BRINGING NEW LAW TO OCEAN WATERS

David D. Caron
but—somewhat like Oppenheim's—on his ability to articulate the early-nineteenth-century international system in the legal traditions of the public law of Europe, and to make plausible the argument that the United States shared in that tradition. Though no mean feat, of course, it was not one that would have raised him among the discipline's defining heroes.

In terms of technical historiography, these six essays leave much to be desired. But perhaps they were intended less as a "technical" book than as an effort, at a difficult time for U.S. internationalists, to remind the country of a tradition of legal activism that once played an important role in the world. That effort is surely to be welcomed. It can only be hoped, however, that the present effort will be followed by more work on this period and the one immediately following—work that will do justice to the American tradition as a tradition in law and as an effort to mould the international world beyond warrior ethics and rational choice.

MARTTI KOSKENNIEMI
University of Helsinki


David Caron and Harry Scheiber, the two editors of *Bringing New Law to Ocean Waters*, were successful in bringing together about twenty scholars, all renowned for their outstanding expertise in the law of the sea, to discuss the field's present state of affairs, new problems faced in this context, and the possible direction of future developments.

The book's twenty-one essays are divided into six main sections, including the first section with its two introductory essays. The five other sections cover—generally speaking—fisheries, technology and seabed issues, institutions and adjudication, the marine environment, and maritime boundaries. The choice of topics may seem traditional; however, most of the current problems being confronted within the law of the sea are touched upon, and some are dealt with in depth by the contributors. For example, Moritaka Hayashi deals with illegal, unreported, and unregulated fishing, an issue the respective international organizations are trying to get under control. Under the heading of technology and seabed issues, Carlos Espósito and Cristina Fraile give a detailed analysis of the 2001 UNESCO Convention on the Underwater Cultural Heritage. Under the same heading, one finds a contribution on the very sensitive issue concerning marine genetic material. In two separate contributions, Bernard Oxman and Lakshman Guruswamy deal with pertinent questions concerning the law of the sea's dispute settlement system. The three articles in the section on the protection of the marine environment focus on the precautionary principle (Jon van Dyke and Daniel Bodansky) and the issue of compensation for environmental damage as dealt with by the UN Compensation Commission (UNCC) (Caron). In the last section, two of the currently most sensitive issues concerning delimitation of maritime areas are addressed: a particular aspect of delimiting the outer continental shelf (Ted McDorman), and the problem of the maritime delimitation between Croatia and Slovenia (Damir Armut).

Given the coverage of so many politically, legally, and economically relevant problems of the regime governing maritime spaces, one wonders why the problems confronting navigation have not been made an issue. The threat posed by international terrorism—in particular, terrorism that is in possession of weapons of mass destruction and that uses the sea as a means for transportation—has induced several states to plan to control international navigation in an unprecedented way. One could also have considered whether new forms of using the oceans, such as bunkering at sea, generation of energy, the laying of pipelines crossing seas, or the construction of tunnels, do not warrant the adaptation of the legal regime for maritime spaces. Nevertheless, the contributions in this volume provide excellent insight into the current state of affairs of the law of the sea and into new trends, too. It becomes apparent that the
Convention on the Law of the Sea (LOS Convention) was able to formulate the legal regime only as it had developed, or was in the progress of developing, until then. However, the Convention does not put an end to a further development of the legal regime, and it is an open question whether the Convention will be able to channel such development. Tulio Treves, in his contribution on the development of the LOS Convention in the first ten years after entry into force, is quite skeptical in this respect.

The essays in this volume display at least three distinctive features. First, many of the contributions address historical aspects or developments—especially the contributions of Scheiber on the development of the U.S. policy concerning the fishing of tuna, and the contribution of Christopher Carr on the “transformation” in the law governing highly migratory species. Both contributions show, for example, that certain approaches (in particular, concerning fisheries) adopted by the LOS Convention or other international agreements are the result of a long development rather than a new initiative successfully promoted at the Third UN Conference on the Law of the Sea. Second, several of the contributors (for example, Scheiber) consider not only the legal, but the economic, aspects of the problems being addressed. Finally, the interrelation of national policies and international developments is frequently demonstrated and assessed (in particular, by Scheiber, Carr, and, in an essay on historic shipwrecks, John White).

It would exceed the space allotted to this review to report on every single contribution individually. The review will focus on those in which the reviewer has a personal interest.

