

**WHO  
PROTECTS THE  
OCEAN?**



# WHO PROTECTS THE OCEAN?

## Environment and the Development of the Law of the Sea

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## FOREWORD

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This book is a product of the Working Group on Ocean Environment of the American Society of International Law, one of several interdisciplinary research groups of the Society in the field of international law, science and technology. All are supported by the National Science Foundation, through the Office of Exploratory Research and Assessment of the Foundation's Program on Research Applied to National Needs (RANN). The Group was drawn from two Society research panels of several years' standing, on International Law and the Global Environment and Law of the Sea, chaired respectively by Stewart L. Udall and Milton Katz.

The Working Group on Ocean Environment was formed in 1972, when it had become clear that the international community was headed for a conference aiming at a comprehensive reconsideration and revision of the law governing ocean space. As this book was readied for press, the first of what will apparently be several substantive sessions of that Conference, held in Caracas, was underway.

The first and last chapters of the book were published in the Spring of 1974 as a paper entitled "Environment and the Law of the Sea", in the Society's series *Studies in Transnational Legal Policy*. "The dominant purpose of both works," the Foreword to the earlier paper explained, "is eminently practical: to assess what is at stake in the Third Law of the Sea Conference as regards mankind's interest in preserving the integrity of the marine environment, and to try to identify what the Conference can and should do to ensure that this interest is adequately defended in the eventual treaty or treaties which the Conference is seeking

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to produce. This study is not, however, intended just for experts in ocean policy, science, or law, whether in or out of government (who will already be familiar with a good many of the facts it sets out). It is intended also for that larger aggregate of persons who in many fields of endeavor have reason to be concerned that the Conference produce a new constitutional regime for the ocean which will seem both just and wise not only to the drafters of the treaty but to their great-grandchildren as well."

The negotiation now formalized as the Third United Nations Conference on the Law of the Sea is at once the largest, one of the most technically complex, one of the most intensely political, and probably the most protracted of all UN lawmaking efforts. Participants in or observers of even less ambitious recent multilateral international negotiations will know that the environment they provide is not notably sympathetic to the large perspective and the long view. The authors hope that this book may help to provide a modest antidote to this condition during the negotiation, and that thereafter it may provide a certain standard by which to judge what has been accomplished and what remains to be done. Thus, while much of the book's analysis and virtually all of its recommendations are tied to the current Law of the Sea Conference, its middle chapters (I through V) and much contained in the remaining chapters are intended to provide understanding of the general economic, legal, political, and scientific milieu in which decisions on marine environmental policy must be made.

A word about the authors. Meredith O. Clement is Professor of Economics at Dartmouth College; Anthony D'Amato is Professor of Law at Northwestern University School of Law; Robert L. Friedheim is Director of the Law of the Sea Project at the Center for Naval Analyses; Edward D. Goldberg is Professor of Chemistry at Scripps Institution of Oceanography; and L. F. E. Goldie is Professor of Law at Syracuse University College of Law. David

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Menzel of the Skidaway Institute of Oceanography participated with great usefulness in the early portions of the Group's work, but was regrettably unable to continue. Two additional members, Richard R. Baxter of Harvard Law School and Louis Henkin of Columbia University School of Law, provided important insight and criticism. The Editor was Director of Studies, and is now Acting Executive Director, of the American Society of International Law.

It should be noted that members participated in the Working Group in their individual capacities and that no views expressed herein are to be attributed to institutions with which any may be affiliated, to the American Society of International Law (which does not take positions as a Society on problems of public concern), or to the National Science Foundation. Earlier versions of portions of Chapters I and VI were presented by John Lawrence Hargrove before the Subcommittee on Oceans and Atmosphere of the Committee on Commerce of the U. S. Senate on June 13, 1973, and before the Southwestern Legal Foundation's 1973 Symposium on Private Investors Abroad—Problems and Solutions in International Business.

