

Book Review

MARINE POLLUTION AND THE LAW OF THE SEA. By John Warren Kindt. Buffalo: William S. Hein & Co., Inc., 1986. 4 vols.; index and additional tables in supplemental loose-leaf volumes.

*Reviewed by J. Peter A. Bernhardt**

INTRODUCTION

This review of *Marine Pollution and the Law of the Sea* (hereinafter *Marine Pollution*) will first make some general comments regarding the information contained in the book. Thereafter, the organization of the four volumes of text and the two loose-leaf volumes will be described. In its entirety, *Marine Pollution* constitutes a thorough analysis of marine pollution issues and related issues in the law of the sea.

Additionally, this review will analyze some of the primary academic themes in Professor Kindt's opus. Perhaps courageously, the author maintains several minority positions which undoubtedly will spark both criticism and debate. In particular, the arguments of the Group of 77 and other interest groups are closely scrutinized and often criticized in this book.¹ Also, in terms of navigational and environmental interests, Professor Kindt is surprisingly adamant in his commitment to navigational interests. This position is encouraging, because unjustifiable infringements on navigational freedoms have always been the *primus inter pares* of United States concerns involving the law of the sea. Professor Kindt, however, could have gone into greater detail when examining some of the conventions of the International Maritime Organization (IMO), but arguably such ex-

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1. J. KINDT, MARINE POLLUTION AND THE LAW OF THE SEA 22 (1986).

aminations would have changed the tenor of the book as a source of general reference.

As the author states, "this book is intended to be a definitive research work on marine pollution [encompassing related terms such as the environment and conservation] and the law of the sea."² Certainly this is the first work to elevate pollution concerns to top priority in examining the numerous issues surrounding the law of the sea. Professor Kindt approaches his subject systematically, using the Lasswell/McDougal format.³ The opus is divided into four parts utilizing the above format, with Part IV, "Policy Alternatives and Recommendations," serving essentially as a mini-text and as a summary of the first three parts.⁴

In looking at the specific environmental effects of types of pollution, such as ocean dumping, the book is necessarily general, given the dearth of comprehensive studies thus far in this area. Again, the depth of the discussion of pollution effects on marine life varies with the availability of information, with life linked more closely to near-shore areas (polar bears, sirenians, shellfish, etc.) being easier to study and also more susceptible to human waste discharge. Moreover, the book covers all aspects of degradation of the marine environment, not simply strict pollution issues. The effects on the marine environment of the exploitation of living and non-living resources,⁵ and international attempts to control overexploitation and minimize damage⁶ are studied in detail.

As noted, this is the first book to deal comprehensively with this subject. By comparison, *Marine Pollution* is of far greater scope and is easier to use than Professor Timagenis' two-volume work,⁷ and *Marine Pollution* will prove of much use to those interested in the international environmental area. The relatively narrow focus of *Marine Pollution* allows the author to cover the subject in detail and to cross reference each sub-issue, placing it in its proper perspective relative to the main themes.

2. *Id.* at v.

3. *Id.* at xxi-lvii (the table of contents).

4. *Id.* at vii. The Lasswell/McDougal format is maintained throughout the sub-units of the book. For example, the chapter on ocean dumping is itself broken down into: (a) delimitation of problems, (b) goals, (c) historical background, (d) trends and conditioning factors, (e) policy alternatives and recommendations, and (f) Law of the Sea provisions. *Id.* at 1085. For a summary of the Lasswell/McDougal methodology, see McDougal & Schneider, *The Protection of the Environment and World Public Order: Some Recent Developments*, 45 *MISS. L. J.* 1085, 1087 (1974). See generally M. McDougal & W. BURKE, *THE PUBLIC ORDER OF THE OCEANS* (1962); Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 *YALE L. J.* 203 (1943).

5. See, e.g., KINDT, *supra* note 1, chapters 14-22.

6. *Id.* chapters 23-24.

