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COASTAL STATE EXPANSION

AND

THE OCEANS REGIME

by

Robert James Stooke, B.A.

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A Thesis submitted to the Faculty of
Graduate Studies and Research in partial
fulfilment of the requirements for the degree of
Master of Arts
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COASTAL STATE EXPANSION

AND

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To My Family

We can find new oceans only
if we have the courage to lose
sight of our shores.

Andre Gide

ABSTRACT

The pretensions of coastal states since the end of the Second World War have eroded open oceans space substantially. Intensified conflict situations among oceans actors, concern over the distribution of oceans resources, and three United Nations conferences on the law of the sea have accompanied this widespread erosion. These factors together emphasise the need to understand the dynamics underlying littoral claims and how coastal state pretensions have an impact on the international system.

The identification and analysis of the dynamics underlying coastal state expansion, a phenomenon that is central to most events that occur in the oceans system, constitutes the primary objective of this thesis. This first objective is approached from a systemic perspective and is demonstrated by an examination of five distinct periods that characterise the evolution of the oceans policy issue area.

Two other objectives are pursued. One entails the integration of various components from several theoretical frameworks into a workable paradigm that can be used as a basis for other studies on coastal state pretension. The other strives to draw from issues introduced by the first two objectives to determine whether the newly emerging law of the sea can accommodate littoral interests and, in so doing, neutralise the need of coastal states to acquire additional areas of oceans space.

The three objectives were pursued successfully.

The major factors associated with coastal state offshore claims were identified and assessed. Explanation was hindered, in part, by the almost exclusive focus on systemic considerations. Similar emphasis must be placed on domestic dynamics before the expansionary process can be accounted for in a comprehensive manner.

It was concluded secondly that the paradigm on coastal state expansion demonstrates that components from several theoretical frameworks can be combined into a workable system. The paradigm provides an excellent base for additional work on littoral expansion particularly since the paradigm focusses on domestic as well as systemic factors. It suffers from the drawback that it does not incorporate components representing the concept, process -- an exclusion that possibly could affect the paradigm's explanatory and predictive value.

It was concluded as well that the predilection of coastal states to expand over the offshore would be minimised if the Third United Nations Conference on the Law of the Sea successfully negotiates a treaty and the superpowers actively challenge claims that threaten the viability of the framework based on that treaty. However the system could remain stable, notwithstanding the failure of UNCLOS III, as long as the maritime powers do not challenge coastal limits designed in the context of UNCLOS III, do not ignore the common patrimony of man concept, and challenge excessive littoral claims should they arise.

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Although multiple leadership and multiple hierarchies help to spread status and diminish incentives for free-rider strategies among the leading states, the bottom of the various hierarchies will usually consist of the same poor weak states. For international regimes to appear legitimate to such states, they must perceive that they are receiving a significant share of joint gains, in relation both to other states and to the transnational system as a relatively open one. As states develop their capabilities, they must be both permitted to share the status and encouraged to share the burdens of collective leadership.¹

A regime's effectiveness and survivability is dependent upon its strength to deter incursions and upon its ability to prevent stagnation from interrupted dynamic relationships. Figure 3 represents the major relationships contributing toward the strength of a regime; that is, towards adherence to its prescriptions. Ideal conditions for regime strength would entail the exercise of effective leadership and a general recognition that the regime represents most significant interests. Stability is ensured when congruence exists between structure and influence. Incongruence need not destabilise the system. It can be circumvented by the institutionalisation of the regime which, in turn, reinforces the regime's legitimacy. Structure-influence congruence also facilitates the exercise of effective leadership. Incongruence and ineffective or non-existent leadership can be circumvented by legitimacy--voluntary adherence to the system's norms and institutions.

Keohane and Nye's framework on regime change and regime maintenance is useful in that it helps to identify systemic

¹Ibid., p. 235.

CHAPTER 1

INTRODUCTION--THEORETICAL FRAMEWORK

Coastal State Expansion (CSE), extensions to national jurisdiction of littoral authorities beyond internationally prescribed limits, has altered the character of the international oceans system, beyond recognition since the end of the Second World War. Yet as a field of study, Marine Affairs suffers from a serious lack of work on the motives behind and effects of CSE. Traditionally, discussions on the extension of coastal jurisdiction have been subsumed within a broader legal and theoretical debate on diverse subjects without specific focus being directed toward the phenomenon of Coastal State Expansion, so central to Marine Affairs.¹ The need for an accurate perception of CSE is clear. Coastal State Expansion is a major factor in systemic stability and is linked directly with the currently evolving oceans management framework. CSE

¹The Ocean Policy Research Workshop conducted a massive programme attempting to identify trends most prevalent in Marine Affairs literature. The Workshop's findings, therefore, provide an excellent introduction to the study of Marine Affairs. See: Robert L. Friedheim and Judith T. Kildow, Report on the Ocean Policy Research Workshop, Law of the Sea Institute Occasional Paper, no. 26, University of Rhode Island, Kingston, 1975; Robert L. Friedheim and Robert E. Bowen, Assessing the State of the Art in National Ocean Policy Studies: An Organising Paper for an NSF Workshop, Institute for Marine and Coastal Studies Occasional Paper, no. 1, U.C.L.A., 1978; Robert L. Friedheim and Robert E. Bowen, National Ocean Policy Bibliography 1968-78, Institute for Marine and Coastal Studies Occasional Paper, no. 2, U.C.L.A., 1978; and Robert L. Friedheim and Robert E. Bowen, "Assessing the State of the Art in National Ocean Policy Studies," Ocean Development and International Law 7 (1979): 179-220.

can give meaningful direction to that evolution, change its course or completely destroy it. It also can induce cooperative outcomes that facilitate international organisation or create conflict outcomes which, depending on their level of intensity, may further destabilise the international order.

The primary task of this thesis, therefore, is to contribute to a better understanding of the process of Coastal State Expansion. Pursuant to this task, this thesis approaches the problem from a systemic viewpoint and details a series of conditions typical of the oceans system that may induce or constrain Coastal State Expansion. A secondary objective is to develop a framework detailing the dominant role of CSE in the international oceans system. The Conclusion accomplishes a third objective: to ascertain whether Coastal State Expansion will continue regardless of the constraining elements of a newly emerging oceans order. Material is ordered on the basis of a framework developed by Robert Keohane and Joseph Nye who have done some work on change and stability in the international oceans system and on how that system affects state oceans behaviour.¹

Complex Interdependence and the International Oceans System

Issue Areas

What makes Keohane and Nye's work so relevant to a

¹ Robert O. Keohane and Joseph S. Nye, Power and Interdependence: World Politics in Transition (Boston: Little, Brown and Company, 1977). Also see Joseph S. Nye, "Ocean Rule Making from a World Politics Perspective," Ocean Development and International Law 3 (1975): 29-52.

study of Coastal State Expansion is its focus on those conditions that permit the international oceans system to adopt distinct political processes, and on how those processes constrain, induce and shape state oceans behaviour. The concept that an area can adopt a unique political process warrants serious consideration.

Within the global macrosystem there are distinct and functionally defined areas consisting of patterns of actual or perceived interdependence among their significant actors:

When governments active on a set of issues (an issue being "problems about which policy makers are concerned, and which they believe are relevant to public policy,"), see them as closely interdependent, and deal with them collectively, we call that set of issues an issue area. When we do so, we are making a statement about actors' beliefs and behaviour, not about the objective reality of the problems themselves.¹ (*Italics added*).

An issue area can have distinct boundaries making its existence easily identifiable or it may have vague, less recognisable boundaries. This depends on the number of subissues and how severely change in one set of relationships affects other

¹Keohane and Nye, Power and Interdependence, pp. 64-65. On the definition the authors state that:

"This definition is not meant to imply that the political analyst can ignore objective reality. Presumably, political actors who misperceive reality are not likely to achieve their goals unless they adjust their perceptions. In the long run, some congruence can be expected between perceptions and reality. Nevertheless, it is on the basis of subjective perceptions, not on the basis of an objective reality that no one understands in a definitive way, that actions are taken; to predict outcomes, or future perceptions, it may be highly useful to have further information about the reality being perceived."

Although not attributed to them in Keohane and Nye's major works, credit for the issue area concept rightly belongs with Robert Dahl who suggested it in one of his early works, and

relationships.¹

The international oceans system is a policy issue area concerned with "the (peacetime) use and regulation of ocean space and resources."² Maregeographic factors give the oceans policy issue a well demarcated boundary. Within that boundary are found both physical relationships encompassing specific aspects of oceans use, such as navigation and mining, and political issues including the entire gambit of bargaining for space, resources and international regulatory structures. These relationships traditionally have been linked loosely, although issue linkage has tightened over the past two decades. Crucial to an understanding of the processes unique to the oceans

with James Rosenau who further developed the concept. See Robert A. Dahl, Who Governs? (New Haven: Yale University Press, 1961); James N. Rosenau, "Pre-theories and Theories of Foreign Policy," in Approaches to Comparative and International Politics, ed. R. Barry Farrell (Evanston: Northwestern University Press, 1966), pp. 27-92; and Idem, "Foreign Policy as an Issue Area," in Domestic Sources of Foreign Policy, ed. James N. Rosenau (New York: Collier-Macmillan, 1967), pp. 11-50. Also see William C. Potter, "Issue Area and Foreign Policy Analysis," International Organisation 34 (Summer 1980): 405-427.

¹Nye, "Ocean Rule Making," p. 31. Subissue issue linkage either can be functional (technical reasons), or perceptual (as determined by the actions and perceptions of government or interest groups).

²Ibid.

system is the realisation that it, like any other issue area, is based on a particular structure, and is governed by a definite set of norms and institutions. The manifestation and influence of each component is variable and dependent on the expression of certain conditions of world politics. Changes in world political conditions cause issue area components to change. The introduction of new issues to a system may compel the system to reflect new political realities.¹ The type of conditions typical of the international system and their relationship with issue areas is the subject of endless debate.

Argument revolves around problems associated with: the significant actors in the international system; their dominant objectives; and the instruments used to promote their goals. The world is regarded as a seamless whole in which, if one identifies the major relationships, a firm grasp will be had of the politics of a particular issue area. Alternatively, issue areas can develop processes at variance with those of the overall macrosystem. Therefore analysis should focus on

¹Ibid.

a specific issue area alone to acquire a proper understanding of the area's politics. Attempts to delineate the structural and systemic conditions of international politics can be divided into two camps: realist approaches to international politics and complex interdependence models of the world political system.

Classical theories of world politics, such as political realism, base analysis on four simplifying assumptions: (1) states are the major actors in the world political system; (2) a hierarchy of objectives exists with military security and political status at the top; (3) the macrosystem is the primary unit of analysis; and (4) military force is the most readily available and significant foreign policy instrument. The realist maintains that these conditions apply to today's world as much as they do to the past.¹

A growing literature suggests that the realist conception of the world cannot sufficiently account for change and process in an international system that is becoming increasingly interdependent. Analysis must be based on a new set of assumptions: the declining utility of force, absence of hierarchy among issues, and multiple channels of contact. It is acknowledged that these conditions of complex interdependence typify an ideal state toward which the global macrosystem is evolving. Realist conditions still apply but in a less direct manner. The nation state remains

¹On the pioneering work on political realism see Hans J. Morgenthau, Politics Among Nations: the Struggle for Power and Peace (New York: Knopf, 1948).

a dominant force and will resort to the use of force as an instrument of foreign policy when its vital interests are not attainable in a more economical way. Gradualists strive for an understanding of why weak countries and international organisations exert an influence far beyond their power capabilities. They do not seek to replace political realism. They do attempt to compensate for what often is the narrow world view characteristic of realist writings.¹

Central to the liberal-realist thesis is the erosion of superpower hegemony and the emergence of a pluralist world order. Bipolar hegemonic competition is superseded by "intra-allied neomercantilistic issues" as the major source of tension in the macrosystem. The inability of either superpower to

¹ Some of the more applicable work on complex interdependence includes: Seyom Brown, New Forces in World Politics (Washington, D.C.: The Brookings Institution, 1974); Robert Angell, Peace on the March: Transnational Participation (New York: Van Nostland, 1969); C. Fred Bergsten, R. Keohane, and Joseph Nye, "International Economics and International Politics: A Framework for Analysis," International Organisation 29 (Winter 1975); Lester R. Brown, World Without Borders: The Interdependence of Nations (New York: Foreign Policy Association, Headline Series, 1972); Richard N. Cooper, The Economics of Interdependence: Economic Policy in the Atlantic Community (New York: McGraw-Hill, 1968); Idem, "Trade Policy is Foreign Policy," Foreign Policy (Winter 1972-73): 18-36; Robert E. Hunter, "Troops, Trade and Diplomacy," Atlantic Community Quarterly 9 (Fall 1971): 283-92; Robert O. Keohane and Joseph S. Nye, "Introduction: The Complex Politics of Canadian-American Interdependence," International Organisation 28 (Autumn 1974); Idem, Power and Interdependence; Edward L. Morse, "The Transformation of Foreign Policies: Modernisation, Interdependence, and Externalisation," World Politics 22 (April 1970); Idem, "Transnational Economic Processes," International Organisation 25 (Summer 1971); Joseph S. Nye, Peace in Parts (Boston: Little, Brown, and Co., 1971); and Idem, "Transnational Relations and Interstate Conflicts: An Empirical Analysis," International Organisation 28 (Autumn 1974).

exercise active leadership creates an unpredictable and uncertain situation where "the old clash of separate calculations of ends and means becomes a tangle of intertwined moves in which the distinction between you and me gets blurry."¹ Instead hegemonic competition is replaced by a system of diffuse competitiveness. There is some disagreement, though, on whether the new order is moving toward a mercantilist pluralism where states exert a high degree of national control or toward a system of complex interdependence where national control is limited by fragmented internal pressures.²

The eroding utility of force has reduced the use of traditional modes of influence and has contributed to the decline of superpower hegemony. The balance of power, nuclear deterrence, costly conventional weapons systems, popular opposition and its adverse effects on national goals, make the use of force an expensive and sometimes counter-productive exercise. Political realism fails to consider possible constraints on the use of force as a foreign policy instrument. Thus the preponderant military power in the overall macrosystem is free to dominate all issues. However, if the use of force is viewed as impracticable and counter-productive, then conflict and competition in the emerging

¹Stanley Hoffmann, "Notes on the Elusiveness of Modern Power," International Journal 29 (Spring 1975): 194.

²The concept of mercantilistic pluralism has been examined at length by D. P. Calleo, "European Coalition in a Fragmenting World," Foreign Affairs (October 1975): 62-63. Also see his "The Decline and Rebuilding of an International Economic System: Some General Considerations," in Money and the Coming World Order, ed. D. P. Calleo et al. (New York: New York University Press, 1976). On the other hand, Keohane and Nye argue that national control is limited by internal fragmented pressures. See their Power and Interdependence. pp. 224-226.

pluralist balance of power system should assume nonmilitary forms. Other instruments of influence will gain in importance-- instruments not necessarily under the exclusive control of the preponderant military power. It is difficult to establish linkages between issues where a state is strong with those where it is weak, short of the direct use of force. Issue areas gradually can adopt their own specific processes and power structure:

. . . linkages will not be drawn regularly and effectively among issue areas. Power resources . . . cannot . . . easily be transferred . . . military capabilities will not be effective in economic issues, and economic capabilities relevant to one area may not be relevant to another.¹

. . . power is relative to a specific situation or set of circumstances; there is no single hierarchy of power in international relations. Power may take many forms - military, economic, psychological - though, in the final analysis, force is the ultimate form of power.²

Conditions of complex interdependence allow the world to assume a new form characterised by a plethora of diverse issue areas. No longer can one expect a congruity of outcomes among issue areas, since it is difficult to use overall dominance to control specific policy issue outcomes. "Goals will therefore vary by issue area under complex interdependence, but so will the distribution of power and the typical process."³

Goals generally will be economic rather than security

¹Keohane and Nye, Power and Interdependence, p. 50.

²Robert Gilpin, U.S. Power and the Multinational Corporation (New York: Basic Books, 1975), p. 24.

³Keohane and Nye, Power and Interdependence, p. 30.

oriented and will be pursued in an economic rather than military manner:

Military force is not used by governments towards other governments within the region, or on the issues when complex interdependence prevails. It may, however, be important in these governments' relations with governments outside that region, or on other issues.¹

The manipulation of asymmetrical interdependencies by the dominant actor in a relationship is of particular importance:

A less dependent actor in a relationship often has a significant political resource, because changes in the relationship (which the actor may be able to institute, or threaten) will be less costly to that actor than to its partner.²

Disparate interdependencies affect state behaviour within an issue area when they reflect vulnerability dependencies rather than sensitivity dependencies (Table 1):

In terms of the costs of dependence, sensitivity means liability to costly effects imposed from outside before policies are altered to try to change the situation. Vulnerability can be defined as an actor's liability to suffer costs imposed by external events even after policies have been altered. Since it is usually difficult to change policies quickly, immediate affects of external changes generally reflect sensitivity dependence. Vulnerability dependence can be measured only by the costliness of making adjustments to a changed environment over a period of time.³

Political realism permits a definite hierarchy of issues to exist with military security at the apex. Complex interdependence conditions, issue specific goals and non military forms of influence make it difficult for such a hierarchy to exist. Economic goals gain in importance to the point that

¹ Ibid., p. 25.

² Ibid., p. 11.

³ Ibid., p. 13. See David A. Baldwin, "Interdependence and Power: A Conceptual Analysis," International Organisation 34 (Autumn 1980): 471-506, passim.

TABLE 1

ASYMMETRICAL INTERDEPENDENCE AND ITS USES

Source Of Interdependence	Dominance Ranking	Cost Ranking	Contemporary Use
Military (costs of using military force)	1	1	Used in extreme situations or against weak foes when costs may be slight
Nonmilitary vulnerability (costs of pursuing alternative policies)	2	2	Used when normative constraints are low, and international rules are not considered binding (including nonmilitary relations between adversaries, and situations of extremely high conflict between close partners and allies).
Nonmilitary sensitivity (costs of change under existing policies)	3	3	A power resource in the short run or when normative constraints are high and international rules are binding. Limited, since if high costs are imposed, disadvantaged actors may formulate new policies.

The dominance ranking column indicates that the power resources provided by military interdependence dominate those provided by nonmilitary vulnerability, which in turn dominate those provided by asymmetries in sensitivity. Yet exercising more dominant forms of power brings higher costs. Thus, relative to cost, there is no guarantee that military means will be more effective than economic ones to achieve a given purpose. We can expect, however, that as the interests at stake become important, actors will tend to use power resources that rank higher in both dominance and cost.

SOURCE: Robert O. Keohane and Joseph S. Nye, Power and Interdependence: World Politics in Transition (Boston: Little, Brown and Company), pp. 16-17.

domestic policy and government departments rally around foreign policy issues. Coalitions are formed within and among governments around those issues transcending national boundaries. Inevitably, "many issues arise from what used to be considered domestic policy, and the distinction between domestic and foreign policy becomes blurred."¹

This blurring of policy is intensified by the third condition of complex interdependence--multiple channels of contact:

Multiple channels connect societies, including: informal ties between governmental elites as well as formal foreign office arrangements; informal ties among nongovernmental elites (face-to-face and through telecommunications); and transnational organizations (such as multinational banks or corporations). These channels can be summarised as interstate, transgovernmental, and transnational relations. Interstate relations are the normal channels assumed by realists. Transgovernmental applies when we relax the realist assumption that states act coherently as units; transnational applies when we relax the assumption that states are the only units.²

Multinational firms not under the direct control of national governments are significant since they can heighten the sensitivity of government policies in different states by acting as transmission belts for policy related issues. The blurring of boundaries increases contact among governmental bureaucracies trying to find support for policy goals. "To improve their chances of success, government agencies attempt to bring actors from other governments into their own decision-

¹Ibid., p. 25.

²Ibid., p. 25.

making processes as allies."¹

The effect of complex interdependence conditions on the global political system is clear. Issue areas begin to develop unique political processes distinct from, although a part of, the macrosystem. Preponderant military powers in the overall system are restricted in their attempts to establish linkages between those areas in which they hold an ascendant position and those in which they are weak. This is due primarily to the declining utility of force and the ineffectiveness of a power resource when it is applied to a different issue area. Congruity between power and outcomes in the global system no longer is expected. Issue areas develop their own particular structures of power wherein power resources are more a reflection of ascendant positions in asymmetrical economic dyadic relationships than of military force. It follows that the nation state loses some of its freedom of action. Fragmented internal pressures force it to respond to the domestic policies of other countries. This leaves the door open for other actors such as international organisations to pursue a more active role and exert more influence in the international system.

One can appreciate the importance of issue areas in today's world political system when it is realised that the world must be viewed through a set of eyes other than those of the political realist. Gradualist assumptions pave

¹Ibid., p. 34.

the way for an understanding of the internal machinations and external effects of policy issue areas. Realist conditions still apply but to a more limited extent. Together both sets of assumptions make it possible to focus on specific issue areas, and to identify their structures of power, norms, institutions and processes. Factors of change and stability then may be determined.

Regimes

A policy issue area is a grouping of related subissues. It also is a system based on a particular structure of power with its own unique norms, institutions and processes. Behaviour within a policy issue is regulated by a "set of governing arrangements that affect relationships of interdependencies," --regimes:

International regimes are intermediate factors between the power structure of an international system and the political and economic bargaining that takes place within it. The structure of the system (the distribution of power resources among states) profoundly affects the nature of the regime (the more or less loose set of formal and informal norms, rules, and procedures relevant to the system). The regime, in turn, affects and to some extent governs the political bargaining and daily decision-making that occurs within the system.¹

¹Keohane and Nye, Power and Interdependence, p. 21. On international regimes see inter alia: C. Fred Bergsten and Lawrence B. Krause, eds., World Politics and International Economics (Washington, D.C.: Brookings Institution, 1975); Seyom Brown et al., Regimes for the Ocean, Outer Space and Weather (Washington, D.C.: The Brookings Institution, 1977); Ernst B. Haas, "Why Collaborate? Issue-Linkage and International Regimes," World Politics 32 (April 1980): 357-405; Idem, "On Systems and International Regimes," World Politics 27 (January 1975): 147-74; Idem, "Is There a Hole in the Whole?" International Organisation 29 (Summer 1975): 827-76; David M. Leive, International Regulatory Regimes (Lexington, Mass.: Lexington

Regime strength, the degree of general adherence to a regime's prescribed norms and standards, dictates the level and type of interactions within a system.

The oceans issue area is ordered by a distinct regime. Keohane and Nye assert that there are two dimensions to the Oceans Regime:

- (1) The nature and extent of states' jurisdiction over the oceans adjoining their coasts; and
- (2) The ownership, use, and regulation of space and resources beyond national jurisdiction.¹

This thesis contends that a strong regime will, with some success, deter states from extending authorities over greater areas of the seas. On the other hand, a weak regime may not counter incursions beyond internationally prescribed limits to national jurisdiction. Analysis of those factors contributing both to regime stability and change should facilitate an understanding of whether the currently evolving Oceans Regime will be sufficiently strong to counter threats to it posed by expansion minded coastal states. Keohane and Nye show that a first step for analysis from a systemic view-

Books, 1976); Edward L. Morse, "The Global Commons," Journal of International Affairs 3 (Spring/Summer 1977): 1-21; John Gerrard Ruggie, "Changing Frameworks of International Collective Behaviour: On the Complementarity of Contradictory Tendencies," in Forecasting in International Relations: Theory, Methods, Problems, Prospects, ed. Nazli Choucri and Thomas Robinson (San Francisco: W. H. Freeman and Co., 1978), pp. 384-406; Oran R. Young, "International Regimes: Problems of Concept Formation," World Politics 32 (April 1980): 331-56; and Idem, "International Resource Regimes," in Collective Decision Making: Applications from Public Choice Theory, ed. Clifford S. Russell (Baltimore: The Johns Hopkins University Press, 1979), pp. 241-82.

¹ Keohane and Nye, Power and Interdependence, p. 89.

point is to describe how a regime relates to the two other components of an issue area, structure and process, without losing sight of an issue area's position in the overall global macrosystem.

Structure

A regime is based on an issue area's structure. Changes in that structure will, more often than not, induce change in the regime:

. . . as the power of states change (that is, as the structure changes), the rules that comprise international regimes will change accordingly.¹

Power, "the capability to exert influence to get other actors to behave differently than they would otherwise behave,"² can be regarded both as a potential ability to influence outcomes and as actual control over patterns of outcomes. Political

¹Nye, "Ocean Rule Making," p. 43. The most important units of a political system's structure are states. The most relevant capabilities traditionally have been regarded as state power resources. The distribution of power resources normally has been defined according to the number and importance of actors in the system which then is characterised as unipolar, bipolar, multipolar and dispersed.

"More precisely formulated: unipolarity means that the first state has twice the capability of the second and at least one-third the total for the top ten; bipolarity means that two states have one-half the total capability, but neither has twice as much as the other; multipolarity means that from three to ten states have half the total capability, each at least 5% and no one of them over 50%; dispersed means that concentrations of capability over 5% comprise less than 50% of the total capability."

George Modelski, World Power Concentrations (Morristown, N.J.: General Learning Corp., 1974), p. 2, quoted in Nye, "Ocean Rule Making," p. 51, note 17.

²Nye, "Ocean Rule Making," p. 39.

realists maintain that patterns of outcomes can be determined by identifying the distribution of resources that provide power capabilities. Gradualists argue that capabilities do not necessarily confer direct control over outcomes:

There is rarely a one-to-one relationship between power measured by any type of resources and power measured by effects on outcomes. Political bargaining is the usual means of translating potential into effects, and a lot is often lost in the translation.¹

Measurable power resources are not automatically translated into effective power over outcomes. Translation occurs by way of a political bargaining process in which skill, commitment, and coherence can . . . belie predictions based on the distribution of power resources . . . But to predict and understand outcomes, we must give equal attention to the bargaining process in which power resources are translated into effective influence over outcomes.²

Process

Thus under complex interdependence conditions, process, the "allocative or bargaining behaviour within a power structure," plays a major role in outcome determination (Figure 1). Process consists of five components: goals of actors, instruments of state policy, agenda formation, issue linkage and international organisation (Table 2 compares how each component differs under realist and gradualist conditions). The first component, actors' goals, varies by issue area. Multiple channels of contact, increase the presence of transnational actors complicating the policy formulation process. The second,

¹Keohane and Nye, Power and Interdependence, p. II.

²Ibid., p. 225.

FIGURE 1

STRUCTURAL MODELS OF REGIME CHANGE

. . . there is likely to be a discrepancy between the structure of power as resources (whether military as in a stark realist formulation or economic as in the issue structure approach), and power as control over outcomes and measured by the pattern of outcomes. The translation from capabilities to outcomes depends on the political process. Skill in political bargaining affects the translation. States with intense preferences and coherent positions will bargain more effectively than states constrained by domestic and transnational actors. And even states with coherent positions may find their bargaining position weakened by the institutions and procedures that characterise a given regime . . .

SOURCE: . Keohane and Nye, Power and Interdependence, p. 53.

TABLE 2

POLITICAL PROCESSES UNDER CONDITIONS
OF REALISM AND COMPLEX INTERDEPENDENCE

	Realism	Complex Interdependence
Goals of actors	Military security will be the dominant goal.	Goals of states will vary by issue area. Transgovernmental politics will make goals difficult to define. Transnational actors will pursue their own goals.
Instruments of state policy	Military force will be most effective, although economic and other instruments will also be used.	Power resources specific to issue areas will be most relevant. Manipulation of interdependence, international organisations, and transnational actors will be major instruments.
Agenda formation	Potential shifts in the balance of power and security threats will set the agenda in high politics and will strongly influence other agendas.	Agenda will be affected by changes in the distribution of power resources within issue areas; the status of international regimes; changes in the importance of transnational actors; linkages from other issues and politicisation as a result of rising sensitivity interdependence.
Linkages of issues	Linkages will reduce differences in outcomes among issue areas and reinforce international hierarchy.	Linkages by strong states will be more difficult to make since force will be ineffective. Linkages by weak states through international organisations will erode rather than reinforce hierarchy.
Roles of international organisations	Roles are minor, limited by state power and the importance of military force.	Organisations will set agendas, induce coalition-formation, and act as arenas for political actions by weak states. Ability to choose the organisational forum for an issue and to mobilise votes will be an important political resource.

SOURCE: Keohane and Nye, Power and Interdependence, p. 37.

instruments of state policy, sees the replacement of military force with the manipulation of international organisations, transnational actors and economic interdependencies. The type of policy instrument chosen, like an actor's goals, varies by issue area. The third, agenda formation, "... how issues come to receive sustained attention by high officials," is affected by issue politicisation, "agitation and controversy over an issue that tends to raise it to the top of the agenda."¹ An issue is politicised by: powerful actors linking it to issues where they are strong; governments pressing for change in a regime; domestic interest groups introducing issues to government; and by bargaining in international organisations. Issue linkage, the fourth component of process, can be exhibited in international organisations by weak states attempting to enhance their influence over organisation dependent processes. The last component, international organisation, provides: a forum where agenda formation and issue linkage can occur; an instrument that can be used by governments to pressure other states, international organisations and transnational actors; and favourable conditions for the formation of coalitions between states, subgovernmental agencies and transgovernmental actors. International organisation also gives smaller nations an excellent opportunity to play a role in the political process. This is contingent on their ability to manipulate organisation dependent power resources such as vote mobilisation and the

¹Ibid., p. 21.

selection of favourable organisational forums.¹

Structure, Stability and Regime Change

States possessing superior capabilities relative to others in a policy issue attempt to dominate patterns of behaviour at the expense of weaker states. This initiates certain changes in a regime's configuration that can be accommodated by existing rules or which demand the destruction of the old regime to make room for the development of a new one. Thus a distinction between activity within an established regime and activity designed to create a new regime can be made. In the former instance, powerful states not happy with a regime can challenge the set of effects implied by its rules. In the latter, the rules themselves can be questioned and changed to the extent that a totally new and restructured regime is established. This distinction is important, for "(P)ower resources that provide influence in political activity often differ in activity within a regime, and rule-making activity."² Those resources that confer influence within the context of a regime are related to sensitivity interdependencies. However, only vulnerability dependencies have the potential of changing a regime's rules:

When the rules are questioned, or the international regime is changed unilaterally, the principles that channeled sensitivity interdependence no longer confer

¹Ibid., pp. 32-33.

²Ibid., pp. 50-51.

power benefits on the actors that had benefited by them. At this point, politics begins to reflect different power resources, relative vulnerability, not sensitivity, or what can be considered as the underlying power structure in the issue area.¹

To better understand this ambiguity, it is useful to make a distinction between two levels of analysis of the distribution of power: (1) a current process level dealing with short-term behaviour within a constant set of institutions, fundamental assumptions, and expectations; and (2) an underlying level having to do with long-term political and economic determinants of the systemic incentives and constraints within which actors operate. This underlying structural level is concerned with how the institutions, fundamental assumptions, and "rules of the game are created and how they support or undermine different patterns of current process activities."²

There are two structural types. The current structure is based on function-specific capabilities. High capability states are more influential in specific subissues than are low capability actors. One would expect countries with sizeable merchant marines to be more influential in issue specific institutions such as the Intergovernmental Maritime Consultative Organisation (IMCO) than non-maritime powers, although asymmetries in sensitivity interdependence may develop when rules are accepted by the major actors.

A second structural type, the underlying structure, is based on an issue area's particular distribution of power. It gives the preponderant actor the "ability to create alternatives, to change fundamental assumptions, to make irrelevant an index based on current processes, and to switch the rules of the

¹ Ibid., p. 52.

² Nye, "Ocean Rule Making," p. 39.

game . . ."¹ The underlying structure is the most important of the two for it allows the most powerful actors to change the rules of the game irrespective of the distribution of power at the current-process level. The most powerful state at the underlying level will seek to change the regime when an incongruity exists between the state's influence and the shape of the regime:

. . . power resources related to vulnerability will dominate resources related to sensitivity within a regime. When the regime produces outcomes contrary to what we would expect on the basis of fundamental power resources, we would expect states powerful at the vulnerability level to force changes in the regime.²

Regimes change to redress incongruities between structure and influence. A stable regime is one where congruities exist. This need not always be the case. Under conditions of complex interdependence it is possible for regimes to be stable and strong despite incongruities between structure and influence. An issue area's networks, norms and institutions "may be reinforced by norms prescribing behaviour in particular institutions, and in some cases by formal institutions."³ That is, regimes and the political process can become institutionalised. International organisation acquires a legitimacy of its own by demonstrating its benefits to the major actors in a system. The linkage of governments at transnational and intergovernmental levels reinforce regime behaviour at the

¹Ibid., p. 41.

²Keohane and Nye, Power and Interdependence, p. 59.

³Ibid., p. 54.

national policy level, making the formal legitimisation of regimes possible. Once institutionalised, the norms, networks, rules and institutions are difficult to change or destroy without the expenditure of almost prohibitive costs by the challenging actors:

Regimes are established and organised in conformity with distributions of capabilities, but subsequently the relevant networks, norms, and institutions will themselves influence actors' abilities to use these capabilities. As time progresses, the underlying capabilities of states will become increasingly poor indicators of the characteristics of international regimes. Power over outcomes will be conferred by organisationally dependent capabilities, such as voting power, ability to form coalitions, and control of elite networks: that is, by capabilities that are affected by the norms, networks, and institutions¹ associated with international organisations . . .

Figure 2 diagrammatically represents how regime institutionalisation assumes its own structure. Organisationally dependent power resources confer control over patterns of outcomes. This does not mean that regime institutionalisation takes control of outcomes away from the system's most powerful actors. It does mean that rule-making processes are based more on organisation than regime dependent capabilities. In effect, the regime takes on a life of its own. Consequently, change is initiated by events not peculiar to a particular policy issue and by weak as opposed to strong political units:

Regimes established in conformity with the underlying power structure in one period, may later develop lives of their own. Underlying power resources may be immobilised by norms and political processes so long as the regime remains in place.
 . . . outcomes are predicted by regime-dependent capabilities; that is, capabilities that are legitimised

¹ Ibid., p. 56.

FIGURE 2

AN INTERNATIONAL ORGANISATION MODEL OF REGIME CHANGE

^aAt the beginning, the organisation of a regime is affected by underlying capabilities of states, but not on a continuous basis.

Existing norms and networks, as well as underlying capabilities, influence organisationally dependent capabilities, which in turn affect outcomes. If one considers only the solid lines in the diagram, this system could be self-perpetuating, with considerable stability, yet not determined entirely by underlying patterns of capabilities. The dotted line indicates the major source of change: other networks, norms, and institutions may interfere with the specific organisational configuration under consideration, thus affecting the nature of the regime.

SOURCE: Keohane and Nye, Power and Interdependence, pp. 56-57.

and made possible by norms and processes that characterise a regime. . . . A regime may be altered by the emergence of new norms in other areas of world politics, which are then transferred to the particular issue area, or by the application of established norms (which operate in other issue areas or in particular organisations) to that issue area. Similarly, a regime may be altered by political bargaining processes that diminish the position of the state with underlying power that gave rise to the regime. Or, the development of networks of political interaction, often centered on international organisations, may facilitate agreement on new principles for an international regime.¹

Of course the major actors may choose to destroy the regime and construct one that better represents their interests when a major incongruity exists between structure and influence:

The costs of destroying a regime will be high when well-integrated elite networks exist on many levels among countries. Nevertheless, the costs of an adverse regime could become so great that some states would resolve to destroy it even though that meant disrupting those networks.²

The strength of a regime. (the degree to which the major actors adhere to its prescribed standards of behaviour) is contingent on its congruence with structural levels. Adherence also is dependent on either one of or a combination of two factors. The first, leadership, exists when one or more states choose to assume the responsibility of preserving the regime. The second, legitimacy, depends on the general perception that fundamental interests and goals can be attained and maintained within the context of a particular regime.

Leadership. A State adopts a leadership role because it considers some framework or ordering device to be

¹Ibid., p. 147.

²Ibid., p. 57.

more conducive to its overall objectives than would an uncontrollable, anarchic, no regime situation:

. . . leadership - that is, willingness to forego short-term gains in bargaining in order to preserve the regime - and that an actor is most likely to provide such leadership when it sees itself as a major consumer of the long-term benefits produced by the regime.¹

Leadership . . . is a way of accepting and distributing responsibility for the preservation and stability of the system.²

An obvious leadership type is practised by the preponderant state in a hegemonial system--hegemonial leadership. Here the strongest actor at the structural level uses its power to ensure that outcomes reflect its basic interests. Thus the preponderant state is in a position to force dissenter states to abide by the rules of the game. States must comply with essential rules and practises to avoid possible retaliation by the system's leader. Legitimacy is a term known only to the major actors. Lesser states rarely share systemic interests similar to those of the more powerful:

What in the eyes of the powerful appears to be policing for the public good may appear in the eyes of the weak as imperialist bullying. As such perceptions differ, the need for compulsion in hegemonic leadership increases.³

Changes in basic power relationships will result in the regime disintegrating or changing to reflect new realities.

A collective leadership situation exists when there is a balance of power between two or more states. No state is in

¹Ibid., pp. 44-5.

²Ibid., p. 229.

³Ibid., p. 230.

a position to assert its will over the other major actors. In this case, there are several possibilities for the exercise of leadership. One is that each power recognises the legitimacy of an existing regime and chooses to defend it from the incursions of challenging states. Another is that newly emergent preponderant states fail to recognise leadership opportunities and are content to let the former dominant power continue its traditional role. Here the leader would not be in a position to force powerful dissenter states to back down from challenging claims. All major states must assume the responsibility of leadership to render a non-hegemonic leadership form effective (effectiveness being a measure of successful counters to influences that tend to erode the regime).

Legitimacy. A regime is not preserved or made stable solely by the leadership activities of its preponderant actors. Regime strength ultimately rests on the regime's legitimacy as interpreted by both the major and lesser powers. This especially is true for nonhegemonic systems where cooperative relationships increase in importance. The perceptions of the weak become nearly as important as those of the strong. All actors must perceive that their continued observance of the regime will benefit them more than a no regime situation. It remains the responsibility of states occupying leadership positions to ensure that some of the regime's benefits filter down to the weaker actors. This may involve a redistribution of resources and shared decision making mechanisms:

Although multiple leadership and multiple hierarchies help to spread status and diminish incentives for free-rider strategies among the leading states, the bottom of the various hierarchies will usually consist of the same poor weak states. For international regimes to appear legitimate to such states, they must perceive that they are receiving a significant share of joint gains, in relation both to other states and to the transnational system as a relatively open one. As states develop their capabilities, they must be both permitted to share the status and encouraged to share the burdens of collective leadership.¹

A regime's effectiveness and survivability is dependent upon its strength to deter incursions and upon its ability to prevent stagnation from interrupted dynamic relationships. Figure 3 represents the major relationships contributing toward the strength of a regime; that is, towards adherence to its prescriptions. Ideal conditions for regime strength would entail the exercise of effective leadership and a general recognition that the regime represents most significant interests. Stability is ensured when congruence exists between structure and influence. Incongruence need not destabilise the system. It can be circumvented by the institutionalisation of the regime which, in turn, reinforces the regime's legitimacy. Structure-influence congruence also facilitates the exercise of effective leadership. Incongruence and ineffective or non-existent leadership can be circumvented by legitimacy--voluntary adherence to the system's norms and institutions.