The Working Group is grateful for help it has received from many quarters (though none of those who have provided criticism, advice or other assistance is to be saddled with any responsibility for the content of the book). Ambassador Arvid Pardo provided careful and thoughtful comments on the first and last chapters. Several marine scientists took time to examine, and in some cases to furnish helpful suggestions on the table of marine pollutants and legal responses thereto which is appended to the volume: James H. Carpenter, University of Miami; Robert A. Duce, University of Rhode Island; M. Grant Gross, National Science Foundation; Captain George C. Steinman, Maritime Administration of the U. S. Department of Commerce; John M. Teal, Woods Hole Oceanographic Institution; and

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John Lawrence Hargrove

Washington, D.C.  
September, 1974

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## CHAPTER I. AN OVERVIEW OF THE PROBLEM

*Anthony D'Amato and John Lawrence Hargrove*

### I. Introduction: The Ocean as a Commons.

The legal conception of freedom of the seas was launched in eloquent terms by Hugo Grotius in 1608 who described the oceans as

that expanse of water which antiquity describes as the immense, the infinite, bounded only by the heavens, parent of all things; the ocean which the ancients believed was perpetually supplied with water not only by fountains, rivers, and seas, but by the clouds, and by the very stars of heaven themselves; the ocean which, although surrounding this earth, the home of the human race, with the ebb and flow of its tides, can be neither seized nor inclosed; nay, which rather possesses the earth than is by it possessed.\*

Today a realistic view of the ocean is almost diametrically opposed to that of Grotius. The ocean is very finite indeed; it constitutes a complex and delicate ecosystem facing injury from many sources.

We stand at the threshold of ecological sophistication at a time when time itself may be running out for the human species. Today we are beginning to grasp the complexity of our interdependence with other life forms in our environment. For every answer that ecologists give us today they generate a thousand questions. In general, we simply do

\* Grotius, Hugo, *The Freedom of the Seas*. Translated by Ralph Van Deman Magoffin. Oxford University Press for the Carnegie Endowment for International Peace, 1916, p. 37.

not know the consequences of what we do, and yet we go on exploiting and abusing our natural environment with a childlike faith in ignorance. The idea of "freedom" of the seas has come to mean in practice the freedom to pollute, the freedom to exploit—and the freedom to do so irresponsibly.

Technology moves us forward; we are almost passive observers of its progress. Indeed, technology has been described as a system for producing more technology. Nations are animated by the desire to industrialize, to reduce as much as they are able of the earth's resources to their own ends, and to make material progress as cheaply as possible. It is no wonder that the dynamism of industrialization, combined with the nation-state system, leaves all other institutions behind as mere servants and apologists. Law is one of these institutions. To say that law has failed to preserve the oceanic ecosystem from national exploitation and abuse is to mistake a symptom for a cause. It has certainly failed thus far to make adequate provision for preservation of the oceans, but it has done so because of ignorance, inattention or failure of will on the part of real people in real countries who have failed to take a long-term view of human survival and its dependence upon the oceanic environment.

But it would be a vast oversimplification to suggest that coping with threats to the planetary environment—particularly future threats—is merely a matter of educating national decisionmakers and provoking new concern about environmental harm. Even assuming vastly improved information on the part of the holders of power in national societies, and deep and widespread concern, in practical fact governments of economically poorer societies perceive themselves as under great and perhaps overwhelming pressure to pursue precisely those forms of social organization and conduct which give rise to the problem. The pressure to



strive for enlargement of economic scale and technological sophistication is felt as irresistible, perhaps even a matter of physical survival, and most strongly so in those cases where the development of agricultural technique seems to be in an endless and accelerating race with population growth. We can expect these pressures to continue unabated for the generations immediately ahead, and the environmental dilemma, accordingly, to deepen rather than dissipate.

Of itself, then, it is of little help—though an important part of the truth—to say that what is needed is a change of will on the part of the peoples of the world and their national leaders. In any event, studies such as the present book cannot accomplish this. They may, however, make some modest contribution towards changed *perspective*, and to identify some practical steps that could help effectuate it. Our purpose here is to operationalize, not to propagandize.

Why take any practical steps, one might ask, when we survived for so long by doing nothing? (Organized efforts to protect the ocean ecosystem are of very recent vintage.) At bottom, the reason for radical and affirmative action to protect the ocean, despite the fact that both we and the ocean have survived thus far, is that we are going to be doing much more to the ocean than we have been doing thus far. Not only are human activities having an impact on the ocean increasing, but the *rate* of their increase is increasing, in a breathtaking acceleration. While it may be true that as yet it is inaccurate to describe the ocean as a whole as “polluted,” many significant local regions of the ocean are polluted, and we know relatively little about consequences throughout the oceanic system of these more readily observable conditions. A prudent working hypothesis for policymakers is that we have only begun to alter the ocean, and that our impacts upon it thus far may turn out