INTRODUCTION

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Comprehensive treaties with global reach such as the UN Law of the Sea Convention, the American scientist and ocean-law diplomat William C. Herrington once commented, "are not drafted by philosophers or legal theorists;" rather they represent "the results of the balancing and bargaining of national and perhaps other interests that are more often short range than long." For the most part, delegates would vote on the basis of national or other tangible and well defined interests. Only marginally would "logic, philosophy, international friendships, or perhaps some quid pro quo" come into play in the process of forging new principles and agreements.[1] Herrington offered this observation in 1968, when the proposal for a general United Nations conference on the entire range of ocean-governance issues was gaining rising acceptance. The realism that Herrington expressed then proved, in the event, well warranted; and it is today a commonplace in scholarly analysis to refer to the 1982 Law of the Sea Convention as an achievement in the "packaging" of complex compromises.[2]

The substantive contents of the Convention "package" were of varied nature. Thus newly formulated principles, some highly innovative, were intermixed with the codification of important established practices already recognized as customary law (for indeed, "philosophers" and "theorists," even some who championed the idea of "international friendships" at a universal level and the concept of new altruistic "obligations" of signatory states–above all Ambassador Pardo–managed to carry the day on at least some issues of

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1 William C. Herrington, "The Geneva Convention—Ten Years Later," *The Law of the Sea: International Rules and Organization for the Sea* (Proceedings of the Third Annual Conference of the Law of the Sea Institute, 1968) (Kingston, 1969), 25-26.

2 One of the most difficult and controversial questions in that "package," the rights to access and use of seabed mineral resources and distribution of earnings from their exploitation, of course required a supplementary agreement embodying further compromise and revision, attenuating collectivist principles, before the convention could be made acceptable to the governments of several of the great industrial powers, including the United States. See Bernard H. Oxman, "The 1994 Agreement Relating to the implementation of Part XI of the UN convention on the Law of the Sea," in *Order for the Oceans at the Turn of the Century*, ed. Davor Vidas and Willy Østreng (Kluwer Law International, 1999), 15-36.

H. N. Scheiber (ed.), The Law of the Sea, xi-xviii.

principle and of textual language).[3] These features of the new instrument were elaborately intertwined, however, with a set of cross-cutting political agreements that reflected successful hard-line advocacy by particular interests and coalitions, above all by those of the coastal states. The objectives embodied in the Convention were profoundly divergent in some essential respects, and so they have inspired further debate and efforts at clarification, especially as new instruments and understandings such as the Rio agreements come into play and occupy common legal fields with the Law of the Sea instrument. Ultimately the divergent objectives will require a resolution of their contradictions in the course of ongoing implementation and adjudication. In light of this necessity, it is of special importance that the delegates found common grounds (despite their profound differences on other matters) enough to agree upon the vital question of the need for a new institution and procedures for adjudication of disputes—a feature of the Convention that, once the instrument had gone into force, resulted in the formation of the new International Tribunal for the Law of the Sea.[4]

The essays in this volume, although they cannot cover the whole spectrum of questions relating to ocean law today, provide analysis of a broad range of important issues relating to legal principle, substantive policy, procedural mandates, and institutional innovation that have been prominent in ocean affairs since the signature of 1982 Convention and its implementation. Each of the authors takes into account to some degree, in framing analysis of specific questions, the perspective of the historic principles of the ocean law tradition; and seeks, as relevant, to indicate how political movements and institutional changes manifested in national, regional, and global arenas–and, of course, new formal agreements such as the Convention on Biodiversity, the marine pollution conventions, or the Fishery Stocks Agreement–have interacted with efforts to implement the Law of the Sea Convention and its mandates. Taken together, these studies serve as a vivid reminder of how accurate is Professor Burke's contention that "evolution of law of the ocean" is a continuing process, and that its success depends upon continued creative thinking and resourceful diplomacy.[5] And for that reason, to examine that challenges emerging in that

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3 Ambassador Pardo himself, it must be noted, was sorely disappointed by the outcome insofar as the "package" included a vast expansion of the area of the Exclusive Economic Zone, containing by far the greatest part of the ocean's usable resources, and ceding to sovereignty of the coastal states more than a third of the global oceans' area. See Arvid Pardo, "An Opportunity Lost," in *Perspectives on U.S. Policy Toward the Law of the Sea: Prelude to the Final Session of the Third U. N. Conference on the Law of the Sea*, ed. C. L. O. Buderi and David D. Caron (Law of the Sea Institute, Occasional Paper No. 35) (1985), 68.

4 See Treves, Chapter 3, this volume. It is sometimes observed by commentators that the recognition of need for a dispute settlement and adjudication mechanism may well prove, in the long run, one of the most important achievements of the authors of the Convention.

continuing "evolution" is of very great importance in the situation of the global community today.