Keohane and Nye's framework on regime change and regime maintenance is useful in that it helps to identify systemic

¹Ibid., p. 235.

FIGURE 3

REGIME STRENGTH

constraints on state behaviour. This is important for states rarely can act in isolation from the structures, processes and regimes of the international system. Their presentation, though, is beset with one serious shortcoming. It does not account for the degree to which the system can constrain state behaviour vis-a-vis state determination to act. Keohane and Nye recognised this problem and suggested what would have to be done to compensate for the limitations of their theory:

To analyse national policies under conditions of complex interdependence, one would need to ask two questions . . . (1) . . . how severe are the external constraints? (2) What determines the responses that are chosen and their success or failure?

To answer the first of these questions, one would have to analyse the effect of contemporary patterns of interdependence on state autonomy. The independent variables would be attributes of the system; the question would be how severely they constrained the governments concerned. Our discussion of interdependence and regime change is helpful in determining how severely particular governments are constrained by the system. To answer the second question we would require close comparative analysis of the domestic structures and political processes of particular states, and we would need to draw heavily on work in comparative politics.¹

Coastal State Expansion can be accounted for, in part, by an analysis of the strengths and weaknesses of the international Oceans Regime over selected historical periods. Be that as it may be, it still remains necessary to model state propensity to expand, as Keohane and Nye's second question indicates. Only when both the national determinants of state behaviour and external constraints are identified, and the relationship between systemic and national processes is

¹Ibid., pp. 233-4.

determined, is it possible to account for Coastal State Expansion. Unfortunately a discussion on both national determinants and external constraints is beyond the scope of this thesis which focusses exclusively on the systemic components that have an impact on Coastal State Expansion. However, a framework and related theoretical material that could serve as a basis for a more comprehensive investigation are presented in Chapter VIII.

One means to determine and identify the elements implicit to the strength of the Oceans Regime is to draw relevant material from the history of the international oceans system that have contributed to the strength and demise of the Oceans Regime. Joseph Nye contends that the international oceans system has been characterised by three distinct regime periods: a strong free seas regime up to 1945; a strong quasi regime between 1946 and 1966; and a weak quasi regime during the 1967-1974 period. Each period is defined by the level of adherence to a policy issue area's norms and institutions.¹ At first glance it would appear that the task of identifying regime types has been accomplished. This being so, an examination of the three periods, and of their strengths and weaknesses, should reveal the systemic conditions most ideal for the perpetuation and prevention of expansionary processes. Closer perusal of Nye's text, however, reveals an approach too general for the scope of this thesis.

Change in the international oceans system is best distinguished by six regime situations: Pax Britannica, a strong

¹Nye, "Ocean Rule Making," p. 31.

Oceans Regime (1883-1914); the interwar period, a strong quasi regime (1919-1938); a weak quasi regime (1945-1960); a no regime situation (1961-1966); new regime formulation (1967-June 1974); and a weak quasi regime (June 1974-September 1982).

Each regime is representative of specific power configurations, jurisdictional relationships and management networks. The first, the classical free seas regime, was the strongest. The following five, aberrations of the first, are distinguishable not necessarily because of varying structural realities but denote attempts to come to terms with what was perceived (and still is perceived) an illegitimate, maritime oriented, littoral restrictive, free seas regime.¹

The first truly universal regime commanding widespread adherence came into being in 1883, when Great Britain adopted the final of a series of legislative acts establishing the exclusivity of the three-mile territorial sea; and in so doing, adopted a standard for all coastal nations. The free seas regime effectively regulated oceans behaviour and deterred Coastal State Expansion until 1914. The peacetime regime emerging after the First World War was based on a different underlying structure and was forced to adjust to new power configurations. It lost its universality and became a strong quasi regime. The growth of fundamental exceptions to the free seas was not determined strictly by alterations in the distribution

¹In fact, freedom of the seas exists in name only. Maritime liberty is a term that obscures the reality of who has dominion and exerts control over the oceans. This great myth, that the seas and oceans are free and open to all, found its greatest expression at a time when most of the world's waters and land mass were under British control.

of power capabilities among the significant actors in the policy issue area. Declining effective leadership and its failure to be perceived as a legitimate creation contributed to the regime's erosion. The early post war period is notable for the failure of the new preponderant power, the United States of America, to come to the defense of the regime after Britain lost its mastery over the seas and an open challenge of such narrow limits by littoral states. The inability of the international community to codify the basic jurisdictional tenets of the free seas and the ensuing expansive claims destroyed the regime's universality and induced a weak regime situation. The apparent anarchy in the oceans policy issue area has been replaced by the development of organisation dependent rule-making processes. The institutionalisation of rule-making processes over the past decade has introduced the prospect that a stable and legitimate Oceans Regime can be established and sustained. The demise of the free seas regime and its erosion by expansionary pretensions is not the destruction of a noble ideal that never really found fruition in practice. What the world has witnessed since the interwar period is the demise of superpower hegemony and the assertion of the weak in an area where the pursuit of their objectives once was subjugated by the powerful on the pretext that they would destroy an open oceans system.

The various oceans regimes are examined in the following six Chapters. Each Chapter is designed to account for the role of leadership and legitimacy in the strength of the regime and

to show how they: relate with the regime's underlying and current structural levels; determine regime type; and influence Coastal State Expansion. With this knowledge, a reasonable assessment can be made of the conditions needed to stabilise the Oceans Regime in the present context and of the ability of the newly emerging Oceans Regime to accommodate littoral interests.

CHAPTER II

PRE-REGIME PRACTICE AND DEBATE: ORIGINS OF THE CONCEPTS OF LIMITS AND THE FREE SEAS

Hegemonial Leadership

Historically, what was known as the free seas was an area dominated by a powerful actor for the perpetuation of the actor's own security and economic interests. Be that as it may be, a sea secure from the scourges of war, piracy and multiple jurisdictions was a safer and consequently more economic area to conduct ocean trade and commerce. There are several examples from Antiquity where a nation has chosen to assume leadership responsibilities to stabilise a part of the oceans system. Ancient Athens, with a naval force of over two-hundred vessels, policed the Aegean freeing it from piracy and from the encroachments of Sparta, Persia and Macedon. The costs incurred from pursuing a hegemonial leadership position derived from: the support of its naval patrol functions; conflict with challenging nations; and a decline in stature in the Greek community: "Her maritime domination was viewed as a tyranny incompatible with the liberty of Greece and the equality of the Greek states."¹ The benefits far outweighed the costs.

¹Pitman B. Potter, The Freedom of the Seas in History, Law, and Politics (New York: Longmans, Green and Co., 1924), p. 23.

Control of strategic points, free and economic passage for its own vessels, tribute exacted from foreign ships and a stable oceans system all helped to maintain Athenian commercial and strategic ascendancy. Athens' friends were able to profit from a secure region without having to pay a penalty in terms of costs for the preservation of the system. It would be erroneous to suggest, however, that the Aegean was free. Athens:

"... dwelt predominantly upon maritime dominion, not maritime liberty, and conceived the latter only as a product of the former. It did not lay down any formal rules of legal right respecting the sea dominion, but regarded the latter as, in the main, a matter of military and commercial power."¹

It was not until Rome assumed a dominant position in the oceans system that the first serious attempt was made to develop a juridical basis for the free seas.

Rome's hegemonic position enabled it to pursue its maritime interests in the face of all competition. The legalities of Pax Romana, codified in Roman law, expounded the commonality of the seas--communis omnium naturali jure.² Title to the sea could not be assumed by any sovereign power. Freedom was something guaranteed not by dominion but by law. This is no better represented than by a statement made by Emperor

¹Ibid., p. 25.

²It was the Roman jurist, Marcianus, who argued that the sea and its coasts are open and common to all mankind. His second century writings are preserved in Justinian's Digest and Institutes (483-565). See Percy Thomas Fenn, "Justinian and the Freedom of the Sea," American Journal of International Law 19 (October 1925): 716-727.

Antonius: "I am indeed lord of the world, but the law is lord of the sea." In practice a different picture emerged. Like Athens, Rome used its naval preponderance to maintain its mastery over the sea and did not hesitate to restrict the activities of foreign vessels in the Mediterranean. The concepts, rights, privileges and liberties espoused in the Justinian Code were applicable to Romans alone who often referred to the known seas as mare nostrum. Dionysius Halicarnossus made this clear: "Rome is ruler of the whole sea, not only that within the pillars of Hercules, but of the whole navigable ocean."¹ And, like Athens, Rome's maritime rule was not condoned by other states:

. . . it cannot be said that either Athens or Rome held a maritime dominion recognised by law among independent states as legally valid, in spite of their naval supremacy, their success in suppressing piracy, and the ideas and feelings of historians and poets regarding their position in general.²

The decline in Roman power left a vacuum that was filled by powerful maritime commercial nations. In 1269 Venice (a major maritime power dominating the Mediterranean and Near East trade route to the Orient) asserted and enforced its sovereignty over the Adriatic. The Venitian claim was in effect until the early sixteenth century. Pisa and Tuscany imposed tolls on users of the Tyrrhenian Sea. Genoa made similar pretensions over the Ligurian Gulf. The weight of the claims was based not only on the naval strength of the city states but also on the influence of the Pope who considered

¹Potter, Freedom of the Seas: Antonius, p. 27; Halicarnossus, p. 30.

²Ibid. pp. 34-35.

the coastal waters of Latium as mare nostrum and all the waters beyond as mare ecclesiae.¹ The influence of Papal authority was considerable, especially when it is realised that during the fifteenth and sixteenth centuries Iberian proprietary over most of the world's waters was legitimised by Papal consent.²

¹These cases are documented in Thomas Wemyss Fulton, The Sovereignty of the Sea: An Historical Account of the Claims of England to the Dominion of the British Seas, and of the Evolution of the Territorial Waters, with Special Reference to the Rights of Fishing and the Naval Salute (Edinburgh and London: W. Blackwood and Sons, 1911), cited by H. G. Knight, The Law of the Sea: Cases, Documents, and Readings (Washington, D.C.: The Nautilus Press, 1976), pp. 8-9..

²Following Prince Henry the Navigator's (1394-1460) exploration of the west African coast, Pope Nicholas V issued a Papal Bull--Romanus Pontifex--on 6 January 1454, giving the Portuguese exclusive jurisdiction over African lands from Cueta to Guinea and "beyond towards that southern shore," under the pretext that salvation be brought to the African people. Bartholomew Diaz reached the Cape of Good Hope by 1486, and in 1497, Vasco de Gama sailed around the Cape, along the east coast of Africa, across the Arabian Sea, to India, establishing an alternate all ocean trade route to the Orient. This placed vast territories and seas under Portuguese dominion.

A series of Bulls issued by Pope Alexander VI favoured Spanish maritime interests. The most significant, Bull Inter Caetera of 4 May 1493 gave all New World lands to Spain. On the following day, the Pope granted Spain dominion over the area lying west of a demarcation line drawn ". . . from the Arctic poles, namely the north, to Antarctic pole, namely the south . . . the said line to be distant one hundred leagues towards the west and south from any of the islands commonly known as the Azores and Cape Verde." The demarcation line followed the 35° west meridian which rests between Greenland and Iceland, and south, dividing the Atlantic. Violation of Portuguese and Spanish waters carried the penalty of excommunication.

Portugal felt that the 100 league line to the west of the Azores and Cape Verde was not sufficient. This, and a Spanish desire to gain Portuguese recognition of its New World claims, prompted both countries to agree on a new demarcation meridian (approximately 15° west longitude resting 370 leagues west of the Cape Verde islands) in the Treaty of Tordesillas of June 1494, ratified in September of that year. All lands east of the line, including eastern Brazil, were

Coastal Pretensions

The Athenian, Roman, Venitian and Iberian pretensions are notable because they were maritime and not coastal in scope. Their main purpose was to ~~secure~~ control over vital trading routes. During the fifteenth and sixteenth centuries many states sought to assert jurisdiction over an immediate coastal belt and in some cases, far out to sea:

The sovereign of the land washed by the sea asserted a new right to protect his subjects and citizens against attack, against invasions, against interference and injury, to protect them against attack threatening their peace, to protect their revenues, to protect their health, to protect their industries.¹

It was not long before most European coastal areas and the waters of the Mediterranean were appropriated. England claimed control of St. Georges Channel, Bristol Channel, the Irish Sea, the North Channel, the North and Narrow Seas, and the waters around the British Isles within an arc drawn from Cape Finisterre in Southern Spain, to Norway's North Cape. Denmark claimed the Sound and Belts of the Baltic; Sweden, the Bothninian Gulf; and Norway the Northern Seas between itself, the Shetland Isles, Iceland, Greenland, and Spitzbergen. There

given to Portugal. The Treaty was recognised by a Papal Bull on 24 January 1506. See C. John Colombos, The International Law of the Sea, 6th ed., rev. (New York: David McKay and Company Inc., 1967), p. 49; Sayre A. Swartztrauber, The Three-Mile Limit of Territorial Seas (Annapolis, Maryland: Naval Institute Press, 1972), pp. 12-15; and H. Vander Linden, "Alexander VI and the Demarcation of the Maritime and Colonial Domains of Spain and Portugal, 1493-1494" American Historical Review 22 (1916): 1-20.

¹Elihu Root, cited by Philip C. Jessup, The Law of Territorial Waters and Maritime Jurisdiction (New York: G. A. Jennings Co., Inc., 1927), p. 5.

were three principal reasons for this trend, the first being to rid the seas of pirates--a problem that grew to enormous proportions following the breakup of the Roman Empire. The second, related to the first, was a general concern regarding the safety of coastal areas. The third, and most important, was that extended jurisdiction gave maritime powers the ability to maintain a monopoly over trade and commerce, and gave coastal nations the ability to regulate offshore fishing activities and to obtain revenue from tribute.¹

New Regime Formulation

A great expansion in commercial enterprise during the late 16th and early 17th centuries brought with it serious challenges to the Iberian powers' pretensions to the dominion and control of the world's oceans. England, France and Holland were interested in obtaining a part of the lucrative east and west Indian trade. It is not surprising that they supported arguments espousing the freedom of the seas, irrespective of the over generous Papal charges. England became directly involved in this debate. When, in 1580 Spain attempted to exclude the British from the Indies, Elisabeth declared to a Spanish envoy:

(T)his (Papal) donation of that which is another mans, which is of no validity in law, and this imaginary propriety, cannot hinder other Princes from trading into those countries and, without breach of the law of nations from transporting colonies into those parts thereof where the Spaniards inhabit not;

¹Knight, The Law of the Sea, pp. 8-9.

. . . . neither from freely navigating that vast ocean, seeing . . . the use of the sea and air is common to all, nor can a title to the ocean belong to any people or private persons, for as much as neither nature nor public use and custom permit any possession thereof.¹

And to Denmark's King Christian who sought to prevent the British from fishing the North Sea fishing grounds, Elisabeth maintained that:

. . . fishing in the high sea was free by the law of nations and the customs of all peoples . . . the law of nations allowed fishing in the sea everywhere,² even in seas where a nation hath power of command.

The main targets for criticism were the Iberian powers who were intent on maintaining their ascendancy over the oceans system. They found themselves unable to defend their dominions from incursion as their competitors increased in strength. Spain was pressed to defend itself from hostile British and French vessels. Its resources were tied in a war with Holland which had revolted from the Netherlands in 1567. Spain's problems were compounded in 1581 when it had to contend with a United Netherlands and again in 1588 when England inflicted humiliating defeat upon the Spanish Armada. An offensive league among the United Netherlands, France and England formed in 1596 and intent on stripping Spain of its western dominion, added to the decline of Spanish maritime power. Portugal too, was losing its Empire. Invaded by its Iberian neighbour

¹ Cited by H. Gary Knight Managing the Sea's Living Resources: Legal and Political Aspects of High Seas Fisheries (Lexington, Mass., D. C. Heath and Co., 1977), p. 15.

² Cited by Potter, Freedom of the Seas, p. 55.

in 1580, the Port of Lisbon was closed in 1599. The occupation lasted until 1640 leaving Portugal's eastern interests open to attack. Spain had neither the capability nor the desire to protect Portuguese shipping and colonies. Consequently the oceans system was left without a preponderant naval power. This induced the destruction of a closed, restrictive regime and promoted new approaches to the governance of the oceans.¹

England and the Netherlands emerged as the principals in the oceans system by the early 17th century. Holland exerted effective control over the East Indies, Java and the Moluccas, and in 1602, the Dutch East India Company was founded to represent the Netherland's eastern interests. Even so, the Portuguese, under Spanish rule, still insisted on asserting their claim over the Indies under the authority of Bull Romanus Pontifex.

It was those preposterous pretensions to the dominion of the immense waters of the globe that caused the great juridical controversies regarding mare clausum and mare liberum from which modern international law took its rise.²

Mare Liberum--Mare Clausum

Portuguese and Dutch trading rivalry intensified and culminated in the seizure of a Portuguese galleon, the Catherine, in the Straits of Malacca as prize by the Company. Because

¹See Swarztrauber, Three-Mile Limit, pp. 12-22.

²Giulio Pontecorvo and Maurice Wilkinson, "From Cornucopia to Scarcity: The Current Status of Ocean Resources Use," Ocean Development and International Law Journal 5 (1978): 385.

the capture was opposed by interests both within the Company and in the Netherlands, a young Dutchman, Hugo Grotius (1583-1645) was retained to write a legal opinion on the matter. The opinion was published in 1604 as De Jure Praedae Commentarius (On the Law of Prize) justifying the seizure. Its import was realised a few years later when the twelfth chapter of the work was published under separate title in 1609 as The Freedom of the Seas or the Right Which Belongs to the Dutch to Take Part in the East Indian Trade. In it, Grotius challenged the Portuguese claim to the eastern seas. He maintained that all men and nations have the common right to freely use the seas, especially as a route for navigation. No country has the right to seek dominion over the seas, not necessarily because the Pope has no jurisdiction to grant a country authority over temporal realms but because it is a matter of physical impossibility. The seas are so vast that they are not appropriable. Their resources are so immense that they are not exhaustible. The inexhaustibility of oceans resources precludes the right of any country to assert exclusive control over them. Ultimately, the utility of mare liberum is the best source of obligation compelling states to respect the free and open seas.¹

Grotius' argument met strong remonstrance from English

¹ Hugo Grotius, The Freedom of the Seas or the Right Which Belongs to the Dutch to Take Part in the East Indian Trade (Mare Liberum); trans. Ralph van Deman Magoffin, In James Brown Scott, ed., Classics of International Law (New York: Oxford University Press for Carnegie Endowment for International Peace, 1916). See also Frans de Pauw, Grotius and the Law of the Sea (Brussels: University of Brussels, 1965).

writers who felt that England could gain substantially by filling the vacuum left by declining Spanish influence, and who were concerned that mare liberum might be used as a pretext for challenges to England's exclusivity over its adjacent fishing grounds.¹ The Dutch did, in fact, use Mare Liberum as the basis of a petition sent to the British protesting the confiscation of a cargo of walrus off the coast of Greenland. This prompted James I to request John Selden (1584-1654) to write a rebuttal to Grotius' work. Selden completed his task in 1618, although it was not published until 1635, as Mare Clausum, seu de Dominio Maris. He contended that the sea is not everywhere common, that resources are finite rather than infinite, and indeed, can be appropriated. Since the seas are subject to dominion they, too, are subject to exclusivity, whether it be for fishing, navigation, gems, landings, trading and so on. Any craft traversing through an area controlled by a foreign power would have to satisfy appropriate conditions for admission, including the payment of tolls. Dominion is not just extendable over adjacent waters. The outer seas conceivably can be affected by pretensions to dominion. Therefore, the seas surrounding the British Isles are a part of the British Empire. With the use of its naval power, Britain is justified in controlling areas of the seas

¹See William Welwood, An Abridgement of all Sea - Lawes (London, 1613) republished in 1972 by Teatrvm Orbus Terrarvm Ltd., Amsterdam, particularly, Chapter 27, "Of the Communitie and Proprietie of the Seas."

far beyond home shores.¹

Grotius and Selden offered two opposing views on regime construction. Of the two, the argument offered by Grotius is the weaker. Grotius bases his claim on two premises--inexhaustibility and non appropriation. At the time, given a series of conditions, utility may have made the prospect of a free seas regime a possibility; these conditions being:

. . . "low population density" or low usage, seemingly infinite availability of resources to be exploited, limited or no trade-offs between different forms of exploitation, and limited or no generation of "negative externalities" or negative spillover effects of the actions of one party upon others.²

They include: few actors in the policy issue; a low state of technology (preventing man from efficiently exploiting oceans resources and from utilising oceans space); and an adequate supply of resources from land sources.³ A non-exclusive, non-divisible, free access, unlimited use system would be one of low political salience. Therefore, demand for a detailed regulatory framework likewise would be low. Granted, these conditions would have to apply to the long term which they do not. Changing technologies, accompanied by demand, increase pressures on oceans resources and lead to their eventual

¹ John Selden, Of the Dominion or Ownership of the Sea, trans. Marchamont M. Nedham, London, 1652, originally entitled Mare Clausum Seu de Donominio Maris 1635, reprinted by Arno Press Ltd., 1972.

² Edward L. Morse, "Managing International Commons," Journal of International Affairs 31 (1977): 3.

³ Jack N. Barkenbus, "The Politics of Ocean Resource Exploitation," International Studies Quarterly 21 (December 1977): 676.

appropriation. Practice at the time of Grotius suggests that his assumption of inexhaustibility was incorrect. States did declare fishing zones. His debate ignored the different needs between littoral and maritime nations. A maritime state could gain access to needed resources by virtue of its mobility. The coastal state, lacking distant-water vessels, is confined to a narrow area. For it there definitely is a limited supply. Practice at the time also indicated that nations endowed with a maritime capability could enforce their pretensions. Enforcement is control and control is effective appropriation. Both exhaustibility and appropriation were realities during Grotius' time. Selden had no trouble in recognising their existence. But even dominion and the projection of power has its limits. Such was recognised by many writers since the thirteenth century. There was a debate on the limits to national jurisdiction.

Jurisdictional Debate

One of the earliest literary defenses on jurisdictional belts is found in a fourteenth century treatise by an Italian jurist, Bartolus de Sassoferato (1314-1357) who argued that a coastal state should be allowed to exercise authority over offshore islands found up to 100 miles from the coast. This was taken to mean that a littoral nation should claim an offshore belt of similar extent. A pupil of his, Baldus de Ubaldis (1327-1400) advocated a seaward jurisdiction of 60 miles. The import of their writings is found in the fact that

they were cited in several cases to defend the closure of coastal areas to foreign vessels. For example, a fourteenth century decision of the Supreme Court of Piedmont based its ruling on the capture of a Spanish ship (bound for Naples in the Ligurian Gulf fifty miles from the port of Monocco) by a Savoyan man-of-war on the writings of Bartolus and Baldus.¹

Perhaps the most important writings in this regard were undertaken by Alberico Gentili (1552-1608) who attempted to synthesise the concepts of dominion and freedom. He contended that the ideal solution to the mare liberum-mare clausum controversy would be to establish a protective belt or territorium 100 miles in extent beyond which the seas would be common to all.² The distinction between a territorial sea and the free seas contributed to the resolution of the closed and open seas dilemma that was very much in question by the end of the sixteenth century:

At the end of the sixteenth century there arose from all quarters demands for national dominion over the sea, for authority at sea over peaceful merchant vessels, over pirates, over merchant vessels in time of war, over fishermen and all who used the sea. On the other side arose the objection of the civilians and the philosophers, declaring that the sea was free by natural law and that no man and no nation could deny men the use of nature's highway in any degree or manner.³

By the early 17th century there was a general perception,

¹ Swarztrauber, Three-Mile Limit, p. II.

² Potter, Freedom of the Seas, pp. 52-54.

³ Ibid., p. 54.

in both practice and literature, that a coastal state is entitled to a protective belt of some order. What was not so clear was the precise breadth of the territorial zone. Most countries adopted their own unique approaches to this problem. Three trends can be identified.

The first, the line of sight doctrine, originally asserted by the peripheral European states -- England and Spain -- had state authority extend out to the visible seaward horizon as viewed from a particular point on land. The distances determined by the doctrine were variable and often imprecise because atmospheric conditions, the height of a ship's mast, the elevation of the viewer, and the viewer's eyesight would play a role in ascertaining the seaward horizon. Its only advantage, assuming all factors are constant, is that it defines a continuous rather than sinuous coastal belt. The second, favoured by the Scandinavian nations, especially Denmark and Norway, was a one league limit measured from the shoreline. Its original purpose was to protect coastal fisheries. It was in use until the early twentieth century. The third and most prevalent, the cannon shot rule, enjoyed widespread use between 1610 and 1911, and was paramount from 1702 to 1793. It was based on the principle of effective occupation, that coastal nations can appropriate offshore areas in so far as the waters could be controlled from the land. An anonymous author expressed this principle poetically:

Far as the sovereign can defend his sway,
extends his empire o'er the wat'ry way;

The shot sent thundering to the liquid plain
Assigns the limits of his just domain.¹

Even Grotius, the oft cited proponent of the free seas, did not deny littoral rights over coastal areas:

Now the Lordship over a portion of the sea is acquired in the same way as other Lordships-that is, as we have said above, by means of persons and by way of territory. By way of persons, when a fleet, which is a sea army, is established somewhere on the sea; by way of territory, insofar as those who navigate in that part of the sea nearest the land can be held in restraint from the land, no less than if they were found upon the land itself.² (Italics added).

Again, territorium is established by effective occupation.

This principle was developed thoroughly by a Dutch jurist, Cornelius van Bynkershoek (1673-1743) in his De Dominio Maris Dissertatio published in 1702:

Wherefore on the whole it seems a better rule that the control of the land (over the sea) extends as far as cannon will carry: for that is as far as we seem to have both command and possession. I am speaking however, of our times, in which we use those engines of war: otherwise, I should have to say in general terms that the control from the land ends where the power of men's weapons ends.

¹ On the line of sight doctrine, see Swarztrauber, Three-Mile Limit, pp. 36-43; the marine league, *Ibid.*, pp. 44-50; and the cannon shot rule, *Ibid.*, pp. 23-35. The poem is found in Domenico Alberto Azuni, The Maritime Law of Europe 2 vols. trans. William Johnson (New York: George Forman, 64 Water-Street, for I. Riley and Co., 1806) cited by Henry G. Crocker, ed., The Extent of the Marginal Sea: A Collection of Official Documents and Views of Representative Publicists (Washington, D.C.: Government Printing Office, 1919), p. 204. The marine league is equal to three nautical miles. The marine league adopted by the Scandinavian states, is equivalent to four, not three nautical miles.

² Hugo Grotius, De Jure Belli ac Pacis (1625), trans. Francis W. Kelsey in James Brown Scott, ed., Classics of International Law (New York: Oxford University Press for Carnegie Endowment for International Peace, 1916), pp. 129-130.

The principle is more succinctly formulated in his Questionis Juris Publici (1737) as:

Imperium terrae finiri ubi finitur armorum potestas.¹

Exactly "where the power of men's weapons ends," was another topic inviting endless debate. At that time range was affected by cannon type, ball size, height and position. A Cleric, Abbe Galiani, suggested that his understanding of cannon range, one league, should be established as the proper breadth of the territorial sea. This is somewhat confusing for the maximum range of cannon during the early eighteenth century was 2,000 yards for an 18 pound cannon ball. It was not until 1859, with the invention of rifling, that it became possible for coastal artillery to have a range of three nautical miles. Limits established by cannon fire were all the more confounding for they precluded the establishment of a uniform territorial sea controlling, instead, small areas determined by arcs of fire.²

A uniform three-mile territorial sea measured from the low water mark was accepted by the great powers during the early nineteenth century as the most appropriate limit to national jurisdiction, the waters beyond being considered open and free to all. The assertion of coastal authority was not requisite on the principle of effective occupation. By the

¹ De Dominio Maris Dissertatio is cited by Knight, The Law of Sea, p. 64. Questionis Juris Publici is cited by Philip C. Jessup, The Law of Territorial Waters and Maritime Jurisdiction (New York: G. A. Jennings Co., Inc., 1927), p. 5.

² Lt. Commander A. D. Tayler R.C.N., The International Law of the Sea and Related Subjects from a Canadian Point of View (Ottawa, 1967), p. 8.

end of the century, when the range of cannon had reached six miles or more, the breadth of the territorial sea remained, due to the policing activities of England, three miles. Consequently limits to national jurisdiction were not prescribed by littoral need and capability but rather reflected the interests of one particular maritime power--Great Britain.

CHAPTER III

THE FIRST PERIOD: A STRONG FREE SEAS REGIME--1883-1914

A multipolar global macrostructure ensued after the defeat of Napoleon and the Congress of Vienna. Under such circumstances it would be difficult for any issue area to evolve its own distinct political process. There was one important qualification: the underlying structure was unipolar. Britain was the preponderant naval power. Britain was able to control rule-making processes and, in so doing, created a regime that conformed to its respective interests and needs.

With 95 capital ships in 1815, Britain's naval fleet surpassed the combined maritime capabilities of Austria, France, Prussia and Russia.¹ Its naval ascendancy continued until the beginning of the First World War when its 192 warships still rivaled all those of Germany (89) the United States (67) and France (52). Similar figures can be cited for current structural capabilities. In 1886 over one half of the world's merchant tonnage sailed under Britain's flag. By 1914 Britain still commanded 40% of the world's total.² Add to this a global Empire and it is clear why Britain did

¹Swartztrauber, Three-Mile Limit, p. 64.

²Ibid., pp. 108-109.

not accept restrictions placed on the passage of its vessels. From its viewpoint, restrictions could be avoided in a system characterised by narrow limits to national jurisdiction where no state save itself could seek dominion over vast areas of the seas. To be effective, most states would have to adhere to these prescriptions. Adherence could be compelled by British maritime power and maintained through the adoption of domestic legislation and practice that could be used as a standard by all.

Leadership

Accordingly, Britain adopted legislation espousing littoral exclusivity within a three-mile territorial belt. England's courts were given competence over admiralty concerns to a distance of three miles, British Common Law was extended over the area, and exclusive fishing rights were proclaimed by: the Act of July 31, 1868; The Territorial Waters Jurisdictional Act of August 16, 1878; and the Sea Fisheries Act of August 2, 1883 respectively. Pursuant to British policy that coastal jurisdiction should be limited to three-miles, all domestic pretensions beyond were rescinded by the 1876 Customs Consolidation Act. Customs enforcement measures commonly known as "Hovering Acts", had been legislated since the early 18th century. One, enacted in 1805, invoked a 100 league customs zone! If foreign states were to find a three-mile limit acceptable then Britain, too,

would have to find it appropriate for all purposes.¹ In some cases, the masters of British vessels were ordered not to fish within three miles of other coastal states.² British colonies and possessions were not left unaffected. The 1878 Territorial Waters Jurisdictional Act stipulated that:

Any part of the open sea within one marine league of the coast measured from low-water mark shall be deemed to be open sea within territorial waters of Her Majesty's dominion.³

By this act, (1876) together with the Territorial Waters Jurisdiction Act of 1878 and the Sea Fisheries Act of 1883, Britain publically and intentionally limited herself to a three-mile limit for all purposes. From that time, she maintained the policy that the territorial sea within three miles was the maximum extent for state jurisdiction, irrespective of the state's ability or power to extend its authority farther. This position taken by the "Mistress of the Seas" was held out as the legal standard for the other states to follow.⁴

Once having adopted the rule of freedom at sea . . . the maritime state is bound to insist upon its adoption in that same particular by all other maritime or quasi maritime states.⁵

A three-mile territorial sea was not meant for Britain alone. Britain assumed hegemonial leadership responsibilities in an effort to stabilise its free seas regime. This was made clear by its Foreign Secretary, Sir Edward Grey, who in 1908 stated that it was his nation's policy not only:

¹ Ibid., pp. 64-67; and Jessup, Territorial Waters, pp. 10-18.

² Swarztrauber, Three-Mile Limit, p. 66.

³ Cited by Jessup, Territorial Waters, p. 17.

⁴ Swarztrauber, Three-Mile Limit, p. 71.

⁵ Potter, Freedom of the Seas, p. 197.

to uphold the three-mile limit, but to protect against and to resist by every means in our power the pretensions of any foreign country to enforce its own jurisdiction on the sea beyond the three-miles limits.¹

His were not empty words. Britain did not hesitate to use its influence and power to defend the free seas from serious incursions when fundamental maritime interests were threatened by expansion minded states. As far back as 1816 the British navy, along with six Dutch vessels, opened the Mediterranean and Western Atlantic by destroying Algerian pirate forces that had been the scourge of the area since the fall of the Roman Empire.² Following vigorous American and English protests, the Russians were compelled to recognise the three-mile limit in treaties (1824-1825) after having declared a 100 Italian mile Ukase in 1821.³ Uruguay was pressured to surrender a Canadian sealer, the Agnes G. Donohu, seized in 1905 within a 60-mile wide, 5,000 square miles fishing zone in the mouth of the Rio de la Plata.⁴ The British navy increased its presence off the Iberian coast in 1905 in

¹ Cited by Swarztrauber, Three-Mile Limit, p. 111, citing Fulton, Sovereignty of the Sea, p. 732, citing Great Britain Parliament, (Hansard's) Parliamentary Debates vol. 170, p. 1383.

² Colombos, International Law, p. 57.

³ Swarztrauber, Three Mile Limit, pp. 73-74. "The Roman and early Italian mile was equivalent to about 1,478 meters and the "hundred mile" limit . . . was therefore the equal of approximately 150 kilometers or 90 English statute miles." Jessup, Territorial Waters, p. XXXVIII.

⁴ Swarztrauber, Three-Mile Limit, pp. 90-91.

response to attempts to keep fishermen from harvesting stocks found within a two league fishing zone proclaimed by Spain and Portugal.¹ A 69-mile fishing zone around Greenland (declared by Denmark) similarly was ignored and abandoned.²

Had it not been for their insistence, it is quite possible that this rule would not now be established in international law.³

Regime Strength

Britain's success in championing the free seas regime is reflected in the almost universal adherence to its prescriptions. There were a few exceptions. Uruguayan and Iberian pretensions persisted though they were ignored by the great powers. They posed no threat to the regime because together the deviants occupied a very small proportion of the world's coastline and controlled less than 10% of its merchant tonnage. By 1900, most coastal nations claimed (either willingly or out of intimidation) three-mile territorial seas. However, it is only fair to note that, at the time, most of the world's coastline was controlled by the colonial and maritime powers - England, France, Germany and the Netherlands.⁴ And they were the most ardent proponents of

¹Jessup, Territorial Waters, pp. 42-43.

²Colombos, International Law, p. 61.

³Jessup, Territorial Waters, p. 62.

⁴Swarztrauber, Three-Mile Limit, p. 110.

the free seas:

. . . the majority of the maritime Nations, judged by the tonnage of their respective navies, are generally in favour of retaining the three-mile limit of territorial waters.¹

This is not surprising. Under a free seas regime the maritime activities of the great powers faced minimal opposition and few restrictions. They were free to fish off the shores of other nations and free to participate in the evolving mercantilist system of colonial trade. In effect, the regime:

minimised the cost of transport of goods, of military surveillance, and of the pursuit of commercial interests. It also provided Europe access to raw materials and markets throughout the world.²

Britain had the most to gain from a free seas regime. It effectively used its power to create it:

With a great navy, it writes the law of naval war; with a great merchant marine, it writes the law of navigation. Concessions to the principle of common consent it makes few.³

Those who opposed the regime were not states with major maritime interests. They were weaker coastal nations concerned about the waters adjacent to their shores. Their immediate areas of interest were endangered not by other littoral countries but by the powerful maritime countries in pursuit of resource wealth, and global security concerns. The only defense of the weak coastal nations, unable to occupy their offshore areas, were ineffectual pretensions over an ever

¹Colombos, International Law, p. 110.

²Pontecorvo and Wilkinson, "Cornucopia", p. 385.

³Potter, Freedom of the Seas, p. 193.

greater extent of adjacent waters:

. . . the most vigorous assertions of maritime sovereignty come, not from the great naval states, who have sea control and can afford to neglect the legal approval of their fellows; but from those quasi-maritime states which, while aspiring to naval rights, as yet have not the force to make sure their authority over neighbouring parts of the sea.¹

Legitimacy

The littoral states had no role in the development of the regime created and enforced by the great maritime states. They thus viewed such a regime as an illegitimate or bastard creation. Evidently freedom was synonymous with control:

If the declaring state's maritime assets were sufficient to protect its own interests in the face of all competition—as was the case with Rome and Britain during their respective "Pax Romana" and "Pax Britannica"—then that state controlled the seas, probably more effectively than the states that had claimed large oceans as private property . . . the freer the seas are, the greater the flexibility of the strong powers,² and the greater their opportunity to exercise control.²

Freedom of the seas has always meant to many nations that freedom which could come only with mastery. So it was with Athens, with Rome, and with Britain . . . In a strict logical sense this is sound; the subordinate is obviously not free, the equal is bound by agreements voluntary though they be, and only the master is completely free.³

And how true! The free seas regime was created by Great Britain for the benefit of Britain. The advantages of a management framework controlled by British power were realised years before the regime was established:

¹ Ibid., p. 195. ✓

² Swarztrauber, Three-Mile Limit, p. 4.

³ Potter, Freedom of the Seas, p. 236.

. . . whosoever commands the sea commands the trade of the world and whosoever commands the trade commands the riches of the world and consequently the world itself.¹

Nevertheless, the British were quick to point out that the common good also would be advanced by the regime:

In manufacture, in merchant marine, in foreign trade, in international finance, we had no rival . . . As we came, by deliberate act of policy, to adopt the practice of free trade and to apply the principle of "all seas freely open for all," we moved towards the Pax Britannica, using the Royal Navy to keep the seas open for the common benefit, to suppress piracy and the slave trade, and to prepare and publish charts of every ocean. No other of our western rivals now had an empire.²

All maritime nations profited from its perpetuation:

free and economic passage, access to offshore fishery resources, a minimisation of competing claims, and a relatively peaceful oceans system:

. . . the collective experience of several countries has established that it is by shared use or shared competence, with a minimum of monopolisation of either use or authority, that the States of the world in their exploitation of the oceans can create the greatest net gains both in the indivisible value of general security and the divisible values of wealths, enlightenment, well-being, and so on.³

¹Sir Walter Raleigh, Works, 1:325 cited by Potter, Freedom of the Seas, p. 84.