Lawrence Juda’s introductory essay on the “Changing Perspectives on the Oceans: Implications for International Fisheries and Ocean Governance” presents, in effect, the leitmotiv of the book. It points out—after describing the environmental effects of modern fishing methods—that the 1992 Rio Conference on Environment and Development changed the perspective on ocean space. Such space now has to be looked upon as a natural system with interrelated and interdependent parts, rather than simply as an area in which diverse resources are found. Juda concludes that ocean governance will change. Most of the other contributions on fisheries highlight, as does Juda, that either changed facts or changed perceptions concerning the management of fishery resources require a rethinking or a modification of the existing legal regimes on fishing. In particular, the reference to the change in perceptions, as mirrored in the Rio Conference, is of relevance here. The modifications called for are already reflected in the UN Convention on Straddling Fish Stocks and Highly Migratory Fish Stocks. This Convention is analyzed with detailed reference to both the international agreements and the national legislation leading up to it by Carr and Yanukucci Song, respectively.

As already suggested, the most crucial problem is that international fishing is facing at the moment is the illegal, unreported, and unregulated fishing—an issue addressed in the contributions by Hayashi and Davor Vidas. Unofficial sources suggest that, for example, over 80 per cent of the catches of Patagonian toothfish are illegal. The UN General Assembly, the Food and Agriculture Organization, and other international and regional fisheries organizations have taken actions that, as Hayashi points out, have not been implemented adequately by either the flag states or the coastal states concerned. In particular, no effective measures have been taken against the reflagging of fishing vessels. There seems to be an increasing trend to strengthen port state control and, as Vidas elaborates, the documentation schemes that would allow port states to take action. An alternative effective measure may be—first steps having been taken in the context of the Convention on the Conservation of Antarctic Marine Living Resources in that respect—to declare illegal, unreported fishing a criminal offense committed by the captain, to be prosecuted on the basis of universal criminal jurisdiction.

In an essay on multilateralism on marine issues in the Southeast Atlantic, Erik Franckx deals with port state control and the problems that may result from using this mechanism as the primary enforcement tool. He argues that one has to distinguish between the access to ports and the application of laws and regulations of port states to foreign vessels. He further argues that, on the basis of the WTO Appellate Body report in the Shrimp/Turtle case, a coastal state may provide for actions being taken against ships having engaged in illegal fishing of highly migratory species on the high seas. This approach has not been tested yet before international courts or tribunals, although the Swordfish Stocks case still pending before the International Tribunal for the Law of the Sea (and just recently granted an extension through January
2008 to institute proceedings) may have to deal with this issue.

Espósito and Fraile give an account, with special attention to the Spanish position, on the negotiations leading to the UNESCO Convention on the Protection of the Underwater Cultural Heritage. They point out that the rules of the LOS Convention concerning underwater cultural objects are inadequate. The new rules try to strike a balance between the jurisdictional powers of flag states and those of the respective coastal states while attributing to UNESCO a coordinating role. This involvement of an international organization is a matter of consequence since there may be a worldwide interest in the preservation of these cultural objects. It is still to be seen whether the UNESCO Convention will be successful in this respect or whether the national interests of coastal states or flag states will prevail.

The contribution by Richard McLaughlin on managing foreign access to marine genetic materials correctly deplores that the "uncoordinated patchwork of national plans and laws providing access rights to genetic resources conditioned on the sharing of benefits, coupled with an increasingly effective international system of intellectual property right protections create a legal environment that is inequitable, economically and biologically inefficient, and ripe for international discord" (p. 258). This harsh statement is reached by assessing the respective rules concerning marine living resources, the Agreement on Trade Related Aspects of Intellectual Property, and the Convention on Biological Diversity. As a cure he persuasively suggests the use of a regional approach based upon cooperation among the states concerned. Considering that there is also a need for the management of the genetic resources of hydrothermal vents in the deep seabed, one could also argue for a new global regime on genetic resources. Such a regime would provide the opportunity to balance the interests of states hosting genetic resources and those using such genetic resources for the development of pharmaceutical products. As McLaughlin points out, the Convention on Biological Diversity failed to establish such a balance.

In separate contributions, Oxman and Guruswamy deal with jurisdictional conflicts between international tribunals. However, whereas Oxman deals with this new, controversial issue within the context of an overall assessment of the jurisprudence of the International Tribunal for the Law of the Sea, Guruswamy’s approach is based on general principles of law. The contributions complement one another, and Guruswamy could have made good use, in particular, of some of Oxman’s arguments that the problem of competing jurisdictions of international dispute settlement bodies should be addressed on the basis of legitimacy and the principles of fairness and reasonableness.