The title of this book refers to "the common heritage"–but in deploying that phrase we need to keep in mind that the heritage of ocean law has not been monolithic or without its own inconsistencies and contradictions. The dominant element in the received doctrinal tradition is of course the "Grotian" principle of freedom of access to and use of the high seas, beyond national offshore boundaries. Those latter boundaries were generally accepted by the early 20th century as the "three-mile limit" of complete sovereign jurisdiction and ownership, beyond which the navigation and resources of the high seas were considered a commons and were open to all.[6] In the opening chapter of this volume, Jon Van Dyke provides an overview both of the Grotian heritage and of its modification, as the notion of "common heritage" in its historic individualistic guise has been challenged and in considerable measure displaced by a new "communal" or "cooperative" variant consistent with the notion that all of humankind—taking into account future and not only the present generation—has claims to ocean use and resources, extending to the question of conservation and preservation of those resources, that rightly should trump the claims of sovereign nation states or transient needs and uses.[7] Benedict Kingsbury reappraises the heritage itself, especially with respect to Gentili's contributions to the tradition. Kingsbury frames this inquiry in the light of the contextual issues of our own day; this approach permits systematic comparison between our contemporary situation and the historic matrix of national rivalries, pluralism, and contending principles that prevailed during the "founding" period of ocean law, when Europe was expanding and the claims of the nation-state were being forged in international law and in legal and political theory.

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5 William T. Burke, "State Practice, New Ocean Uses, and Ocean Governance under UNCLOS," in *Ocean Governance Strategies and Approaches for the 21st Century*, ed. Thomas Mensah (Proceedings of the 28th Annual Conference of the Law of the Sea Institute) (Honolulu, 1996), 229-30.

6 As the scholarship of Stefan Riesenfeld and others made clear long ago, however, the three mile limit is useful as a general metaphor for the boundaries of offshore national sovereignty but in a strictly interpreted sense was not an accurate representation of the changing realities. Various national governments, over the course of 400 years, took varied and evolving positions on the distance offshore to which their sovereign claims reached, and in many aspects special zones of interest and control were claimed. Riesenfeld, *Protection of Coastal Fisheries under International Law* (Carnegie Endowment for International Peace, Division of International Law, Monograph Series, No. 5) (1942).

7 Lewis M. Alexander, "The Cooperative Approach to Ocean Affairs: Twenty Years Later," *Ocean Development and International Law*, 21 (1990) 105. See also the discussion of the complex and contradictory traditions of ocean law in Harry N. Scheiber, "The Biodiversity Convention and the Access to Marine Genetic Materials in Ocean Law," in *Order for the Oceans at the Turn of the Century*, ed. Vidas and Østreng, at 190-94.

The chapters by Tullio Treves and by Ronald Bartson in Part II (*Inherited Doctrine and Institutional Innovation*) focus attention upon how, in the pattern of change in modern-day ocean law, there are some developments in institutional organization and in procedural innovation which portend to be as far-reaching in their importance and potential as were the basic doctrinal innovations of the founding era and the comparable doctrinal changes of the post-1960s era. Analyzing the various models of adjudication that have been incorporated into the tradition of ocean law, Treves also contributes to the important ongoing debate of "fragmentation" and choice of forums in international dispute settlement and adjudication. Barston's chapter takes port-state control as its focus, in a discussion of the progeny of the 1978 Hague Memorandum of Understanding, raising a set of intriguing questions about how both traditional flag-state prerogatives and a broad set of newly imposed flag-state duties will be implemented if effective controls over shipping are to be achieved. In these essays, the old models of the unfettered sovereign state and of unregulated enterprise on the open seas become anachronistic images indeed; instead, the symbols, rhetoric, and principles of a new order are in the forefront, and now the problematics of institutionalization–whether in adjudication or in the apparent need for greater regionalization in enforcement of maritime rules–have become powerfully evident.

The two chapters in Part III (*Management and Conservation of Living Resources*) deal with regulation of fisheries on the high seas and with the highly controversial issues associated with the International Whaling Commission's regime, including what may fairly be termed its continuing "moratorium with exceptions" and its implications. In his chapter on the 1995 United Nations Straddling Stock Agreement, basis for a regime that will potentially control 80 per cent of the world's marine harvest, William T. Burke re considers some of the basic interpretive views that have been advanced regarding the extent of new obligations legally imposed by the agreement, and regarding the relationship of the FSA to other instruments in force, including the Law of the Sea Convention itself. He also considers surviving elements, some robust indeed, of the Grotian heritage as to the high seas access and as to the concept of sovereign rights in the coastal area. Burke also offers penetrating commentary on the precautionary principle as embodied in the 1975 Agreement and in other contexts, on the newly expressed principles for estimating the limits of sustainable fishing effort, and on the perplexities that he identifies in making workable the notion of biodiversity in the implementation of the new international agreements.