²Lord William Strong, Britain in World Affairs: The Fluctuations in Power and Influence from Henry VIII to Elizabeth II (New York: Frederick A. Praeger, 1961), pp. 99-100.

³Myres S. McDougal and William T. Burke, The Public Order of the Oceans: A Contemporary International Law of the Sea (New Haven: Yale University Press, 1962), p. 562.

This does not suggest that the free seas regime solely benefited the maritime powers. Weaker nations no longer had to worry about pirates. Some nations, especially the Central and South American republics, owe their independence to Britain's active challenge to Spain's pretensions.¹

But the repressive nature of the regime cannot be ignored, especially when its illegitimacy is compared with current attitudes and practice. Today, many Third World nations look at the free seas regime with a great deal of suspicion. They are reluctant to confer any form of legitimacy on a regime inimical to their interests, particularly one created and directed independent of their control. The grandiose nature of the free seas has lost its appeal for many newly independent states freed from the yoke of Empire. They are quick to point out that the free seas were instrumental in their exploitation and suppression during the previous century:

Freedom of the seas has been akin to "Freedom of Labour" in the Industrial Europe of the 19th century: in effect the right of the great was licence, that of the poor was submission.²

This perception has been one of the most fundamental factors contributing to the demise of the free seas regime and suggests that rule-making processes must be initiated universally to be legitimate. That did not occur until the fifth

¹Colombos, International Law, pp. 56-60.

²Rene-Jean Dupuy, The Law of the Sea: Current Problems (Dobbs Ferry, New York: Oceana Publications Inc., 1974) p. 3.

period. Why not before then? Surely the Oceans Regime could have acquired some form of legitimacy, say by having its various components codified at an international conference where at least some coastal nations would have had some input. Pitman Potter, writing during the interwar period suggested that the League could have conferred a certain degree of legitimacy on the regime:

What destroys international freedom at sea is national exercise of powers at restriction. - To have powers defined and employed by the League, as the League would need to do, as a method of enforcing its authority, - sea control would be the League's most effective weapon - would be an entirely different matter.

He adds:

Freedom from all authority at sea, maritime anarchy, is impossible from a practical viewpoint, and undesirable. Freedom from having the law of the sea dictated by one power as by Britain, can come only by matching the naval strength of that power. That not all states can do; equality of naval strength among all states is impossible To serve the freedom of the seas best that situation must be utilised at least to secure, through international conference, a definition of the law of territorial waters and the law of war at sea, conciliating as reasonably and fairly as possible non-combatant and neutral freedom at sea in time of war with the belligerent aims of naval states, so long as international naval war is permitted, then, as a final step, our political, economic, and military or naval power must be used to secure such a definition and enforcement of national rights under a League of Nations as would make possible that suppression of international war, naval war included, without which full freedom of the seas is impossible.¹

Otherwise the stability and strength of an illegitimate regime is dependent on a determined exercise of power and national example by the major powers in the system:

¹Freedom of the Seas, p. 244; p. 247.

Great Britain championed the three-mile limit to its interwar paramouncy by employing two methods. First, she adopted the three-mile limit-and only that limit-for all purposes.

. . . By adhering strictly to one limit, she provided a very clearly understood standard for other states to observe, and at the same time, she could not be accused of duplicity in her foreign policy. Second, she utilised her position of naval superiority to force the states to comply with the three-mile rule.¹

But as Keohane and Nye point out:

Willing submission to hegemonic leadership is difficult to maintain for long, because the legitimacy (if not the power) of such leadership tends to erode. What in the eyes of the powerful appears to be policing for the public good may appear in the eyes of the weak as imperialist bullying. As such perceptions differ, the need for compulsion in hegemonic leadership increases.²

¹ Swarztrauber, Three-Mile Limit, p. 236. On this point also see Pontecorvo and Wilkinson; "Cornucopia," p. 395.

² Robert Keohane and Joseph Nye, Power and Interdependence: World Politics in Transition (Boston: Little, Brown and Company, 1977), p. 230.

CHAPTER IV

THE SECOND PERIOD: A STRONG QUASI-FREE SEAS REGIME--1919-1938

There are two reasons why Britain effectively championed the free seas regime for over thirty years. First, Britain adopted the three-mile limit for all purposes and thereby provided a standard for other states to follow. Second, Britain's naval preponderance enabled it to force challenging states to adhere to the three-mile rule.

The free seas regime was unstable. Britain established a standard that was not conducive to the needs of states with strong littoral characteristics. Many questioned its validity:

(the three-mile limit) . . . would seem to be regarded as a kind of floating fence patrolled by a lone and lonely policeman who is forbidden to act until someone attempts to step through, very much like a small boy at a baseball game. But this attempt to apply a single arbitrary limit of jurisdiction to utterly different situations results . . . in much needless confusion . . . A strict adherence to the 3-mile limit as in the case of a spawning bed extending 4 to 5 miles out to sea would render this task of protection impossible. . . . States should not be required to adhere to an interpretation which would reduce them to the undignified, impotent, ridiculous role of playing hide-seek within an imaginary three-mile limit with swift craft waiting a favourable opportunity to dart through, violate national laws, and slip out immediately with impunity.¹

To an unprejudiced student of history and of present world affairs, it is abundantly apparent . . . that

¹Philip Marshall Brown, "The Marginal Sea," American Journal of International Law 17 (January 1923): 90-91; 93-94.

there never has been and is not today any general agreement on the extent of territorial waters . . . (and) . . . that it always has been the opinion of realistic experts that if definite limits are set to marginal seas, jurisdiction over those limits¹ should be different for different purposes . . .

Littoral impugnation brought diplomatic censure and forced compliance. This was hardly a basis for systemic cohesiveness particularly after the champion of the free seas began to lose its preponderant naval hegemony.

U. S. Free Ridership

World War One transformed the once hegemonial oceans policy issue area into a balance of power system. This was recognised at the Washington Conference on the Limitation of Armaments (12 November 1921-6 February 1922) where the new structural realities were formalised in the 5:5:3 ratio of British, American and Japanese capital ships.² The stability of the free seas regime was dependent on British enforcement actions and on American and Japanese concurrence.

Unlike Britain and Japan, the United States had a powerful littoral orientation. The decline of the U.S.

¹ Joseph Walter Bingham, Report on the International Law of Pacific Coast Fisheries (Stanford, California: Stanford University Press, 1938), p. 9 cited by Sayre A. Swartztrauber, The Three-Mile Limit of Territorial Seas (Annapolis, Maryland: Naval Institute Press, 1972), pp. 150-151.

² On the Washington Naval Conference see C. John Colombos, The International Law of the Sea, 6th ed., rev. (New York: David McKay Company Inc., 1967), and Pitman B. Potter, The Freedom of the Seas in History, Law, and Politics (New York: Longmans, Green and Co., 1924), p. 231.

merchant marine to a size half that of Britain's in the wake of the Harding administration's decision to end the merchant building programme, in addition to a heavy dependence on coastal rather than distant-water fisheries, contributed to an intensification of coastal concerns. These concerns, traditionally given partial expression, managed to exert greater control over U.S. oceans policy during a period when effective British leadership was lacking.¹

Roots of U.S. Discontent

The United States was the first nation to incorporate the three-mile territorial sea into its domestic legislation.² Yet it always has been imperfect in its adherence to the free seas regime:

(The United States) . . . more than any other Power has varied her principles and claims as to the extent of territorial waters, according to the priority at the time.³

¹ Joseph S. Nye, "Ocean Rule Making from a World Politics Perspective," Ocean Development and International Law Journal 3 (1975): 42.

² See, for example, "An Act in addition to the Act for the punishment of certain crimes against the United States, June 5, 1794," United States Congress, The Public Statutes At Large, ed., Richard Peters, I: 384, cited by Swarztrauber, Territorial Sea, pp. 59-60. The relevant article in the Act is found in Section 6: "And be it further enacted and declared, that the district courts shall take cognizance of complaints, by whomsoever instituted, in cases of capture made within the waters of the United States or within a marine league of the coasts or shores thereof."

³ Thomas Wemyss Fulton, The Sovereignty of the Sea: An Historical Account of the Claims of England to the Dominion of the British Seas, and of the Evolution of the Territorial Waters, with Special Reference to the Rights of Fishing and the Naval Salute (Edinburgh and London: W. Blackwood and Sons, 1911), p. 650, cited by Philip C. Jessup, The Law of Territorial Waters and Maritime

Jessup allows that the United States has given itself limited powers over areas beyond three miles but disagrees with Fulton's assertion that the breadth of the American territorial sea has come into question:

. . . the United States has not considered it inconsistent . . . to maintain certain rights of jurisdiction and control outside its territorial waters.¹ (*Italics added*).

In fact, only five years after adopting the Act of 1794, the United States acquired the authority to regulate the activities of foreign ships bound for American ports within 12 miles of its coastline.² The legality of the Act of 1799 was tested by the U.S. Supreme Court in 1804 when an American trading ship, the Aurora, was seized four leagues off the Brazilian coast for engaging in illicit trade in violation of Portuguese law. The case, Church v. Hubbart, was resolved in favour of the seizure:

The seizure of a vessel within the range of its cannon by a foreign force, is an invasion of that territory, and is a hostile act which it is its duty to repel. But its power to assure itself from injury may certainly be exercised beyond the limits of its territory.³

Jurisdiction (New York: G.A. Jennings Co., Inc., 1927), p. 49.

¹ Jessup, Territorial Waters, p. 57.

² "An Act to Regulate the Collection of Duties on Imports and Tonnage, March 2, 1799", United States Congress, The Public Statutes at Large, I: 647-88, reproduced in Charles G. Fenwick, ed., Cases on International Law, 2d ed. (Chicago: Callaghan and Co., 1951), p. 501.

³ Church v. Hubbart (1804), *Ibid.*, p. 496. Another example of the United States asserting authority over areas beyond three miles prior to the First World War occurred in 1897 when Congress Approved the "United States Inland Rules of the Road." The "Rules" established a boundary line delimiting the point where U.S. standards for navigation end and where international rules begin. The boundary extends in places well beyond three miles, the most notable being a line along the New England Coast and the Florida Keys which rests 15 miles offshore. The rules were approved by

The import of Chief Justice Marshall's ruling rests not only on the fact that it acknowledges the existence of a "gray area" beyond three miles, but also on the fact that it was used as precedent for a future ruling on U.S. pretensions beyond three miles.¹

Many of America's interwar pretensions were based on the juridical concepts that began to develop prior to the First World War. These claims to functional jurisdiction beyond the U. S. territorial sea shaped its oceans policy for years to come. Several customs enforcement and neutrality zones were established during the course of the second period. Significant court rulings occurred. Therein are found the seeds of post-war extensions over the seabed and fisheries.

Customs Enforcement

The ratification of the 18th Amendment of the U.S. Constitution on 16 January 1919 and its implementation by the "National Prohibition Act," confronted American authorities with the problem of how to control the illegal importation of alcoholic beverages into U.S. territory.² Specific legislation,

¹ Congress on 7 June 1897, and came into effect in October, 1897. See Raymond F. Farwell, The Rules of the Nautical Road, rev. ed., (Annapolis: United States Naval Institute, 1954), pp. 67-74; United States Coast Guard, Rules of the Road: International - Inland (CG-169), (Washington, D.C.: Government Printing Office, 1965), pp. 389-99; and Swarztrauber, Three-Mile Limit, p. 239.

¹ The Grace and Ruby (1922).

² The 18th Amendment is reproduced in Thomas James Norton, The Constitution of the United States: Its Sources and its Application (New York: Committee for Constitutional Government, Inc., 1943), p. 254. Section I thereof: ". . . the manufacture, sale or transportation of intoxicating liquors within, the importation

the Tariff Act of 1922, had to be adopted to counter offshore rum-running activities since the bulk of illegal liquor entered the country by boat. The Tariff Act broadened the scope of the Act of 1799 by empowering American customs officials not only to board, search, and seize port-bound vessels within 12 miles of the low-water mark but to board, search, and seize vessels making passage through the area notwithstanding their destination:

(Federal officials are authorised to) . . . go on board of any vessel or vehicle at any place in the United States, or within four leagues of the coast of the United States, to examine the manifest and to inspect, search and examine the vessel and or vehicle, and every port thereof, and any person, trunk or package on board, and to this end to hail and stop such vessel or vehicle, if under way, and use all necessary force to compel compliance and if it shall appear that any breach or violation of the laws of the United States has been committed, whereby or in consequence of which such vessel and or vehicle, or the merchandise, or any part thereof, on board of or imported by such vessel or vehicle, is liable to forfeiture, it shall be the duty

thereof into, or the exportation thereof from the United States and all territories subject to the jurisdiction thereof for beverage purposes, is prohibited."

"The National Prohibition Act" of 28 October 1919, United States Congress, The Public Statutes at Large 41, p. 305, reproduced, in part, in Jessup, Territorial Waters, p. 212. The Act came into effect on 16 January 1920, and is often referred to as the Volstead Act. Section 3 of Title II states that:

"No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorised in this Act, and all provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

"The Supplemental Act" of 23 November 1921, extended the scope of the Volstead Act to include" . . . not only the United States but to all territory subject to its jurisdiction." Section 3. United States Congress, U.S. Statutes at Large 42, p. 222, cited by Jessup, Territorial Waters, p. 212.

of such officer to make seizure of the same, and to arrest any person engaged in such breach or violation.¹ (Italics added).

The Act did not fail to evoke serious protests from the international community.² Under its provisions, the innocent passage of foreign vessels through American territorial waters could face interference, not to mention the blatant obstruction of passage on the high seas marginal to the U.S. shoreline.³ The Justice Department's zealous application of the terms of both the Volstead and Tariff Acts significantly increased international concern. The Department actually sought to prohibit the entry of all foreign vessels carrying liquor for crew and passenger use. This directly contravened the domestic laws of many states, particularly Denmark, Belgium and Italy,

¹ The Tariff Act of 21 September 1922, United States Congress, U.S. Statutes at Large 42, p. 989, reproduced, in part, in Jessup, Territorial Waters, pp. 212-213. One of the more dramatic examples of the application of the Act was the sinking of a British owned Canadian registered vessel. In 1929 the I'm Alone, sighted 10.5 miles off Louisiana, was pursued and sunk 200 miles off the U.S. littoral. A joint U.S.-Great Britain Commission declared the sinking illegal. The case is reproduced, in part, in D.J. Harris, Cases and Materials on International Law (London: Sweet & Maxwell, 1973), pp. 352-5.

² On this point see Jessup, Territorial Waters, pp. 211-238.

³ The concept of innocent passage was established in international law by 1921. Note Article 2 of the "Barcelona Convention on Freedom of Transit," signed 20 April 1921, League of Nations Treaty Series 7, p. 13:

"... in order to ensure the application of the provisions of this article (relative to free transit) the Contracting States will allow transit in accordance with the customary conditions and reserves across their territorial waters."

whose vessels were exacted to keep liquor for passenger and crew consumption.¹ Nevertheless a 1923 decision of the U.S. Supreme Court upheld the seizure of alcoholic beverages from foreign vessels.² Some understanding with the other maritime powers was needed to reconcile outstanding differences. The seizure of 39 foreign vessels during the fiscal year of 1924-1925 made this abundantly apparent.³

A series of bilateral treaties were concluded which allowed the signatories' vessels to enter U.S. territorial waters with liquor on the condition that the liquor would be kept under seal. In return, it was recognised that the United States could enforce its customs regulations beyond three miles:

(Great Britain) . . . raise(s) no objection to the boarding of private vessels under the British flag outside the limits of territorial waters by the authorities of the United States for purposes of discerning whether the vessel was illegally attempting to import alcoholic beverages into the United States.⁴

¹ Jessup, Territorial Waters, p. 217.

² Cunard Steamship Co. et al v. Mellon et al (1923). A text of the decision can be found in Fenwick, Cases, p. 354.

³ Figures from U. S. Department of Justice, Annual Report of the Attorney General, 9 December 1926, cited by William Edward Masterson, Jurisdiction on Marginal Seas with Special Reference to Smuggling (New York: The Macmillan Co., 1929), p. 211.

⁴ United States and Great Britain, "Convention between the United States of America and Great Britain to Aid in the Prevention of Smuggling of Intoxicating Liquors into the United States, Washington, 23 January 1924," Article II, printed in Masterson, Marginal Seas, pp. 346-352.

To allay the fears of Britain, the Netherlands, Germany, Cuba and Panama concerning U.S. adherence to the three-mile territorial sea, the United States affirmed its support of the three-mile concept in each respective treaty:¹

The High Contracting Parties declare that it is their firm intention to uphold the principle that three marine miles extending from the coast line outwards and measured from the low water mark constitute the proper limits of territorial waters.²

One curious provision of the twelve treaties signed is that they do not include reference to a specific customs enforcement

¹Netherlands: Signed 21 August 1924, United States Treaty Series, No. 712, Instruments of Ratification exchanged 18 April 1925.

Cuba: Signed 4 March 1926, United States Treaty Series, No. 738, Instruments of Ratification exchanged 18 June 1926.

Germany: Signed 19 May 1924, United States Treaty Series, No. 694, Instruments of Ratification exchanged 11 August 1924.

Panama: Signed 6 June 1924, United States Treaty Series, No. 707, Instruments of Ratification exchanged 19 January 1925.

Cited by Jessup, Territorial Waters, pp. 293-294.

²United States and Great Britain, Article I. Treaties were concluded as well with Belgium, Denmark, France, Italy, Norway, Spain, and Sweden. Affirmation of the three-mile limit was not made. Instead, existing rights and claims were asserted:

Belgium: Signed 9 December 1925, Instruments of Ratification exchanged 3 March 1926.

Denmark: Signed 29 May 1924, United States Treaty Series, No. 693, Instruments of Ratification exchanged 25 July 1924.

France: Signed 30 January 1924, United States Treaty Series, No. 755, Instruments of Ratification exchanged 12 March 1927.

Italy: Signed 3 June 1924, United States Treaty Series, No. 702, Instruments of Ratification exchanged 22 October 1924.

Norway: Signed 24 May 1924, United States Treaty Series, No. 689, Instruments of Ratification exchanged 2 July 1924.

Spain: Signed 10 February 1926, United States Treaty Series, No. 799, Instruments of Ratification exchanged 17 November 1926.

Sweden: Signed 22 May 1924, United States Treaty Series, No. 698, Instruments of Ratification exchanged 18 August 1924.

Cited by Jessup, Territorial Waters, pp. 293-294.

area. Instead they recognised the integrity of a vessel "... at a greater distance from the coast of the United States, its territories or possessions than can be traversed in one hour by the vessel suspected of endeavoring to commit the offence."¹ This, as Jessup notes, far exceeds the twelve miles originally stipulated in the Tariff Act:

The fast motor-boats and sea sleds employed by the smugglers were capable of visiting a liquor ship hovering more than thirty miles off the coast, and of returning to land within an hour.² (*Italics added*).

This principle was challenged and upheld by a 1933 Supreme Court decision.³

The Roosevelt administration's abrogation of the 18th Amendment by the 21st Amendment on 5 December 1933, failed to restrict the powers conferred by both the Tariff Act and the treaties. These powers were reasserted by a U.S. District Court decision in 1934. The Anti-Smuggling Act of 1935 actually expanded the scope of America's customs jurisdiction. The Act of 1935 empowered the President to establish customs-enforcement areas (mobile zones having a potential spatial extent of 150 miles) simply upon the detection of an offshore hovering smuggling vessel!:

¹United States and Great Britain, Article II (3).

²Jessup, Territorial Waters, p. 290.

³The seizure of a vessel capable of only 10 knots, 11.5 miles from the U.S. coast, was declared illegal. Cook v United States (1933) reproduced in Herbert W. Briggs, ed., The Law of Nations: Cases, Documents, and Notes 2d ed. (New York: Appleton-Century-Crofts, Inc., 1952), pp. 362-371, cited by Swarztrauber, Three-Mile Limit, p. 144.

No customs enforcement area shall include any waters more than one-hundred miles from the place or immediate area where the President declares such vessel or vessels are hovering or are being kept . . . and . . . shall not include any waters more than fifty nautical miles outwards from the outer limit of customs waters.¹

U.S. Oceans Policy

The United States was not content with a three-mile limit to national jurisdiction for all purposes. It repeatedly asserted functional authority over the waters adjacent to its territorial sea, yet concurrently emphasised that the freedom of the seas and narrow limits to national jurisdiction were integral planks of America's oceans policy. At the 1930 Hague Conference the United States declared its support for the three-mile territorial sea and was adamant in its rejection of any proposal seeking to establish a contiguous zone adjacent to territorial waters.² It is true, as Colombos notes, that the U.S. attempted to legitimise its pretensions beyond three-miles

¹The Golmaccam (D. Maine, N.D. 1934). See Swarztrauber, Three-Mile Limit, p. 144. The smuggling of alcoholic beverages into the United States continued to be a problem after the implementation of the 21st Amendment. It has been estimated that the U.S. annually lost revenue exceeding \$30,000,000 due to smuggling related activities after 1933. Customs enforcement costs to counter the illegal importation of alcohol amounted to approximately eight million dollars yearly. The Anti-Smuggling Act of 1935 was designed to reduce enforcement costs, and restrict lost revenues. On this point see Myres S. McDougal and William T. Burke, The Public Order of the Oceans: A Contemporary International Law of the Sea (New Haven: Yale University Press, 1962), p. 588. See also "United States Anti-Smuggling Act, August 5, 1935," United States Congress, U.S. Statutes at Large 49, p. 517, cited by McDougal and Burke, Public Order, p. 588.

²League of Nations, Final Act, Conference for the Codification of International Law, The Hague, March-April 1930, reprinted in "Supplement," American Journal of International Law 20 (July 1930): 12-16.

by concluding a series of bilateral treaties with the major maritime powers:

Another striking illustration of the American adherence to the marginal belt of three-miles is to be found in the fact that when the United States government sought to extend its liquor prohibition laws . . . it sought and obtained the consent of the other maritime nations by the conclusion of . . . treaties . . .¹

Colombo's statement is misleading. It fails to mention that the bilateral treaties were concluded after the fact; treaties were not concluded with every maritime nation; and the American judiciary disputed whether a clear distinction between the territorial sea and high seas did, in fact, exist. This latter point is not to be taken lightly. The Church V. Hubbard case determined that a state can exercise its authority beyond its territory to protect itself from injury. That case was used as precedent in a 1922 court decision. In February 1922, a British vessel, the Grace and Ruby, was seized four miles from the U.S. coast on the ground that the vessel's pilot boat which was apprehended in U.S. territorial waters amounted to "constructive presence." The court resolved that:

The line between territorial waters and the high seas is not like the boundary between us and a foreign power. There must be, it seems to me, a certain width of debatable waters adjacent to our coasts . . .²

¹ C. John Colombos, "The Unification of Maritime International Law in Time of Peace," British Yearbook of International Law 21 (1944): 97.

² The Grace and Ruby (1922) in Fenwick, Cases, p. 501.

U.S. interwar oceans policy thus was riddled with contradictions. It supported the three-mile territorial sea concept. Yet the U.S. found it necessary to extend its own jurisdiction for functional purposes. It rejected proposals for a zone contiguous to the territorial sea at the Hague Conference. Yet the U.S. refers to certain "gray areas" or "debatable" waters in its Court decisions. Interwar practice set the tone for future inconsistency in America's oceans policy. There is no doubt that such contributed to an erosion of the territorial sea concept and, therefore, the free seas regime. Swarztrauber agrees:

For nearly every advantage or jurisdiction associated with the territorial sea, the United States has found it to be in her national interest to claim a jurisdiction greater than that afforded by the three-mile limit.

The inter war experiences and practice of the United States more than anything else, influenced the growth of the doctrine of the contiguous zone.¹

Why did the United States permit this erosion to take place? Why did Britain, as the champion of the free seas, not force the U.S. to rescind its claims?

Leadership

It has been suggested that implicit to regime maintenance is "leadership", a "willingness to forego short-term gains in

¹Swartztrauber, Three-Mile Limit, p. 240; p. 141.

bargaining to preserve the regime and that an actor is most likely to provide leadership when it sees itself as a major consumer of the long-term benefits produced by the regime."¹

(Italics added). In the pre-World War I oceans system Britain established and maintained the essential rules of the oceans issue area. It demanded exceptions to the rules only in times of war but was scrupulous in its enforcement of the free sea's rules even when such rules were contrary to its own domestic interests as the Consolidation Acts of 1876 would indicate. Britain was able to maintain a stable regime because it exercised ~~an~~ effective hegemonic leadership--"a situation in which one state is powerful enough to maintain the essential rules governing interstate relations, and is willing to do so."² But change in an issue area's underlying structure of power alters the original premises on which the regime rests. This was the case during the interwar period when the events surrounding the First World War transformed the unipolar oceans structure into a tripolar oceans system. No longer was Britain in a position to enforce universal compliance to the free seas regime. Even so, its staunch support of the regime remained unchanged.

Great Britain did not support the extension of littoral jurisdiction beyond three-miles for any reason. A statement by Sir Maurice Gwyer at the 1930 Hague Conference made this

¹ Robert O. Keohane and Joseph S. Nye, Power and Interdependence: World Politics in Transition (Boston: Little, Brown and Company, 1977), p. 44.

² Ibid., p. 230.

quite clear:

The British Delegation firmly supports Basis No. 3 - that is to say, a territorial belt of three miles without the exercise as of right, or any powers by the Coastal State in the contiguous zone, and they do that on three grounds, which I will express in as few words as I can: First, because in their view the three-mile limit is a rule of international law already existing and adopted by maritime nations which possess nearly 80% of the effective tonnage of the world; secondly, because we have already, in this committee adopted the principle of sovereignty over territorial waters; and thirdly, because the three-mile limit is the limit which is most in favour of freedom of navigation.¹ (*Italics added*).

The fact that Britain did not attempt to force the United States to rescind its interwar claims and actually concluded a bilateral agreement acknowledging U. S. customs authority beyond three miles, gives credence to the contention that a change in the underlying structure of power prevented Britain from forcing U. S. adherence to the free seas regime. If the stability of the regime was to be preserved, then the United States would have had to share the responsibility of leadership with Britain or at least not act in a way that would alter the rules of the game. This was contingent on the perception that it would be a major beneficiary of the regime structure:

. . . regime structure bears some of the characteristics of a collective good. It is costly to supply and is likely to be in short supply unless there is a preponderant state that sees itself as a major consumer or beneficiary. Other states tend to assume the position of free riders.²

¹League of Nations, Final Act, p. 14.

²Joseph S. Nye, "Ocean Rule Making from a World Politics Perspective," Ocean Development and International Law Journal 3 (1975):48. On this point see Charles P. Kindleberger, The World

This certainly applies to America's interwar position. As a free rider it was content to allow Britain to champion the free seas while at the same time, given its position of power relative to Britain, naval parity, the United States was able to demand and receive exceptions to the regime. Exceptions were demanded because the very nature of America's political system precluded the possibility of forming a definite coherent position on the Oceans Regime. America's oceans policy had to reconcile many competing domestic interests. Functional extensions of jurisdiction were made to appease the Justice Department, Prohibitionists, and the fishing and petroleum lobbies. They exerted a greater influence on Congress and the President than did the Navy and State Departments whose influence during the interwar period was negligible.¹ This does not mean that State and the USN were excluded from the policy formulation process. The fact that the three-mile territorial sea concept as such was not challenged by any interest is significant. Yet for some obscure reason, it was felt that the concept would not be eroded if functional jurisdiction extended beyond three miles providing the distinction between functional and territorial jurisdiction remained clear. However, by giving expression to those domestic interests calling

in Depression 1929-1939 (London: Allen Lane, The Penguin Press, 1973), pp. 291-308; and, Idem, Power and Money: The Economics of International Politics and the Politics of International Economics (New York: Basic Books, Inc., 1970).

¹On this point see Foreign Relations of the United States, 1935, vol. I (Washington, D.C.: U. S. Government Printing Office, 1953).

for extended offshore jurisdiction, the United States adversely affected its ability to assume leadership responsibilities after World War II when the underlying structure of power once again was unipolar with America as the preponderant naval power. This also created a situation where the United States' coastal interests expected further exceptions to the free seas regime.

Legitimacy

The failure of the United States to pursue its interwar leadership responsibilities notwithstanding, the free seas regime could have been strengthened by a successful resolution of the problems related to the regime's illegitimacy. The international community had an ideal opportunity to confer legitimacy on the regime through the instrument provided by the Hague Conference on the Progressive Codification of International Law (13 March-12 April 1930). One of the Conference's purposes was to codify the international customary law of the territorial sea. The free seas regime could have obtained a respectability and legitimacy lacking under British hegemonial leadership by having a plurality of nations participate in the codification process with their subsequent ratification of a convention. The Conference's 42 participants failed to do so. No consensus emerged on the ideal breadth of the territorial sea. Many argued for flexible limits. Others voiced support for the three-mile limit on condition that an additional zone contiguous to the territorial sea be established. The results

of a questionnaire submitted to 37 delegates on their "Position in Principle" revealed one thing for certain, the rigid free seas regime created by Great Britain was not perceived as sufficient for all purposes by a majority of nations. As Table 3 notes, even though a majority of states, 19, still voiced support for the three-mile territorial sea, 9 of them qualified their support with demands for a contiguous zone beyond.

The maritime powers, including Great Britain and the United States of America, insisted on an exclusive and absolute jurisdictional ambit of three miles. Their position was opposed by countries heavily influenced by littoral characteristics:

The chief pragmatic reasons for advocacy of the three-mile limit today are: (1) fullest range for operations of belligerent naval powers; (2) free fishing on foreign coasts; and (3) freedom of commerce on the seas-but this third reason could be satisfied by liberal exemptions of commerce from restrictions within a wider territorial zone under the limiting doctrine of innocent passage Indeed the utter failure of the sanguine effort under the auspices of the League of Nations at the Hague in 1930 to codify the international law of territorial waters was in large part due to irreconcilable fishing claims. Claims on the part of great states interested in fishing off foreign coasts, and therefore supporting the British doctrine limiting territorial control to a narrow sea zone of three miles and control over coast fisheries to territorial waters, opposed claims by other states to control of fishing off their coasts over a wider zone of the sea.¹

The Conference failed precisely because of this intransigence:

Had the British not been so fervent in their opposition to the contiguous zone, and had they been able to

¹ Joseph Walter Bingham, Report on the International Law of Pacific Coast Fisheries (Stanford, California: Stanford University Press, 1938), p. 9, cited by Swartztrauber, Three-Mile Limit, pp. 150-151.

TABLE 3

DELEGATE POSITIONS ON DESIRED LIMITS OF NATIONAL JURISDICTION

Extent of
Territorial Sea
in Nautical Miles

3

4

6

Australia
Canada
China
Denmark
Great Britain
India
Japan
Netherlands
Union of South
Africa
United States of
America

Iceland
Norway
Sweden

Brazil
Colombia
Italy
Romania
Uruguay
Yugoslavia

Plus
Contiguous
Zone

Belgium
Chile
Egypt
Estonia
France
Germany
Greece
Irish Free State
Poland

Finland

Cuba
Latvia
Persia
Portugal
Spain
Turkey

Total

19

4

12

SOURCE: Data derived from Swarztrauber, Three-Mile Limit,
p. 137.

accept . . . the three-mile limit, together with a contiguous zone of nine additional miles (the three-mile limit) might have been codified.¹

The reluctance of the Maritime powers to listen to the voice of the majority did little to remove the image that the free seas was an imposed, artificial and illegitimate regime. Many nations did not consider an absolute limit of three miles to be sufficient for fisheries, security, neutrality, customs, navigation and sanitary related issues. The adoption of the contiguous zone concept would have resolved many outstanding concerns. The Hague Conference provided a platform for the expression of previously unacceptable views, including the contiguous zone concept. The concept thereby acquired a certain legitimacy. America's interwar pretensions beyond three miles as well as its Convention with Great Britain and other maritime powers, gave credence to the idea that there should be a formal zone adjacent to the territorial sea. Consequently, the big loser at the Conference was not the contiguous zone concept but the three-mile territorial sea and a regime still under the control of the great powers:

One result of the 1930 Conference was, however, to cast a degree of doubt upon the notion that states could not lawfully claim a territorial sea broader than three-miles.²

This became more obvious as an increasingly large number of states asserted some kind of jurisdictional control beyond

¹ Swarztrauber, Three-Mile Limit, p. 138.

² McDougal and Burke, Public Order, p. 525. On the discussion of the contiguous zone concept see Ibid., pp. 565-729 passim.

2

4

three miles (Table 4).

Britain's naval superiority relative to other maritime powers declined during the First World War. A tripolar underlying structure emerged with the British sharing maritime ascendancy with Japan and the United States of America. Although all three had a vested interest in the continuance of the regime, its universal appeal was lost. Universality was replaced by fundamental exceptions in the form of pretensions for specific reasons. The regime could have remained strong and stable. The three preponderant naval powers could have pursued a collective leadership strategy, each sharing the responsibility of enforcing the regime's prescriptions, and foregoing the short-term benefits associated with extended jurisdiction. Even so the roots of the regime's instability, its lack of formal legitimisation, would have remained. On the other hand, legitimacy could have been conferred on the regime by having the League of Nations formally endorse its dicta. Neither course was followed. The United States demanded exceptions to the regime. Its partners in leadership had little choice but to accede. This weakened the regime considerably. An attempt to codify the international law of the sea failed because the nations most powerful at the underlying and current structural levels refused to give up their rule-making monopoly. Their clumsy efforts to block the will of the majority at the Hague Codification Conference, however, backfired. By discussing new jurisdictional tenets at an international forum, new expansionary concepts acquired

TABLE 4

MISCELLANEOUS STATE CLAIMS (1930-1940)*

State	Extent	Purpose of Claim	Means and Dates of Implementation
Bulgaria	6 miles	Territorial waters	Decree-Law of 25 August 1935
China	12 miles	Customs	Customs Preventive Law of 19 June 1934
Columbia	20 kilometers	Customs	Customs Law of 19 June 1931
Cuba	5 miles	Sanitation	General Law on Fisheries of 28 March 1936
Denmark	12 miles	Anti-smuggling	Act No. 316 of 28 November 1935
Dominican Republic	3 leagues	Naval security area	Law No. 55 of 27 December 1938
Ecuador	15 miles	Fishing	Decree No. 607 of 29 August 1934
El Salvador	12 miles	Police and security	Law of Navigation and Marine of 23 October 1933
Finland	6 miles	Customs	Customs Regulation of 8 September 1939
France	20 kilometers	Fishing (Indo-China)	Presidential Decree of 22 September 1936
Greece	6 miles	Territorial seas	Law No. 230 of 17 September 1936
Guatemala	12 miles	Port authority jurisdiction	Regulations of 21 April 1939
Honduras	12 miles	Territorial seas	Constitution of 28 March 1936
Hungary	12 miles	Anti-smuggling	Treaty with Finland of 23 November 1932
Iran	6 miles 12 miles	Territorial waters Marine supervision zone	Act of 19 July 1934
Italy	12 miles	Customs	Customs Law No. 1424 of 25 September 1940

TABLE 4 - Continued

State	Extent	Purpose of Claim	Means and Dates of Implementation
Lebanon	20 kilometers	Customs	Order No. 137/LR of 15 June 1935
Norway	10 miles	Customs	Royal Resolution of 28 October 1932
Poland	12 miles	Customs	Customs Law of 27 October 1933
Romania	6 miles	Territorial seas	Royal Decree No. 296 of 7 February 1934
Syria	20 kilometers	Customs	Customs Code of 15 June 1935
United Kingdom	1 hour's sailing distance	Customs	Treaty with Finland of 13 October 1933
U.S.S.R.	12 miles	Sovereignty over air space	Air Code of 7 August 1935+
Venezuela	12 miles	Security, customs, sanitation	Presidential Decree of 15 September 1939

*Data in this table is from United Nations, Laws and Regulations on the Regime of the High Seas, pp. 53-168, passim; and United Nations, Laws and Regulations on the Regime of the Territorial Sea, pp. 45-46.

+This Code provided for Soviet sovereignty in the air space over her maritime belt, which had been fixed earlier at twelve miles.

SOURCE: Swarztrauber, Three-Mile Limit, p. 148.

a recognition they otherwise would not have enjoyed. This, combined with continuing American demands for exceptions to a rigid regime, created expansionary pressures that almost were impossible to contain.

However, the regime did retain its essential character. Pretensions were limited. A majority of nations still accepted the concepts of narrow limits to national jurisdiction and free seas beyond. What they were not prepared to accept was a restrictive, inflexible approach to national jurisdiction. The regime lost its rigidity and universality. The regime no longer was pure, thus what existed during the interwar period and certainly by 1930 was a strong quasi regime in an apparent state of transition. Such a transition was spawned by the continuing illegitimacy and insufficient leadership of the second period.

CHAPTER V

PERIOD THREE: A WEAK QUASI-REGIME--1945-1960

The free seas regime continued its decline after the end of the Second World War. Once again war altered the underlying structure of power creating a bipolar overall distribution of power capabilities and a unipolar underlying structure in the oceans policy issue area. The United States emerged as the undisputed champion of the free seas regime commanding 1,060 naval vessels compared to 605 British, 168 Soviet and 78 French. Its commercial preponderance was more striking. Out of a world total of 71 million gross tons the U.S. controlled 38.6 million, more than double that of the British Commonwealth, which altogether controlled a total tonnage of 16 million.¹ America had both the strength and apparent interest to champion the regime. Yet it was unwilling to assume this role.

The petroleum, fishing, and government departmental interests that successfully had pressed for extended jurisdiction during the interwar period expected nothing less than an absolute littoral orientation in U.S. oceans policy. Their overriding influence in the decision-making apparatus resulted in the

¹ Sayre A. Swartztrauber, The Three-Mile Limit of Territorial Seas (Annapolis, Maryland: Naval Institute Press, 1972), pp. 170-171.

United States initiating an offshore claims race by making two of the most expansive claims in history, the Truman Proclamations of 1945. At the same time the U.S. reaffirmed its commitment to the three-mile territorial sea. Other nations could not entertain narrow limits to national jurisdiction while such inconsistency existed in the system leader's national oceans policy. Imbroglia in U.S. oceans policy was accompanied by limitations on America's ability to police the activities of other coastal nations. The manifestation of complex interdependence conditions compounded America's failure to adopt a systemic role.

Without effective leadership the peacetime Oceans Regime continued to be eroded, teetering precariously on the brink of anarchy. Central to its ultimate demise was its continuing illegitimacy. Efforts to establish precise limits to national jurisdiction were no more successful than had been those made at the Hague. They actually may have accelerated the regime's inevitable downfall. Oceans rule-making no longer was controlled by the system's major actors. Such rule-making was captured instead by Coastal State Expansion.