7. G. TIMAGENIS, *INTERNATIONAL CONTROL OF MARINE POLLUTION* (1980) (two vol.).

Under Part II, "Clarification of Goals,"⁸ the author discusses overall goals, and goals for reduction of, as well as an analysis and history of, each category of pollutant: hydrocarbons, toxic metals, radioactive wastes, solid wastes, and particulate pollution.⁹ In Part III, "Trends and Conditioning Factors," Professor Kindt focuses on the traditional sources of pollution (*i.e.*, land-based, vessel-source, and ocean dumping)¹⁰ as well as conservation and pollution concerns related to the exploitation of living and non-living resources.¹¹ Part IV provides policy alternatives and recommendations from an overall perspective. In addition, it reiterates recommendations for each type of pollutant and coalesces the issues related to exploitation, as well as special, related issues such as marine sanctuaries¹² and ice-covered areas.¹³

The two supplemental volumes, now being published, will contain the index and tables which, due to their contents, should be revised periodically. The first supplemental volume contains "Tables Correlated to Each Chapter." The author's intent was to include in this loose-leaf volume any textual updates and appendices which might change, while including after each bound chapter those appendices which had lasting historical significance or which were unlikely to change.¹⁴ The tables included in this volume are a cornucopia of data, which are found in a myriad of government reports, but which are systematically collated for the first time in the context of issues involving marine pollution and the law of the sea. The tables involving maritime claims for territorial seas, fishing zones, and exclusive economic zones (EEZs) are particularly noteworthy because the author extrapolates from the regular publications of the Office of the Geographer at the State Department to fill some historical gaps.¹⁵

The last supplemental volume, "Appendices and Index," holds the opus together with overall tables for the four volumes of text. It is thus possible to find all of the textual references to a particular convention, statute, or case by checking these overall tables. Of particular note is the Convention Index, included prior to the general index

8. KINDT, *supra* note 1, at 675.

9. *Id.* chapters 6-10.

10. *Id.* chapters 11-13.

11. *Id.* chapters 14-22.

12. *Id.* at 1904 (chapter 23).

13. *Id.* at 1931 (chapter 24).

14. *Id.* at preface (loose-leaf volumes).

15. To calculate his tables on various maritime claims, Professor Kindt relies primarily on OFF. GEOGRAPHER, U.S. DEP'T ST., LIMITS IN THE SEAS (5th rev. 1985); OFF. GEOGRAPHER U.S. DEP'T ST., NATIONAL MARITIME CLAIMS: 1958-85 (1985).

in the last volume. The Convention Index lists the textual references to the United Nations Convention on the Law of the Sea (LOS Convention),¹⁶ including references to an entire reprint of the LOS Convention in volume one. The Convention Index is easy to use and provides quick access to needed information. The marine pollution provisions and many tangential provisions of the LOS Convention are frequently referenced and discussed, but researchers should not expect to find every provision discussed in detail.

Generally, the text of *Marine Pollution* consists of both analyses and historical documentation, which delimit the bases for many current problems regarding marine pollution issues and the law of the sea. Professor Kindt's writing style is directed toward the future, and there is an effort to phrase issues and developments in a context which probably will read well for another ten years. Some readers might balk at this style for a number of reasons. For example, the author does not discuss the possibility of future amendments to the Law of the Sea Convention in terms of current situations.¹⁷ Instead, Professor Kindt often makes general policy statements suggesting possible modifications¹⁸ to the LOS Convention to be considered and implemented when the Convention is open to amendment.¹⁹

CONTROVERSIAL POSITIONS IN THE CONTEXT OF UNCLOS III

Throughout his book, Professor Kindt details from an objective perspective the different positions involving issues from the Third United Nations Conference on the Law of the Sea (UNCLOS III).²⁰ Yet, there are some areas where Professor Kindt obviously feels compelled to argue a position. Significantly, where he has taken a stand on a particular issue, it is sometimes the minority or more controversial side that he supports.

For example, Professor Kindt encourages the utilization of various agreements of the International Maritime Organization (IMO) and the marine pollution provisions (articles 192-237) of the LOS Convention.²¹ Professor Kindt correctly interprets article 211²² of the Convention, regarding pollution from vessels, as being administered by only the IMO. This distinction often is overlooked.

Two of the primary themes of *Marine Pollution* are: (1) the

16. United Nations Convention on the Law of the Sea, *opened for signature*, Dec. 10, 1982, U.N. Doc. A/CONF.62/122, *reprinted in* 21 I.L.M. 1261 (1982) [hereinafter LOS Convention].