In the present writer's chapter on whaling regulation, historical evidence is given weight in the normative analysis of modern jurisprudential and moral claims; the record of the past is invoked not solely as a matter of understanding the intellectual and legal history. History is also invoked in the task of determining what nations and peoples, if any, come to the table with clean hands based on their historic role in depletion of whale stocks globally. Here, as in other chapters (especially those by David Bederman and Jean-Pierre Plé in Part IV), the interplay of legal doctrine, institutional competence, environmental

imperatives, and scientific management principles all come into play; but the whaling question is complicated by cultural issues. And these cultural issues themselves have been shaped both by the evolving principles of earlier ocean law and diplomacy, in this instance with respect to whaling, and by the obligations of states embodied in post-1970 agreements such as those relating to environmental preservation, sustainable development, and human rights.

The prominence of regional arenas of law, policy, and diplomacy is indisputably one of the key features of both modern ocean-law conflicts and the implementation of new principles and agreements. Several distinctive aspects of structure and dynamics in a regional context are considered in the chapters in Part IV (*Ocean Regions and New Legal Regimes*). Focusing his attention on a unique ocean region, in which the offshore claims to sovereign control in the EEZ area are not an overarching problem in the way of effective regulation, David Bederman analyzes in depth the implementation record of the 1980 Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR). He gives attention to the principles in this agreement that mirror larger doctrinal trends in the proliferating regional and multilateral fishery management regimes of the modern era, demonstrating why CCAMLR is "a weak institutional reality," and with what consequences now and potentially for the sustainability of valuable fishery stocks. Viewing in a different light than that offered by Burke some of the new principles concerning flag state obligations and the imperatives of environmental protection that are embodied in other instruments of modern international environmental law, Bederman offers a bold program of proposed reform to stem "race-to-the-bottom" dangers to fishery stocks in Antarctic waters and to firm up an uncertain and largely ineffective system of monitoring and enforcement.

Parallel issues for the Atlantic region—with a regional management regime very different from CCAMLR in basic respects, yet itself facing problems of severe depletion of stocks—are considered in the chapter by Plé on the record of the International Commission for the conservation of Atlantic Tunas (ICCAT) and the Northwest Atlantic Fisheries Organization (NAFO). In particular he deals with the problems presented by non-member vessels' fishing operations–and even by "rogue vessels"–and he proposes that many of the principles embodied in the 1995 Fishery Stocks Agreement are already effectively incorporated in the instruments that govern various regions and species in the North Atlantic. Of striking significance in this region, however, is the persistence of activities based on the traditional individualistic "freedom of the seas" variant of the doctrinal inheritance; a "common heritage" ideal in its modern cooperative and communal variant requires institutional adjustment and will.

A very different dimension of regional regime building is the subject of Yann-Huei Song's chapter on the relations of the PRC and Taiwan governments in the context of overlapping and intersecting claims in the water of the China Sea and South China Sea. Questions of sovereignty and its limits–boundary lines at sea–form, of course, the basic geographic and jurisdictional framework

for regime definition, whether with respect to the Law of the Sea Convention's EEZ limits and mandates, or with respect to other agreements. Song provides a detailed exploration of how the two governments in question, both in relations with one another and in a matrix of cross-cutting disputes within and among other nations of the East Asian-Southeast Asian region. His analysis deals with a congeries of developments that are both complex in themselves and darkly portentous as to the region's security and peaceful relations among states. Ultimately such conflicts, not restricted to this region but certainly most intractable and potentially volatile here, will test the new principles of universal law and perhaps bend the trajectory of legal development in ways unforeseen. Song ends with reference to the policy of the United States—a theme that is implicit in all the studies of modern ocean-law innovation, since in a formal sense this superpower, or hegemon, among the nation states of the word stands outside the institutional framework—having not ratified some of the agreements that are central to the new framework of international law, including the keystone to the arch of ocean law, the Law of the Sea Convention. The American presence and influence are thus exercised through diplomatic channels and its material presence in world affairs and ocean activity, and the U.S. Government is an observer or else entire outsider with regard to some of the most important new institutions, including the Tribunal.