Unilateral Leadership

The Truman Proclamations

The Fisheries Proclamation

In the 1930s Japan responded to rising domestic demand for food protein by expanding its fishing fleet. Technological

advance in the fishing industry enabled fishing vessels to fish efficiently at greater distances and for longer periods of time. This, combined with constraints placed on Japanese activities in the Soviet salmon fishery, forced Japan to increase its salmon catch off the Alaskan coast in the Bristol Bay area. The escalated fishing effort seriously depleted the area's salmon stock between the years of 1936 and 1938.¹ The State Department strongly urged the Japanese government to deter its nationals from fishing the high seas adjacent to U.S. waters under threat of unilateral action. The Japanese conformed to a temporary ban in 1938.²

This temporary solution was not sufficient. It eventually was replaced by a more permanent solution in 1945: "Policy of the United States With Respect to Coastal Fisheries in Certain Areas of the High Seas." The Proclamation cited concern over the inadequacy of current fishery management schemes to protect a resource vital to coastal communities from the adverse affects of technological development:

Whereas for some years the Government of the United States of America has viewed with concern the inadequacy

¹For background material see Joseph W. Bingham, "The Continental Shelf and the Marginal Belt," American Journal of International Law 40 (1946): 175; Edward J. Cosford, "The Continental Shelf 1910-1945," McGill Law Journal 4 (1958): 245-256; and "Formulation of United States Policy on the Resources of the Continental Shelf and on Coastal Fisheries," Foreign Relations of the United States, (Washington D.C.: U.S. Government Printing Office, 1945) 2: 1481-1520.

²"A note sent by State Department to Japanese Government," State Department Press Release of 25 March, 1938, cited by Lawrence Juda, Ocean Space Rights: Developing U.S. Policy (New York: Praeger Publishers, 1975), p. 18.

of present arrangements for the protection and perpetuation of the fishery resources contiguous to its coasts . . . ; and

Whereas such fishery resources have a special importance to coastal communities . . . ; and

Whereas the progressive development of new methods and techniques contributes to intensified fishing over wide areas and in certain cases seriously threatens fisheries with depletion; and

Whereas there is an urgent need to protect coastal fishery resources from destructive exploitation, having due regard to conditions peculiar to each region and situation . . .

The Proclamation empowered the Government of the United States to:

. . . establish conservation zones in those areas of the high seas contiguous to the coasts of the United States wherein fishing activities have been or in the future may be developed and maintained on a substantial scale. Where such activities have been or shall hereafter be developed and maintained by its nationals alone, the United States regards it as proper to establish explicitly bounded conservation zones in which fishing activities shall be subject to the regulations and control of the United States. Where such activities have been or shall hereafter be legitimately developed and maintained jointly by nationals of the United States and nationals of other States, explicitly bounded conservation zones may be established under agreements between the United States and such other States; and all fishing activities in such zones shall be subject to regulation and control as provided in such agreements.

Similar rights for other states were recognised and the freedom of the high seas was affirmed:

The right of any State to establish conservation zones off its shores in accordance with the above principles is conceded, provided that corresponding recognition is given to any fishing interests of nationals of the United States which may exist in such areas. The character as high seas of the areas in which such conservation zones are established and the right to their free and unimpeded navigation are in no way thus affected.¹

¹"Presidential Proclamation No. 2668, Concerning the Policy of the United States With Respect to Coastal Fisheries

As a press release accompanying the Proclamation acknowledged, the Proclamation was a direct result of the concern expressed over the excessive exploitation of the Alaskan salmon fishery:

As a result of the establishment of this new policy, the United States will be able to protect effectively for instance, its most valuable fishery, that for the Alaska salmon.¹

The effort to establish fishery conservation zones is not controversial if the zones are co-designed and co-administered by all countries fishing a particular area. A conservation zone becomes controversial when a state unilaterally asserts its jurisdiction over an area of the high seas without the consent of all concerned states. The Fisheries Proclamation went partially in this direction. Agreements could be concluded with those countries historically exploiting an affected area. New countries wishing to fish an established zone could do so only with the consent of the traditional users and on terms dictated by them. Furthermore, any areas opened by U.S. nationals, or which had the potential to be opened in the future, would be subject to conservation regulations established by the Government of the United States. The U.S. could prohibit newcomers from fishing the zones and

in Certain Areas of the High Seas of September 28, 1945," reproduced in Juda, Ocean Space Rights, pp. 153-154. A detailed analysis of both Proclamations is found in Marjorie M. Whiteman, Digest of International Law, U.S. Department of State Publication 7825 (Washington, D.C.: Government Printing Office, 1965), 4: 752-758; 829-838.

¹White House Press Release of 28 September 1945, "The Natural Resources of the Continental Shelf," reproduced in Juda, Ocean Space Rights, p. 156.

bind them to follow its regulations irrespective of their desire to do so. In essence, the Proclamation was a claim to exclusive authority over areas of the high seas contiguous to the United States developed by or likely to be developed by U.S. nationals. .

Another Proclamation, "Policy of the United States With Respect to the National Resources of the Subsoil and Seabed of the Continental Shelf," was released simultaneously with the Fisheries Proclamation. It, too, unilaterally asserted jurisdiction over areas beyond the American territorial sea.

Proclamation on the Continental Shelf

The chain of events leading to the Fisheries Proclamation was not the sole factor which brought the continental shelf to the attention of U.S. policy-makers. The potential non-living resource wealth of the shelf area was of great interest to many Americans. A geological survey conducted by the Interior Department in 1938 revealed the probability of extensive oil deposits in areas beyond territorial waters off California and the Gulf coast.¹ Both President Roosevelt and the Navy were aware of the great resource potential and expressed a concern over the ability of existing domestic reserves to meet future demand.² Roosevelt went so far as to suggest he "issue

¹"Memorandum for the Secretary of the Interior from the Geological Survey," dated 23 May 1940, in the files of the Interior Department, cited by Ibid., p. 19, note 17.

²Ibid., p. 14. Concern over the inability of domestic reserves to meet demand had been expressed as far back as 1920:

an Executive order setting up naval oil reserves on the coast beginning with the shore line and extending halfway across the ocean . . .¹ Anxiety over future oil supplies was a major force in turning American interest beyond the three-mile limit.

This anxiety led the U.S. government to consider measures encouraging research into oceans resources and exploitation of areas of the high seas. Business interests were reluctant to make expenditures on research and development unless their operations beyond American territory were protected and unless exclusive rights were granted for exploration and exploitation. Government had to extend its authority beyond the territorial sea in order to grant concessions and rights and to guarantee protection.² Marjorie Whiteman points out that the activities of foreigners beyond three-miles were also of concern:

(The United States has a sufficient basis) . . . to assert necessary control over . . . operations off the coasts of the United States to guard against the depletion of . . . mineral resources and to regulate, from the point of view of security, the activities of foreigners in proximity to the coast . . . (because the continental shelf is) . . . an extension of the

"We should expect, unless consumption is slowed, to find ourselves dependent on foreign petroleum deposits to the tune of 150 to 200 million barrels a year - perhaps even by 1925 . . . Add to this the probability that in five years, perhaps even in three, production will have begun to lag because of exhaustion of reserves." David White, "The Petroleum Resources of the World," The Annals (May 1920) cited by Bertrand de Jouvenel, "An Economic View of Marine Problems," in Elisabeth Mann Borgese and David Krieger, eds. The Tides of Change: Peace, Pollution, and Potential of the Oceans (New York: Mason Charter, 1975), p. 13.

¹ Juda, Ocean Space Rights, p. 13.

² Jouvenel, "Economic View," p. 11.

landmass of the coastal nation and thus naturally appurtenant to it.¹

Extended jurisdiction also would solve the problem of how to treat oil produced from the continental shelf beyond U.S. borders. Technically, such "imported" oil would be subject to quotas and entry duties even though it originated on America's continental shelf.²

Another consideration causing the federal government to contemplate an extension of its authority over the continental shelf was the pretensions of individual states. Some action had to be taken to prevent states such as Louisiana and Texas from claiming exclusive rights to shelf resources. Both states are littoral to an oil-rich continental shelf extending 50 to 130 miles into the Gulf of Mexico. Louisiana and Texas employed the rationale of increased cannon range to legitimise claims to 24 and 27 miles respectively:

Section I. Be it enacted by the Legislature of Louisiana, that the gulfward boundary of the State of Louisiana is hereby fixed and declared to be a line located in the Gulf of Mexico parallel to the three-mile limit as determined according to said ancient principles of international law, which gulfward boundary is located twenty-four marine miles further out in the Gulf of Mexico than the said three-mile limit.

Since the said three (3) mile limit was so established as the seaward boundary of each sovereign State, modern cannons have been improved to such an extent that now many cannon shoot twenty-seven (27) miles and more, and by the use of artillery located on its shores a State can now make its authority effective at least twenty-seven (27) marine miles out to sea . . .³

¹Whiteman, Digest, p. 754.

²Jouvenel, "Economic View," p. 12.

³"Act No. 55, to declare the sovereignty of Louisiana along its seacoast and to fix its present seacoast boundary and ownership, .

On June 5, 1943, the Secretary of the Interior, Harold L. Ickes, sent a letter to President Roosevelt proposing an extension of authority to include the continental shelf adjacent to the territorial sea:

The Continental Shelf extending some 100 or 150 miles from our shores forms a fine breeding place for fish of all kinds; it is an excellent hiding place for submarines; and since it is a continuation of our continent, it probably contains oil, and other resources similar to those found in our States.

I suggest the advisability of laying the groundwork now for availing ourselves fully of the riches in this submerged land and in the waters over them. The legal and policy problems involved, both international and domestic, are many and complex. In the international field, it may be necessary to evolve new concepts of maritime territorial limits beyond three miles . . .

By 1938 President Roosevelt had realised that international law would have to be modified to accommodate new realities:

30 June 1938; "Act Declaring the Sovereignty of Texas along its Seacoast, 16 May 1941," United Nations, Laws and Regulations on the Regime of the High Seas, (U.N. Pub. ST/LEG/SER/B/I, 1951) (New York: United Nations, 1951) 1: 114-115, p. 41 citing Acts Passed by the Legislature of the State of Louisiana (1938), p. 169, and citing General and Special Laws of the State of Texas, 47th Legislature (1941) chapter 268, p. 454. Note that California's State Constitution of 1849 provides for jurisdiction out to three miles from the coast. Constitution of the State of California, Article XXI, Section I. 1849, reproduced in United Nations, Laws and Regulations on the Regime of the Territorial Sea, (U.N. Pub. ST/LEG/SER.B/6) (New York: United Nations, 1957), pp. 56-57. All three states failed to have their claims upheld in the U.S. Supreme Court. The Court maintained that only the Federal Government can claim authority over the non-living resources found beyond the low-water mark. See United States v. California (1947); United States v. Louisiana (1950); and United States v. Texas (1950) cited by Whiteman, Digest, pp. 769-793. In 1953, the United States Government gave the States rights over the seabed out to three miles, and confirmed federal rights beyond. See "The Submerged Lands Act, 22 May 1953," cited by Ibid., pp. 783-784. The act was later interpreted by the Supreme Court to grant Texas and Florida their historic claims to a three-league limit. See Swarztrauber, Three-Mile Limit, p. 238.

¹ Secretary of the Interior Harold L. Ickes, letter to President Roosevelt of 5 June 1943, in Whiteman, Digest, p. 946, citing Department of State, file 811.0145/367.

I recognise that new principles of international law might have to be asserted but such principles would not in effect be wholly new, because they would be based on the consideration that inventive genius has moved jurisdiction out to sea to the limit of inventive genius.¹

Ickes became a strong proponent for extended American rights over offshore areas and was instrumental in the formulation of the Continental Shelf Proclamation. The Interior Department's keen interest in an extended regime stems from its desire to administer the new territory.² The State Department, on the other hand, held serious reservations over claims beyond three miles:

First, it would be difficult to obtain acceptance from other states of a claim to territorial waters far exceeding the generally observed three-mile limit. Second, such a claim by the United States would encourage other states to make similar claims of their own, thus leading to interference with normal American fishing operations in places such as Mexico and Cuba (shrimp) and the west coast Latin American states (tuna). Third, wider territorial seas would make it more difficult for the United States Navy since unfriendly ships could take refuge in neutral territorial waters of correspondingly wide extent. Fourth, there was really no need to claim sovereignty when all that was called for was control over the resources of the seabed of the continental shelf.³

The result was a compromise document reflecting the interests of the Departments of State and Interior and, to a lesser extent, the United States Navy. The Proclamation on the Continental Shelf

¹ "Memorandum from President Roosevelt to the Secretary of the Interior," dated 1 July 1939, in the files of the Interior Department, file no. 2/208, pt. 2, cited by Juda, Ocean Space Rights, p. 13.

² Indeed, an executive order released with both Proclamations mandated that the Secretary of the Interior be given the authority to exercise his department's jurisdiction and control over the natural resources of the shelf. Executive Order 9633 of 28 September 1945, cited by Ibid., p. 40, note 7.

³ Ibid., p. 16.

cited the need to discover new supplies of non-living resources which were to be found on the continental shelf adjacent to the coast of the United States of America.

Technological advance would allow the practicable utilisation of such resources. Therefore "jurisdiction over these resources is required in the interest of their conservation and prudent utilisation when and as development is undertaken." Since the resources of a continental shelf are found in an area "naturally appurtenant" to the land-mass of the United States, it is logical that the U.S. should establish "measures to utilise or conserve these resources." Thus it was declared that:

. . . the Government of the United States regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control . . . The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected.¹

The Truman Proclamation was the first claim by a major power over the continental shelf. It asserted a new principle

¹"Presidential Proclamation No. 2667, Policy of the United States With Respect to the Natural Resources of the Subsoil and Seabed of the Continental Shelf of September 28, 1945," reproduced in *Ibid.*, pp. 151-152. Note that the Proclamation failed to define the continental shelf and did not indicate the shelf's extent. A White House press release, issued simultaneously, defined the concerned area as: ". . . submerged land which is contiguous to the continent and which is covered by no more than 100 fathoms (600 feet) of water . . ." Reproduced in *Juda, Ocean Space Rights*, p. 156. This covers an area extending from 20 to 250 miles on the east coast, and from 1 to 50 miles on the west coast of the United States. *Whiteman, Digest*, p. 760, citing *Annual Report of the Secretary of the Interior. Fiscal Year Ended June 30, 1945*, pp. IX-X. Neither 2667 nor 2668 ever were implemented by a piece of legislation, nor were any fishery conservation areas ever established. On this point see Hilary K. Josephs, "Japanese Investment in the U.S. Fishing Industry and its Relation to the Two-Hundred Mile Law," *Marine Policy* 2 (October 1978): 257.

of international law--that areas "naturally appurtenant" to the land-mass of a coastal state should be managed by that state. The Proclamation represented an acquisition of 700,000 square miles.¹ Its validity as a legal precedent was enhanced by the fact that not one nation state protested its content.² Countries such as the Soviet Union, Britain, Canada, Mexico, the Netherlands, Norway, France, Iceland, Denmark, Cuba and Portugal were notified of the proposed proclamations without raising the diplomatic protest that one might have expected.³ The American government was careful to ensure that the proclamations would satisfy most concerned domestic and foreign interests:

. . . Thus American industry was to be provided the legal stability needed to encourage the exploitation of . . . minerals. At the same time, the waters above the continental shelf were to keep their legal character as high seas thereby allowing unrestricted navigation and overflight. Assuming that other states made similar claims on their own behalf, there would be no detrimental effect upon the uses of the seas so important to the United States Navy. Moreover, the rights of American fishermen who operated off the coasts, but beyond territorial waters of other states, would not be violated.⁴

U.S. policy makers tried to distinguish between different strata of oceanspace, claiming that different rules should apply

¹ Danny M. Leipziger and James L. Mudge, Seabed Mineral Resources and the Economic Interests of Developing Countries (Cambridge, Mass.: Ballinger Publishing Company, 1976), p. xvii.

² Jouvenal, "Economic View," p. 9.

³ Juda, Ocean Space Rights, p. 17. Britain's failure to protest America's pretension may be attributed to, in part, the "Treaty Relating to the Submarine Areas of the Gulf of Paria," concluded on behalf of Trinidad and Tobago with Venezuela on 26 February 1942. See J.-G. Castel, International Law: Chiefly as Interpreted and Applied in Canada (Toronto: Butterworths, 1976), p. 299.

⁴ Ibid., p. 21.

to different strata. They sought to draw a distinction between the continental shelf and its superadjacent waters and were conscious of the fact that the proclamations could be misinterpreted as an erosion of the high seas. It was for these reasons that the Proclamations were released as separate documents, affirmed the freedom of the seas and did not claim sovereignty over the continental shelf.

International Response

Consequently, many used the Proclamations as precedent for claims beyond three miles. A failure to distinguish between sovereignty and jurisdiction was typical of the many state pretensions following the Truman Proclamations of 1945. The large number of claims and their reference to the precedence of the Proclamations make the Truman Proclamations a turning point in oceans politics and another significant erosion of the free seas regime.¹ Many of these claims either had a Latin American regional configuration or were influenced by the Soviet Union.²

¹In the period between 1945 and 1950, 39 unilateral claims were made over some aspect of oceans space beyond the three-mile territorial area. Of those claims, 25 were related to the continental shelf. Six were claims to sovereignty linking the continental shelf to its superadjacent waters. U.S. Department of State, National Claims to Maritime Jurisdictions (Washington: Bureau of Intelligence and Research, 1981), passim.

²The reasons for the regional grouping, and the motivations behind the Latin American claims are discussed in Karin Hjertonnson, The New Law of the Sea: Influence of the Latin American States on Recent Developments of the Law of the Sea - A Study of the Law on Coastal Jurisdiction as it has Emerged in Latin America and its Impact on Present and Future Law (Leiden: A. W. Sijthoff, 1973), passim.

Latin America

One month following the Proclamations Mexico issued two very similar declarations which made reference to the Truman Proclamations.¹ In 1946, Argentina referred to both the American and Mexican proclamations as precedents to justify a far more expansive declaration:

Whereas . . .

(T)he Governments of the United States of America and of Mexico have issued declarations asserting the sovereignty of each of the two countries over the respective peripheral epicontinental seas and continental shelves . . . , It is hereby declared that the Argentine epicontinental sea and continental shelf are subject to the sovereign power of the nation . . .²

This was a clear misrepresentation of both the American and Mexican claims. Neither had asserted sovereignty over resources, claiming "jurisdiction and control" instead. Nor did they make claims over the continental shelf and overlying waters in their entirety, opting for functional authority over particular areas and resources. Furthermore, they did not attempt to establish a link between the shelf and its superadjacent waters. Nevertheless, the Proclamations were used to justify many pretensions beyond the three-mile territorial sea.

Chile was quick to follow the Argentine lead and proclaimed:

its national sovereignty over all the continental shelf adjacent to the continental and island coasts of its

¹"Presidential Declaration with Respect to Continental Shelf, 29 October 1945," in United Nations, Laws and Regulations on the Regime of the High Seas, (U.N. Pub. ST/LEG/SER/B/I, 1951) (New York: United Nations, 1951), p. 13.

²"Decree No. 14, 708 concerning National Sovereignty over Epicontinental Sea and the Argentina Continental Shelf, 14 October 1946," in *Ibid.*, pp. 4-5.

national territory, whatever may be their depth below the sea . . . (and) over the seas adjacent to its coasts whatever may be their depths, and within those limits necessary in order to reserve, protect, and exploit the natural resources of whatever nature found on, within and below the said seas.

The Chilean claim encompassed "all the seas contained within the perimeter formed by the coast and mathematical parallel projected into the sea at a distance of 200 nautical miles from the coasts of Chilean territory."¹ Peru and Costa Rica also made references to the American, Mexican and Argentine actions in their respective declarations.² Peru and El Salvador proclaimed 200-mile territorial seas in 1947 and 1950 respectively. Ecuador asserted a comparable claim in 1952; Honduras in 1951. On 19 August 1952, Chile, Ecuador and Peru issued a joint declaration, the "Santiago Declaration on the Maritime Zone," stipulating that:

to each one of them belongs the sovereignty and exclusive jurisdiction over the seas that washes their respective coasts, up to the minimum distance of two-hundred (200) nautical miles from the said coasts.³

In addition to the Latin American declarations, many socialist and newly independent states made serious incursions

¹"Chilean Presidential Declaration of 23 June 1947," in United Nations, Laws and Regulations on the Regime of the Territorial Sea, U.N. Pub. ST/LEG/SER.B/6 (New York: United Nations, 1957), p. 4.

²"Peruvian Presidential Decree No. 781 of 1 August 1947; Costa Rican Regulation No. 363 of 11 January 1949 as amended by Decree No. 739 of 4 October 1949," in United Nations, Territorial Sea, p. 39, p. 462.

³Article VI. The Declaration is reproduced in S. Lay, R. Churchill, and M. Nordquist, eds., New Directions in the Law of the Sea: Collected Papers (Dobbs Ferry, N. Y.: Oceana Publications Inc., 1973), pp. 231-234. The treaty was ratified by all signatories and acceded to by Costa Rica.

into the free seas regime between the years 1950 and 1960. The Soviet Union was the main protagonist behind these claims.

The Soviet Influence

By the end of the Second World War the Soviet Union possessed an insignificant merchant marine, most of which was composed of U.S. lend-lease assets. Its navy was coastal in nature. Understandably, Soviet maritime inferiority prompted it to adopt a series of extensions designed to provide a secure coastal belt. A twelve-mile territorial sea originally proclaimed in 1927 was reasserted. The passage of foreign warships through Soviet territorial waters was not considered innocent.¹

The Soviet Union's closing of its littoral seas to all states save those bordering their waters represented a further extension of jurisdiction. Historic claims were used to close the White Sea and Cheskaya Gulf (1921), the Gulf of Riga and the Sea of Azov (1947), the Kara, Laptev, East Siberian and Chukchi Seas (1951), Peter the Great Bay (1957) and the Sea of Okhotsk (1956).²

The import of the Soviet extensions of jurisdiction rests on the fact that most socialist states were eager to follow the Soviets' lead. Bulgaria and Romania proclaimed 12-mile territorial seas in 1951, Albania, 10 miles in 1952 and China, 12 miles in

¹Swarztrauber, Three-Mile Limit, pp. 125-126.

²U.S. Department of State, National Claims to Maritime Jurisdiction, 3rd. rev. (Washington, D.C.: Office of the Geographer, 1975), pp. 177-178.

1958. The Soviet Union also encouraged other states, particularly newly independent countries, to reject the limitations imposed by a three-mile territorial sea. It espoused a view that "the breadth of the territorial sea shall be determined by the national legislation of each coastal State." The already suspicious attitude of developing and newly independent states towards an international law created by their former colonial masters was reinforced by the Soviet Union's encouragement that they adopt new boundaries better reflecting their interests and needs.¹

Ineffective Enforcement

The United States protested most activities perceived as harmful to the free seas and the concept of narrow territorial jurisdiction. It vigorously lobbied to have the Inter-American System and the International Law Commission endorse its approach to regime construction. However, there is not one case before 1960 where the U.S.A. successfully used force to compel adherence.

One of the first protests registered in the post-war period concerned Argentina's pretension to sovereignty over its

¹United Nations, Conference on the Law of the Sea, pp. 31-32, quoting the Soviet delegate, Mr. Tunkin, 12 March 1958 cited by Swarztrauber, Three-Mile Limit, p. 180. On this point see S. Prakash Sinha, New Nations and the Law of Nations (Leydon: A. W. Sijthoff, 1967).

continental shelf and superadjacent waters:

To have made no protest would have been viewed as acquiescence in and acceptance of the Argentine claim. Argentina was informed that the principles underlying its declaration differed in large measure from those of the United States proclamations and that they appeared to vary with generally accepted principles of international law. The United States government, therefore, put Argentina on notice that it reserved rights and interests in the face of the Argentine decree and of any measures designed to give it effect.¹

Similar notes of protest were sent to Peru, Chile, El Salvador and to the signatories of the Declaration of Santiago, the CEP States.² All protests reserved existing rights and stressed the illegality of claims to sovereignty beyond three miles.

The United States also carried its protests to the Inter-American System, used as well by the Latin American territorialists to legitimise their claims. Most of the debate with respect to oceans related issues occurred in the Inter-American Council of Jurists (IACJ), created as a part of the Organisation of American States in 1948. In June 1950, at Rio de Janeiro, the IACJ requested the Inter-American Juridical Committee (IAJC) to prepare a study on the territorial sea. The result was a "Draft Convention on Territorial Waters and Related Questions" adopted in June of 1952 by a vote of 4 to 3, with Brazil, Columbia and the United States dissenting. Mexico, Peru, Chile and Argentina voted in favour of the draft articles which recognised a state's right to implement a 200-mile economic zone and to assert its sovereignty over the entire continental shelf, its superadjacent waters and airspace:

¹ Reproduced in Juda, Ocean Space Rights, pp. 115-116.

² Ibid.

1. The signatory States recognise that present international law grants a littoral nation exclusive sovereignty over the soil, subsoil, and waters of its continental shelf, and the air space and stratosphere above it, and that this exclusive sovereignty is exercised with no requirement of real or virtual occupation.

2. The signatory States likewise recognise the right of each of them to establish an area of protection, control, and economic exploitation, to a distance of two hundred nautical miles from the low-water mark along its coasts and those of its island possessions, within which they may individually exercise military, administrative, and fiscal supervision over their respective territorial jurisdictions.¹

A third meeting of the IACJ convened in Mexico City, January 1956. It adopted the "Principles of Mexico on the Juridical Regime of the Sea" by a vote of 15 to 1 with 5 abstentions. The vote was opposed by the United States, with Bolivia, Colombia, Cuba, Dominican Republic and Nicaragua abstaining. The Principles pointed to the inadequacies of the three-mile limit. Their adoption represented a defeat for the American position on the territorial sea. The resolution itself stated that:

1. The distance of three miles as the limit of territorial waters is insufficient, and does not constitute a general rule of international law. Therefore, the enlargement of the zone of the sea traditionally called "territorial waters" is justifiable.

2. Each state is competent to establish its territorial waters within reasonable limits, taking into account geographical, geological, and biological factors as well as economic needs of its population, and its security and defense.²

The adoption of these Principles prompted the United States to press for the acceptance of a more moderate position at the "Inter-American Specialised Conference on the Conservation of

¹ Reproduced in part in Barry Buzan, Seabed Politics (New York: Praeger Publishers, 1976), pp. 15-16.

² Ibid., p. 17.

of Natural Resources: The Continental Shelf and Marine Waters" held at Ciudad Trujillo, 15 to 28 March, 1956. At this conference agreement was reached on a legal definition of the continental shelf:

The seabed and subsoil of the continental shelf, continental and insular terrace, or other submarine areas, adjacent to the coastal state, outside the area of the territorial sea, and to a depth of 200 meters or, beyond that limit, where the depth of the superadjacent waters admits of the exploitation of the natural resources of the seabed and subsoil, appertain exclusively to that state and are subject to its jurisdiction and control.¹

The agreement was supported by the United States and represents a modification of both the American and Latin American positions. It is significant to note that no mention of sovereignty is made, referring instead to "jurisdiction and control." In addition, the definition's exploitability criterion is at variance with the geologically defined continental shelf of the Continental Shelf Proclamation. The provisions of Ciudad Trujillo definitely are more moderate than those of Mexico City. The reason why, as Juda notes, is that "the United States brought very intense diplomatic pressure to bear on these states during the short interval between the Mexico City and Ciudad Trujillo Conferences."²

While the United States attempted to gain acceptance of its views at a hemispheric level, it simultaneously was striving to have them accepted at an international level within the context of the International Law Commission, concerned with the preparation

¹The resolution is reproduced in Shigeru Oda, The International Law of the Ocean Development (Leiden, Sijthoff, 1972), p. 346-347.

²Juda, Ocean Space Rights, p. 36.

of a set of draft articles on the regime of the high seas.¹

The U.S. reaffirmed its historical support for the three-mile territorial sea concept and repeatedly stressed that its continental shelf and fisheries proclamations did not interfere with the freedom of the high seas. The ILC's draft treaty on the law of the sea does not seriously depart from the U.S. position. Sovereignty claims beyond three miles were rejected as well as attempts to link the continental shelf with its superadjacent waters. Buzan notes that "The ILC's proposals were a major landmark in seabed politics. They demonstrate that the type of claim pioneered by the United States in 1945 was a widely acceptable extension of coastal state jurisdiction."²

Despite its protests and conference manoeuvres, the United States failed to persuade the Latin American states to renounce their claims. They, in turn, vigorously sought to bring newly claimed areas under effective national control. Many vessels were seized and fined for illegal activity in the disputed areas;

¹The International Law Commission (ILC) was created by the United Nations to undertake the codification of international law by preparing draft conventions to form the basis for negotiations at international conferences. The Commission's 15 members for the years 1949 to 1956 were: Panama and Columbia (1949-1953), Cuba and Bolivia (1954-), Mexico, France, U.S.S.R., U.S.A., U.K., Brazil, Taiwan, Syria, India, Netherlands, Sweden, Greece, and Czechoslovakia. The ILC produced three sets of draft articles -- 1951, 1953, 1956 -- the latter being used as the preparatory document for the 1958 United Nations Conference on the Law of the Sea. See various volumes of Yearbook of ILC. U.N. Doc. No. A/CN.4 Ser.A/1950-1956.

²Buzan, Seabed Politics, p. 25.

a good many of those vessels were under American registry.¹ Some of the more notable seizures occurred off: Mexico, February 1953 (U.S. shrimp boats within 9 miles of the Mexican coast); Panama, July 1953 (Tuna Clipper Star Crest); Ecuador, 1953 (4 tuna vessels).² All seizures provoked strong American diplomatic rebuke.³ One case that attracted wide international attention, was the seizure of Aristotle Onassis's German based, Panamanian registered whaling fleet off the Peruvian coast on 15 November 1954. Five of eleven vessels were captured, two 160 miles off the coast of Peru and three, 300 to 364 miles off the coast. (The latter were seized under the pretext of hot pursuit originating from within Peru's 200-mile Maritime Zone). Even though the vessels were not of U.S. registry, the United States was vocal in its protest of an action that was, in its view, blatant interference with the operation of vessels on the high seas.⁴

Constraints

The cases illustrate the inability of the United States of

¹For a list of tuna vessels captured within Latin American zones of jurisdiction beyond three miles see: U.S. Congress Congressional Record, 90th Congress, 2nd Session 28 March 1968 at 8093,8094, "List of Seizures, Detentions, and other Harassments of Tuna Vessels, (1951-1967)," prepared by the American Tunaboat Association.

²Swarztrauber, Three-Mile Limit, pp. 184-186.

³On seizures of U.S. vessels and U.S. reactions see Herman Phleger, "Recent Developments Affecting the Regime of the High Seas," Department of State Bulletin 32 (1955): 934-940.

⁴Whiteman, Digest, pp. 1062-1070.

America, the preponderant naval power of the third period, to prevent other coastal states (particularly Latin American countries which were in an area of alleged American hegemony) from effectively challenging pretensions of sovereignty beyond the three-mile territorial sea. Such was this inability that vessels of U.S. registry were subjected to indiscriminant harassment and seizure. What contributed to this situation?

Alliance Relationships

Keohane and Nye, Nye, Swarztrauber, Brown, and Bobbie Smetherman and Robert Smetherman all agree that because the bipolar global macrostructure made the U.S.A. leader of the anti-communist alliance, security concerns and maintenance of the Western alliance had greater importance than any other issue, including jurisdictional claims over the free seas.¹ Thus after the seizure of the Onassis whaling vessels the United States sought to "put an end to what it considers exaggerated claims of territorial rights" through "piece-by piece discussion of high seas problems" in the United Nations General Assembly. Even so, the disarmament and atoms-for-peace issues on the General Assembly's agenda were accorded more consideration.²

¹Robert O. Keohane and Joseph S. Nye, Power and Interdependence: World Politics in Transition (Boston: Little, Brown, and Company, 1977), p. 134; Joseph S. Nye, "Ocean Rule Making from a World Politics Perspective," Ocean Development and International Law Journal 3 (1975): 43; Swarztrauber, Three-Mile Limit, p. 243; Seyom Brown, New Forces in World Politics (Washington, D.C.: The Brookings Institution, 1974), pp. 8-9; and Bobbie B. Smetherman and Robert M. Smetherman, Territorial Seas and Inter-American Relations: With Case Studies of the Peruvian and U.S. Fishing Industries, (New York: Praeger Publishers, 1974), pp. 38-39.

²Nye, "Ocean Rule Making," p. 44.

The desire to avoid disrupting alliance relationships precluded America from forcefully reacting to what it considered illegal interference with legitimate fishing activities off the coasts of several Latin American states.

Economic Interdependence

U.S. controlled transnational organizations on Latin American soil were subject to manipulation by aggrieved states. They urgently requested the United States to refrain from adopting measures that could be inimical to their overall economic position. Multinational fishery corporations such as Van Camp, Del Monte and Star Kist especially were in delicate positions. From an Ecuadorian viewpoint, extended jurisdiction was an extremely profitable approach to fishery management. However, restricted access would affect adversely the interests of parent companies involved in long-distance fishing activities from U.S. ports. A harsh response by the United States to Latin American claims would create a hostile corporate environment in the offended country. U.S. investments in these nations were substantial. Any demonstration of force would fuel the fires of Latin American nationalism and possibly result in greater national control over corporations.¹

Some reaction more effective than diplomatic protest but short of military force was required. Since the Latin Americans exerted pressure on transnational actors holding sizeable investments in several Latin American nations, it was more

¹ Smetherman and Smetherman, Territorial Seas, passim.

practicable for the U.S. to provide compensation to transnational corporations in a domestic context than to risk America's overall systemic interests:

The United States had decided that it was cheaper to maintain its legal position by manipulating the domestic end of a conflictual transnational system than by curtailing the system or by intervening abroad.¹

Fisherman's Protective Act. The response to the seizure of American fishing vessels was the "Fisherman's Protective Act" of 1954. This Act empowered the Secretary of State to take appropriate diplomatic action to secure the release of vessels and crew. The Act provided for Treasury Department reimbursement of affected fishermen and covered the cost of fines and licenses.² The Act was intended to encourage American distant-water fishing interests to continue fishing disputed waters. In this manner the U.S. could avoid any possibility of implied acceptance of the territorial extensions:

By compensating fishermen for fines paid when their boats were seized, the United States government diminished their incentive to purchase Peruvian or Ecuadorian fishing licenses that might have implied acceptance of the South American claims to extended jurisdiction.³

This action failed to deter Latin American nations, or any other state for that matter, from unilaterally asserting jurisdiction over areas of the high seas. Moreover, as Joseph

¹Keohane and Nye, Power and Interdependence, p. 134.

²The Act empowered the U.S. to deduct the claims from foreign assistance extended to the coastal state. United States Congress, House of Representatives, "Protecting the Rights of Vessels of the United States on the High Seas and in the Territorial Waters of Foreign Countries," 83rd Congress, 2nd Session, approved 27 August 1954.

³Keohane and Nye, Power and Interdependence, p. 119.

Nye points out:

... the international political effect was to weaken the credibility of the American efforts to deter extended claims to ocean space. When the alliance leader confronted its weak allies in the oceans issue area, it was the superpower that blinked.

As a nuclear superpower concerned with alliance leadership in a bipolar macrosystem, the United States had less leeway in exercising its potential naval hegemony than did Great Britain, unencumbered by alliances or nuclear fears in the multipolar macrosystem of the nineteenth century.¹

Systemic Factors

Systemic factors account for the inability of the United States to prevent socialist countries from asserting sovereign jurisdiction beyond three miles. The Soviet Union's possession of nuclear arms made any confrontation undesirable. As Hoffmann, Martin, and Keohane and Nye show, nuclear weapons in the post-war macrosystem diminished the utility of force considerably.² A great power's use of force was perceived as extremely costly, especially in the event that hostility could give way to nuclear retaliation. This necessarily affected the United States' and the U.S.S.R.'s behaviour in the Oceans Regime.

Leadership Lag

The U.S.A.'s coastal orientation obfuscated the fact that America had inherited the leadership of the free seas. This

¹"Ocean Rule Making," p. 45.

²Stanley Hoffmann, "The Acceptability of Military Force," Lawrence Martin, "The Utility of Military Force," in Force in Modern Societies: Its Place in International Politics (London: I.I.S.S. Adelphi Paper 102, 1973); Keohane and Nye, Power and Interdependence, pp. 99-104.

prevented U.S. initiative in formulating a maritime policy congruent with its new found role. Nye asserts that one of the reasons why the United States did not choose to police the free seas immediately after World War Two is that there was a lag in America's perceptions of the benefits to be derived from assuming the leadership of a regime where it already was, in realist terms, the preponderant naval power:

. . . in periods of transition in the underlying structure of power in an issue, there is likely to be a lag between a state's capacity to provide leadership and its perceptions of benefits to be gained from leadership and of the necessity to supply it.¹

The leadership lag also was due partly to preoccupation with domestic coastal concerns, and to the U.S. still being "a free rider until Latin American imitators shocked it into new perceptions of its systemic role in regime maintenance after 1946."²

Nevertheless, the U.S. indirectly assumed a leadership role in 1945 with unintended systemic effects--the unilateral initiative:

A large state may not be able or willing to police the behaviour of other states, but because of its size and importance, its actions may determine the regime that governs situations of interdependence, both because of its direct effects, and through imitation.³

Many states were not content to imitate the actions of the U.S.A.. Coastal nations referred to the American claims as

¹Nye, "Ocean Rule Making:" p. 48.

²Ibid.

³Keohane and Nye, Power and Interdependence, p. 230.

precedent for expansive assertions of authority beyond the three-mile territorial sea. The United States' interwar pretensions beyond that limit and its agreements with Great Britain and other maritime powers gave credence to the idea that there should be a formal zone adjacent to the territorial sea. In a regime dominated by the U.S., many states had the opportunity to act in a fashion that had not been permissible in a regime characterised by Britain's hegemonial leadership. By the time America realised the gravity of an ever growing number of offshore claims and assumed appropriate leadership responsibilities, a pattern had been established. Furthermore, systemic constraints precluded any reaction save diplomatic protest. The very essence of the cold war macrosystem prevented the United States from opposing the claims of its allies or those of its rival superpower, the Soviet Union. This erosion of the United States' rule-enforcing powers weakened its hegemonic position, further strengthening the claims of other coastal states:

. . . as the rule-making and rule-enforcing powers of the hegemonic state begin to erode, the policies of secondary states are likely to change. But so are the policies of the hegemonic state. An atmosphere of crisis and a proliferation of ad hoc policy measures will seem not only undignified but unsettling to many. Dissenters will begin to wonder about the costs of leadership. Further, this leadership will less and less appear to guarantee economic and political objectives, as other states become more assertive. The renewed emphasis of these secondary governments on status and autonomy adds a further complication, since these values have a zero-sum connotation that is much less pronounced where economic values are involved. More status for secondary states means less for the dominant power; increases in weaker powers' autonomy bring concomitant declines in the positive influence of the system's leader.