17. KINDT, *supra* note 1, at 1576-78.

18. *Id.* at 1577.

19. *Id.* at 1578.

20. One noticeable exception is in chapter 25 on marine scientific research where the U.S. position is criticized. KINDT, *supra* note 1, at 1999-2000.

21. LOS Convention, *supra* note 16, arts. 192-237.

22. *Id.*, art. 211.

marine pollution provisions of the LOS Convention should be promoted and (2) the role of the IMO should be expanded.²³ In the latter case, it appears that Professor Kindt is recommending that the IMO's authority should be expanded in order for it to become a more effective organization.²⁴ Although caught between the conflicting strategies of implementing environmental protection policies and encouraging oceans resources development, Professor Kindt appears to be impressed by the IMO's record. While applauding the regional seas program of the United Nations Environment Program (UNEP),²⁵ Professor Kindt is concerned about the effectiveness of some U.N. organizations, including some aspects of UNEP operations. Regarding the regional seas program, Professor Kindt neglects to refer to the Cartagena Convention for the Caribbean and he similarly does not discuss the South Pacific Regional Environmental Program (SPREP). These specialized programs are admittedly recent developments, and although the book does encourage these types of regional approaches to environmental issues, including the regional seas programs which foster environmental treaties like the Convention for the Protection of the Mediterranean Sea Against Pollution,²⁶ these developments will need to be included in updates in the loose-leaf volumes.

With the exception of the practical application of "essential development" as an excuse for totally disregarding the environment,²⁷ the author is generally supportive of the Declaration of the United Nations Conference on the Human Environment²⁸ and the provisions of the Declaration are reprinted as an appendix to chapter one.

Another primary theme of *Marine Pollution* is that all pollution can be viewed from the perspective of marine pollution.²⁹ Although several of these positions may spark debate, Professor Kindt is viewing all issue areas, such as environmental protection vis-a-vis development, from the internationalist standpoint of the "scholarly observer or decisionmaker who identifies, not merely with some single parochial community, but rather with the whole of man's many dif-

23. KINDT, *supra* note 1, at 42, 198.

24. *Id.* at 198.

25. *Id.* at 1057-61, 2000.

26. *Done*, Feb. 16, 1976, reprinted in 15 I.L.M. 290 (1976).

27. KINDT, *supra* note 1, at 174, 2116-17.

28. See Report of the United Nations Conference on the Human Environment, U.N. Doc. A/CONF.48/14 Rev.1, at 3-5 (rev. ed. 1972).

29. See, e.g., KINDT, *supra* note 1, at 970 (citing Jacques Cousteau); see also Kindt, *International Law and Policy: An Overview of Transboundary Pollution*, 23 SAN DIEGO L. REV. 583, 603-04 (1986) [hereinafter *Transboundary Pollution*]. .

ferent — often concentric, and always interpenetrating — communities.”³⁰ With this observational viewpoint, it might be expected that Professor Kindt would be non-supportive of many United States policies. On the contrary, the book is surprisingly sympathetic to most United States policies and domestic legislation. The author also provides well-documented support and evidence to bolster his positions and arguments. Admittedly, Professor Kindt is not an environmental purist. He encourages formulation of reasonable policies to develop ocean resources and rejects efforts to completely abolish ocean development.

In chapter four, however, there is an obvious exception when Professor Kindt criticizes the policy behind the United States enactment of the Magnuson Fishery Conservation and Management Act³¹ (Magnuson Act) because of its impact on the international policies of other countries.³² He states that the Magnuson Act was a unilateral extension of fisheries jurisdiction by the United States, which violated articles 2, 6, and 22 of the Convention on the High Seas³³ and articles 1, 7, 9-12 of the Convention on Fishing and Conservation of the Living Resources of the High Seas.³⁴ Professor Kindt charges that the Magnuson Act precipitated many other unilateral extensions³⁵ and hindered the United States negotiating position at UNCLOS III.³⁶ Viewing the UNCLOS III negotiations from the internationalist perspective, Professor Kindt recites the history behind the Magnuson Act and what he perceives to be its practical historical consequences. Apparently, he also recognizes that subsequent to 1976, international law had developed to permit 200 mile claims to fisheries jurisdiction.³⁷ This discussion highlights another of the book’s themes — that in certain circumstances, unilateral extensions of jurisdiction transgress international law³⁸ if those extensions

30. McDougal & Schneider, *supra* note 4, at 1089; see KINDT, *supra* note 1, at xv, 675-76.

31. 16 U.S.C. § 1801 *et seq.* (1982 & Supp. II 1984).