Van Dyke gives a very well documented analysis on the evolution of the precautionary principle and of its implementation or rejection by international or regional dispute settlement institutions. Whereas the International Court of Justice interpreted this concept narrowly, the International Tribunal for the Law of the Sea and the WTO Appellate Body (in the Beef Hormones case) cautiously adopted a more positive approach. Van Dyke, while pointing to the inherent dangers of the precautionary principle, rightly emphasizes that it already has changed the process of decision making. Bodansky is more critical in this respect, arguing that the precautionary principle has not yet developed any clear contours in international law. As with the Oxman and Guruswamy essays, these two contributions complement one another.

Caron analyses the UNCC’s first report concerning the environmental damages caused by the Gulf War. The report recommended compensation of approximately $243 million to five claiming governments—to cover the costs for monitoring and assessment of environmental damages. It is noteworthy, as the author underlines, that the UNCC not only simply awarded funds to the claiming states, but also directed them to expeditiously distribute the amounts received and to provide UNCC with information concerning such distribution. Caron is correct in pointing out that this decision was instrumental in getting the national administrations to take appropriate monitoring and remedial action, and thus may stand at the beginning of a new era of international involvement in national decisions concerning environmental protection.

In the book’s final section, dedicated to the delimitation of maritime boundaries, Arnaut gives a detailed, graphic account of the problem concerning the maritime boundaries between Croatia and Slovenia. It is apparent that the claims advanced are not easily reconciled with established
principles concerning the delimitation of maritime spaces—especially Slovenia’s claim for direct access to the high seas. This particular issue—namely, not to be cut off from access to the high seas—is of considerable importance for geographically disadvantaged states but was not recognized by the LOS Convention (it is to be noted that several bilateral agreements, two of which the author considers in detail, provide for an acceptable solution). The author rightly points out that the solution will have to be found through agreement among the parties concerned, rather than by recourse to judicial settlement of disputes.

Using the Russian Federation’s submission as an example, McDorman describes in detail the task of, and the procedure before, the Commission on the Limits of the Continental Shelf. This contribution is predominantly factual in describing the content of the submission and the notes verbales delivered by Canada, Denmark, Japan, Norway, and the United States. Only in the last two pages does McDorman indicate that the commission’s Rules of Procedures would have enabled it to pursue a different approach.

Finally, Choon-Ho Park draws attention to an issue that may become of relevance in the future—namely, the emergence of new islands or the disappearance of existing ones. This situation presents a striking example in which the actual legal regime of maritime spaces may have to be adjusted to new circumstances or scientific findings, as is already happening with regard to delimitations of the continental shelf.

Altogether, Caron and Scheiber’s Bringing New Law to Ocean Waters contributes significantly to our understanding of the legal regime on maritime spaces and its interrelation with new scientific findings, geographical developments, and changes in perception. The volume should be of interest not merely to scholars, but to lawyers and politicians involved in progressively developing the legal regime on maritime spaces at all levels.

RUDIGER WOLFRUM
Max Planck Institute for Comparative Public Law and International Law, Heidelberg


This is not the first time that the American Society of International Law and this Journal have come across the international law issues involved in the Cyprus question.1 Cyprus is an island of some 3,600 square miles in a strategic location at the crossroads of three continents in the eastern Mediterranean. Its history dates back to 6000 BC, with many foreign occupations, which have left traces of their presence but have not altered Cyprus’s unity and ethnological character. Cyprus’s native Greek population, whose ancestors came to the island before the Trojan War and who constitute about 80 percent of the island’s current population of approximately one million, has retained intact its language, religion, and cultural traditions. The majority population has coexisted with minority communities, the largest of which (18 percent of the population) is that of the Turkish Cypriots, most of whose ancestors arrived on the island after the Ottomans conquered Venetian-controlled Cyprus in 1571.

Modern disputes over Cyprus are a legacy from the wounding down of two empires and the continuing interest of major powers in the island as a strategic asset. England acquired administrative powers over Cyprus in 1878 under a secret treaty, whereby promises were made to defend eastern Turkey against Tsarist Russia. When Turkey entered World War I in 1914, the United Kingdom annexed Cyprus—and then kept the island as a Crown colony once Turkey agreed, by the 1923 Treaty of Lausanne, to renounce all claims to it. Beginning in the mid-1950s, self-determination for Cypriots (exercisable by way of union with Greece) was repeatedly raised at the UN General Assembly; Greek Cypriots waged a guerrilla war against the colonial power; and Turkey and Turkish Cypriots claimed retrocession of the island to Turkey or, short of that, partition.