Thus the systemic orientation natural to a hegemonial power-which identifies its interests with

those of the system it manages - is challenged by a more nationalistic perspective at home and abroad.¹

Legitimacy

The spate of national claims following the Truman Proclamations placed enormous strains on the Oceans Regime. The regime was faced with imminent collapse and the threat of anarchy. Effective leadership was non-existent; the perceived illegitimacy of the regime was translated into action by many, creating a situation where competing and varied rule making processes were out of control.

A regime cannot exist if each and every country and region adopts its own unique approach to the management of the oceans system. Rule-making processes must be universalised to be operative and legitimate and to command widespread adherence. This was realised during the interwar period with the failure of the Hague Conference's attempt to codify the law of territorial waters. The absence of such codification proved to be a prime factor in the demise of the free seas regime.

UNCLOS

During the immediate post war period, the international community once more realised that an effective, stable regime requires a codified, precise and complete jurisdictional framework; preferably one formulated by the participation of a majority of actors in the system. For that reason, the First United

¹Ibid., p. 45.

Nations Conference on the Law of the Sea opened in 1958 with 86 participants. Four conventions on various aspects on the law of the sea were produced.¹ The two most pressing issues, the breadth of the territorial sea and the status of an adjacent fishing zone, were not resolved. Accordingly, a second Conference was convened in 1960 to discuss these outstanding issues. It concluded without success.²

Conventions

Considering the number of states involved at the first conference and the surfeit of issues discussed, it is amazing

¹Of the participants, 29 were western states, 10 socialist, 20 Latin American, 9 Arabic, 16 Asian, and 2 were African. Of these, 38 were developed, and 48 were developing nations. The four conventions produced were:

1) The Territorial Sea and the Contiguous Zone, signed 29 April 1958, effective 10 September 1964. United Nations, Conference on the Law of the Sea, 2:133-135. Document A/CONF.13/L.52.

2) The High Seas, signed 29 April 1958, effective 30 September 1962. Ibid., 2:135-139. Document A/CONF.13/L.53.

3) Fishing and Conservation of the Living Resources of the High Seas, signed 29 April 1958, effective 20 April 1966, 2:139-142. Document A/CONF.13/L.54.

4) The Continental Shelf, signed 29 April 1958, effective 10 June 1964. Ibid., 2:142-145. Document A/CONF.13/L.55.

²On UNCLOS II, see United Nations, Official Records of the Second United Nations Conference on the Law of the Sea, Geneva, 17 March - 26 April 1960, Committee of the Whole, Verbatim Records of the General Debate (New York: United Nations, 1960), U.N. Pub. A/CONF. 19/9. 88 countries participated in the deliberations at UNCLOS II. The conference nearly agreed on a proposal calling for a six-mile territorial sea and exclusive fishing rights in a six-mile contiguous zone beyond. The proposal failed by one vote. See Castel, International Law, pp. 235-237.

that four conventions actually resulted. Progress was made, especially in the area of boundary delimitation. The conventions, however, are riddled with ambiguity. Rather than offering some insight on what should constitute the precise boundary of the regime, several provisions outlined a flexible approach on limits. Only one jurisdictional type, the contiguous zone, was defined precisely. The other major areas relating to the breadth of the territorial sea, fisheries jurisdiction and extent of littoral authority over the continental shelf, were less than punctiliously handled.

What was obvious, and perhaps most significant, was that the Conventions allowed littoral control to extend to areas beyond the territorial sea. A distinction was made between different strata of oceans space wherein a coastal state could exercise function-specific authorities. The status of the high seas remained unchallenged. But exactly where the high seas begin, the boundaries of the free seas regime, was another matter. The closest that one can come to determining that limit is found in the article on the contiguous zone. Article 24 defines it as "a zone of the high seas contiguous to its territorial sea," wherein a coastal state has the power to "Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea." The zone itself can have a maximum extent of 12 nautical miles measured from an appropriate baseline. This is all very clear, providing one turns a blind eye to the extent of the territorial sea. That the international community chose to accept such a myopic vision was to lead to

continuing problems for the free seas regime.

A definite limit for the territorial sea is not prescribed by the Convention. The Convention on the Territorial Sea and Contiguous Zone defines the territorial sea as:

The sovereignty of a State extends beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea.¹

Nor does the High Seas Convention incorporate any specific territorial limit in its definition of the high seas:

The term "high seas" means all parts of the sea that are not included in the territorial sea or in the internal waters of a State.²

However, it has been argued that because the contiguous zone can extend no farther than 12 nautical miles from the coastline, this by definition implies the territorial sea can have a breadth no wider than that limit.³

If one assumes that national territorial jurisdiction legally can not stretch beyond twelve miles, one still would have to take into account resource exploitation activities that could interfere with the traditional rights of the high seas. Four rights are — mentioned specifically:

The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty . . . It comprises, inter alia, both for coastal and non-coastal States:

- (1) Freedom of navigation;
- (2) Freedom of fishing;

¹Article I.

²Article I.

³This point is offered as a Separate Opinion by Mr. Fitzmaurice, in "The Fisheries Jurisdiction Case," Federal Republic of Germany v. Iceland (1973) International Legal Materials 12, p. 310, note 1.

- (3) Freedom to lay submarine cables and pipelines;
- (4) Freedom to fly over the high seas . . .¹

At first glance, it appears that these rights are absolute and that they begin immediately beyond the territorial sea. Yet the Convention on Fishing and Conservation of the Living Resources of the High Seas acknowledges that the littoral state " . . . has a special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea," and may, under certain conditions (when the area is not being fished by foreign nationals or when negotiation with other nations fails to resolve outstanding differences) " . . . adopt unilateral measures of conservation appropriate to any stock of fish or other marine resources in any area of the high seas adjacent to its territorial sea" The failure to place definite limits on fisheries jurisdiction eroded one of the fundamental freedoms of the high seas to such an extent that the concept of "natural interest" has evolved into one of "exclusive jurisdiction."²

¹Article 2.

²Article 6, Article 7. The concept of "natural interest" originally rooted in the Truman Fisheries Proclamation, was acknowledged internationally in the "Anglo-Norwegian Fisheries Case," which notes that coastal states have a natural interest in and, therefore, a right to protect offshore fisheries. . "Judgement, Fisheries Jurisdiction Case," United Kingdom v. Norway (1954). The concept eventually was translated into one of "preferential rights" for states highly dependent on coastal fisheries. "Judgement, Fisheries Jurisdiction," United Kingdom v. Iceland (1974). "Preferential rights," in turn, is moving toward the concept of "exclusive jurisdiction." See Articles 61 and 62 of United Nations, "Draft Convention on the Law of the Sea," Third Conference on the Law of the Sea, Document A/CONF.62/L.78 (New York: United Nations, 1981).

Similarly, by distinguishing between the high seas and the continental shelf and by implication between the deep seabed and its superadjacent waters, the Continental Shelf Convention gives states the opportunity to expand without seemingly interfering with the water column's high seas status.¹ Time has shown that this has done nothing to curb littoral expansionary pretension. Specifically, the convention recognises that coastal nations can exercise exclusive rights over the resources of the continental shelf:

1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.
2. The rights referred to in paragraph 1 of this Article are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal State.
3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or any express proclamation.

No attempt is made to define the continental shelf as a geographic concept. The coastal state is given every opportunity to claim areas beyond a certain depth criterion as it acquires the ability to exploit resources at ever greater depths and distances from the shore:

For the purpose of these Articles, the term "continental shelf" is used as referring (a) to the seabed and subsoil

¹Article 3: "The rights of the coastal State over the continental shelf do not affect the legal status of the superadjacent waters as high seas, or that of the air space above those waters." Apparently this distinction is made to frustrate the Latin American strategy of linking continental shelf claims with those over the water column. See Buzan, Seabed Politics, p. 54.

of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters or, beyond that limit, to where the depth of the superadjacent waters admits of the exploitation of the natural resources of the said areas . . .¹ (Italics added).

Alarmist positions maintain that the failure to define the boundaries of the continental shelf gives a technologically advanced state the right to appropriate massive areas of the seabed. However, there is at least a vague distinction between a continental shelf and the deep seabed. What is not so exact are differences among the continental slope, rise and margin.² Notwithstanding the distinction between a continental shelf and the deep seabed, even if precise definitions were offered, problems associated with the boundary of the Oceans Regime still would be exacerbated by a lack of uniformity. Continental shelves vary immensely in extent and state ability to exploit shelf resources is as variable. Variability does not facilitate the development of a precise universal regime.

One final problem created by the ambiguous conventions is the failure to make specific mention of the status of the deep seabed. Is it a part of the high seas? Can any portion be appropriated by national governments for national purposes? Admittedly, these questions were not of immediate concern. But

¹Article 2, Article 1.

²Definitions of these concepts can be found in A. Guilcher, "Geo-Physical Characteristics," in R. Churchill et al., eds., New Directions in the Law of the Sea: Collected Papers, vol. III (Dobbs Ferry, N.Y.: Oceana Publications Inc., 1973), pp. 109-110. For a discussion of the continental margin, see K. O. Emery, "Geological Aspects on Sea-Floor Sovereignty," in Lewis M. Alexander, ed., The Law of the Sea: Offshore Boundaries and Zones (Kingston, R. I.: University of Rhode Island, 1967), pp. 139-160.

as exploitive technology became available, debate emerged as to whether the resources of the deep seabed were open to claim or whether they constitute a global commons. The resolution of this debate will have vital implications for the status of the high seas, especially should it be ascertained that private and public interests have the right to stake claims to certain areas of the seabed. Of direct relevance is a "Notice of Discovery and Claim of Exclusive Mining Rights and Request for Diplomatic Protection and Protection of Investment" given to the U.S. Secretary of State from Deepsea Ventures Inc. on 14 November 1974. The letter gives notice of a claim over a deposit of manganese nodules and asserts proprietary over an area of approximately 60,000 square kilometers! While the high seas status of the water column is affirmed, one must question whether a claim of such character actually can be made and enforced without restricting the high seas rights of other nations.¹

What gives a nation or corporation the right to claim exclusive rights to vast areas of the seabed? And if state fishing activity should conflict with mining activity? Does a claim as the one initiated by Deepsea Ventures give that company authority to restrict such activities on the basis of its claim? Other states may choose to exercise their high seas rights and attempt to lay submarine cables and pipelines or even send

¹"Deepsea Ventures Inc., Notice of Discovery and Claim of Exclusive Mining Rights, and Request for Diplomatic Protection and Protection of Investment," Letter from Deepsea Ventures Inc. to U.S. Secretary of State, 14 November 1974. Reproduced in Churchill et al., New Directions. 5: 376-392.

research vessels to the area. Whose rights are to be protected: those of the company which could interfere with the legitimate high seas rights of other nationals or those of the international community endorsed by the High Seas Convention?

It is patently absurd to suggest that the status of the continental shelf or the seabed can truly and unequivocally be kept separate and distinct from that of the water column. Neither environment can be separated from the other and activities inevitably overlap.

In many ways, the four Geneva Conventions destabilised the Oceans Regime. The universal, uniform, precise boundaries that existed during the first period gave way to imprecise, variable and questionable limits during the third period. This was due to the basic illegitimacy of the free seas regime and a trend among littoral states to seek redress during a period of ineffective leadership. UNCLOS provided a vehicle which, if properly used, could have re-established definite limits to the Oceans Regime, legitimising it in the process. Improperly used, it achieved precisely the opposite. The territorial sea became some obscure creature varying between three and twelve miles in breadth. Whatever the case, the territorial sea lost its exclusivity and no longer was adhered to by two-thirds of the international community:

Some writers say that such a new norm cannot come into existence against the resistance of a leading state. That is why the so-called "sector principle" on the acquisition of sovereignty over Polar regions has certainly not become a new norm of customary international law, in consequence of the non-acceptance by the United States. On the other hand, even the concurrent attitude of the leading Powers cannot create a norm of customary general international law against the resistance of other Powers. That is why

the three-mile limit of territorial waters upheld by the leading maritime Powers, the United States and Great Britain, has, in the light of non-acceptance by other states not become a norm of customary international law.

The eminent scholars of the world are of the opinion that there is no agreed rule of international law as to the width of the territorial sea, so long as the three-mile limit is not considered as established.

The absence of a uniform limit to the territorial sea has made it difficult to give precise legal evaluation to the claims of various States to coastal waters, especially if asserted within twelve miles from the coast. . . .

Granted, authorities beyond the territorial sea were recognised for resource management, fiscal, customs, immigration and sanitary regulations. Traditional freedoms of the high seas were codified. Yet the conventions leave a door open for their erosion and a shrinkage of high seas space.

One could conclude that the free seas Oceans Regime ceased to exist following the 1960 conference. Despite the failure of UNCLOS to come to terms with well defined limits to national jurisdiction, the fact that such questions were discussed by the international community indicates a consensus that the coastal state is not competent to determine unilaterally the extent of its jurisdictional pretensions:

The conferences, though short in positive provision on this issue; were nonetheless notable as providing explicit indication of a consensus that states are not considered authorised to exercise a complete discretion in establishing a particular width of the territorial sea.²

McDougal and Burke's contention is strengthened by the fact that there was a general perception at the 1958 conference that coastal

¹Josef L. Kunz, The Changing Law of Nations, pp. 339-340, Shigeru Oda, International Control of Sea Resources, p. 15. Both are cited by Swartrauber, Three-Mile Limit, pp. 249-250.

²McDougal and Burke, Public Order, p. 70.

states should not expand until UNCLOS II had sufficient time to consider the issue.¹ It could be argued that anarchy was avoided by specifying particular areas of jurisdictional competence:

(the exploitability criterion) . . . could be regarded as the first stage in the effort to prevent the principle of first come first served or grab-as-grab can being adopted in the seabed.²

For these reasons, it would be incorrect to suggest that no regime existed by the end of the third period. At least some direction for oceans behaviour remained in relatively narrow limits to national jurisdiction with the free seas beyond. But the eroded regime was weakened. Rule-making processes were monopolised by the coastal nations though there was some recognition that the international community should play a role in the process. Even that recognition was threatened after UNCLOS II. Its destruction surely would have brought an end to the remnants of the free seas regime.

The succeeding period, as its predecessors, is characterised by major structural change. The formation of a Third World consciousness and the utilisation of the United Nations as a power instrument, introduced the possibility that the international community could gain control of the regime's rule-making processes. Alternately, the emergence of a bipolar underlying structure brought superpower maritime interests together, with the consequent possibility of superpower hegemony over the Oceans Regime.

¹ Swarztrauber, Three-Mile Limit, p. 214.

² Evan Luard, The Control of the Sea-Bed: Who Owns the Resources of the Oceans? (London: Heinemann, 1974), p. 41.

CHAPTER VI

THE FOURTH PERIOD: A NEW STRUCTURAL FORMATION--1961-1966

The failure of the international community to arrive at precise definitions of the boundaries of many components of the Oceans Regime left the question on limits to national jurisdiction open to debate. No longer were the maritime powers able to censure expansionary pretensions on the basis that they did not conform to international law. The international law of the sea was in a great state of confusion and was in the process of evolving into a system based on an entirely different set of premises. Coastal states were left without an effective referent that could give meaningful direction to their behaviour. The reasons for this failure are obvious. The large number of nations involved in the negotiating process, each representing its own interests, made it next to impossible for majority agreement to be reached on substantive issues. The resolution of this problem necessitated that a plurality of states recognise a commonality of interest and acquire the determination to work together for the promotion and defence of mutual concerns.

The fourth period brought with it the development of a sense of common purpose and need for unified action among the poor and weak nations of the world. Many had obtained their

independence only recently and all shared similar attitudes respecting the Oceans Regime. Most played no role in the development of the various management frameworks of the international system and naturally were suspicious that the biggest beneficiaries were the former colonial masters.¹ A shared suspicion was not the only factor contributing to the development of a sense of group purpose and need. The Third World is united by similar economic circumstance, many of its nations are poor:

Inter alia their per capita incomes are below a certain cut-off point, their rate of income growth per capita is relatively low for other reasons because of high population growth; only a small percentage of their labour force is engaged in industry and there is a shortage of technical and managerial skills. Their per capita investment in public works and services is also low. Under these conditions capital goods, skilled labour, and a modern technology are necessary requirements for economic growth.²

Common interests and economic perceptions are strengthened by a serious conviction that the inherited international system and all of its manifestations, including its legal and monetary frameworks, still bind LDC's to an exploitative system that threatens their political sovereignties:

... without political independence it is impossible ... to achieve economic independence, and without economic

¹On this point see T. O. Elias, Africa and the Development of International Law (London: Sweet and Maxwell, 1973), and F. C. Okoye, International Law and the New African States (London: Sweet and Maxwell, 1972).

²Bransilov Gosovic cited by Alan G. Friedman and Cynthia A. Williams, "The Group of 77 at the United Nations: An Emergent Force in the Law of the Sea," San Diego Law Review 16 (April 1979):558.

power, a nation's political independence is incomplete and insecure.¹

The Oceans Regime was no exception. The concept of narrow limits to national jurisdiction and free seas beyond was formulated and defended by Great Britain to permit easy, unhindered access and transport to and from its colonies; in effect, facilitating the economic exploitation and political subjugation of the peripheral nations. Of greater and more immediate concern to the weaker littoral nations was security from foreign navies and the protection of coastal fisheries, both demanding wide offshore areas of national jurisdiction. To many, the freedom of the seas gave the rich and powerful the freedom to bleed the poor of their resources as well as freedom to harvest the riches off the shores of the weak. As long as a limited number of colonial masters guided the destinies of the great mass of humanity, change in the Oceans Regime for the betterment of all concerned was not possible. Stability and adherence was dependent on force, not on legitimacy. This condition is possible only in so far as the distribution of power does not change in any intrinsic manner. Once underlying structural changes are such that the exercise of force is limited, then stability becomes dependent on legitimacy related considerations. The lack of effective leadership during the third period made the stability and even the survival of the free seas regime dependent on an overall perception of its

¹Jan Tinbergen, RIO, Reshaping the International Order: A Report to the Club of Rome (Scarborough, Ontario: New American Library of Canada Limited, 1977), p. 15.

legitimacy, and that it did not have:

This law with its emphasis on the freedom of the seas, is viewed by all African states as a structure created by the great maritime powers to ensure the unrestricted operation of their naval and fishing fleets at the expense of the coastal states.¹

Rigid adherence to the traditional rules of international law could prove disastrous to all concerned, for the traditional rules on the regime of the seas had been created by the great Powers for their own purpose before many major problems had arisen and before the birth of the new states which now formed the majority.²

In a system where conference diplomacy was becoming the chief instrument of regime construction, it is clear that if a majority of countries ever were to recognise a commonality of interest, then together they could induce through constructive effort in multilateral forums outcomes that fail to correspond with current and underlying structural levels of power. Pursuant to this and the objectives of legal, political and economic emancipation, in 1963 75 Third World nations submitted the "Joint Declaration of the Developing Countries" to the United Nations General Assembly outlining a series of shared rights, demands and grievances.³ This was the first of many instances when the developing world used its numbers to

¹Penelópe Simões Ferreira, "The Role of African States in the Development of the Law of the Sea at the Third United Nations Conference," Ocean Development and International Law Journal 17 (1979):90.

²A. Mexican delegate speaking at UNCLOS I, cited by Robert L. Friedheim, "The 'Satisfied' and 'Dissatisfied' States Negotiate International Law," World Politics 18 (1965):24.

³G. A. Res. 1897, 18 U.N.G.A.O.R., Supp. (No. 15) 24 app., U.N. Doc. A/5587 (1963).

promote common views. Another occurred the following year in the Fourth Committee of the United Nations Conference on Trade and Development at Geneva. There the LDCs sought to create the appropriate institutional machinery to help them establish a more just international system, realising "that to remain divided would be to remain a 'bunch of beggars' and the 'clientele' of the rich." Only united would the LDCs be a political force."¹ With this in mind, the developing nations issued perhaps one of the most significant declarations of this era-the "Joint Declaration of the Seventy-Seven Developing Countries:"

The unity . . . has sprung out of the fact that facing the basic problems of development they have a common interest in a new policy for international trade and development . . . The developing countries have a strong conviction that there is a vital need to maintain and further strengthen this unity in the years ahead. It is an indispensable instrument for securing the adoption of new attitudes and new approaches in the international economic field.²

The Group of 77 was not entirely powerless to realise its stated objectives. The United Nations system recognises the "sovereign equality" and "equal rights of . . . nations large and small . . .," and offers the G-77 a convenient vehicle, one nation, one vote, two-thirds majority, to promote defined goals.³ The Group had the opportunity to wield and

¹Friedman and Williams, "Group of 77", citing Gosovic, p. 559.

²Cited by Ibid., p. 559. See also Proceedings of the United Nations Conference on Trade and Development, Geneva, 23 March-16 June 1964, U.N. Doc. E/CONF.46/141.

³See the Charter of the United Nations, Article 2.1, and its preamble.

control a source of power denied the developed world--majority vote. "This meant bloc organisation, bloc voting, bloc sponsored proposals, bloc sponsored candidates for the elective offices of the conference, and bloc attempts to manipulate the rules of procedure."¹

The implications for rule-making processes were enormous for it meant the institutionalisation of rule-making in a manner that effectively circumvents the influence exerted by the powerful actors in the underlying and current structures. Instead influence and power would be, in good part, a product of a country's organisational skills. This is confirmed in a study on influence in UNCTAD. Joseph Nye found that underlying and current sources of power accounted for a rank order correlation of .43 and .41 respectively, with influence.² The roots of this trend are found at the 1958 and 1960 UNCLOS Conferences, where states already had begun to align themselves on North/South lines which, however loose, profoundly impacted the shape of negotiations and outcomes.³

¹Friedheim, "Satisfied and Dissatisfied," p. 21..

²Joseph S. Nye, "UNCTAD: Poor Nations' Pressure Group." in Robert Cox and Harold Jacobsen, eds., The Anatomy of Influence (New Haven, Conn.: Yale University Press, 1973), p. 361. See also Robert S. Walters, "International Organisation and Political Communication: The Use of UNCTAD by Less Developed Countries," International Organisation 25 (Autumn 1971): 818-835.

³Robert L. Friedheim, "Factor Analysis as a Tool in Studying the Law of the Sea," in Lewis M. Alexander, ed., The Law of the Sea (Columbus: Ohio State University Press, 1967), pp. 60-61; Idem, "Satisfied and Dissatisfied," passim.

The fourth period, short as it was, is distinguishable not only in that it spanned the years between UNCLOS II and the repoliticisation of the oceans policy issue in 1967 but, more importantly, because it gave rise to a set of conditions for a new structural type, the international institution and its corresponding control of rule-making processes. The decisive actors in the new structure would not be those possessing the greatest power by traditional measures but rather those who could command group adherence, alliances and organisational forums. The structure was not congruent with regime process. Regime change, therefore, was imminent.

CHAPTER VII

PERIOD FIVE: THE LEGITIMISATION OF ORGANISATION

DEPENDENT RULE-MAKING--1967-1974

The second and third periods reveal that change in the underlying and current structures can initiate rule-making processes that may alter the shape of an existing regime or destroy it completely. A regime must reflect the interests of its major actors if it is to remain intact. The structural changes of the fourth period added another variable to the overall equation, that the "survivability" of a regime is dependent on its acceptability to a majority of states in the international system. Consequently, regime change, or at least its impetus, can arise from situations other than those where preponderant powers attempt to correct perceived incongruities between power and process. Add to this the non-structural component of legitimacy and one is confronted with an extremely complex problem.

The free seas regime, as it was defined by Great Britain, lasted as long as it did because adherence was compelled by British naval power. Yet the construction of a regulatory framework based on maritime rather than coastal premises created an inherently unstable force-dependent regime. With force removed, or at least the resolve to use force, aggrieved states were able to express interests that previously had been stifled

by the policing activities of the regime's hegemonial leader. The actions of the U.S.A. and the other coastal states during the third period prove that the free seas regime was an illegitimate and artificial construction. If it was legitimate, then state practice would have proved otherwise. This suggests that long-term stability demands that regimes reflect the interests of the powerful and be legitimate in the eyes of the powerful and the weak alike--a most difficult prescription. Trends within the fifth period point to the possibility, however remote, that regime construction can accommodate most relevant interests.

The fifth period is characterised best as a struggle between the weak and powerful to choose an arena for negotiations, and to determine what items should be placed on the agenda.¹ The

¹Detailed accounts of the events and processes during the period between the years of 1967 and 1974 can be found in: Barry Buzan, Seabed Politics (New York: Praeger Publishers, 1976), pp. 65-242; Penelope Simoas Ferreira, "The Role of African States in the Development of the Law of the Sea at the Third United Nations Conference," Ocean Development and International Journal 7 (1979): 89-129; Robert Friedheim, Joseph Kadane et al., "Quantitative Content Analysis of the United Nations Seabed Debate: Methodology and a Continental Shelf Case Study," International Organisation 24 (Summer 1970): 479-502; Robert Friedheim and Joseph Kadane, "Ocean Science in the UN Political Arena," Journal of Maritime Law and Commerce 3 (April 1972): 473-502; Douglas M. Johnston and Edgar Gold, The Economic Zone in the Law of the Sea: Survey, Analysis and Appraisal of Current Trends, Law of the Sea Institute Occasional Paper no. 17, Kingston, University of Rhode Island, 1973; Johan Ludvik Løvald, "In Search of an Ocean Regime: The Negotiations in the General Assembly's Seabed Committee 1968-1970," International Organisation 29 (Summer 1975): 681-709; Evan Luard, The Control of the Sea-bed: A New International Issue (London: Heinemann, 1974); Edward Miles, "The Dynamics of Global Ocean Politics," in Douglas Johnston ed., Marine Policy and the Coastal Community (London: Croom Helm, 1976), pp. 147-181; and, Edward Miles, "The Structure and Effects of the Decision Process

structural changes of the fourth period resulted in a debate on an appropriate forum for negotiation. The G-77, representing the majority of countries within the international system, recognised that the interests of the weak could be protected and promoted within a forum where majority strength is used as a weapon against the economic or military strength of a powerful minority. It also recognised that favourable outcomes are probable within a setting where a bundle of issues is discussed. The Group of 77 was prescient in not separating policy issues from technical matters for issue specific organisations tend to benefit the technologically advanced nations.¹

The struggle for arena and agenda marked a period when oceans issues became highly politicised. A proposal introduced by Malta, and the ensuing debate within the Seabed Committee set up for that purpose, turned the world's attention to a variety of marine related considerations. Countries with little expertise in oceans issues were able to acquire information and to develop much needed expertise. Issues became better defined and more clear cut. Countries with similar interests began to work together. Coalitions were organised to strengthen and promote defined positions. Concurrently, individual states and regional groupings adopted both legislation and bargaining techniques that strengthened

in the Seabed Committee and the Third United Nations Conference on the Law of the Sea," International Organisation 31 (Spring 1977): 159-234.

¹See David J. Padwa, "The Curriculum of IMCO," International Organisation 14 (Autumn 1960): 524-547.

their negotiating position on important questions. Perhaps most importantly, the Group of 77 recognised the opportunity to use its majority voting power to ensure that the emerging Oceans Regime would be distributional as well as managerial by linking oceans problems to the question of a more equitable international order.

The distributional question dominated all other issues during the first phase of the fifth period, which lasted until 1970. This phase focussed on the area beyond the limits of national jurisdiction and on how resources of the deep seabed could be used to promote the well-being of mankind. It was realised that discussion of the area beyond the limits of national jurisdiction is meaningless without resolving the substantive problems related to limits. A chain of events forced the United Nations to come to terms with the question of limits. For this reason, 1970 is treated as a turning point in the Oceans Regime. It represents the beginning of a second phase of the fifth period, a phase more comprehensive than the first, which gave emphasis to the previously neglected issue of limits to Coastal State Expansion. The events of the second phase ensured that items of importance to coastal states would be given serious consideration during the rule-making sessions of the sixth period. In doing so, coastal state rights reached a legitimacy or general acknowledgement far in excess of that provided by the 1958 Geneva Conventions.

The first phase of the fifth period is noted best by the oscillation of the seabed debate between the purviews of the

United Nations General Assembly and the Seabed Committee.

The first phase begins with an event that acted as a catalyst in forcing the international community to come to terms with the oceans policy issue.

Phase 1: 1967-1970

The Maltese Proposal

The fourth period's technological developments compounded the scope, complexity and number of oceans issues.¹ Such developments enhanced the ability of many states to function at further distances from their shores and allowed the maritime powers to exploit and monitor the resources of other states with increased intensity. Much attention was directed toward the need to manage offshore areas with both national and international regulatory mechanisms. Many nations, especially the more technologically advanced, became aware of the vast wealth to be found in the form of manganese nodules on the deep seabed. Although man was reaching the stage where these riches could be acquired efficiently, their ownership had yet to be determined. The G-77's demand for a more just world order and a realisation on the part of some countries, including the United States, that the deep seabed's resources should be used for the benefit of mankind, helped to create a sense of urgency over the unresolved status of the area beyond the limits of national jurisdiction. A statement made by America's President Johnson on 13 July 1966 was compelling in this regard:

¹On these developments see Buzan, Seabed Politics, passim.

Under no circumstances, we believe, must we ever allow the prospects of rich harvest and mineral wealth to create a new form of colonial competition among maritime nations. We must be careful to avoid a race to grab and to hold the lands under the high seas. We must ensure that the deep seas and the ocean bottoms are, and remain, the legacy of all human beings.¹

Combine this vision with the possibility that advances in marine science and technology would give the major powers the capability to use the deep seabed for military applications and a very ominous picture emerges. It took the proposals of the Maltese delegate to the United Nations, Arvid Pardo, to instigate an international response.

On 17 August 1967, the Maltese Mission to the United Nations proposed that the agenda of the General Assembly's 22nd session include an item entitled:

"Declaration and treaty concerning the reservation exclusively for peaceful purposes of the seabed and of the ocean floor, underlying the seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind."

Pardo was concerned that the inability of international law to curb the technologically induced tendency of coastal states to extend their offshore jurisdictions would result in growing competition for the seabed's minerals and induce attempts to appropriate those areas for national rather than international purposes. He contended that the need to protect extended national interests would lead to the militarisation of distant offshore areas. Militarisation and competition would threaten

¹Johnson made the statement at the commissioning of a new research vessel, the Oceanographer, and is quoted by the U.S. Ambassador to the United Nations, Mr. Goldberg, in an address to the General Assembly's First Committee. U.N. Doc. A/C.I/P.V. 1524.

the stability of the international system. And, since the technology needed to exploit seabed resources was under the exclusive domain of the developed countries, there was a strong possibility that the world's poor would be excluded from sharing in the great wealth to be found beyond the limits of national jurisdiction:

In view of rapid progress in the development of new techniques by technologically advanced countries, it is feared . . . that the seabed and the ocean floor, underlying the seas beyond present national jurisdiction, will become progressively and competitively subject to national appropriation and use. This is likely to result in the militarisation of the accessible ocean floor through the establishment of fixed military installations and in the exploitation and depletion of resources of immense potential benefit to the world, for the national advantage of technologically developed countries.

What was needed, argued Pardo, was a definite limit to national jurisdiction and an acknowledgement on the part of the United Nations that the wealth found beyond such limits constitutes the common heritage of mankind. This would be made possible by operationalising the common heritage principle in a treaty providing for: the reservation of the area for peaceful purposes; the creation of an international agency to regulate all activities within the international area; the utilisation of revenues derived from resource exploitation for Third World development; and, the interdiction of national attempts to appropriate any part of the area.¹

¹ Attached to the item was a note verbale. Both were sent from the Permanent Mission of Malta to the United Nations Secretary-General, dated 17 August 1967, circulated as A/6695. XXII, 18 August 1967. Discussion on the item and note can be found in A/C.I/P.V. 1515, pp. 23-67; and, A/C.I/P.V. 1516, pp. 3-7.

Many LDCs were impressed by the Pardo initiative.¹

Indeed, the proposal coincided with an intensified resolve in October of 1967 by the Group of 77 to alleviate the impoverished condition of the poor. The Group's ministerial meeting adopted the "Charter of Algiers" which exacted, inter alia, rapid assistance for the Third World.² On the other hand, there were those who did not look at the proposals with such a sympathetic viewpoint. The Latin American territorialists did not favour any measure that would limit their right to determine the extent of their offshore jurisdiction. The developed nations were hesitant to accept possible barriers on future attempts to exploit the resources of the deep seabed. And the eastern bloc, strongly against increased international organisation, was reluctant to support any initiative that might result in the creation of new international bodies.³

Ad Hoc Seabed Committee

On 1 November 1967 the General Assembly allowed Pardo to introduce his item to the First Committee. The Committee

¹The statements of the representatives of the following states give a fairly accurate representation of the reaction of Third World countries, generally, to the Pardo proposals: Libya, A/C.I/P.V. 1525, pp. 36-42; Somalia, Ibid., pp. 43-44; Trinidad and Tobago, A/AC.I/P.V. 1526, pp. 46-50; Ceylon, Ibid., pp. 50-53; and India, A/C.I/P.V. 1530, pp. 2-6.

²Ministerial Meeting of the Group of 77. Algiers, October 1967. United Nations Document T.D. 138.

³Luard, The Control of the Sea-bed, p. 87.

recommended that the General Assembly adopt the item in a revised and less objectionable form. Instead of it being worded as, "Declaration and treaty concerning . . ." it was adopted in a formal resolution, 2340, on 18 December 1967 as, "Examination of the question of . . ." by a vote of 99-0-0. The resolution requested the formation of a 35 member ad hoc committee to study the question.¹

As Buzan notes, the watered-down item and limited agenda did not reduce the significance and influence of the Pardo proposal:

. . . it separated the seabed from the general matrix of ocean issues and successfully established it as an important focus of concern. Second, it gave an immense momentum to the issue of the common heritage of mankind by linking it to the needs and interests of the developing countries. Third, and related, it set the issue squarely in the context of developed versus developing country interests, and thereby established, or greatly helped to establish, alignments on the issue that might otherwise have evolved in different, or at least in less stark forms. Fourth, it raised the vision of a new type of international organisation that would give economic benefits and political power to the developing countries as a means of restoring the balance between them and developed countries. Fifth, it raised a banner against technological imperialism, of both the economic and the military variety, around which the developing countries could rally with relative ease. And sixth, it placed the policy initiative regarding a regime for the deep seabed firmly within the

¹ Resolution 2340 is reproduced in Shigeru Oda, The International Law of Ocean Development: Basic Documents (Dordrecht: Sijthoff Publishing Company, 1972), p. 32. 16 of the 35 members of the Ad Hoc Seabed Committee (AHSBC) were developed countries, the remaining 19 nations being LDCs. The AHSBC divided its work between itself and two subcommittees. Working Group I was charged with economic and technical affairs. Working Group 2 discussed legal issues. The Committee itself was concerned with scientific questions and proposals to increase international cooperation in the area. Summaries of the AHSBC's work during 1968 can be found in GAOR XXIII, A/7230, September 1968 (Report of the Ad Hoc Seabed Committee); AHSBC Summary Records A/AC.135/SR. pp. 1-26; A/AC.135/WG.1/SR. pp. 1-14; and A/AC.135/WG.2/SR. pp. 1-15.

framework of international organisation before any states had made claims to that area.¹

The sixth point suggests the immense impact that Pardo's efforts had on the rule-making processes of the oceans policy issue area. For once international organisation was to take the initiative in an area where state action previously had been the chief instrument of politicisation. This placed a tremendous responsibility on the United Nations to come to terms with the status of the deep seabed before technological developments and state activity confronted the organisation with a fait accompli. The responsibility was also an opportunity to legitimise the U.N. as an acceptable rule-making authority unencumbered by the state practice and stubborn positions that had weakened the credibility and rule-making efforts of the 1958 and 1960 United Nations Conferences on the Law of the Sea. As well, an important element of that opportunity was a chance to strengthen organisation-dependent capabilities in the power structure rather than the traditional influences exerted by underlying and current conformations. The creation of a separate arena for the discussion of seabed issues marked a victory for the world's weak majority.

It would be unfair to suggest that the formation of the AHSBC was an absolute defeat for the developed powers in the battle over arena. After all, the AHSBC was a temporary creation of a specific nature that was established by a unanimous vote. Its decision-making apparatus, consensus, prevented any one group from adopting measures at variance with the interests of any state.

¹ Seabed Politics, p. 68.

However, the AHSBC provided precedent for the discussion of oceans issues in a separate committee. Consequently, a basis was set on which the General Assembly could extend the mandate of the AHSBC and expand its scope and size.

Seabed Committee

In 1968, the United Nations General Assembly established a permanent Seabed Committee consisting of forty-two states. The SBC's mandate was extended by one year in 1969. In 1970 it was transformed into an 86 member preparatory body for a comprehensive conference on the law of the sea whose membership once more was increased by five to 91, in 1971.¹ The growth in the SBC's size at the same time was accompanied by significant additions to its agenda. Resolutions 2467B, 2467C, 2574C, 2750A and 2750B instructed the Secretary-General to prepare reports on:

¹The twenty-third session of the General Assembly transformed the AHSBC into a permanent Seabed Committee on 21 December 1968 by adopting Resolution 2467A with a vote of 112-0-7. The U.S.S.R., Ukraine, Byelorussian Republic, Hungary, Cuba, Cambodia, and Equatorial Guinea abstained. The SBC's work for 1969 is found in: A/AC.138/SR.1-16; A/AC.138/SC.I/SR.I-29; A/AC.138/SC.II/SR.1-25; and GAOR XXIV, Suppl. 22, A/7622, 1969 (Report of the SBC). The twenty-fourth session renewed the SBC's mandate on December 15, 1969 with Resolution 2574B, by a vote of 109-0-1. The work of the SBC during 1970 is contained in: GAOR XXV, Suppl. 21, A/8021, 1970 (Report of the SBC); A/AC.138/SR. 17-44; A/AC.138/SC.I/SR 30-38; and A/AC.138/SC.II/SR. 26-40. The General Assembly's twenty-fifth session changed the SBC into a preparatory committee on 17 December 1970 with Resolution 2750C by a vote of 108-7-6. See: GAOR XXV, Suppl. 21, A/8021, 1970 (Report of the SBC); A/AC.138/SR.17-44; A/AC.138/SC.I/SR. 30-38; and A/AC.138/SC.II/SR. 26-40. Resolution 2881 of 21 December 1971, added five other states to the SBC: China, Fiji, Finland, Nicaragua and Zambia. It was adopted by a vote of 128-0-0 at the twenty-sixth session of the U.N.G.A. On the SBC's work between 1971 and 1973 see: GAOR XXVI, Suppl. 21, A/8421, September 1971 (Report of SBC); GAOR XXVII, Suppl. 21, A/8721, 1972 (Report of the SBC); and GAOR XXVIII, Suppl. 21, A/9021, 1973 (Report of the SBC). Resolutions 2467A, 2574B, 2750C, and 2881 are reprinted in Oda, Basic Documents, pp. 35-51.

pollution that may arise from the exploitation of the international area; an international machinery for the area, taking into consideration the needs of developing countries; a detailed plan for an exploiting machinery for the area; the impact of deep seabed mineral production on LDC mineral exporters; and the question of free access to offshore areas for land-locked nations, respectively. These subjects were to be studied by the SBC as well. Resolution 2574A of the Twenty-Fourth session on 15 December 1969, requested, for the first time, a study on the possibility of convening a comprehensive conference on the law of the sea that would discuss questions related to the territorial sea, fishing and contiguous zones, the high seas, continental shelf and the overall status of the international area beyond the limits of national jurisdiction. 2750C of 17 December 1970 brought the possibility of 2574 into reality by deciding:

to convene in 1973, . . . a conference on the law of the sea which would deal with the establishment of an equitable international regime-including an international machinery- for the area and the resources of the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction, a precise definition of the area, and a broad range of related issues . . .