32. KINDT, *supra* note 1, at 243-56.

33. Convention on the High Seas, *done* Apr. 29, 1958, 15 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82, arts. 2, 6, 22 [hereinafter High Seas Convention].

34. Convention on Fishing and Conservation of the Living Resources of the High Seas, *done* Apr. 29, 1958, 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285, arts. 1, 7, 9-12 [hereinafter Fishing Convention].

35. When chapter 4 was published as a law article in 1980, it included several tables to support Professor Kindt’s position. In the book, these tables may be found in the loose-leaf volume under “Tables Correlated to Each Chapter.” Professor Kindt obviously expects the readers of his book to check the loose-leaf volume for his “advance sheets.” See Kindt, *Special Claims Impacting upon Marine Pollution Issues at the Third U.N. Conference on the Law of the Sea*, 10 CAL. W. INT’L L.J. 397, 425-31 (1980).

36. KINDT, *supra* note 1, at 255-56.

37. *Id.* at 1234; see *id.* at 1247-48. Professor Kindt would permit 200 mile fishing zones as one subgoal of the maintenance of a favorable legal order. *Id.* at 685.

38. See *id.* at 243-56.

violate existing customary international legal norms. Instead of uniformly supporting unilateral extensions of jurisdiction over marine pollution, Professor Kindt generally tends to favor the preservation and promotion of the traditional navigational freedoms when those freedoms conflict with environmental concerns.³⁹ Professor Kindt, for example, supports the LOS Convention's article 234 compromise for navigation in the environmentally sensitive ice-covered areas, but the author conveys the impression that he does not favor a broad interpretation of that article.⁴⁰

As previously mentioned, Part III, entitled "Trends and Conditioning Factors," occupies most of the opus, and this section is the main section of the book. In this area there should be more analyses interrelating the chapters on the traditional categories of pollution (*i.e.*, land-based, vessel-source, and ocean dumping) with the following chapters on specialized topics.

A hypothetical case illustrates a problem area unaddressed by Professor Kindt. A scenario could involve a vessel which runs aground in a United States National Marine Sanctuary, damaging the sanctuary's coral reefs. The chapters on vessel-source pollution and marine sanctuaries naturally would be consulted. If an environmentally harmful cargo, such as oil, were accidentally discharged, the chapter on hydrocarbon pollution would lend insight into the extent and calculation of damages. To simplify this hypothetical, however, it should be assumed that any damages are minor.

If the damaged vessel is in territorial waters, then there is definite coastal state jurisdiction pursuant to article 2 of the LOS Convention.⁴¹ The damaged vessel could also voluntarily submit to port state jurisdiction.⁴² If the vessel is not in territorial waters or does not voluntarily submit to port state jurisdiction, then jurisdictional concerns could be analyzed from the perspective of damage to continental shelf resources. Such a determination would be more appropriate than basing jurisdiction on coastal state resource rights in the exclusive economic zone.⁴³ An immediate but admittedly minor problem is that, unlike the case in part XII of the LOS Convention, establishing the pollution regime, there is no continental shelf regime article corresponding to part XII, section 9, article 235(1),⁴⁴ providing for

39. *Id.* at 2251.

40. *Id.* at 2389.

41. LOS Convention, *supra* note 16, art. 2.

42. *See id.* arts. 218(1), 220(1); KINDT, *supra* note 1, at 1188-89.

43. LOS Convention, *supra* note 16, art. 56.

44. *Id.* art. 235(1).

state responsibility and liability in accordance with international law. As a practical matter, it is unlikely that anyone seriously would question that an equivalent state responsibility exists for damage to continental shelf resources. At a minimum, there is vicarious state responsibility for flag vessels as inferentially provided in article 229 regarding the institution of civil proceedings⁴⁵ and article 235(2) ensuring recourse by states under their legal systems for compensation for damage by persons under their jurisdiction.⁴⁶ The apparent omission in the Convention text probably is a result of a basic fact: the continental shelf regime in the LOS Convention is less detailed than the vessel-source pollution regime, in that the latter (particularly the enforcement regime) was first developed and put into practice by states during the Conference years, whereas the former was of long standing and widely recognized and practiced by the world community. In short, it was not necessary to state it.