"Pursuing interests without compromising sovereignty" is the characterization applied by Tsuneo Akaha to Japan-South Korean fishery diplomacy in another part of the troubled Asian ocean region. Many of the questions before the two countries, in conflicts over fishing rights and management, have hung over the region like a dark cloud since the 1950s; but as Akaha shows, the Law of the Sea Convention here, as in so many other regions and arenas, imposed new principles that required reassessment of existing agreements and the creation of new arrangements. Akaha demonstrates how even in bilateral relations there is a pervasive realism in which the "overriding diplomatic interests" prevail over the narrower material interests such as those of the fisheries sector itself. He thereby embroiders further William Herrington's proposition as to how realism typically overrides "theory" of "philosophy" in such international relations. However, principled jurisprudence embodied in new rules of international law can serve to shape outcomes when the prevailing political situation makes it desirable.

Similarly illustrative of complexity in regional maritime areas is the chapter by David VanderZwaag, dealing with the Gulf of Maine region in the northwest Atlantic. Across a broad spectrum of issues, the security and preservation of the marine environment have required sensitive diplomatic negotiations and the creation of an elaborate set of intersecting scientific and regulatory institutions. Both "hard law" and "soft law" have been mobilized, and across this spectrum there are evident the impacts of new technologies on both the creation of environmental problems, on the one side, and, on the other, their detection and possible remediation. As in the Antarctic Ocean region, here too the regulatory rules and working regimes are on the whole inadequate, Vanderzwaag contends;

and he calls for formalization, coordination, and a strengthening of existing initiatives if the regulatory effort is to be made effective. An intriguing element of his analysis is his suggestion that the newly evident emphasis on global initiatives in regime-building may actually prove to be a diversion and a threat to progress in the creation and implementation of effective regional efforts. "Stormy diplomatic waters" still prevail in the Gulf of Maine, he writes, and "the goals of clean seas and sustainable fish stocks have remained elusive." In sum, in the northwest Atlantic, as is true in regard to the serious problems being confronted in Asian waters and in the global arena of whaling regulation, there are robust political obstacles—not just the ambiguities or limitations of scientific inquiry, or shortfalls of implementation technologies, or the like–that still stand in the way of realizing the new "common heritage" goals that Van Dyke identified in our opening chapter.

The book concludes with a overview by Robert Friedheim of the emerging issues that are prominent in ocean governance as the new millennium opens, and his suggestions as to what is needed to design an effective ocean policy for the future. After analyzing the trends in political and economic dynamics, and in international relations, that have been most influential in shaping the ocean law debates of the recent past and current day, Friedheim posits what he terms an "intermediate goal" (as opposed to more remote and poorly defined, though perhaps entirely laudable, general goals) as the touchstone for fashioning of the new ocean order. This intermediate goal is to achieve "sustainability," a concept central to nearly the whole corpus of modern international agreements and emerging law for the ocean environment and its uses. To indicate how progress can be made toward this end, he first gives close critical analysis to the six principles comprising the widely noticed "Lisbon Principles," formulated by a group of scholars, convened a few years ago by the Luso-American Development Foundation, as an agenda for management of the marine environment.[8] But if the Lisbon Principles offer useful guidance to substantive goal-setting, Friedheim contends, attention to effective implementation is essential. "Governance is what we are after," he writes, and his chapter concludes with an extended analysis of what he contends are the core requirements for effectiveness. Institutional innovation and rising complexity of institutional structure in ocean governance have been concomitants of innovation in law, as has been seen in earlier chapters on a variety of themes and with respect to several regions. How to maximize the efficacy, and thereby the legitimacy and acceptance, of these institutions and their consistency with the imperatives of a democratic order within states and a regime of security as well as participation among states, is for Friedheim the next question if the complex issues of ocean environment and security are to be confronted with any hope of real success.

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8 The principles were published in Robert Constanza *et al.*, "Principles for Sustainable Governance of the Oceans," *Science* 281 (10 July 1998) 198.

The Charter of the United Nations prescribed a "just and peaceful international legal order," and perhaps in no other respect has that core objective of post-1945 multilateralism and international organization been more effectively advanced than in ocean governance. The first great departure from the old Grotian order was achieved more than forty years ago, in the 1958 Geneva conventions on ocean law; the Law of the Sea Convention, a quarter century later, was unprecedented in the history of ocean governance both in its comprehensiveness of scope and its articulation of universal principles that sought to establish rule of law on the high seas. The 1990s brought a further proliferation of agreements, not only in the ocean law area but in the larger field of international environmental law. The decade of the nineties also witnessed institutional innovations, most of which are discussed in this book, that may well be a staging platform for a new thrust of the kind that Friedheim proposes and that can serve equally the cause of marine-resource sustainability and the larger purposes of justice and peace. As the authors in this volume make clear, however, the balance of achievements and persisting problems is as yet an uncertain one. If these essays can contribute usefully to the better understanding of the persistent challenges that are associated with ocean law and policy, in the context of a complex doctrinal heritage, the book will have served its purpose.