(and) . . . Instructs the enlarged Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction to hold two sessions in Geneva, in March and in July-August 1971, in order to prepare for the conference on the law of the sea draft treaty articles embodying the international regime-including an international machinery-for the area and the resources of the sea-bed and the ocean floor, and the subsoil thereof beyond the limits of national jurisdiction, . . . and a comprehensive

list of subjects and issues relating to the law of the sea conference . . . which should be dealt with by the conference, and draft articles on such subjects and issues; . . .

The SBC's agenda definitely had grown in complexity and scope since 1967 when Resolution 2340 established "an Ad Hoc Committee to study the peaceful uses of the sea-bed and the ocean floor beyond the limits of national jurisdiction, . . ."¹

From 1968 to 1971 the SBC moved from a concern over the area beyond the limits of national jurisdiction to a consideration of the whole range of law of the sea issues including the question of what limits should be placed on national jurisdiction. The growth in agenda favoured one group of states in particular--the Group of 77. The AHSBC's inherent stagnation guaranteed that its work would be carried on within the General Assembly's First Committee where majority vote and not consensus was used. The results of UNCTAD II at New Delhi during the winter of 1968 once more strengthened the developing world's resolve to exercise its power in numbers to redress perceived inequalities. Its apparent frustration over the slow progress being made in this

¹The resolutions are reproduced in Oda, Basic Documents, pp. 33-55.

2467B (XXIII)	21 December 1968	119-0-0
2467C (XXIII)	21 December 1968	85-9-25
2574C (XXIV)	15 December 1969	100-0-11
2750A (XXV)	17 December 1970	104-0-16
2750B (XXV)	17 December 1970	111-0-11
2574A (XXIV)	15 December 1969	65-12-30
2750C (XXV)	17 December 1970	108-7-6

regard helped to form suspicions of the developed world's actual determination to assist the Third World.¹ Resolution 2467A, establishing a permanent Seabed Committee on 21 December 1968 and the decision to include the question of an international machinery on the SBC's agenda illustrates the way the LDCs overcame the limitations of the SBC. The inclusion of new items on the agenda forced all states to come to terms with an increasing range of items during the ensuing discussions. This gave the new topics a certain legitimacy or credibility that they otherwise would not have enjoyed.

Moratorium Resolution

The UN permitted the G-77 to introduce new items to the SBC's agenda. It also gave them the opportunity and the "means" of counterbalancing the natural advantages of the developed states with respect to ocean issues."² Accelerating technological development, and the creation of an actual deep sea nodule mining industry confronted the United Nations with the possibility that state practice would render the international seabed debate meaningless. It was in the interests of the countries possessing such technologies--the U.S.A., Japan, West Germany, France and Canada-- to stall the seabed debate for as long as was necessary, to give them a chance to develop and consolidate claims over known

¹United Nations Conference on Trade and Development, Second Session, New Delhi. 1 February-20 March 1968. Summary Records of the 37th to 81st Plenary Meetings, U.N. Doc. TD/SA 37-81.

²Buzan, Seabed Politics, p. 74.

nodule deposits.¹ The developing nations were aware of this development and decided to play a stalling game of their own by adopting Resolution 2574D, the "Moratorium Resolution," at the Twenty Fourth session of the General Assembly:

. . . pending the establishment of the . . . international regime:

(a) States and persons, physical or juridical, are bound to refrain from all activities of exploitation of the resources of the area of the sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction;

(b) No claim to any part of that area or its resources shall be recognised.²

Even though a Resolution of the General Assembly is not binding and despite 2574D's failure to constrain Coastal State Expansion by not defining the area in question, the Resolution created an environment that deterred private investors from becoming involved in an area of disputed rights. It also gave the international community additional time to promote and secure community interests:

What it amounted to was a more subtle effort to undermine the technological advantage of the developed states by increasing the uncertainty surrounding the legal environment in which nodule mining would have to take place.

. . . Voting power was the only weapon available to the developing countries with which to combat the steadily increasing economic and technological advantage of the developed states. It was a way of buying time in which to negotiate before the whole negotiating process was overtaken by a fait accompli. . .³

Until 1969, the international community was attentive to

¹ Ibid., pp. 149-153.

² The Resolution was adopted by a vote of 62-28-28. It is reproduced in Oda, Basic Documents, p. 43.

³ Buzan, Seabed Politics, p. 100.

oceans issues beyond the limits of national jurisdiction. This was due to Pardo's almost exclusive focus on that area and the issue's subsequent consideration within a committee of an ad hoc nature. Focus on the area was enhanced by the Group of 77's need to maintain unity and cohesion to maximise its influence in the United Nations General Assembly. An international area whose resources should be considered a common heritage of mankind was an easy concept for a majority of states to accept in principle. As a general objective, few states could find any need to criticise it. However, the more contentious issue of limits excluded any possibility for general consent or agreement, making group unity a difficult objective to attain. This, of course, would result in a situation that favours the developed minority and reduces the potential for influence through organisation-dependent capabilities. The question of limits was avoided during the first phase. This accounts for the G-77's success in controlling the SBC's agenda and in expanding the Committee's size and mandate to reflect Third World interests.

A series of events between 1969 and 1971 politicised the issue of limits. Its salience is noted by its inclusion in a Declaration of Principles and by its becoming a substantive item for discussion within the Seabed Committee. The fifth period's second phase is marked by the adoption of the Declaration and the transformation of the SBC into a preparatory committee for a comprehensive conference on the law of the sea. Focus was directed to coastal jurisdiction rather than to the

international area following the General Assembly's Twenty-Fifth session in 1970.

Oceans Politics-- 1969-1971

Superpower Proposals

The transformation of the policy issue's structure into a dispersed current and bipolar underlying distribution of power with the Soviet Union ranking fifth in total merchant tonnage and second in naval capability, caused its maritime policy to coalesce with that of the United States. Both the U.S. and the U.S.S.R. expressed misgivings over the failure of the 1960 Conference to place limits on the extent of coastal state jurisdiction. There was a threat that the territorialist's pretensions would influence the behaviour of other littoral nations. A growing number of countries claiming 12-mile territorial seas insisted that they had the right to regulate passage through international straits. The development of the Archipelagic Doctrine by the Philippines, Indonesia and Malaysia similarly affected the global security interests of the superpowers whose massive bluewater navies depended on unimpeded transit for strategic mobility. Consequently, both powers argued that fixed limits to national jurisdiction were needed to prevent "creeping jurisdiction" from erecting barriers against that mobility.¹

¹Sayre A. Swartztrauber, The Three-Mile Limit of Territorial Seas (Annapolis, Maryland: Naval Institute Press, 1972), pp. 172-173.

In 1969 (in an attempt to gain some indication of their acceptability) both powers circulated a set of draft articles on the territorial sea and international straits within their respective areas of influence. Together, with the support of their allies and friends, both nations could command a 2/3s majority in the United Nations--approximately 85 states. However, they failed to anticipate the determination of the Third World to gain more out of a convention than definitions of ambits. The Latin American territorialists rejected the proposals outright.¹ Nonetheless, the proposals did draw attention toward the contentious issue of limits and provoked responses from both the "200 milers" and the G-77.

Latin America

Montevideo Declaration

The Latin American territorialists faced a formidable challenge. The superpowers' desire to convene a conference on the breadth of the territorial sea confronted the 200 milers with a possibility that the international community would legislate against their pretensions. Even within the context of a comprehensive conference on the law of the sea, such as the one suggested by Resolution 2574A, the territorialist position would not be as secure as Article 3 of the Continental Shelf Convention would indicate. To face these threats as well as defend policy, coordinate postures and strengthen their negotiating positions,

¹ Sayre A. Swaztrauber, The Three-Mile Limit of Territorial Seas (Annapolis, Maryland: Naval Institute Press, 1972), pp. 245-247.

9 Latin American states meeting in Montevideo, Uruguay, adopted a "Declaration on the Law of the Sea," on 8 May 1970. The declaration stipulated that coastal states have the right to determine the extent and exclusivity of their offshore jurisdictions, "without prejudice to freedom of navigation and to the passage of vessels and overflight by aircraft of any flag"¹

Lima Declaration

By excluding any mention of definite jurisdictional limits, the Montevideo Declaration left the door open for other countries to adopt the Principles outlined in its text. This occurred three months later when a group of states concluded a similar document in Lima, Peru, on 8 August 1970. It, too, was signed by the territorialists but went one step further by responding to the superpowers and the initiatives of Resolution 2574A:

. . . the convening of a conference or conferences with a limited agenda for the purpose of dealing separately with particular aspects of the law of the sea is undesirable, because it would compromise the success of a general conference

The Declaration suggests that the "200 milers" were certain that a) their overall objectives could be attained within a comprehensive conference format or b) a comprehensive conference would fail to resolve the outstanding issues related to limits, leaving their pretensions unchallenged. Whatever the case, the refusal of the Latin American land-locked states, Bolivia

¹The Declaration was signed by Argentina, Brazil, Chile, Ecuador, El Salvador, Panama, Peru, Nicaragua, and Uruguay. It is reproduced in Oda, Basic Documents, pp. 347-8.

and Paraguay and of the Caribbean participants, was conspicuous. The impact of this initiative on the negotiating patterns in the Seabed Committee was considerable.¹

The Lusaka Statement

Also responding to 2574A and the superpowers' initiative was the non-aligned movement. It knew that a conference on limits alone would preclude any attempt to resolve issues related to the international area and destroy what little chance there was to have the deep seabed beyond the limits of national jurisdiction declared the common heritage of mankind. This was made clear in a statement on the seabed by 53 non-aligned nations on 10 September 1970, remarking that the international area's status should be included in a Declaration of Principles and that a comprehensive conference on the law of the sea should be convened at the earliest possible date. Of the signatories, 26 were African, 13 Arab, 9 Asian, 4 South American (Guyana, Jamaica, Trinidad and Tobago, Cuba) and one was European (Yugoslavia). 13 of these countries are landlocked, 6 shelf-locked and 4 are metal exporters (Congo, Uganda, Zaire and Zambia). Not one of these states were adherents to the Lima Declaration. The Lusaka Statement indicates that new groups were forming, particularly the African states, with an

¹ Argentina, Brazil, Chile, Ecuador, El Salvador, Nicaragua, Panama, Peru and Uruguay, all 200-mile states, signed the Lima Declaration. It was signed, as well, by Mexico, Colombia, Honduras, Guatemala and the Dominican Republic. Of the participating states, Venezuela, Bolivia, Paraguay, Trinidad and Tobago, Jamaica, and Barbados did not sign. The Lima Declaration is reproduced in Oda, Basic Documents, pp. 349-55.

approach to coastal state jurisdiction at marked variance to the territorialist stance. These groups prefer to link jurisdictional issues with an entirely different set of premises as the inclusion of the land-locked countries would indicate.¹

The Nixon Proposals

The United States, still wanting to restrict expansionary pretensions, proposed an alternate arrangement for the Oceans Regime. On 23 May 1970, President Nixon outlined a new direction to America's oceans policy. Expressing some concern over the inability of international law to "meet the needs of modern technology and the concerns of the international community," Nixon pointed to the need for a multilateral approach to the problem before state action precluded that possibility. He suggested that before a regulatory mechanism for the international seabed area be established, it first was necessary to define precise jurisdictional ambits. Ideally, littoral states should exercise exclusive control over all continental shelf resources out to the 200 metre isobath. Between that limit and the furthest extent of the continental margin would be a trusteeship zone to be controlled by the coastal state. Revenue derived from the exploitation of resources within the trusteeship zone would be shared with an appropriate international development agency. A 12-mile territorial sea and guarantees for free transit through international straits would complete the necessary components of a new Oceans Regime. The proposal was submitted

¹Reproduced in Oda, Basic Documents, p. 360.

to the Seabed Committee in the form of a draft treaty on 3 August 1970.¹

The United States set the conditions by which it would judge the legitimacy of a new Oceans Regime. The concurrence of the U.S. was essential for it had the capability to exploit resources beyond the limits of national jurisdiction and it had the military capability to oppose excessive pretensions. Its proposals inspired considerable debate in the SBC.² The proposals also forced the international community to turn its attention away from the international area toward the problem of coastal state jurisdiction:

Arctic Waters Pollution Prevention Act

Another event that placed the question of limits into perspective was the unanimous approval given the "Arctic Waters Pollution Prevention Act" by the Canadian House of Commons and Senate on 9 June 1970. The Act attempted inter alia to regulate shipping for pollution control purposes within a 100 nautical mile zone in Canada's northern waters. Washington was quick to protest Canada's intention. The reaction from the rest of the world was more sympathetic.³ Indeed, there is a relation-

¹The American draft treaty on the international seabed area is reproduced in Lawrence Juda, Ocean Space Rights: Developing U.S. Policy (New York: Praeger Publishers, 1975), pp. 205-249.

²Ibid., pp. 119-121.

³See Albert E. Utton, "The Arctic Waters Pollution Prevention Act and the Right of Self-Protection," UBC Law Review 7 (1972): 221-234. Note that the bill gave cabinet the authority to implement pollution control legislation within very generous guidelines. Specific regulations were not adopted until 1972.

ship between the Canadian pretension and the resolve expressed in several regional and international declarations.

The Lima Declaration's, fourth principle, adopted nearly two months later, suggests that its authors may have been influenced by the Canadian legislation: The article professes:

The right of the coastal State to prevent contamination of the waters and other dangerous and harmful effects that may result from the use, exploration or exploitation of the area adjacent to its coasts; . . .

This provision was given additional significance by its inclusion in a resolution that accompanied the Declaration:

Recommends to the Governments participating in this Meeting:

(a) That they reaffirm their decision to take such steps and measures as they may deem appropriate to prevent, control and reduce or eliminate contamination and other dangerous and harmful effects resulting from the exploration, exploitation and use of the sea adjacent to their coasts and of the soil and subsoil thereof, and from any other activities carried out in non-marine environments that may affect the interests of their people, in exercise of the right of coastal States to protect its maritime heritage; . . .

Previous declarations issued at Santiago in 1952, Ciudad Trujillo, 1956, and most importantly at Montevideo (one month before the AWPPA and three months before the Lima Declaration which was modelled after Montevideo) did not directly refer to pollution control.

A comparison of the texts of 2574A requesting a study on the desirability of convening a conference on the law of the sea, and of 2750C deciding to convene a comprehensive conference, also reveals a possible Canadian influence. No mention of pollution control is made in the former resolution of November 1969 whereas the latter includes "the preservation of the marine environment (including inter alia, the prevention of pollution)" within its

terms of reference. While other events such as activities within the Intergovernmental Maritime Consultative Organisation, preparations for the Conference on the Human Environment and several severe oil spills played a role in the inclusion of the pollution provisions, the Canadian influence cannot be discounted.

Declaration of Principles

The General Assembly adopted several important resolutions during its Twenty-Fifth session including a "Declaration of principles governing the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction." The declaration was the culmination of the work initiated in 1967. It asserted "... that there is an area of the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction . . . the precise limits of which are yet to be determined." It stated inter alia that:

1. The sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction . . . , as well as the resources of the area, are the common heritage of mankind.
2. The area shall not be subject to appropriation by any means by States or persons, natural or juridical, and no State shall claim or exercise sovereignty or sovereign rights over any part thereof.

The international area is to include only the sea-bed, and does not interfere with the high seas status of the water column:

13. Nothing herein shall affect:

(a) The legal status of the waters superjacent to the area or that of the air space above those waters; . . . ¹

¹The Declaration is reproduced in Oda, Basic Documents, pp. 44-49. It was adopted by the General Assembly as Resolution 2749 (XXV) on 17 December 1970 by a vote of 108-0-14.

It makes no reference to the Moratorium Resolution and does not mention whether the limits should be defined before or after those questions related to the international regime and machinery are resolved.^{*} Both the Soviet and Western blocs abstained. The Soviets abstained because the resolution refers to international machinery for the area: the West because they wanted jurisdictional questions to be resolved before those associated with the area.¹

Notwithstanding these reservations, Resolution 2749 does mention that there are "limits" of some kind and that there is an "area beyond limits" wherein "all activities are governed by the regime." Property rights over the area are to be held in common by mankind. No state has the right to appropriate any part of the area or to assert jurisdiction over its resources. Luard sanguinely notes that "the situation of anarchy in the deep seabed . . . was now formally rejected."² His enthusiasm overlooks the fact that the area was not defined.

¹Buzan, Seabed Politics, p. 109.

²Luard, Control of Seabed, p. 137.

Resolution 2750C

The question of limits was not ignored by the international community despite the understandable failure to incorporate specific mention of limits in the Declaration of Principles. The events of the preceding 18 months convinced many of the need to resolve the jurisdictional issue as soon as possible. The question had to be included on the SBC's agenda and the Seabed Committee had to be given more meaning and clout by being converted into a preparatory committee for a conference on all outstanding issues.¹ 2750C recognised this need by deciding to convene a conference in 1973 that would attempt to resolve all issues related to:

a precise definition of the area, including those concerning the regimes of the high seas, the continental shelf, the territorial sea (including the question of its breadth and the question of international straits) and contiguous zone, fishing and conservation of the living resources of the high seas (including the question of the preferential rights of coastal States), the preservation of the marine environment (including, inter alia, the prevention of pollution) and scientific research; . . .²

The significance of 2750C must not be underestimated. It signaled that the entire international community, save the socialist bloc, acknowledged the United Nations as a legitimate

¹The SBC established three new subcommittees. The first, SC.1, was to prepare a set of draft articles on the regime and international machinery, taking 2749 as a starting point. SC.2 was to prepare a list of subjects and issues related to the law of the sea. SC.3 was charged with issues related to marine conservation and scientific research. The plenary body itself was to define the limits, and to determine the peaceful uses of the area.

²Reproduced in Oda, Basic Documents, p. 48.

rule-making authority in the oceans policy issue.¹ A new structural reality was formalised. Institutional based power resources were captured and manipulated by the G-77. The influence of the Group of 77 is revealed by the vastly increased terms of reference of 2750C vis a vis 2340.

Within a period of three years, the oceans agenda had moved from an examination by a 35-member ad hoc Committee of the peaceful uses of the seabed beyond the limits of national jurisdiction to a comprehensive list including distributional issues. The agenda provided ample opportunity for linkages to be made between apparently unrelated areas. As a result the esoteric discussion on the international area, devoid of precise boundaries, moved to the more substantive question of limits. This marks the beginning of the fifth period's second phase.

¹This does not mean that rule-making from 1971 on was initiated and controlled solely by the United Nations. Unilateral state action continued to be a vital component of the process.

Phase 2: 1971-27 June 1974

The second phase begins with the conversion of the SBC into a preparatory body for a comprehensive conference on the law of the sea. The second phase ends after the first week of the second session of the Third United Nations Conference on the Law of the Sea, held at Caracas Venezuela, at which time the agenda was completed, all procedural questions relating to the conference were resolved, the power arena was selected, and the United Nations was legitimised as a rule-making authority for the oceans policy issue area. The end of the second phase marks the beginning of the formalised rule-making sessions of the sixth period that basically have deliberated on the issues introduced by the events of the fifth period. The second phase is distinguished from the first because emphasis moved from the international area to the more contentious issue of limits. Both phases are included within the same period because the battle for arena and agenda continued, although on a more refined scale.

The second phase is typified most by states and groups reacting to the developments of the previous phase. In anticipation of a new law of the sea conference they continued to define positions and seek support for already established positions. The G-77 was aware that the best opportunity for its views to be accepted would be in a negotiating session where the agenda would be comprehensive and where decisions would be adopted through majority vote rather than consensus. The divergence of opinion on issues between the developing and developed worlds became

immediately apparent. The developed world wanted a conference that would discuss the limits question alone. The developing world found this proposal unacceptable for it probably would have resulted in an indefinite postponement of area issues. Ultimately, however, it was realised that the success of a new conference on the law of the sea was dependent on the convening of a comprehensive conference :

Every country, and every group of countries had a different sometimes conflicting range of interests within oceans space: either on the surface of the sea, on the bottom, or both. Agreement was likely to be reached only if all these varying interests would be accommodated through a vast, comprehensive package. Only if these varying interests were balanced would a solution be possible. And only if all the manifold issues were considered together as a single mammoth negotiation, so that a concession on one point could be balanced by a concession on another, were the conflicting interests likely to be reconciled.¹

For this reason the SBC was restructured to guarantee a hearing for most relevant interests. Resolution 2750C transformed the SBC into a preparatory body and enlarged its membership from 42 to 86 states. The committee was charged to compile a list of subjects and issues relevant to its mandate and to construct a set of draft articles relating to them.

The significance of the SBC from 1971 to 1973 derives from its attempt to define the boundary between the national and international seabed areas. Whilst the Seabed Committee met sporadically from 1971 to 1973, Asian and African groupings as well as the G-77 attempted to coalesce their positions. Their activities had a

¹Evan Luard, The Control of the Seabed (London: Heinemann, 1974), pp. 152-3.

major bearing on the limits debate and its outcome in the SBC.¹

Regional Activity

Asian-African Legal Consultative Committee

The first substantive reaction to the events of the preceding phase and a reflection of the growing importance of the oceans policy issue area for many actors was expressed by the Asian-African Legal Consultative Committee (AALCC). The thirteen member AALCC adopted the law of the sea as a priority item for discussion at its 12th session.² It and two subsequent sessions held at Lagos and New Delhi helped member states to prepare for the upcoming Third United Nations Conference on the Law of the Sea. They also contributed to the definitional development of the exclusive economic zone (EEZ) concept that was examined at length by the Seabed Committee.³

¹UNCTAD III held at Santiago Chile from 13 April to 21 May 1972 and the 1972 United Nations Conference on the Human Environment held at Stockholm also contributed to the limits debate in that both conferences gave nations an opportunity to meet and discuss the law of the sea and to develop pre-conference strategy. See Douglas M. Johnston and Edgar Gold, The Economic Zone in the Law of the Sea: Survey, Analysis and Appraisal of Current Trends, Law of the Sea Institute Occasional Paper, no. 17, Kingston, Rhode Island: Law of the Sea Institute, 1973, p. 29.

²Colombia, Sri Lanka, January 1971. Members: Sri Lanka, Ghana, India, Indonesia, Iraq, Pakistan, Japan, Egypt, Jordan, Sierra Leone, Thailand, Burma, and Nigeria. See Asian-African Legal Consultative Committee, Report of the Twelfth Session, Colombo, 1971.

³Report of the Thirteenth Session, New Delhi, 1973; AALCC, Brief of Documents on the Law of the Sea, 13th Session, Appendix IV, p. 433 and pp. 312-13.

The AALCC nations saw in the EEZ concept a means to reconcile the interests of states who, for economic reasons, supported territorial seas with breadths greater than 12 nautical miles with those of nations favouring a more extended but less comprehensive position. An economic zone would restrict the scope of a territorial sea but at the same time guarantee littoral control over all offshore exploration and development activity.¹

The growth of the AALCC's membership to 20 by 1973 and the attendance of observers from the U.S. and the U.S.S.R. is indicative of the interest created by the committee's deliberations.² The impact of the AALCC is demonstrated by the fact that the EEZ concept, as it was defined by the AALCC, was endorsed by the Heads of State of Nonaligned Countries at the Algiers Summit Meeting.³

Santo Domingo Declaration

The Latin American nations traditionally have been active in attempting to arrive at some common regional position respecting

¹Kenya submitted a working paper on the EEZ that eventually served as a major working document in the SBC.

²See A/AC.138/34 (April 1971), pp. 7-13; A/CN.4/248; and ST/LEG/SER.B/16 (1974), pp. 594-598.

³Nasila S. Rembe, Africa and the International Law of the Sea: A Study of the Contribution of the African States to the Third United Nations Conference on the Law of the Sea (Alphenaan den Rijn, The Netherlands: Sijthoff and Noordhoff, 1980), p. 118; UNCLOS, Official Records, vol. 1, 25th Meeting, p. 82, para. 2. Also see Algiers Charter, September 1973, Resolution No. 13: "Resolution of 1973 Concerning the Law of the Sea and Political Declaration Relating to the Question of the Seabed."

jurisdictional ambits.¹ They too were active during the second phase. Even so, these nations failed to adopt a uniform oceans policy. State practice was variant and serious problems emerged among the landlocked nations (Bolivia and Paraguay) the Latin American and the Caribbean coastal states. And although the Latin American territorialists had captured the preceding deliberations at Montevideo and Lima, the two resultant declarations did not reflect the interests and needs of many Central American and Caribbean states. Pursuant to this divergent range of interests were the aspirations of the Central American and Caribbean nations. They met in June 1972, in the Dominican Republic for the "Specialised Conference of the Caribbean Countries on the Problems of the Sea," and adopted an alternate declaration commonly known as the Santo Domingo Declaration which enunciated the concept of the patrimonial sea and rejected the territorialist contention that states should have the right to establish limits unilaterally.²

The proposals were influenced, in part, by the 12th and 13th sessions of the AALCC. They reflect a compromise between moderates and territorialists--a type of exclusive economic zone. The declaration is in marked contrast to both the Montevideo and Lima Declarations which left the question of seaward limits unresolved and specified exclusive territorial control out to at

¹Note the Santiago Declaration of 1952, the Resolution of Ciudad Trujillo of 1956, the Montevideo Declaration of Principles of the Law of the Sea of 1970, and the Lima Declaration on the Law of the Sea, 1970.

²U.N. Doc. A/AC.138/80.
Participants: Barbados, Colombia, Costa Rica, Dominican Republic, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Trinidad and Tobago, Venezuela, El Salvador, and Guyana. Of these 15 states 5 abstained: Barbados, El Salvador, Guyana, Jamaica and Panama.

least 200 nautical miles. Essentially, the Santo Domingo Declaration acknowledged coastal state rights over the exploration and development of waters and the seabed out to a seaward limit of 200 nautical miles wherein authorities over scientific research and marine pollution prevention would be exercised. Authority also would apply to areas of the continental shelf that are found beyond this limit. Territorial jurisdiction was not to exceed 12 nautical miles in breadth measured from appropriate baselines. Contiguous to the territorial sea is a 200-mile zone called the patrimonial sea wherein the state has "sovereign rights" over all living and non-living resources. Notwithstanding littoral rights over the patrimonial sea, traditional high seas freedoms (navigation, overflight and the laying of cables and pipelines) were asserted. The patrimonial sea concept did not enjoy widespread support. It did not accommodate the aspirations of Paraguay and Bolivia. Several states demonstrated, by their practice, support for the exclusivity that a 200-mile territorial sea would provide.

African Bloc

One of the most profound developments of the second phase was the formation of a cohesive African bloc, an event that deeply affected the proceedings of the SBC. Most of the bloc's members were coastal oriented. Together they constituted the largest group in the Group of 77. They were aware that their interest would be promoted best when expounded from a unified group posture. They also had reservations about the Latin American territorialist approach to regime construction. The Organisation of African

Unity foresaw the importance of the law of the sea as early as 1967 when, upon the realisation that effective participation in the SBC and UNCLOS proceedings was requisite on well informed delegations coalesced around a common regional position, the Scientific Council of Africa (SCA) recommended the formation of an advisory committee on marine affairs. At its Sixteenth Ordinary Session, the OAU requested the SCA to form a committee on the law of the sea.¹ The committee's recommendations provided the background for three resolutions on the law of the sea that were adopted by the OAU's Council of Ministers in June 1971.² One resolution on fisheries, although not specifically defining precise jurisdictional ambit, did go so far as to state that the industrial development of African nations was dependent on living marine resources that were threatened by non-African fishing fleets. Accordingly, the resolution:

Confirms the inalienable rights of African countries, over the fishery resources of the continental shelf surrounding Africa . . .

2. Urges the governments of the African countries to take all necessary steps to proceed rapidly to extend their sovereignty over the natural resources of the high seas adjacent to their territorial waters and up to the limits of their continental shelf.³

¹The scientific panel on the law of the sea established by the SCA proposed an exclusive fishing zone extending out to the 600 metres isobath even if it were to exceed traditional territorial limits. See Nasila S. Rembe, Africa and the International Law of the Sea: A Study of the Contribution of the African States to the Third United Nations Conference on the Law of the Sea (Alphenas den Rijn, The Netherlands: Sijthoff and Noordhoff, 1980), p. 120.

²Addis Ababa, 11-14 June, 16th Ordinary Session.

³OAU Resolution on Fisheries (Document CM/Res.250 (XVII)) reproduced in Shigeru Oda, The International Law of the Ocean

Apparently natural marine resources, perceived as essential to African development, were deemed as securable in a manner short of territorial exclusivity. The OAU preferred to express function specific authorities over a particular resource. Littoral authorities would extend out to the furthestmost reaches of the continental shelf.¹ The SCA itself decided to adopt a more precise position. Following its meeting in Ibadan, Nigeria, in November 1971, the SCA proposed a maximum territorial limit of 200 nautical miles with a 12-mile contiguous zone beyond giving a total littoral reach of 212 nautical miles.²

Development (Leiden: Sijthoff, 1972), p. 363. Also see OAU Resolution on the Permanent Sovereignty of African Countries Over their Natural Resources (Document CM/Res. 245 (XVII)). The Council of Ministers of the OAU met in its Seventeenth Ordinary Session at Addis Ababa, Ethiopia, 15-19 June 1971.

¹In effect the OAU resolution linked the coastal position with the anti-developed country position of the G-77. A few months following the resolutions, in November 1971 at Lima, the second ministerial meeting of the Group of 77 adopted a Resolution on Marine Resources whereby it was stated:

"as a common aim of the Group of 77 and recognition by the international community that coastal States have the right to protect and exploit the resources of the sea adjacent to their coasts and of the soil and subsoil thereof, within their limits of national jurisdiction, the establishment of which must take due account of the development and welfare needs of their peoples." (reproduced in Oda, International Law, pp. 364-66.

The resolution was similar to that adopted at Montevideo in May 1970 and the OAU Resolution on the Permanent Sovereignty of African Countries Over their Natural Resources, adopted June 1971. Buzan notes:

"By linking the overall coastal state position to the image of developed states plundering the resources off the coasts of developing countries, the developing states were able to achieve a substantial measure of support for their position within the Group of 77 despite the fact that coastal state policy held no direct advantage for many developing countries." See Buzan, Seabed Politics, p. 186.

²The area would be used for economic purposes and pollution

Soon after, another proposal was introduced at the Second Ordinary Session of the OAU's Educational, Scientific, Cultural and Health Commission meeting at Cairo, 29 November to 4 December 1971. The Commission adopted a Resolution on Territorial Waters endorsing the SCA's recommendation for a 200 nautical mile territorial sea plus a 12-mile contiguous zone wherein coastal pollution control and exclusive fishing powers would be exercised.¹ Both the OAU Resolutions and the SCA Recommendations of 1971 expressed a desire to extend littoral authority over marine resources beyond traditional limits to national jurisdiction and were used as tools to harmonise African oceans policy. These regional recommendations provided the background for the unanimously adopted Conclusions of the African States' Regional Seminar on the Law of the Sea, held at Yaounde, Cameroon, 20-30 June 1972.²

Yaounde Conclusions

The Conclusions offered a further development of the EEZ concept. Territorial limits were set at 12 nautical miles (Article 1. a. 2). Beyond would be an economic zone wherein

control. 28 October-8 November 1971. Document ESCHC/63, Recommendation XVI. See Rembe, Africa, p. 120.

¹ Reproduced in Rembe, Africa, pp. 216-217.

² Report of the African States Regional Seminar on the Law of the Sea, 1972. U.N. Document A/AC.138/79. Reproduced in Rembe, Africa, pp. 217-220. The Seminar was attended by 16 African states: Cameroon, Central African Republic, Benin, Egypt, Equatorial Guinea, Ethiopia, Ivory Coast, Kenya, Mauritania, Nigeria, Senegal, Sierre Leone, Tanzania, Togol, Tunisia, Zaire.

littoral pollution and resource control authorities would be exercised. Traditional high seas rights still would exist, including transit rights through international straits. Land-locked and geographically disadvantaged nations would be given access to the resources of the EEZ and would be assured of transit rights through the area. The Conclusions, however, did not mention a specific jurisdictional breadth for the EEZ. The question of limits was left open to individual state discretion subject to:

. . . reasonable criteria which particularly take into account their own geographical, geological, biological and national security factors.

The limits of the economic zone shall be fixed in nautical miles in accordance with regional considerations taking duly into account the resources of the region and the rights and interests of the land-locked and near land-locked States, without prejudice to limits already adopted by some States within the region.¹

Article 1.a.7 acknowledged that there was some difficulty in arriving at a common position on limits. This accounts for the open-ended approach found in the Conclusions. Yet Article II suggested that the continental shelf might be used as an endpoint for the economic zone. The Article recommended that states:

. . . extend their sovereignty over all the resources of the high seas adjacent to their territorial sea within an economic zone to be established and which will include at least the continental shelf.

Obviously the great diversity of interests found among the African nations was responsible for a jurisdictional formula that accommodated most relevant interests. It was a realistic

¹Article 1.a.1.; Article 1.a.5..

document in that by placing limits on territorial competence and asserting high seas freedoms within the economic zone, there was a good possibility that it would obtain big power approval.

OAU Declaration

The Conclusions found expression in a declaration by the OAU's Council of Ministers in 1974--The Declaration of the Organisation of African Unity on the Issues of the Law of the Sea. Like the Conclusions, the question of territorial zonal limits was left open but most other provisions including innocent passage were asserted. An absolute limit of 200 nautical miles for the EEZ was established. The Declaration asserted that these proposals would represent the interests of many African nations that did not participate in the rule-making sessions of the First and Second United Nations Conferences on the Law of the Sea and provided a powerful base on which African nations could establish a united position respecting UNCLOS III.¹

List of Subjects and Issues

The activities of the G-77, the Latin American and African nations helped to focus attention toward the limits question, so much so that the SBC spent a great portion of its time in the second phase examining limits and related issues. This is

¹Concluded at the 21st Ordinary Session in Addis. Ababa, 17-24 May 1973 and at its 23rd Ordinary Session in Mogadiscio, 6-11 June 1974. Document A/CONF.62/38; OAU Doc. CM/Res.289 (XIX), reproduced in Rembe, Africa, pp. 220-226.

evidenced by the large number of draft articles on limits oriented subjects that were submitted to the SBC from 1971 to 1973.¹ The impact of the limits debate is illustrated further by the detailed attention given to jurisdictional ambits in the "List of Subjects and Issues" prepared by the SBC to provide the basis for discussion at the Third United Nations Conference on the Law of the Sea.²

Procedural Debate

Notwithstanding the debate on limits and the apparent ability of the developing world to determine the international oceans agenda and its success in having all substantive items handled by a comprehensive forum rather than issue specific agencies; one serious factor prevented LDCs from directly impacting outcomes. Actual outcomes are determined by the rules of procedure governing rule-making in the organisational arena. As such, the decision-making mechanisms assumed an exaggerated importance that would not have been prevalent under

¹For example, see:

20 African States, "List of Subjects on Law of the Sea," 1971, A/AC.138/58.

23 African States, "List of Subjects on the Law of the Sea," 1972, A/AC.138/66 and Corr.2.

Kenya, "Fisheries," A/AC.138/SC.11/L.10, July 1972.

Kenya, Malagasy, Senegal, "Draft Article on Fisheries," 16 July 1973, A/AC.138/SC.II/L.38.

14 Powers, "Draft Article on the Exclusive Economic Zone," 16 July 1973, A/AC.138/SC.11/L.40.

Uganda, Zambia, "Draft Article on the Exclusive Economic Zone," 16 July 1973, A/AC.138/SC.11/L.41.

²"List of Subjects and Issues at the Third United Nations Conference on the Law of the Sea." United Nations, Report of the Committee on the Peaceful Uses of the Seabed and the Oceans Floor Beyond the Limits of National Jurisdiction (New York: United Nations, 1973) 2: 24-38.

normal conditions. LDC strength would be greatest in a system where developing nations could exercise majority vote. That system was entrenched in the procedural apparatus of the General Assembly and previous international conferences. Alternatively, the power of the developed world would be enhanced if decisions could be made through consensus. Consensus would permit DCs to bloc undesirable Third World initiatives.

One of the mandates of the Seabed Committee was to prepare rules of procedure for the Third United Nations Conference on the Law of the Sea. This it failed to do. The deliberations of the SBC were, in fact, extended for another year.¹ The SBC did manage to discuss rules of procedure in March and April of 1973 but it failed to arrive at any definitive conclusion. The General Assembly's First (Political) Committee resumed the task at the 28th session of the General Assembly, October to November 1973. It, too, failed to arrive at a solution.² Even the organisational session of UNCLOS III failed to adopt the necessary rules of procedure. It was not until 27 June 1974, the end of the first week of the Caracas session, that the rules finally were established.³

¹General Assembly Resolution 3029A, 18 December 1972.

²U.N. Document A/CONF.62/SR.16, at 7; U.N. Document A/C.1/PV.1924-33, 1936-39, 46, 48, October-November 1973.

³General Assembly Resolution 3067 called for the convening of an organisational session at New York, 3-15 December 1973, and for the first substantive session to be held at Caracas 20 June to 29 August 1974. The organisational session was charged with appointing officers for the conference and selecting appropriate rules of procedure. The New York proceedings are recorded in U.N. Document A/CONF.62/SR.1-13, 22 February 1974.

The developed maritime powers, particularly the U.S.A., the U.S.S.R., the U.K., Japan and the E.E.C. were behind the delay. By 1973 they had lost the battle for arena. The G-77 had compelled the United Nations to examine the entire range of issues related to the law of the sea. They were able to do so by using their superior position in the General Assembly's Political Committee to circumvent the SBC's unfavourable voting structure. The maritime powers were cognisant that, if similar rules pervaded UNCLOS III, the outcome would not be conducive with their systemic interests. The maritime powers had an opportunity to redress their previous losses by adhering to a consensual-based rule making structure. A favourable decision-making apparatus would give the DCs an opportunity to bloc Third World initiatives that they had opposed over the previous six years. The developed world's view predominated.