However, a most important distinction should be noted. There is a question regarding whether a coastal or port state possesses the right to impose penalties on a vessel for navigational error outside its territorial sea, particularly if error resulting in damage was not willful or grossly negligent. Balancing coastal and navigational rights, penalties would skew that balance. Even in the case of the detailed Part XII pollution regime, article 230 provides, *inter alia*, that only monetary penalties may be imposed for violations committed beyond the territorial sea.⁴⁷ This also applies to violations within the territorial sea, unless it was a willful and serious act of pollution therein.⁴⁸ Given this sliding scale, perhaps the port state should not impose a fine for damage to natural resources occurring beyond the territorial sea — even if the vessel was voluntarily within a port — although such could be considered a legitimate port state entry requirement. Fines could, of course, be imposed for violations occurring within internal waters.

Turning, however, to enforcement of a coastal state's rights to recover damages, should the coastal state exercise jurisdiction over the hypothetical vessel if it does not enter port? Such an exercise of jurisdiction is possible, even if the coastal state already has the option of bringing an action elsewhere in accordance with traditional admiralty practice and even though proof problems and procedural issues would be more complex. First, it is pointless to accord a state sovereign rights over resources if it cannot meaningfully enforce those rights against others — *ubi ius ibi remedium*. Second, if one recognizes the right of coastal state enforcement to take action *in situ* for

45. *Id.* art. 229.

46. *Id.* art. 235(2).

47. *Id.* art. 230(1).

48. *Id.* art. 230(2).

damage to resources occasioned in the EEZ due to a vessel-source pollution incident, there is no logical reason not to recognize such a right if a vessel commits damage to resources by means other than pollution, provided that the enforcement right is precisely drafted, narrowly construed, carefully applied, and both proportionate to and commensurate with the damage — which itself must be significant enough to justify interference with international navigation. If the same “sliding scale” were adopted by coastal states for such non-pollution resource damage as that sliding scale incorporated into article 220,⁴⁹ theoretically no navigational interest would have grounds for complaint. As a safeguard against coastal state abuse, however, such an enforcement regime should first be submitted to the IMO for its approval, as no clear international rules and standards at present exist. It is hoped that Professor Kindt will address this issue area in the future, but the book should not be faulted for not addressing all of the hypothetical situations which could arise in these issue areas because addressing all potential situations would constitute an exercise *ad infinitum*.⁵⁰

Perhaps in an attempt to be as unbiased as possible or perhaps due to a desire to wait and see how the customary international law developed after the LOS Convention was signed on December 10, 1982, Professor Kindt does not often commit himself with regard to which provisions of the Convention definitely constitute customary international law. *Arguendo*, no author would want to have to pick and choose (on an article-by-article basis) which provisions of the Convention constituted customary international law.⁵¹ Such an exercise could taint the content of any book on the law of the sea. Even so, Professor Kindt strongly implies that the LOS Convention should be considered customary international law, with perhaps the exception of the deep seabed mining provisions.⁵²

49. *Id.* art. 220.

50. Professor Kindt is already expanding on his work in *Marine Pollution*. For example, in the chapter on “solid wastes” the references to the pollution problems of the Chesapeake Bay on pages 915-16 generated an in-depth article. Warner & Kindt, *Land-Based Pollution and the Chesapeake Bay*, 42 WASH. & LEE L. REV. 1099 (1985); see KINDT, *supra* note 1, at 915-16. In another law article, Professor Kindt has coalesced several of the themes in *Marine Pollution* into a strategic overview of transboundary pollution. See *Transboundary Pollution*, *supra* note 29, at 583.

51. For analyses of the status of the Law of the Sea Convention as customary law, see Sohn, *The Law of the Sea: Customary International Law Developments*, 34 AM. U.L. REV. 271 (1985).

52. See, e.g., KINDT, *supra* note 1, at 1577 (placing an imprimatur on John Norton Moore's two-track approach that all provisions of the LOS Convention, except for seabed mining, are customary international law).

