNCLOS is specifically devoted to straits, with a clear intention to differentiate its rules from Part II, which is devoted to the territorial sea. The regime of Part III therefore constitutes a compromise solution, since the new institution of "passage in transit", which is much more favorable to strait-using States than innocent passage that cannot be suspended (downgraded to a rule for straits of minor importance), can be considered as a "reward" demanded by maritime powers in exchange for accepting the twelve-mile rule as the maximum extent of the territorial sea. The regime of transit passage applies, under Article 37 UNCLOS, “to straits used for international navigation between one part of the high seas or EEZ and another part of the high seas or EEZ”. For other straits, in particular those linking the high seas or EEZ with the territorial sea of another State, the regime of innocent passage without suspension applies. How does transit passage differ from simple innocent passage? In contrast to the latter, transit passage also extends to overflight, and does not expressly require submarines to transit in surfacing, thus reducing the possibilities for the coastal State to restrict navigation. This explains the resistance of many coastal States to the regime of transit passage both during the Third UN Conference on the Law of the Sea and also after the entry into force of UNCLOS. In Europe, for example, Spain opposed the return of the Strait of Gibraltar to this regime, as did Russia with regard to the straits in the Arctic Sea, despite its policy of supporting the widest possible freedom of navigation, and although the Soviet Union was a great supporter of this new institution at the time of the Third UN Conference on the Law of the Sea. It is therefore still difficult to affirm (legal literature is also divided on this point) that the regime provided for by UNCLOS on this matter corresponds to customary law, also because some States with important straits (Iran - which has only signed it - Turkey, Venezuela) have not ratified the Convention. It certainly seems paradoxical that the fiercest defenders of the right of transit regime established by UNCLOS are the USA, which has not ratified the Convention, and which is instead a party to the 1958 Geneva Convention on the Territorial Sea, which does not provide for such an institution! In recent practice, there has been a growing tendency on the part of coastal States to regulate transit also with a view to protecting the marine environment and thus in the general interest of the international community. For example, the adoption of mandatory pilotage systems for certain categories of ships to prevent the risk of accidents is widespread. We do not share the objections expressed by certain States of ships in transit to these initiatives, which are certainly in line with a new concept of "freedom of the seas", to be understood in a broader sense than in the past. There are also a number of obligations and prohibitions that may appear, prima facie, to be unjustifiable from a legal point of view, because they are incompatible with the rule that passage through straits cannot be suspended, but which are reasonable in the light of the lack of appropriate provisions to protect the marine environment in such areas. The question is paramount for us as presently China is rapidly increasing its dependence upon oil from the Middle East, while the United States and others are gradually reducing such dependence.

Roughly 85 per cent of the oil that China imports passes through the Straits of Malacca. Having little control over the passage, any disruption – ranging from piracy to fears of a potential naval blockade by the United States and its allies – will have an adverse impact on China's long-term food and energy security.

Another contested matter is the regime of "Archipelagic States" and "Archipelagic waters". The problem is that Article 46 UNCLOS defines an "Archipelagic State" as "a State constituted wholly by one or more archipelagos and may include other islands" and thus, it is distinguished from an oceanic "archipelago" that is part of a continental State. The rules contained in the following articles refer only to "Archipelagic States", i.e. States made up exclusively of "one or more archipelagos and possibly other islands", with the exclusion from the special regime of States with a mainland mass but which also have archipelagos, whether close to the coast or not "coastal" (as in the case of Denmark for the Faroes, Ecuador for the Galapagos, Norway for Svalbard, Portugal for the Azores or Spain for Canary Islands). These States should therefore not be entitled to archipelagic status, nor be entitled to use the archipelagic baseline method ("straight archipelagic baselines" are the lines joining the outermost points of the outermost islands and reefs of an "Archipelagic State"). However, in practice, all the continental States mentioned above have used similar measures reflected in Part IV of UNCLOS in drawing the baselines for their oceanic archipelagos before and after the adoption of the Convention.

Undoubtedly, the regime of archipelagos "dependent" on a "prevailing" territory is a shortcoming of UNCLOS. At the time of the Third UN Conference on the Law of the Sea, the issue was deliberately omitted because the international community was not yet ready to resolve it. Thus, principles applicable to oceanic archipelagos of continental States are still in evolution. In the light of significant practice, however, it cannot be ruled out that a new rule of customary international law may be in the making, affirming the same rights and principles contained in Part IV of UNCLOS and applicable to oceanic archipelagos. What is certain is that the use of the regime provided for archipelagic States is not permissible in cases where sovereignty over the islands in question is contested, as in the case of the archipelagos of the South China Sea or East China Sea, as highlighted by the Arbitral Tribunal in its 2016 decision mentioned above, whose sovereignty is disputed between various States in the region, but in respect of which, nevertheless, there are attempts to submit them to the archipelagic baselines regime as in the case of the so-called China's "Nine-dash Line".

All the disputes relating to the interpretation of rules of the law of the sea mentioned so far, and also others, as well as issues related to territorial sovereignty, are present in the South China Sea disputes, and are entangled with one another, thus making this controversy the most complicated of all territorial and maritime disputes in the world. There is no doubt, moreover, that this dispute would be one of the most difficult obstacles for China to implement the MSR Initiative. Members of ASEAN countries have further increased their concerns with China's strategic advance, and even if without any maritime territorial claims in the area, the United States considers the freedom of navigation in the so-called

"international waters", including EEZs, to be an unalienable right of all countries and will continue to pursue national interests in the South China Sea based on this stance.

3. The third issue I want to very rapidly mention is the MSR's consistency with the institutional framework put in place at supranational level. First of all, as we know, it is necessary to understand the relationship between an initiative like BRI (and MSR) and the WTO. The first one is clearly an initiative that is economically and politically very strong and well-defined, but which lacks an institutional structure, based on flexible frameworks with potential bilateral agreements between the various participants. Institutional structure, on the contrary, is the main feature of the WTO, of which China is also a member, based on market economy with precise rules and jurisdictional guarantees. Secondly, and this relates to the European situation, we know that as many as 27 States have ceded large portions of sovereignty to the EU institutions in key areas for the MSR such as competition, maritime policy and fisheries. It is obvious that the EU as a whole will be supportive of OBOR and the MSR only if China renounces approaching individual Member States in search of bilateral agreements, but so far this does not seem to be the intention of the Chinese authorities.

In conclusion, it should never be forgotten that Western civilization, and modern Europe in particular, is largely the product of the ancient Silk Road. Ideas, goods, wars and epidemics travelled along this corridor. In short, life. The plan to reintroduce this route on land as well as at sea, free and flowing, can only be welcomed. Moreover, this project corresponds to the need for cooperation and coordination that underlies multilateral diplomacy and transnational trade, which has always been favored in the international arena, especially by the United Nations, as the only hypothesis to be pursued. The duty to cooperate also emerges as the only way to defeat threats such as transnational terrorism or piracy, as well as to counter threats to the marine environment. If in the Chinese plans, in addition to an understandable aspiration for economic expansion, there is also all this, it is possible that the project could take off, otherwise mutual distrust will win the day.

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