The maritime actors repudiated the General Assembly's normal rules of procedure. They wanted the rules to be replaced by a set that would give them greater control over outcomes. The G-77 had little choice but to comply. The developing world was aware of the fact that a Convention ratified by a majority of states but without the support of the major actors in the system simply would not be workable:

This conflict arose out of the North-South confrontation. Though the consensus procedure was cumbersome and time consuming, the hope was that if it produced a treaty, it would be more likely to result in the creation of a viable¹ regime than the traditional rules of the General Assembly.

¹Edward Miles, "The Structure and Effects of the Decision Process in the Seabed Committee and the Third United Nations Conference on the Law of the Sea," International Organisation 31 (Spring 1977): 184.

A compromise was achieved on 27 June 1974.¹ The compromise was based on a Gentleman's Agreement annexed to the rules of procedure. It is similar to one voted on by the General Assembly at its 16 November 1973 meeting.² Both the agreement and the rules were adopted by consensus at the 19th and 20th Plenary Meetings of the session. Essentially, consensus would be the main decision-making force. A vote would be utilised only when efforts at consensus had been exhausted.³ This laid the ground rules for the mammoth rule-making sessions of the sixth period, still ongoing (December 1981). It marks the end of the fifth period.

27 June 1974 marks the end of the fifth period because the events of that day formally guaranteed the survivability of a new structural component in the Oceans policy issue area, international organisation. By agreeing on a set of acceptable rules of procedure, the major actors in the oceans system signalled their determination to initiate regime development through international organisation rather than unilateral pretension. The sixth period commencing with the second week of negotiations at the Caracas session is the full embodiment of this new structural form. Rule-making during the sixth period has, with little exception, taken place within the context of the new structure.

¹U.N. Doc. A/CONF.62/30, Rev. 1. Also see International Legal Materials 13 (1974): 1199.

²U.N. Doc. A/CONF.62/WP.2, 25 June 1974.

³U.N. Doc. A/CONF.62/SR.19 and 20. The rules are discussed in detail by Daniel Vignes, "Will the Third Conference on the Law of the Sea Work According to the Consensus Rule?" American Journal of International Law 69 (January 1975): 119-29 passim.

The institutionalised rule-making sessions of the sixth period have not been accompanied by radical changes in both the underlying and current structures. However, the consensus based rules of procedure and the complexity of the talks have prevented UNCLOS III from quickly arriving at a definitive conclusion. Ten sessions thus far have been held, drawn out over a course of seven years.¹ This should not be regarded as a failure of international organisation to develop a new law of the sea. The fact that the conference has managed to last as long as it has, that all major actors have chosen to continue participating in the session and that state claims registered within that period have not (with only a few exceptions) exceeded the bounds of the emerging Oceans Regime augers well for organisation dependent rule-making.² The regime, in essence, has taken on a life of its own.

An examination of the evolution of the Oceans Regime confirms that stability (regime strength) is dependent on leadership, legitimacy, structure/influence congruence and the institutionisation of rule-making processes. These four systemic components, therefore, are related with Coastal State Expansion. The Oceans Regime weakened and CSE intensified when several or all of these components were lacking.

Although this thesis has focussed almost exclusively on

¹ Appendix.

² Compare United Nations, Draft Convention on the Law of the Sea, tenth session (resumed) Geneva, 23-28 August 1981: A/CONF. 62/L.78, 28 August 1981, and U.S. Department of State, National Claims to Maritime Jurisdiction, 4th rev. (1981).

systemic considerations, it should not be assumed that they are paramount. Dynamics peculiar to the state also play a role in the expansionary process. They, too, should be examined so as to give a more complete comprehension of Coastal State Expansion. Chapter VIII examines the process from a state-centric perspective and suggests how the frameworks developed by Keohane and Nye, and Choucrist, North and Bousfield can be utilised to account for CSE in a complete manner. As such, the Chapter suggests a possible avenue for additional work to be done on Coastal State Expansion.

CHAPTER VIII

APPLICABLE LITERATURE AND THEORETICAL APPROACHES

Studies attempting to describe related aspects of marine behaviour can contribute to a comprehension of the forces underlying CSE. There are few. Those that have been undertaken vary in complexity from simple attribute identification to models taking into consideration up to 90 variables. Similarly, theoretical approaches to Coastal State Expansion are limited. However, from existing theoretical approaches it is possible to discern a theoretical basis and paradigm that should help to fill a gap in theory and in Marine Affairs literature.

At its most basic level, a relationship exists between state oceans behaviour and certain objective conditions such as maregeographic characteristics. Several writers have attempted to identify those components or indices of national interest corresponding with littoral and maritime activity and national

marine policy. The compilations are useful in that they permit the researcher to model state relationships with the marine environment though they do not attempt to correlate the attributes with specific behaviour.¹ Lewis Alexander takes this one step further by grouping countries with common categories of interests under the headings of accessibility, investment, dependence and control. Alexander's approach permits comparative analysis which should facilitate an understanding of the relationship, if any, between behaviour and a selected attribute.²

¹Three significant compilations of marine attributes have been compiled thus far: Lewis M. Alexander, "Indices of National Interest in the Oceans," Ocean Development and International Law Journal I (1973): 21-49; John K. Gamble, Global Marine Attributes (Cambridge, Mass.: Ballinger Publishing Co., 1974); and, Michael McGwire and Wilma Broeren, The Components of National Interest: Information Package, Centre for Foreign Policy Studies Department of Political Science, (Halifax: Dalhousie University, 1973).

²Lewis Alexander's grouping is found in "Indices of National Interest." Several studies concerned with regime construction have attempted to establish relationships between specific national attributes and preferences for alternate regime types. Douglas M. Johnston and Edgar Gold, in a detailed study on the Exclusive Economic Zone, grouped states under numerous distinctions to assess the flexibility or inflexibility of countries anent the zone and to point to the direction in which the Exclusive Economic Zone concept is evolving. See their The Economic Zone in the Law of the Sea: Survey, Analysis and Appraisal of Current Trends, Law of the Sea Institute Occasional Paper, no. 17, University of Rhode Island, Kingston, 1975. In a rather ambitious effort, Manjula Shyam undertook to model linkages between state attributes and marine policy preferences, particularly with regard to fisheries management, international straits and the international seabed regime. Her method and results are found in: An Empirical Analysis of the Third Law of the Sea Conference, (Ph.D. dissertation, University of Pittsburgh, 1974). Also see Shyam's: "International Straits and Ocean Law," Indian Journal of International Law 15 (1975): 15-46; "Rights of the Coastal States to Fisheries Resources in the Economic Zone: An Empirical Analysis of State Preferences," Ocean Management 3 (1976): 1-30;

It also allows the utilisation of several techniques other than simple correspondence to determine postulated relationships.¹

The strength of discussions of this kind is determined by their assumptions. Three simplifying premises are identifiable. First, a predictable relationship exists between certain objective conditions and state behaviour. Second, a state is a monolithic unit and not a grouping of competing interests:

The model of unitary actor helps to provide some approximations of future outcomes; if that assumption is discarded, one is left with a map of countless variables to which a researcher should be sensitive without any indication as to how they will interact and what the outcome of such a process will be.²

Third, the only significant actor in the international system is the nation state:

The additional complexity of including transnational and inter-government actors in the analysis is not accompanied by any corresponding gains in predictability to warrant their inclusion.³

and "International Seabed Regime: An Empirical Analysis of State Preferences," Cooperation and Conflict 2 (1976): 111-134.

¹Johan L. Løvvald used national attributes as predictor variables in a stepwise multiple regression analysis of interactions regarding negotiations for an international regime in the Seabed Committee: "In Search of an Ocean Regime: The Negotiations in the General Assembly's Seabed Committee 1968-1970," International Organisation 29 (Summer 1975): 681-709; and Planning the Future of Ocean Space: A Case Study of the United Nations Sea - Bed Committee, 1968-1970 (Ph.D. dissertation, Northwestern University, 1973).

²Shyam, "International Seabed Regime," p. 112.

³Ibid.

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Some writers demonstrate that explanation requires the inclusion of additional material excluded by these three assumptions.

The three assumptions ignore the means by which the attributes are translated into actual behaviour. Intervening referent variables may induce outcomes at variance with the original expected results. John King Gamble, in his work on marine policy, evinces that inputs into the policy system are processed through a filter mechanism composed of a country's values, bureaucratic structure and decision-making apparatus to such an extent that anticipated outcomes may not be realised:

... marine policy . . . may be distorted and shaped in ways that are not intrinsically logical given the set of preconditioning national characteristics. There is also the very real possibility that certain non-marine factors (substantive factors) may be so important to a country that they influence (distort) marine policy so it bears little resemblance to the policy one might otherwise have suggested.¹

Gamble undertook an extremely ambitious project. He modelled marine policy, defined as "a set of goals, directives, and intentions formulated by authoritative persons and having some relation to the environment," with 90 variables.² His input-output model (Figure 4) is based on the assumption that "a group of input characteristics sets the bases and direction of most aspects of marine policy." Inputs are the "objective, quantifiable characteristics from which policy can be developed." That is, "characteristics deriving from the basic geographic

¹ John King Gamble, Marine Policy: A Comparative Approach (Lexington, Mass.: D.C. Heath and Company, 1977), pp.5-6.

² Ibid.

situation." On the other hand, outputs "may take a variety of forms, including assertion of domestic jurisdiction, control over marine activity, ratification or rejection of a treaty, support of a particular industry, maintenance of a naval force level, or rejection or acceptance of actions by other countries."¹ (Italics added).

FIGURE 4

AGGREGATE MODEL OF MARINE POLICY MAKING

SOURCE: John King Gamble, Marine Policy: A Comparative Approach (Lexington, Mass.: D. C. Heath and Co., 1977), p. 8; figure 1.1.

¹Ibid., p. 7.

The model rejects the assumption that states are monolithic units. Considerable literature now argues that policy often is the result of compromise among competing coalitions of interests.¹ Lawrence Juda shows that U.S. oceans policy is a resolution of bureaucratic infighting, not that all nations must contend with similar levels of infighting.² Its intensity and outcome are subject to diverse factors such as the political salience of oceans issues, type of government and size of bureaucracy.³

Even though the inclusion of political process increases the explanatory power of the Marine Policy paradigm, the model itself suffers from several serious misconceptions. The first is its exclusive focus on maregeographic characteristics as inputs to the marine political process. Policy outcomes and state behaviour arise from many other factors such as technological capability, fish exports as a percentage value of GNP and a nationally controlled merchant marine.⁴

¹For several analyses on this point see: Graham T. Allison, "Conceptual Models and the Cuban Missile Crises," American Political Science Review 63 (1969):689-718; Idem, The Essence of Decision (Boston: Atlantic, Little - Brown 1972); Graham T. Allison and Morton H. Halperin, "Bureaucratic Politics: A Paradigm and some Policy Implications," World Politics 24 (Spring 1972): 40-79; and Morton H. Halperin, Bureaucratic Politics and Foreign Policy (Washington, D.C.: The Brookings Institution, 1974).

²Ocean Space Rights: Developing U.S. Policy (New York: Praeger Publishers, 1975).

³Ann L. Hollick, "United States and Canadian Policy Processes in Law of the Sea," San Diego Law Review 12 (April 1975): 519.

⁴Løvald, "In Search of an Ocean Regime," pp. 693-696.

Gamble prefers to place these "other factors" in the output side of his overall equation. In doing so, he creates a static representation of what is a dynamic process. Granted, certain attributes do not change over time, as Gamble's list of objective, quantifiable components indicates. But this should not preclude the incorporation of more elusive and variable indices. The use of feedback mechanisms between outputs and inputs, whereby an output of policy becomes a policy input, would overcome this objection.

Another problem with Gamble's Marine Policy paradigm is its preoccupation with domestic phenomena. It ignores the potential and actual impact of transnational and systemic elements on the policy making process. The validity of state-centric analyses must be questioned when one realises that, in an interdependent world, group and linkage politics have managed to exert a noticeable effect on state political processes:

Increasingly therefore, internal events and trends are sustained by external events and trends, so that the distinction between domestic and foreign policy have become increasingly blurred.¹

It no longer is correct to ignore the influence of the two

¹James N. Rosenau, "Adaptive Politics in an Interdependent World," Orbis 16 (Spring 1972), p. 156. Other work on "linkages" between domestic and foreign policy can be found in James N. Rosenau, ed., Linkage Politics: Essays on the Convergence of National and International Systems (New York: The Free Press, 1969). One interesting approach in marine affairs which utilises Rosenau's concepts to account for positions taken in Latin American territorial waters disputes has been completed by Bobbie B. Smetherman and Robert M. Smetherman, Territorial Seas and Inter-American Relations: With Case Studies of the Peruvian and U.S. Fishing Industries (New York: Praeger Publishers, 1974).

other significant actors in the international oceans system, Intergovernmental Organisations (IGOs) and International Non-Governmental Organisations (INGOs).¹ On occasion transnational ties have resulted in nations adopting policies that are based on inputs not contained within national boundaries and which may not be in the general national interest.² Furthermore, the oceans system has evolved to a point where it constrains and strongly influences state behaviour:

Does policy (in the sense of national political goals) predetermine the outcome of multilateral political negotiations on the law of the sea? Or, instead, do the game (ocean politics), and its rules (multilateral bargaining on a wide range of issues) create their own requirements and lead the players into goals they never intended?³

¹On the relative importance of each of the three main actors in the oceans system see Edward Miles, "Transnationalism in Space: Inner and Outer," in Transnational Relations and World Politics, ed. Robert O. Keohane and Joseph S. Nye (Cambridge, Mass: Harvard U. Press, 1972), pp. 252-75.

²Jack N. Barkenbus, "The Politics of Ocean Resource Exploitation," International Studies Quarterly 21 (December 1977): 684-687.

³Barry G. Buzan and Barbara Johnson, Canada at the Third Law of the Sea Conference: Policy, Role and Prospects, Law of the Sea Institute Occasional Paper, no. 29, University of Rhode Island, Kingston, 1975, p. 10. On this point see: Barry G. Buzan, Seabed Politics (New York: Praeger Publishers, 1976); Joseph S. Nye, "Ocean Rule Making from a World Politics Perspective," Ocean Development and International Law Journal 3 (1975): 29-52; and Robert O. Keohane and Joseph S. Nye, Power and Interdependence: World Politics in Transition (Boston: Little, Brown and Company, 1977). On the political processes particular to the oceans system see Edward Miles, "The Dynamics of Global Ocean Politics," in Marine Policy and the Coastal Community: Studies in the Social Sciences, ed. Douglas M. Johnston (London: Croom Helm Ltd., 1976), pp. 147-81.

Relevant international organisations, INGOs and transnational interest groups should be included in the processing sector of the Marine Policy paradigm. Appropriate systemic components should be considered along with the other input attributes since the oceans system both inhibits and/or induces state behaviour. With these components it is possible to construct a simple representation of littoral oceans behaviour, the first of several steps needed before a general framework modelling the process of Coastal State Expansion can be realised. Figure 5 gives an aggregate view of the dynamics underlying littoral state behaviour.

FIGURE 5

Equal emphasis is given to the international oceans system and the coastal state. An analysis of change and stability in that system is essential. The system can constrain or induce state oceans behaviour. It can play a role in the marine policy formulation process. Likewise the activity of littoral states becomes a part of the systemic process and

plays a role in determining the way the oceans system will affect state oceans behaviour.

The paradigm attempts to build on the most complete work done on state oceans behaviour. It strives to compensate for the deficiencies of studies based on three simplifying assumptions but which fail to facilitate explanation. Incorrect and misleading findings can be avoided when the analyst accepts that: there is no direct predictable relationship between objective conditions and behaviour; a state is a grouping of competing interests; and the nation state is not the only significant actor in the international system. Shyam warns that these base conditions for analysis leave the researcher "with a map of countless variables." By consequence, a muddled, unworkable situation will ensue with "no corresponding gains in predictability."¹ Contrary to Shyam's assertion, several theoretical frameworks do permit the ordering of an enormous amount of data in a workable and predictable system.

Robert Keohane and Joseph Nye have done extensive work on change and stability in the international oceans system and on how that system affects state oceans behaviour. Their approach is outlined in the first Chapter of this thesis. A framework that also is applicable to state behaviour, and more capable of accounting for the expansionary process, has been

¹"International Seabed Regime," p. 112.

developed by Robert North, Nazli Choucri and Marie Bousfield.¹

A synthesis of both the complex interdependence and lateral pressure frameworks should provide an insight to the process of Coastal State Expansion.

National Expansion

Nazli Choucri and Robert North attempted to locate the source of state external behaviour. They traced it to the growth processes of high capability countries. More precisely formulated, national growth and international expansion is determined by the interaction of three master variables-- population, resources and technology. These variables are related dynamically and tend to cluster in a high capability society giving rise to demands and specialised capabilities that become institutionalised. Eventually, provided there are inadequate resource bases at home, pressures emerge forcing the state to expand into low capability areas.

Choucri and North hypothesised that "expansionist activities are most likely to be associated with relatively high capability countries and to be closely linked with growth in population and advances in technology."²

¹Nazli Choucri and Marie Bousfield, "Alternative Futures: An Exercise in Forecasting," in Forecasting in International Relations: Theory, Methods, Problems, Prospects, ed. Nazli Choucri and Thomas W. Robinson (San Francisco: W. H. Freeman and Company, 1978), pp. 308-26.

²Nations in Conflict: National Growth and International Violence (San Francisco: W. H. Freeman, 1975), p. 28.

In fact, by relating the foreign activity of the six major European powers prior to the outbreak of World War I to the underlying domestic factors generating national growth, Choucrist and North were moderately successful in establishing causal links between indicators of national growth and indicators of external activity and conflict outcomes.¹ The results give some credence to their theoretical framework based on 17 propositions and five theoretical dependencies (Table 5 and Table 6).²

¹Ibid. This does not mean that World War I was caused by the dynamics of growth, expansion and competition. These processes merely set the stage for the actors in combat.

²The lateral pressure perspective is outlined, inter alia, in: Nazli Choucrist and Robert North, "The Determinants of International Violence," Peace Research Society, Papers 12 (Cambridge 1968): 33-63; Nazli Choucrist and William C. Mitchell, "Armaments Behaviour Among Competing Nations Simulating the Naval Budgets of Major Powers: Europe, 1870-1914," (Departments of Political Science, Massachusetts Institute of Technology and University of Chicago, October 1969); Nazli Choucrist and Robert C. North, "Dynamics of International Conflict: Some Policy Implications of Population, Resources and Technology," World Politics 24 (Supplement 1972): 80-122; Nazli Choucrist, "Population, Resources, Technology: Political Implications of the Environmental Crisis," International Organisation 26 (Spring 1972): 175-212; Nazli Choucrist, "In Search of Peace Systems: Scandinavia and the Netherlands 1870-1970," in Peace, War, and Numbers; ed. Bruce M. Russett (Beverly Hills: Sage, 1972), pp. 239-74.; Richard P. Lagerstrom and Robert C. North, "An Anticipated Gap, Mathematical Model of International Dynamics," (Institute of Political Studies, Stanford University, April 1969,); Robert C. North and Nazli Choucrist, "Background Conditions to the Outbreak of the First World War," Papers, Peace Research Society (International) 9 (1968): 1-13; Robert C. North and Richard Lagerstrom, War and Domination: A Theory of Lateral Pressure (New York: General Learning Press, 1971); Robert C. North and Nazli Choucrist, "Population, Technology, and Resources in the Future International System," Journal of International Affairs 25 (1971): 224-37; Robert C. North, "Some Paradoxes of War and Peace," Papers, Peace Science Society (International) 25 (Nov. 1975): 1-14; Robert C. North, "The Stanford Studies in

TABLE 5
PROPOSITIONS

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1. The larger a given population, the greater is likely to be the amount of resources demanded.
 2. The more advanced the level of technology among a given population, the greater will be the range and quantity of resources required to sustain that technology and advance it further.
 3. Advancing knowledge and skills also alter a people's perceptions of what they "need" and consequently their demands are likely to increase.
 4. . . . population and technology combine multiplicatively to produce human demands for resources.
 5. Such demands may be satisfied in whole or in part by acquisition of resources either directly from original sources or through trade.
 6. The scarcer the resources relative to population and level of knowledge and skills, the greater will be the level of unsatisfied demands.
 7. National leaderships may be viewed as operating cybernetically to minimise or close one (or a combination) of three types of gap. The most basic of these (a) is a gap between resources that are "needed" or demanded and resources that are actually available. The second (b) is the gap between an expectation and the reality that materialises (as, for example, when climbing productivity begins to decline); and the third (c) is a gap between the actor's level of resources or growth rate and that of a competitor or rival. Behavior at any given time may be accounted for in considerable part by one, or, more probably, a combination of such gaps. (Gaps in military and naval power, prestige, status and other attributes may exacerbate existing gaps or create new ones).
 8. Absolute levels of population, technology, territory, resources and trade affect a nation's overall capabilities, its power, prestige and status. Rates of change along these dimensions (as well as absolute amounts) contribute to the shaping of a nation's values, preferences, predispositions, institutions and behaviors.

TABLE 5 - Continued

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9. In their efforts to close gaps between what is available and what is "needed," desired or demanded, both individuals and interpersonal systems tend to allocate certain proportions of the energy available to them for the development of specific capabilities.
 10. Demands and specific capabilities (whether developed by ruling elites or important sectors of the populace or both) combine multiplicatively to produce what might be called lateral pressure This amounts to a tendency to invest energy and acquire some degree of influence over a wider extent of space or among a larger number of other people or both.
 11. Nation-states and empires with high lateral pressure (whether generated by ruling elites or important sectors of the populace or by a combination of both) tend to extend their influence in search of raw materials and markets.
 12. The higher the lateral pressure generated by a given state or empire the greater will be its tendency to extend its interests and influence into (and often domination over) territories and countries with a lower level of capability.
 13. As a nation-state or empire extends influence (and hence its interests) there frequently tends to develop a feeling among the leaders (and also often among the rank and file of citizenry) that this influence and these expanding interests ought to be protected. This tendency may give rise to the extension of military or naval forces, the development of a tendency to police areas beyond the legal boundaries of the state or empire, and a feeling of responsibility for regional or even world "law and order."
 14. The desire to achieve and maintain law and order (as defined by the national leadership) and protect national interests (or large private interests) in far-off places may lead to wars against indigenous tribes, chiefdoms and petty principalities, and the effort to attract, equip and partially finance client chiefs, princes, warlords or other rulers or ruling groups.
 15. To the extent that two (or more) countries with high energy levels and high lateral pressure tendencies extend their interests and psychopolitical borders outward, there is a strong probability that sooner or later the opposing perimeters of interest will intersect at one or more points.

TABLE 5 - Continued

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16. There is often a feeling on the part of an aspiring but still somewhat weaker or less prestigious power that it is being "encircled" by its rivals. When this happens, we may expect the competition to intensify and tend to become transformed into conflict and perhaps a so-called cold war or arms race. Crises are likely to emerge around such intersection points.
 17. Competitions and conflicts between two or more high lateral pressure countries frequently lead (either directly or through colonial or client wars or through some combination of local and more diffused conflicts) into arms races, crises, and large scale wars.
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SOURCE: Robert C. North, "Alternate Futures for Society: Certain Variables and Parameters," (47th Annual Meeting, American Orthopsychiatric Association, San Francisco, California, March 24, 1970): 18-32.

TABLE 6

THEORETICAL SPECIFICATION OF THE PROCESS OF EXPANSION

The theoretical dependencies representing the process of expansion can be distinguished as follows:

- (1) the demands resulting from the process of national growth
- (2) the capability to initiate activity beyond territorial boundaries.
- (3) the disposition to extend activity beyond national boundaries (referred to as lateral pressure)
- (4) the activities resulting from this disposition
- (5) the impact which these activities have upon the international environment

The phenomena described in 1-3 are antecedent to actual foreign behavior, while 4-5 refer to these behaviors and their consequences. In each case we are dealing with dynamic processes which are characteristically interactive. The limitations of verbal specification prevent an adequate examination of these processes because of their complexity and because feedback effects, which are fundamentally important to the determination of system behavior, are also operating. Therefore, even an approximate representation of this process requires formalisation, and toward this end, we have employed system dynamics.

To date, this effort has been directed at modelling the determinants of behavior. Hence, lateral pressure, the disposition to extend activity beyond national boundaries, is specified as follows:

$$\text{Lateral Pressure} = (\text{Demands}) \cdot (\text{Capability})$$

Demands

- The product of the component demand multipliers which themselves are modelled to represent the individual sectoral influences generated by growing population, increasing technology and investment, and the changing resource endowment.

TABLE 6 - Continued

Capability	- The national technological-economic base, presently measured in a highly aggregated form, using Gross National Product as an indicator.
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SOURCE: Brian M. Pollins, "National Determinants of Foreign Expansion: Forecasting U.S. Lateral Pressure," (Prepared for presentation at the 1976 Annual Meeting of the International Studies Association, Royal York Hotel, Toronto, Ontario, Canada, 25-29 February, 1976), p. 5, table 1.

Theoretical Dependencies

Demand

The first theoretical dependency, demand, is produced by the interaction of three variables: population, technology and resources. Population growth is not directly linked with national expansion. Growth in population is significant when it is accompanied by and interacts with technological development and resource constraints. For example, considerable population increases in 19th century Europe combined with advances in technological capabilities and economic productivity has been associated with colonial expansion during that period.¹

Technology, "the general level and rate of development of human knowledge and skills in a society and the related industrial output," satisfies demand by identifying new uses for old resources and by making new resources available. Technology exacerbates demand by requiring an ever greater quantity and type of resources "to provide energy and structure for tools, machines, and factories, and raw material for processing," (and) "by making new productions and services possible, technological advances encourage consumption

International Conflict and Integration," in In Search of Global Patterns, ed. James N. Rosenau (New York: Free Press, 1976) pp. 73-80; and Robert C. North, "Toward a Framework For the Analysis of Scarcity and Conflict," International Studies Quarterly 21 (Dec. 1977): 569-591.

¹Choudcri and North, "Dynamics of International Conflict."

and raise expectations."¹

The third component of demand, resource scarcity, is a condition which exists "when the materials required to close gaps strongly felt by substantial numbers of people appear to be critically overpriced or unavailable to some considerable number."² (Italics added). Scarcity is not a state of absolute exhaustion. Scarcity is a condition that is assessed in terms of real dollar and environmental costs. Costs, in turn, are determined by the availability of appropriate technologies.³

Population and technology combine multiplicatively to produce demands for resources. Obviously, "the scarcer the resources relative to population and level of knowledge and skills, the greater will be the level of unsatisfied demands."⁴ This process can be represented crudely as:

$$\frac{P \times T}{R} = D \quad (\text{perceived gaps})$$

There is a strong psychological component to demand. Demand is a perception of need which is satisfied by a perceived supply of resources. Rising expectations are as essential to the equation as is economic growth. Nevertheless, whether need

¹ Nazli Choucri, Michael Laird, and Dennis L. Meadows, Resource Scarcity and Foreign Policy: A Simulation Model of International Conflict (Cambridge: MIT Centre for International Studies, 1972), p. 29.

² North, "Toward a Framework," p. 580. Also see "Alternate Futures," p. 22.

³ North, "Toward a Framework," p. 576.

⁴ Choucri, Laird, and Meadows, "Scarcity and Foreign Policy," p. 56.

is actual or perceived, demand motivates society's decision-makers to set in motion powerful activities designed to minimise or close the three gaps mentioned in Proposition 3.¹

Capability

A country utilises existing means to obtain much needed resources or allocates certain proportions of available resources for the development of specific capabilities. A capability is defined as "any means at the disposal of the nation which would permit it to affect a desired change, or to prevent an undesired change. More directly, we might think of capabilities as delineating the set of actions that could be undertaken in the short or immediate run."² They are determined by absolute levels of population, technology, resources and trade. Examples of specialised capabilities include marine scientific research and development, light and heavy industry, and military preparedness. Specialised capabilities may be attained rapidly by forming alliances with other countries enjoying a high capability base; technology transfer agreements; and joint research operations.³

Lateral Pressure

Together demand and capability create:

the predisposition to reach beyond national boundaries to satisfy demands . . . The predisposition may be acted

¹North and Choucri, "Future International System," p. 226.

²Brian M. Pollins, "National Determinants of Foreign Expansion: Forecasting U.S. Lateral Pressure," (Prepared for presentation at the 1976 Annual Meeting of the International Studies Association, Royal York Hotel, Toronto, Ontario, Canada, 25-29 February, 1976), p. 5.

³Ibid.

on - the desired resources are acquired - or the country may be prevented from doing so by another state. Thus if a country demanding resources also lacks the naval or military capabilities necessary to overcome resistance by another country, the predisposition . . . will not be acted on.¹

The predisposition to act is defined as lateral pressure:

a society's tendency to exert efforts in one mode or another, or in a combination of modes, ever farther from its natural or original borders. This can occur as an attempt to meet demands for resources (and/or markets), or because a society has generated surplus capital for investment, or for other reasons.²

This is to be distinguished from the actual manifestation of external behaviour - trade, investments, military expansions, and other means.³

This distinction is important for the disposition to initiate foreign activity arises from demands but the particular activity itself is determined by those capabilities giving a state the means to act. Capabilities define the limits of a country's possible foreign policy options. Figure 6 gives an aggregate representation of the lateral pressure sector. Table 7 outlines some of the characteristic patterns associated with the disposition to expand.

Activity

The manifestation of a state's disposition to expand can take the form of many kinds of activities beyond national boundaries. External activity will be focussed into low capability areas:

¹Choucri and North, Nations in Conflict, p. 21.

²Idem, "Population," p. 231.

³Choucri, Laird, and Meadows, "Scarcity and Foreign Policy," p. 15.

FIGURE 6

OVERVIEW OF STRUCTURE AND LINKAGE OF SECTORS

SOURCE: Brian M. Pollins "National Determinants of Foreign Expansion: Forecasting U.S. Lateral Pressure," (Prepared for presentation at the 1976 Annual Meeting of the International Studies Association, Royal York Hotel, Toronto, Ontario, Canada, 25-29 February 1976), p. 13, figure 1.

TABLE 7

SOME PATTERNS ASSOCIATED WITH EXPANSIONARY DISPOSITION

Population, technology, territory-resources, and trade can be combined in the following ways to yield characteristic patterns and predispositions:

moderate, stable population;
high, growing technology,
favourable trade; "adequate"
territory, resources

prosperous, progressive,
nonaggressive society;
high standards of public
welfare (Sweden today)

large, growing population;
low, lagging technology;
"inadequate" resources;
large underdeveloped
territory; low or unfavourable
trade

high basic demands, low
capability, mass society
near subsistence; dis-
integrated political,
economic systems; "warlordism";
external penetration by
aggressive, high lateral
pressure states (China,
1912-1924)

large, rapidly growing population
and technology; "inadequate"
resources; limited territory;
inadequate trade relative to
demands

centralised, aggressive,
militaristic society; likely
to feel "surrounded,"
blocked; likely to expand
opportunistically (Japan,
1930)

large, growing population;
high, rapidly developing
technology; high level of
resources but needing particular
external resources; large
territory (or colonial holdings);
high, favourable trade

Great Power with much
lateral influence, pressure;
strong generator of energy;
engaged in Great Power
competitions, arms races,
(pre-World War I U.K.; U.S.,
U.S.S.R. today)

. . . a high energy generating unit . . . extends its influence, power, and control laterally to encompass neighbouring units of less capability.¹

. . . expanding patterns of such activities often create expanding areas of private and/or public (national) interests which concurrently or subsequently may serve as claims for national defense.²

Impact

State external behaviour has an impact on the system. For example, it is likely that when two or more high capability states extend their interests outward, their interests will intersect. Intersecting interests can assume the form of intense competition for resources in the area of intersection:

When two or more major powers extend their respective interests outward, there is a strong probability that these interests will be opposing and the activities of these states may collide. A nation may find itself at a relative disadvantage in the world competition for resources, markets, etc. . . . (and) . . . will look for means for improving the nation's relative position. This may involve increases in military or naval capabilities or improvements in heavy industry. One method of increasing capabilities is to secure favourable alliances. Such bonds normally imply the pooling of some capabilities for the maintenance of shared interests.³

Improvements in one country's ability to assert effective influence in a particular area will not go by unnoticed by its competitors:

An increase in the political, economic, or military strength and effectiveness of one nation will tend to generate new demands in the rival nation and a disposition among its leaders to increase appropriate capabilities.⁴

¹North, "Alternate Futures," p. 23.

²Ibid., p. 27.

³Choucri and North, Nations in Conflict, pp. 19-20.

⁴Ibid., p. 22.

It is possible that an intense competition situation can reach a point where state activity is determined not so much by internal demand and capability generating processes but by the capabilities and behaviour of other states. This "break-point" or shift from one set of dynamics to another "accounts for the progression of a conflict situation in the direction of large scale violence (or perhaps the rejection of violence as a foreign policy behaviour). Earlier stages of competition are dominated by dynamics internal to the nation state."¹ (Italics added).

Choucri and North's theoretical framework enabled them to demonstrate a link between indicators of national growth and external behaviour.² Choucri, Laird and Meadows sought to increase the explanatory and predictive power of the lateral pressure paradigm by identifying the underlying factors that generate demands and determine capabilities.³ This work has been carried on by Choucri and Bousfield with the immediate objective of linking demands and capabilities to disposition. The study is directed toward the long-term goal of establishing connections between each of the five theoretical dependencies of the dynamics of national expansion.⁴ Their framework of

¹ Idem, "Dynamics of International Politics," p. 97.

² Idem, Nations in Conflict.

³ Resource Scarcity and Foreign Policy."

⁴ Nazli Choucri and Marie Bousfield, "Alternative Futures: An Exercise in Forecasting," in Forecasting in International

analysis is applicable to and will facilitate an understanding of the process of Coastal State Expansion.

The framework entails modelling:

the relevant demand-generating and capability determining processes; thereby linking demands and capability to disposition. The extended specification of modes of lateral pressure will link the disposition to specific activities and finally, an examination of the international mix of activities which produce cooperative and conflictual outcomes will link these activities to their international impact.¹

Disposition can be linked to activity by disaggregating the lateral pressure sector into specific modes of behaviour. This involves the construction of a taxonomy whereby various foreign policy behaviours are placed under headings specifying lateral pressure modes. An incomplete taxonomy done by Pollins indicates what is necessary (Table 8).

An examination of Choucrist and Bousfield's work reveals the many complexities that such an endeavour entails. It involves many complex relationships and several levels of

Relations: Theory, Methods, Problems, Prospects, ed. Nazli Choucrist and Thomas W. Robinson (San Francisco: W. H. Freeman and Company, 1978), pp. 308-26. See as well: Nazli Choucrist, "Applications of Econometric Analysis to Forecasting in International Relations," Papers, Peace Science Society (International) 21 (1973): 15-39; Nazli Choucrist, "Forecasting in International Relations: Problems and Prospects," International Interactions I (1974): 63-86; Nazli Choucrist, Population Dynamics and International Violence: Propositions, Insights, and Evidence (Lexington, Mass.: D. C. Heath and Co., 1974); Nazli Choucrist and Marie Bousfield, The Determinants of Lateral Pressure: A Forecasting Model of the United States, 1930-2000 (Cambridge: MIT Center for International Studies, 1975); and Nazli Choucrist, "From Correlation Analysis to Computer Forecasting: Evolution of a Research Program," in In Search of Global Patterns, ed. James N. Rosenau (New York: The Free Press, 1976): 81-90.

¹Pollins, "National Determinants of Foreign Expansion," p. 10.

TABLE 8

SOME POSSIBLE FOREIGN POLICY BEHAVIOURS
UNDER CONDITIONS OF LATERAL PRESSURE

<u>ECONOMIC MODE</u>	<u>MILITARY MODE</u>
Trade	Establish or Abandon
Direct Foreign Investment	Military Bases
Technology Transfer	Overseas Troop Levels
International Patenting	Military Aid
Participation in Collusive	Arms Transfer
Activity by Sellers or	Maneuvers
Buyers of Raw Materials	Arms Limitation Efforts
<u>DIPLOMATIC MODE</u>	<u>TERRITORIAL MODE</u>
Establish or Break Relations	Initiate Changes in
at Various Levels	Domestic Territory
Diplomatic Communications	Initiate Changes in
Participation in IGOs	Colonial Territory

Once this taxonomy is complete, it will be necessary to link these modes to particular domestic phenomena. That is, it must be determined which population, technology, and resource-related demands, in conjunction with a specified array of capabilities, result in determining changes in the levels of activity within these individual modes.

SOURCE: Brian M. Pollins, "National Determinants of Foreign Expansion: Forecasting U.S. Lateral Pressure," (Prepared for presentation at the 1976 Meeting of the International Studies Association, Royal York Hotel, Toronto, Ontario, Canada, 25-29 February 1976), p. 9.

feedback mechanisms employing system dynamics as an analytic technique.¹ Such methodologies require an enormous data base and complex modelling. Notwithstanding the obvious complexities involved, it should be possible to determine the aggregate demand generating and capability creating processes predisposing a coastal state to extend its jurisdiction and activity over offshore areas and to assess the impact of these activities on the international oceans system.

Granted, there are serious difficulties with the lateral pressure framework. It is state-centric. The theoretical structure does not directly make allowances for economic interdependencies, transnational and systemic factors, and their impact on domestic demand generating processes. However there is no attempt to suggest that Choucri and North's theory is all encompassing. It strives to account for change in the international system, not to predict discrete events.² Its value is based on the fact that it permits an ordering of a vast amount of material. In doing so it adds perspective to

¹"System Dynamics is a theory of system structure and a set of tools for identifying, representing, and analysing multi-loop, non linear feedback relationships. A feedback system is influenced primarily by its own internal structure involving elements related through negative and positive feedback." Choucri, Laird, and Meadows, "Resource Scarcity and Foreign Policy," p. 23. System Dynamics is an approach normally associated with Jay W. Forrester. See his Principles of Systems (Cambridge, Mass.: Wright - Allen Press, 1968), and "Counter-intuitive Behaviour of Social Systems," Technology Review (1971): 1-16.

²Choucri and North, Nations in Conflict, p. 9.

a phenomenon, Coastal State Expansion, that previously has failed to attract serious investigation.

The lateral pressure paradigm allows the researcher to account for the domestic determinants of national expansion. Keohane and Nye's work on regime maintenance and ocean rule-making helps to identify more precisely the systemic components related to the expansionary process. Both perspectives are united by giving equal emphasis to the impact of state external behaviour on the international system. However the latter emphasises that the system may determine the type of activity before actual impact is made, defined ultimately by the strength of the Oceans Regime. This is expressed diagrammatically in Figure 7.