One area where Professor Kindt's position is unlikely ever to reach majority status is with regard to his constant reference to the EEZ as just the "economic zone." Professor Kindt repeatedly states that since a coastal state's rights in its economic zone are by no means exclusive rights under the LOS Convention, the more appropriate terminology is just the "economic zone" and not the "exclusive economic zone."⁵³ Indeed, the use of the word "exclusive" implies that a coastal state has more rights in its EEZ under the Convention than it actually has. Other countries do have rights in the area covered by the EEZs of coastal states, such as the freedoms of navigation pursuant to Articles 58 and 87 of the Convention.⁵⁴ Although there are flaws in this simplified example, it illustrates Professor Kindt's point. Professor Kindt, however, acknowledges that his position constitutes the minority viewpoint, when for example, he discusses the United States EEZ in the context of the Presidential Proclamation on the "Exclusive Economic Zone of the United States of America."⁵⁵

This persistence in maintaining what are obviously minority positions suggests that Professor Kindt is interested in encouraging certain amendments to the LOS Convention.⁵⁶ In one of several different conclusions,⁵⁷ Professor Kindt mentions the policy of "building a record" of potential amendments. This policy is usually expressed in terms of recommendations coming from other authors.⁵⁸ It soon becomes apparent, however, that as a published book *Marine Pollution* is part of the "record" and will impact on international policy and on determinations involving customary international law accordingly. This is particularly true since the book is scheduled to be updated regularly. This book will help delimit the parameters of future debate, because it must necessarily be cited with regard to environmental law, marine pollution issues, and the law of the sea. Accordingly, the book performs a service to international law and policy and to the "maintenance of a favorable legal order."⁵⁹

CONCLUSION

Pollution is a major and increasing concern in the ocean environment, with issues such as persistent plastics, ocean incineration, nuclear waste disposal, oil spills, and seabed mining and drilling regularly vying for headlines. The ocean is the engine which drives the earth's entire ecosystem. No one yet knows the extent of the ocean's

53. KINDT, *supra* note 1, at 1450, 1474 n. 359.

54. LOS Convention, *supra* note 16, arts. 58, 87.

55. Proclamation No. 5030, 3 C.F.R. 22-23 (1984).

56. *See, e.g.*, KINDT, *supra* note 1, at 1577, 1354-56, 2104.

57. *Id.* at 2054, 2394.

58. *See, e.g., id.* at 2054-56.

59. *Id.* at 685, 687.

capacity to absorb continued degradation without inviting collapse of the entire system,⁶⁰ but now is the time to begin to devise ways to deal with the problems created by pollution and exploitation of the oceans. This issue is made immensely more complex by the need to coordinate such efforts among more than one hundred coastal states, each with its own agenda and priorities for using the ocean.

Professor Kindt approaches the issue not from a purely environmental focus, but from the more practical aspect of why coordination and development of effective multi-national pollution controls can be so difficult to achieve. He also proposes solutions to these problems. The thrust of his recommendation is that the international community must give marine pollution concerns much greater emphasis than has heretofore occurred. As Professor Kindt summarizes:

There is an increasing need to keep the international public advised of those marine pollution considerations which impact on both the earth's ocean and the total world environment. The UNCLOS III negotiations did not succeed in placing sufficient emphasis on marine pollution issues, compounding the necessity to emphasize pollution issues in potential amendments to the LOS Convention. If countries do not adhere to this policy, the world may experience the sudden collapse of marine ecosystems.⁶¹

For anyone involved in ocean affairs, Professor Kindt's opus will serve as a comprehensive synopsis of the issues surrounding pollution and exploitation of the marine environment, and one which can be updated as new information becomes available. The judicious provision for two loose-leaf volumes will ensure its continued relevance in a rapidly burgeoning area of public international law.

Professor Kindt began work on the book in earnest in 1975 and the depth of his commitment to the issue is reflected therein. It certainly mirrors and synthesizes into one source the current state of knowledge on pollution in the marine environment and its effects on multilateral decision-making. Professor Kindt's book will prove an extremely useful work and indeed become the *locus classicus*, standard reference work, in the field.

60. *Id.* at 5-7; *Transboundary Pollution*, *supra* note 29, at 602.

61. KINDT, *supra* note 1, at 2104.