Capability determination is included in the paradigm because it determines type of activity selected.¹ Activity selection also is influenced by the character of the Oceans Regime. A strong regime may preclude the selection of territorial modes of lateral pressure, inducing governments to opt for economic or military options. Once a particular option is chosen by the state and acted on, its conduct and regulation will be

¹This model is based on several assumptions at variance with those found in Choucri and North's works. It is assumed that lateral pressure, as a disposition, can arise strictly from demands rather than from an appropriate combination of demand and capability. Furthermore, it is assumed that lateral pressure can give rise to an activity type, CSE, without utilising any apparent capability. Non-jurisdictional activities, of course, can be expressed only if appropriate capabilities are prevalent. The inclusion of the variable Capability Determination at a point following Lateral Pressure rather than preceding it permits the paradigm to account for both jurisdictional and non-jurisdictional modes of activity.

FIGURE 7

AGGREGATE STRUCTURE OF NATIONAL AND
SYSTEMIC DETERMINANTS OF EXTERNAL BEHAVIOUR

influenced by regime type. That is, when regime conditions are weak, the state may exercise external activities with a minimum of external direction and constraint. Alternatively, strong regimes place conditions on the exercise of external activity. The impact of a particular activity on the international environment may, if favourable, strengthen a regime or may seriously destabilise the system and weaken the regime. For example, a coastal state determined to exercise a territorial option despite the existence of a strong regime may, capabilities permitting, develop its naval power to a point where it would be able to defend incursions into the regime.

Coastal State Expansion

It is of great interest to acquire an understanding of the underlying dynamics and systemic effects of Coastal State Expansion. No effort will be made to identify every process and variable related to Coastal State Expansion. The immediate objective is to describe and account for the major components, in aggregate form, that are involved in the overall equation. In doing so, it should be possible to place Coastal State Expansion in proper perspective relative to its domestic and systemic implications and to offer a reasonably accurate assessment of the ability of expansionary dynamics to manifest themselves in given regime periods. Unfortunately, the constraints under which this thesis operates do not permit subjecting the postulated relationships to the rigorous

testing that they require; however, an attempt will be made to indicate direction and fit.

Figure 8 represents the hypothesised dynamics of Coastal State Expansion as both a dependent and independent variable. As a dependent variable it is directly affected by 10 variables. Coastal State Expansion serves as an explanatory device in five other equations (all major concepts are defined in Table 9). A coastal state's propensity to extend its jurisdiction beyond internationally prescribed limits influences and is influenced by a multitude of domestic and systemic factors. A littoral entity may choose to expand to consolidate its control over offshore resources and to regulate the activity of foreign actors in coastal areas. Working against the propensity to expand are competing domestic maritime interests as well as concerns over the anticipated and actual reaction of the international community. These concerns arise out of an awareness that along with gains from the control and regulation of offshore resources and foreign maritime activity come negative and often costly outcomes.

The process of Coastal State Expansion cannot be explained solely by an analysis of the factors that affect it most directly. As Figure 9 reveals, each relevant variable is related closely to other elements. Intervening variables and feedback mechanisms play important roles in postulated dynamics and must also be assessed in terms of their effect on expansionary phenomena. Consequently the simple linear formula must be accompanied by a constructive paradigm that captures

TABLE 9

DEFINITIONS AND CONCEPTS

A	- Access:	The extent and availability of a coastal state's living and non-living marine resources is determined by maregeographic circumstance.
ARE	- Actual Resource Exploitation:	The deliberate utilisation of living and non-living marine resources.
CSE	- Coastal State Expansion:	Extensions to national jurisdiction of littoral authorities beyond internationally prescribed limits.
CSEO	- Coastal State Expansion of Others:	The authoritative pretensions of littoral actors in the oceans policy issue area.
DWE	- Distant Water Exploitation:	A highly developed coastal state facing significant marine resource demand but which has a small or unproductive Offshore Resource Base may choose to acquire much needed resources from distant coastal and deep sea areas.
DWEO	- Distant Water Exploitation of Others:	Foreign resource development activities in offshore areas.
ECp	- Economic Capability:	The interaction of population, technology and resources determines a state's level of development and rate of growth.
II	- Intensity of Intersection:	Seaward extensions of state interests conflict with those of other international actors.

TABLE 9 - Continued

MSTCp	- Marine Science and Technology Capability:	National growth and technological innovation increases a coastal state's ability to exploit resources from its offshore areas and perhaps off the coasts of other nations. Establishments concerned with the systemic investigation of the aquatic environment and concerned with the development of techniques needed for offshore activity are associated with technologically advanced states.
MP	- Maritime Power:	Coastal states sailing ocean-going vessels under their flags or having navies to protect vital interests.
MPO	- Maritime Power of Others:	The presence of foreign naval and merchant vessels in or near a coastal state's offshore waters.
OR	- Oceans Regime:	Codified and/or customary norms specifying: "The nature and extent of states' jurisdiction over the oceans adjoining their coasts; and . . . The ownership, use, and regulation of space and resources beyond national jurisdiction" ¹
ORB	- Offshore Resource Base	The living and non-living means, either actual or potential, adjacent to the coast of a littoral state needed to satisfy substantive or projected demands generated by the interaction of population, technology and national growth.

¹Robert O. Keohane and Joseph S. Nye, Power and Interdependence: World Politics in Transition (Boston: Little, Brown and Company, 1977), p. 89.

TABLE 9 - Continued

OTD	- Offshore Trade	Heavy reliance on sea-going vessels for the export and import of goods.
P	- Population:	"The sheer numbers of people and rate of increase." ¹
R	- Resources:	The human, living and non-living means available to satisfy demands generated by economic processes.
T	- Technology:	"The levels, distribution, and rates of knowledge and skills among the people." ²

¹Nazli Choucri and Robert C. North, "Dynamics of International Conflict: Some Policy Implications of Population, Resources and Technology," World Politics 24 (Supplement 1972): 82.

²Ibid.

FIGURE 8

HYPOTHESISED DYNAMICS OF COASTAL STATE EXPANSION
AS BOTH A DEPENDENT AND INDEPENDENT VARIABLE

FIGURE 9

DYNAMICS UNDERLYING COASTAL STATE PROPENSITY TO EXPAND

both direct and referent processes.¹ The model in Figure 9 includes just three other variables. These variables can be used to map many vital relationships excluded in Figure 8. Figure 10 shows how all major variables and relationships fit with the earlier introduced model on State Oceans Behaviour.

¹The Coastal State Expansion paradigm assumes that its postulated relationships pass through the distorting filter of process. However, the processing function will not be discussed in depth here because it already is the subject of a considerable literature. See *inter alia*: David B. Bobrow, "International Politics and High-Level Decision Making: Context for Ocean Policy," Ocean Development and International Law Journal 3 (1975): 171-180; Barry G. Buzan and Barbara Johnson, "Canada at the Third Law of the Sea Conference;" Robert L. Friedheim and Robert E. Bowen, "Assessing the State of the Art in National Ocean Policy Studies," Ocean Development and International Law 7 (1979): 179-220; Alan G. Friedman, "US Law of the Sea Policy: A Bureaucratic Politics Analysis," Marine Policy 2 (October 1978): 304-320; Ann L. Hollick, "The Law of the Sea and U.S. Policy Initiatives," Orbis 15 (Summer 1971): 670-686; Ann L. Hollick, "United States Oceans Politics," San Diego Law Review 10 (May 1973): 407-50; Ann L. Hollick, "Bureaucrats at Sea," in New Era of Ocean Politics, ed. Ann L. Hollick and Robert E. Osgood (Baltimore: The Johns Hopkins University Press, 1974), pp. 1-73; Ann L. Hollick, "The United States and Canadian Policy Processes in Law of the Sea," San Diego Law Review 12 (1975): 518-52; Ann L. Hollick, "National Ocean Institutions, Research Needs," Ocean Development and International Law 3 (1975): 155-70; Ann L. Hollick, "Canadian-American Relations: Law of the Sea," in Canada and the United States: Transnational and Transgovernmental Relations; ed. Anette Fox et al (New York: Columbia U. Press, 1976), pp. 162-187; Ann L. Hollick, "The Roots of U.S. Fisheries Policy," Ocean Development and International Law 5 (1978): 61-105; Juda, Ocean Space Rights; H. G. Knight, "Special Domestic Interests and United States Oceans Policy," in International Relations and the Future of Ocean Space, ed. Robert G. Wirsing (Columbia, South Carolina: U. of South Columbia Press, 1972), pp. 10-44; Kenneth H. Kolb, "Congress and the Ocean Policy Process," Ocean Development and International Law 3 (1976): 261-286; Keohane and Nye, Power and Interdependence; Michael A. Morris, "The Domestic Context of Brazilian Maritime Policy," Ocean Development and International Law (1977): 143-170; Leigh S.

FIGURE 10

STATE OCEANS BEHAVIOUR

Choucrist and North's framework on national expansion attributes the disposition to expand to a combination of demand and capability determining processes that motivate a state to seek resources (needed for the perpetuation of growth processes) beyond national boundaries. The first conclusion to be derived from the lateral pressure paradigm is that Coastal State Expansion, as a part of the territorial lateral pressure mode, is determined to a great extent by the need to obtain offshore resources to avoid serious economic and political disruptions. A country can obtain needed living and non-living resources, in part, by exploiting (Actual Resource Exploitation - ARE) its Offshore Resource Base (ORB); providing maregeographic circumstance allows significant Access (A) to that resource base. A Marine Science and Technology Capability (MSTCp) gives a country the means to determine the extent of its ORB, facilitates Access to those resources and permits their actual exploitation. MSTCp generally is possessed by high Economic Capability (ECp) states, for they are able to command necessary financial resources for the development and support of appropriate marine technologies.¹

Ratiner, "United States Oceans Policy," Journal of Maritime Law and Commerce 2, (January 1971): 225-266; Bobbie B. Smetherman and Robert M. Smetherman, Territorial Seas; Don Walsh, "Some Thoughts on National Ocean Policy: The Critical Issues," San Diego Law Review 3 (1976): 514-627; and Edward Wenk, The Politics of the Ocean (Seattle: University of Washington Press, 1972). John King Gamble's study reveals that process exerts little influence on outcome. Marine Policy, p. 88.

¹MSTCp is not strictly within the competence of developed coastal states. MSTCp can be attained by low ECp actors through joint research initiatives, technology transfer, and international research and development projects.

At first glance, it would appear that only the economically developed nation embodies the most appropriate components predisposing it to expand over offshore areas. This is true to a certain extent, especially when expansion takes the form of extended activity. However, when expansion strictly entails the assertion of authority over offshore areas, disposition can be influenced by non resource need considerations and be expressed without the development of specific capabilities.

It is difficult to conceive of any case where a coastal state is divorced from the maritime activities of other littoral entities. Most coastal areas are affected by the extended presence of countries that depend on an expansive maritime role for the perpetuation of economic and security concerns. Coastal states often find that their offshore waters are the subject of scientific investigation, surveillance, transport, naval maneuvers and alien controlled resource exploitation. They may find themselves pressured into claiming offshore jurisdiction for a plethora of reasons other than resource control, including restricting foreign coastal activity, conservation and management, environmental protection, safety standards, rules of the road, security and customs enforcement.¹ Foreign activities may be perceived by the coastal state as actually or potentially inimical to its littoral situation warranting some response. Consequently demand must embody

¹W. Burke et al., National and International Law Enforcement in the Ocean (Seattle: University of Washington Press, 1975), p. 45.

elements other than resource need. Demand can be a reaction to the Maritime Power of Others (MPO) (which results in an intensified foreign presence off the shores of a coastal state) and to the Distant Water Exploitation of Others (DWE) (which utilises resources that may be required by the state presently or at some anticipated future date).

Before a country's decision makers decide to extend national jurisdiction, they must first carefully assess the potential impact of unilateral action on the country's domestic and global interests. Many developed coastal nations find themselves in the unenviable position of having to account for both littoral and maritime considerations. The need to control and manage offshore activity must be weighed with the potential impact that extended jurisdiction may have on the oceans policy issue area. One nation's expansionary pretensions are bound to influence those of other countries. Coastal State Expansion of Others (CSEO), if widespread, could adversely affect a maritime power's global security interests, increase the costs of transporting seaborne goods and deny access to much needed resources. It follows that a state which is a Maritime Power (MP) and which may be engaged in Distant Water Exploitation (DWE) activities, will be pressed hard to arrive at a solution that accommodates both coastal and maritime interests--a most difficult task. Even a heavy reliance on seaborne trade for the continuance of vital economic processes, Offshore Trade Dependence (OTD), would mitigate against any tendency to expand, for expansion

could initiate global processes that hinder the free and economic transport of goods over the oceans. Ultimately, the result of diverse national interest competition will determine whether a state adopts a littoral or maritime oceans policy.

The actual manifestation of state oceans policy is contingent on the character of the international Oceans Regime. A strong regime will reduce a state's chances to consolidate its control over offshore areas and should deter the introduction of any unilateral legislation. Under such circumstances, the pressures to expand would have to be overwhelming and the state would have to be prepared to defend its pretensions from international enforcement actions, necessitating an enormous expenditure of resources.

The more widespread a country's oceans activity and jurisdiction, the greater the probability that its extended interests will conflict with those of other states. Intersecting interests, for example, could take the form of competition for depleting fishery resources and disagreements over boundary delimitation. The Intensity of Intersection (II) actually may induce conflict outcomes. The realisation that such outcomes may result from extended jurisdiction and defeat any possible gains surely would act as a constraining factor in any debate on the ideal extent of a nation's offshore jurisdiction.

Table 10 shows how the main variables of the CSE paradigm relate to the five theoretical components of national expansion:

TABLE 10

THEORETICAL COMPONENTS OF COASTAL STATE EXPANSION

DEMAND: ECp, MPO, DWEO, ORB, A, CSEO

DISPOSITION:

CAPABILITY: MSTCp.

ACTIVITIES: CSE, ARE, DWE, MP, OTD

IMPACT: CSEO, II, OR

The development of each variable and anticipated relationship would constitute the next step toward the construction of a complete framework on Coastal State Expansion. Such a development should illustrate quite clearly that state propensity to expand is related both to marine resource need and the desire to regulate foreign actor activity proximate to national littorals. Type of activity selected is dependent on the targets of national demand. An appropriate application of national capabilities is needed to acquire resource targets. On the other hand, responses to foreign actors offshore may assume jurisdictional forms, something not dependent on actual capability. Ultimately, the successful manifestation of any initiated activity will have an impact on the oceans system by: inducing competition situations; influencing other coastal states to expand; and possibly destabilising the Oceans Regime.

The preceding Chapters illustrate the relationship between the international oceans system and Coastal State Expansion. The Chapters examine the hypothesis that CSE will find expression in weak or no regime periods based on the assumption that expansionary dynamics are subject to less constraints in weak regimes than in strong ones. Strongly related with this anticipated relationship is the role of leadership and legitimacy in regime maintenance and how changes in the system's underlying and current structures can alter the character and strength of the Oceans Regime. It was shown that leadership and legitimacy, their presence or lack thereof, are two essential features involved in regime stability and therefore are related to the inability/ability of coastal states to assert littoral

authorities over areas beyond internationally prescribed limits. In effect, Chapter VIII contributes toward the development of the variables Coastal State Expansion of Others, Intensity of Intersection and Oceans Regime found in the CSE paradigm, three major aspects of the theoretical component impact.

Chapter IX outlines the most relevant direct and indirect relationships involved in the expansionary process and should help direct attention to the need to give CSE more complete attention in marine affairs literature. The development of the CSE paradigm is a small step in that direction. But much more work needs to be done to build on its generalities. Some of the material warranting more in depth attention include:

1. Selecting appropriate indicators for each variable in the CSE paradigm and subjecting postulated direct and indirect relationships to the rigorous testing that they require.
2. Disaggregating the various sectors of the paradigm into more specific analytical units. As it now stands, its use is confined to being a conceptual tool--a means of looking at CSE and the Oceans Regime and a means of explaining and arriving at general conclusions.
3. Testing could focus on two modes of analysis. One would entail testing the validity of the paradigm against individual cases. Another would use it as a basis for comparative littoral analysis.
4. Trends could be projected to demonstrate a predictive value.
5. It would be interesting to conduct comparative analysis of state expansionary dynamics in selected periods of regime strength.

6. Cognisant of the influence of complex interdependence conditions and diverse interest group competition on CSE, perhaps some means of quantifying process would be possible.

The potential for other work based on the CSE paradigm is great. It would provide a convenient tool for detailed case studies on littoral oceans behaviour and provides a basis for comparative analysis. And if sufficiently developed, the paradigm could add a valuable predictive scope to the process.

CHAPTER IX

CONCLUSION: COASTAL STATE EXPANSION AND THE OCEANS REGIME

The stability of the Oceans Regime in the first period was dependent on the naval preponderance of Great Britain and on Britain's determination to police the seas. Change in the distribution of capabilities introduced the possibility that Britain's leadership would be challenged. The regime had to change to reflect the interests of new ascendant actors in the system despite Great Britain's continuing commitment to the three-mile territorial sea during the interwar or second regime period.

The U.S.A., one of the newly emergent naval powers of the second period, chose to adopt measures at variance with the traditional structure of the free seas regime. There was little that Great Britain could do to challenge America's pretensions. Many littoral actors chose to follow America's lead. Although the regime no longer was absolute, the basic jurisdictional tenets of the free seas regime remained. Challenges to the three-mile territorial sea concept were not significant and the major maritime powers, subject to qualifications regarding a contiguous zone, were supportive of the narrowly defined territorial sea concept.

The Second World War transformed the oceanic structure into a unipolar one with the United States attaining mastery

over both the underlying and current structural levels. The U.S. was in an excellent position to assume leadership responsibilities and to shape the regime in a fashion that reflected its systemic and littoral interests. It did this by upholding the integrity of the three-mile territorial sea concept and espousing a littoral functionalism conducive to its continental shelf and fisheries interests.

These additional features could have become entrenched components of the Oceans Regime. The United States could have capitalised on its hegemonial leadership position and actively pursued a leadership policy by defending the newly defined Oceans Regime. The Oceans Regime could have become as strong and universally defined as the one in the first period. The regime could have survived as long as the U.S.A. remained the preponderant power in the system and was determined to exercise its leadership responsibilities regardless of the determination of other littoral actors to act otherwise. The United States failed to live up to its systemic responsibilities. Leadership lag, alliance commitments and a highly confused and disoriented domestic political process mitigated against the U.S. adopting a cohesive and active leadership strategy.

Littoral actors, spurred on by the expansionist example set by America, responded to domestic expansionary pressures and to foreign actor activity off national littorals. They initiated a widespread series of claims. Many of the claims were at variance with the oceanic dicta prescribed by the United States. This weakened the Oceans Regime. Effective

leadership was lacking. Widespread adherence to the boundaries of the regime, whether they be the three-mile concept upheld by Britain, the similar territorial sea concept subject to functionalist qualifications as was favoured by the U.S., or to some other boundary regime demanding universal compliance, did not exist. No one definition of the Oceans Regime was perceived as legitimate by all members of the oceanic community who pursued strategies conducive to their own particular littoral interest.

The fifth period was the most significant since regime stability became equated with legitimacy. A new power source was introduced--organisation based power capabilities through the instrument of the United Nations system. Issue linkage and asymmetrical interdependencies assumed a major role in the oceans rule-making process. The Group of 77 effectively utilised its strength in numbers by ensuring that the oceans agenda encompassed the entire gambit of oceans issues. This strengthened linkage strategies and prevented the great powers from controlling procedural outcomes. The success of such a process demanded that institutionalised rule-making be responsive to the interests of all important actors involved.

A new outlook on the Oceans Regime emerged within the framework of the United Nations system. Consensual agreement revolved around a regime typified by a 12-mile territorial sea; a 24-mile contiguous zone; and a 200-mile exclusive economic zone (EEZ) plus non-living margin resources beyond.

The seabed seaward of the economic zone/margin would become part of the common heritage of mankind.

This thesis demonstrates that regime stability is related to four components: leadership, legitimacy, structure/influence congruence and regime institutionalisation. These four components are related to Coastal State Expansion in that CSE is easier to execute in weak regimes than in strong ones. But this provides an incomplete picture of Coastal State Expansion. The national dynamics underlying Coastal State Expansion should be assessed as well. Such an investigation, along the lines suggested in Chapter VIII would constitute the next logical step in the development of a framework detailing the eminent role of Coastal State Expansion in the international oceans system.

The Seventh Period

The marathon rule-making sessions of the sixth period are scheduled to conclude on 30 April 1982. The signing of a Convention on the Law of the Sea should take place at Caracas in September 1982. September 1982, therefore, provides an ample point for the conclusion of the sixth period and the beginning of the seventh regime period.

There already are indications that the seventh regime will be stable but not absolutely strong.

Legitimacy

Certain events seem to indicate that the regime's boundaries of the seventh period will face serious challenge both from the littoral majority and the maritime minority who covet the rich resources of the seas. One of the main factors behind this challenge will be several ambiguous provisions in the Convention on the Law of the Sea. The high seas fisheries provide a case in point.

The Draft Convention on the Law of the Sea recognises absolute littoral competence to manage living resources found 200 nautical miles seaward of baselines (Article 56.1.a).¹ Within the context of the exclusive economic zone, the coastal state has sovereign rights relating to the exploration, development and conservation of all living resources found within the limits. (Article 56.1.a). The coastal state is

¹United Nations Draft Convention on the Law of the Sea (A/CONF.62/L/78, 28 August 1981).

charged with ascertaining the productive capacity of stocks subject to appropriate scientific method. (Article 61). What is appropriate is not defined. No provisions are made for other states to confirm the results of scientific investigation and no compulsory procedures are provided for the settlement of disputes. The coastal state is charged exclusively with the conservation of the resource and it alone determines surplus stocks and Total Allowable Catch (Article 61). LDCs are to be given preferential access to surplus stocks as well as subregional states including the landlocked and geographically disadvantaged (Articles 69 and 70). They are to be given access on terms specified by the coastal state (Article 62.4). Shared stocks should be administered by some form of regional organisation, including stocks ranging between adjacent exclusive economic zones and between EEZs and the high seas. (Article 63). Utmost cooperation among all concerned actors over migratory stocks is urged (Article 64). The articles further recognise that the coastal state has the primary interest and therefore responsibility for anadromous stocks (Article 66).

Littoral state rights seem to be firmly entrenched when the high seas provisions are considered. Article 87.1.e acknowledges the freedom to fish on the high seas but the freedom is limited or qualified by the conditions established in Section 2. Due regard must be given to the interests of others. All user states must ensure that acceptable conservation practices are adhered to. User states must participate in

management programmes and cooperate in the establishment of subregional and regional fisheries organisations. The coastal state is given preferential management rights over anadromous species. Too, the freedom to fish the high seas is subject to treaty obligations and to "the rights and duties as well as the interests of coastal states" (Article 116.b).

There are several problems with these articles. No provision is made linking jurisdiction over the continental shelf beyond two-hundred miles with the superadjacent water column. Substantial fisheries are found beyond 200 nautical miles. The migratory nature of many species makes it impossible to implement decent management programmes particularly when the coastal state does not have the juridical competence to manage the entire resource. For example, pelagic concentrations of Chloroscombrus Chrysurus and species of genera Trachinotus and Peprilus, not yet utilised, are found 300 miles off Brazil.¹ The Draft Convention basically leaves the responsibility for management of migratory species and species found beyond 200 nautical miles to the international community. Yet international organisations in the past failed to manage the high seas fishery effectively.

Given these considerations, how would the coastal state respond to excessive foreign actor harvest of living resources found beyond 200 miles? The newly emerging Oceans Regime will give the coastal state exclusive control over all living

¹T. G. Lyubimova, A. G. Naumov, and L. L. Lagunov, "Nonconventional Resources of the World Ocean," Journal of the Fisheries Resources Board of Canada 30 (1973): 2200.

resources found within the 200 nautical mile exclusive economic zone. Distant-water actors will find themselves overcapitalised as coastal nations increase their catching, processing and marketing capabilities. They therefore may fish peripheral extraterritorial waters more completely and, by consequence, induce stock depletion. Poland, for one, has expressed its intention to harvest about 40% of its catch from areas controlled by the NEAFC and ICSEAF, the sub-Antarctic and waters beyond 200 nautical mile jurisdictional zones.¹ The coastal state, the majority actor in the oceans policy issue area most supportive of the boundaries of the newly emerging Oceans Regime, one day may be compelled to expand beyond 200 miles to control intensified distant-water activity on the fringes of existing fishing zones.

Already fishing interests in Canada are calling for an extension of jurisdiction beyond its 200-mile fishing zone proclaimed in 1977. A large part of the Grand Banks fall beyond 200 miles where an immense foreign effort is concentrated. Four valuable species range this area: capeland, yellowtail, cod and redfish. Capeland now is reduced. It is contended that foreign actors are responsible for the stock's reduction. The pressures placed on Canada by the mammoth foreign fishing effort could be translated into some form of jurisdictional response especially when one considers that some of Canada's own coastal provinces are attempting to bar one another from offshore areas.²

¹Vladimir Kaczynski, "Distant-Water Fisheries of the East European Countries: Their Present Economic Status and Future Activities in the North east Pacific," Ocean Development and International Law 6 (1979): 93.

²"Harvesting the Shelf," a documentary aired on CBC Television

Clearly, the coastal state will face very real pressures to expand beyond the boundaries of the newly emerging Oceans Regime. The powerful expeditionary states hardly will tolerate another offshore claims race that would deprive them of access to needed marine resources and navigable waters.

Structure/Influence Congruence

Another major component of regime strength is structure/influence congruence. The regime must reflect the interests of the major actors of the system if it is to survive. Incongruity of interest may occur in the realm of resource supply. Both the Soviet Union's need for fish protein and America's need for deep seabed mineral resources provide ample illustrations.

The Soviet Union of the 80s will find itself in a position that demands intensification of self-reliance. The willingness of the Western world to use grain as a weapon, and America's demonstrated use of access to fishing zones as an instrument of influence, reveals that the Soviets will have to find secure sources of supply, particularly if they choose to continue a foreign policy that conflicts with the immediate interests of the West.¹

5/3/80. See "Peckford Confirms Intention of Controlling Cod Fisheries," The Calgary Herald, 27 August 1980, p. B8.

¹"Soviets Harvest New Problems," Toronto Star, 29 October 1980, p. A8. The U.S.A. denied the U.S.S.R. access to surplus stocks found within America's Fishery Management and Conservation Zone in retaliation for the Soviets' aggression against Afghanistan. See H. Con. Res. 273, 96th Congress, 2nd Session, 5 February 1980; and Congressional Record, 5 February 1980, p. E382. Also see "Testimony of Morris D. Busby, Acting Deputy Assistant Secretary for Oceans and Fisheries Affairs before the Subcommittee on Fisheries and Wildlife Conservation and the Environment House Committee on Merchant Marine and Fisheries in H. Con. Res. 273, 3 March 1980."

Over 90% of the most productive fisheries are found within the boundaries of the newly emerging regime, presumably under littoral control. A Soviet Union with heavy investments in distant-water infrastructures and in desperate need for fish protein may become reliant on fish protein found within the 200-mile exclusive economic zones of many coastal nations especially if alternate non-conventional sources of supply do not prove to be suitable or desirable for human consumption.

If the international system continues its post Afghanistan course toward greater instability and if the post Afghanistan world is one where the Soviets lose Third World respect and therefore easy and cheap access to LDC exclusive economic zones, a Soviet Union in dire need of secure sources of fish protein will be tempted to violate the jurisdictional sanctity of a new Oceans Regime. Even if the post Afghanistan world should assume a more stable posture, LDC determination to control the development of offshore living resources will continue. Their procurement and processing of these resources would mean that Soviet supply increasingly will be subject to the policies of an unpredictable Third World.

The United States finds itself in a similar position although, in its case, the U.S. is more concerned about the status of the seas beyond the limits of national jurisdiction than the limits themselves. Note America's vacillations over the institutionalised rule-making sessions of the sixth period. The U.S. is disconcerted over the G-77's success in capturing the rule-making sessions of the fifth and sixth periods. The

United States also is concerned over its vulnerability to imports of strategic minerals. It fears that one means to reduce that dependence, minerals from the deep seabed, would be threatened and impeded by the various provisions proposed at UNCLOS III. The U.S. could decide to circumvent the conference proceedings and pursue deep seabed development on its own terms.¹

There is no doubt that both the United States and the Soviet Union face a dilemma regarding their relationship with the newly emerging Oceans Regime. They could attempt to pursue their oceanic interests with the hope that the regime would survive in its nascent form. But that would be a naive hope. The newly emerging regime is based on an extremely intricate web of often divergent interests. Its structure, outlined in the Draft Convention on the Law of the Sea, is survivable only as a comprehensive totality. By disrupting that fragile balance on which the stability of the regime inevitably will rest, especially in a manner as that contemplated by the U.S.A., will weaken and perhaps destroy the regime.² As a matter of consequence, many nations will question whether the regime reflects their own maritime interests. For example, if the U.S.A.,

¹"The Sea up for Grabs," South (April 1981): 20-24.

²The U.S.A. announced to the resumed tenth session of UNCLOS III that it wishes to reopen negotiations on issues related to deep seabed mining. It is possible that a Convention still will be concluded but without U.S. participation. Although the President of the Conference contends that the Convention would be workable under such a circumstance, it is difficult to see how. See "May Set Treaty on Sea Without U.S.," Globe and Mail, 8 August 1981, p. 4.

or any other maritime actor for that matter, chooses to ignore the progress of the past 13 years regarding the deep seabed, then coastal states will have to reexamine their stance taken on the limits question. The entire negotiating text drafted at UNCLOS III is based on interlocking compromise. To ignore the binding element of that intricate web, the common heritage of mankind, something that all nations once were able to galvanise around, then coastal states may attempt to compensate for a losing position by entrenching littoral authority over additional areas of the seas. Such an eventuality would be nothing new. In the past, coastal nations have adopted rather excessive pretensions to exact at least some form of compensation for other actor gains in the oceans policy issue area. Louis Henkin describes this relationship perfectly:

It was President Truman who achieved that coastal state expansion which is now the doctrine of the continental shelf, and justified it as "reasonable and just." Now other coastal states insist, if it is reasonable and just that the resources of the continental shelf belong to the coastal State, why not those of the continental slope and the continental rise? If coastal minerals, why not coastal fish? If as the 1958 Convention provides—sedentary fish, why not swimming fish? If 12-mile fishing zones (now claimed even by the United States), why not 25 miles (which some consider the average width of the continental shelf), or 50 miles, or 200? And if it is reasonable and just that the coastal State have monopoly over resources, why not authority to act there to protect her security or the environment or to regulate all other uses?¹

Coastal nations are aware of the positive role that littoral pretension played in the development of the newly emerging regime.

¹Louis Henkin, "Old Politics and New Direction," in New Directions in the Law of the Sea: Collected Papers, ed. Robin Churchill, K. R. Simmonds, and Jane Welch (Dobbs Ferry, New York: Oceana Publications Inc., 1973), p. 6.

They may decide that CSE is the only rational response to a regime that has lost its legitimacy, something that surely would occur if either superpower attempted to change the rules of the game:

In support of such a process in the development of the law of the sea, commentators cite particularly the 1945 Truman Proclamation on the continental shelf, which was later adopted by the 1958 Convention on the Continental Shelf and the unilateral determination of baselines by Norway, which was eventually accepted as legitimate in the Anglo-Norwegian Fisheries Case. To that list may be added the 200-mile claim originally asserted only by Chile, Ecuador, and Peru, and the new concept of EEZ now gaining worldwide acceptance. Thus Iceland found it easy to invoke the widespread trends in the practice of states to support its position in the fisheries jurisdiction dispute with the United Kingdom. It will be recalled that in that case the World Court did not answer in the affirmative the question of whether Iceland had, by that unilateral action, violated international law.

Leadership

The newly emerging Oceans Regime reflects Soviet and American interests in that it: places narrow restrictions on the seaward extent of littoral territorial authority (12 miles); reaffirms the right of innocent passage; and guarantees free transit through international straits. On the other hand, the regime does not support Soviet and American views on living resource development and deep-sea mining respectively. A regime, no matter how new, could be discarded either by the Soviets or the Americans, or both.

It is not likely, however, that either the U.S. or the

¹Charles Odidi Okidi, "Toward Regional Arrangements for Regulation of Marine Pollution: An Appraisal of Options," Ocean Development and International Law 4 (1977): 3.

U.S.S.R. would pursue a singular leadership strategy.¹ One would not stand by while the other's navy policed the seas. Furthermore, any system imposed by the U.S. or the U.S.S.R. would lack legitimacy. It would be unstable. Stability could be guaranteed through the exercise of effective collective leadership. The Cod Wars illustrate that active leadership in this decade is prohibitive in terms of cost, even for a major maritime power. The costs involved in policing an illegitimate regime would be too high. Prestige would decline. Access to waters proximate to Third World nations would be obstructed and possibly lost or at least made more costly. There is one leadership strategy, however, that could work-- collective leadership of a legitimate regime.

Upon ratification, the Draft Convention on the Law of the Sea assumes a legitimacy unparalleled in history. Effective leadership directed toward preventing incursions into that regime would be a far more preferable option for American and Soviet policy makers. It is conceivable that a joint leadership strategy could be devised between the two superpowers. This

¹There are indications that the U.S. may be willing to pursue a leadership role in the near future regardless of the costs involved. For example, the CINCLANT leak of 1979 revealed America's determination to ignore littoral territorial pretensions beyond three nautical miles. However, past experience reveals an unwillingness to pursue a leadership strategy when alliance and economic relationships could suffer. The new policing strategy already has been applied to North Korea and Libya. See: Elliot L. Richardson, "Power, Mobility and the Law of the Sea," Foreign Affairs 58 (Spring 1980): 909-919, passim; Globe and Mail, "U.S. Warns of Measures to Prevent Air Piracy," 29 August 1981, p. 14; and Globe and Mail, "U.S., Libya Exchange Protests Over Air Clash," 20 August 1981, pp. 1-2. Both incidents curiously occurred during the last week of the resumed tenth session of UNCLOS III.

would reduce the costs of leadership by a very great extent. Here leadership would have to entail far more than showing the flag in littoral waters not recognised by the maritime state. Definite action would have to be taken to demonstrate the effectiveness of the leadership strategy--escorts, blockade, and so on. Only in this way would the coastal state realise that the costs incurred for expanding would outweigh possible benefits. This strategy would be successful as long as it is based on the legitimacy of the new regime. Joint leadership without legitimacy could work but the costs would be enormous. The regime would not be strong. It would be subject to constant pressure and tension, and would never attain legitimacy:

. . . even the concurrent attitude of the leading Powers cannot create a norm of customary international law against the resistance of other Powers. That is why the three-mile limit of territorial waters upheld by the leading maritime Powers, the U.S. and Great Britain, has, in the light of non-acceptance by other states, not become a norm of customary general international law.¹

The Oceans Regime

The significance of the ability of UNCLOS III to arrive at some form of agreement on the boundaries of a new Oceans Regime must not be underestimated. Current majority state practice implies tacit acceptance of this new boundary. In other words, for the first time in the history of the oceans policy issue area, the boundaries of the newly emerging regime have and are gaining legitimacy. Out of the turmoil following

¹A. Kunz, "The Nature of Customary International Law," American Journal of International Law 47 (1953): 662.

the collapse of a strong free seas regime stabilised by the preponderant underlying naval power, Great Britain, a new regime is taking shape, not molded by superpower interest but by the democratisation of rule-making processes through the auspices of the United Nations system and the moral compulsion felt by most nations to follow the will of the majority. Nevertheless, flexibility, legitimacy and effective leadership still would not create a regime totally devoid of tension and disruption. It could be said that although a great many causes for dispute in the new order nonetheless remain, their impact on regime stability will be moderated by a new source of regime strength, legitimacy, and this accomplished before the formal codification of a new law of the sea!:

Thus even if the Conference broke up or transformed itself into a semi-permanent, long-term negotiating body, the practical effect would still be one of continuing dispute within the bounds of a broadly legitimised framework.¹ (Italics added).

The very fact that so many nations have been willing to negotiate on the law of the sea for over 14 years and actually are in the process of codifying their endeavours in a massive new Convention on the law of the sea shows that reason, the rejection of violent outcomes and unilateral action, is the guiding force of state activity in the Oceans Regime. Article 89 in the Draft Convention actually prohibits Coastal State Expansion, something that previous international conventions have failed to specify: "No State may validly purport to subject

¹Barry Buzan, "A Sea of Troubles? Sources of Dispute in the New Ocean Regime," Adelphi Papers, No. 143 (London: The International Institute for Strategic Studies, 1978), p. 3.

any part of the high seas to its sovereignty." Indeed, Article 89 may curb Coastal State Expansion providing effective leadership and legitimacy become integral elements of the Oceans Regime.

APPENDIX

THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA

Sessions

First Session	-	New York: 3-15 December 1973
Second Session	-	Caracas: 20 June-29 August 1974
Third Session	-	Geneva: 17 March-10 May 1975
Fourth Session	-	New York: 15 March-7 May 1976
Fifth Session	-	New York: 2 August-17 September 1976
Sixth Session	-	New York: 23 May-15 July 1977
Seventh Session	-	Geneva: 28 March-19 May 1978
	-	New York: 21 August-15 September 1978
Eighth Session	-	Geneva: 19 March-27 April 1979
	-	New York: 19 July - 24 August 1979
Ninth Session	-	New York: 3 March-4 April 1980
	-	Geneva: 28 July-29 August 1980
Tenth Session	-	New York: 9 March-24 April 1981
	-	Geneva: 3 August-28 August 1981
Eleventh Session	-	New York: 8 March-30 April 1982
Signature	-	Caracas: September 1982

Negotiating Documents

1. Informal Single Negotiating Texts, Third Session, Geneva, 17 March-10 May 1975. United Nations Docs. A/CONF/62/WP.8/Parts I, II and III, 7 May 1975.
2. Revised Single Negotiating Text. Fourth Session, New York, 15 March-7 May 1976. A/CONF.62/WP.8/Rev.1/Parts I, II and III, 6 May 1976.
3. Revised Single Negotiating Text. Fifth Session, New York, 2 August-17 September 1976. A/CONF.62/WP.9/Rev.2/Part IV, 23 November 1976.
4. Informal Composite Negotiating Text. Sixth Session, New York, 23 May-15 July 1977. A/CONF.62/WP.10, 15 July 1977.
5. Informal Composite Negotiating Text/Revision 1. Eighth Session, Geneva, 19 March-27 April 1979. A/CONF.62/WP.10/Rev.1, 28 April 1979.

6. Informal Composite Negotiating Text/Revision 2. Ninth Session, New York, 3 March-4 April 1980. A/CONF.62/WP.10/Rev.2, 11 April 1980.

7. Draft Convention on the Law of the Sea (Informal Text). Ninth Session (resumed) Geneva, 28 July-29 August 1980. A/CONF.62/WP.10/Rev. 3, 27 August 1980.

8. Draft Convention on the Law of the Sea. Tenth Session (resumed) Geneva, 3-28 August 1981. A/CONF.62/L.78, 28 August 1981.

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