

CRISIS IN THE LAW OF THE SEA:  
COMMUNITY PERSPECTIVES VERSUS NATIONAL EGOISM

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THE historic function of the international law of the sea has long been recognized as that of achieving an appropriate balance between the special exclusive demands of coastal states, and other special claimants, and the general inclusive demands of all other states in the world arena.<sup>1</sup> Historically, the record is familiar: the oceans of the world were at one time claimed for the exclusive use of a limited number of states, but concern for the more general interest of the whole community of states ultimately succeeded in freeing the larger expanses of the oceans for relatively unhampered use by all.<sup>2</sup> The knowledge is equally familiar, however, that coastal states never surrendered their claim to exclusive and comprehensive authority over certain adjacent areas of the sea<sup>3</sup> and that,

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1. The reference made in the word "coastal" is geographic. The most important exclusive claims to the use of the oceans are made by coastal states, but states on occasion assert exclusive claims over waters far removed from their shores.

By an exclusive claim is meant a claim to authority over an area or over specified activities which other states cannot share with the claimant state (the category of authority state *A* gets, state *B* cannot get). By such a claim, the claimant state commonly asserts a competence to apply its authority to all persons in an area or engaged in certain specified activities, irrespective of the nationality of the person. Examples may be noted in the claims coastal states make to control over "internal waters" and "territorial sea."

By an inclusive claim is meant a claim to authority over an area or over specified activities which the claimant state can, by some accommodation to avoid physical interference in use, share with another (the category of authority state *A* gets, state *B* can also get). By such a claim, the claimant state commonly asserts a competence to apply its authority only to its own nationals, concedes a comparable authority with respect to the area or activities to other states with respect to their nationals and demands that other states reciprocally refrain from the exercise of authority over its nationals and their activities in the area. Examples may be noted in the claims states make to navigation and fishing on the "high seas."

2. FULTON, *SOVEREIGNTY OF THE SEA* 544-45 (1911); SMITH, *THE LAW AND CUSTOM OF THE SEA* 3-5 (2d ed. 1950); COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA* 39-54 (3d rev. ed. 1954); POTTER, *THE FREEDOM OF THE SEAS* 1-96 (1924).

3. FENN, *THE ORIGIN OF THE RIGHT OF FISHERY IN TERRITORIAL WATERS* (1926); CONFERENCE FOR THE CODIFICATION OF INTERNATIONAL LAW, *BASES OF DISCUSSION* 22-33 (League of Nations Pub. No. C.74.M.39.1929.V) (hereinafter cited as *BASES OF DIS-*

even after a consensus developed that states were not to exercise continuing and comprehensive authority beyond a relatively narrow belt of such waters, it was quickly discovered that the occasional exercise of some coastal authority beyond this belt had necessarily to be honored if the special interests of the coastal state were to be given adequate protection.<sup>4</sup> Through several centuries of interaction, of particular claim and general community acceptance or rejection, a body of principles and process of decision were thus developed which achieved a compromise between demands of coastal and noncoastal states, roughly corresponding to exclusive and inclusive claims, effectively internationalizing in the common interest a great resource covering two thirds of the earth's surface.

Turning from historic achievement to the contemporary world arena, an observer cannot fail to note the increasing demands, unparalleled in scope and complexity, for extension of the exclusive authority of states over the oceans of the world. To begin with, there are the various new, much protested demands, precipitated by the *Anglo-Norwegian Fisheries Case*, for expanding the area of internal waters<sup>5</sup> and thus increasing the total water area over which coastal states assert the most comprehensive authority.<sup>6</sup> By far the most controversial of recent demands, however, and indicative of the greatest change

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CUSSION); International Law Commission, *Report*, U.N. GENERAL ASSEMBLY OFF. REC., 10th Sess., Supp. No. 9, at 25-49 (Doc. No. A/2934) (1955); JESSUP, *THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION* 7 (1927) (hereinafter cited as JESSUP).

4. MASTERTSON, *JURISDICTION IN MARGINAL SEAS passim* (1929); FRANCOIS, *SECOND REPORT ON THE REGIME OF THE TERRITORIAL SEA* 11-17 (U.N. Doc. No. A/CN.4/61) (1953); *LAWS AND REGULATIONS ON THE REGIME OF THE HIGH SEAS* (U.N. Doc. No. St/LEG/SER.B/1) (1951); U.S. NAVAL WAR COLLEGE, *INTERNATIONAL LAW SITUATION AND DOCUMENTS 1956* (1957) (hereinafter cited as U.S. NAVAL WAR COLLEGE); McDougal & Schlei, *The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security*, 64 *YALE L.J.* 648 (1955); Boggs, *National Claims in Adjacent Seas*, 41 *GEOGRAPHICAL REV.* 185, 191-201 (1951); Mouton, *The Continental Shelf*, 85 *HAGUE ACADEMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS* (hereinafter cited as *HAGUE RECUEIL*) 347 (1954).

5. Such terms as "internal waters," "territorial sea," "contiguous zones" and "high seas" make both a vague factual reference to varying proximity to coasts and to varying concentrations of the interests of coastal and noncoastal states, and a highly technical, legalistic reference to certain consequences in the allocation of authority between states which are assumed to inhere in a designation of specified waters as being appropriately subsumed under a particular label. The factual reference is vague both because there are many different authoritative modes of measurement and measures for fixing geographical location and because what is important for policy, in choosing between modes of measurement and measures, is not simple, dead-weight proximity but the differing degrees of concentration of coastal and noncoastal interests which vary only roughly with distance from the shore. The technical legal reference is vague because so few words cannot adequately describe all the variables and policies which in fact affect decision or indicate the variety of alternatives open in most contexts to a decision-maker. For want of better words, we will, however, continue to use the traditional terms to make a rough geographical reference and will trust to context to make our exact meaning clear.

6. The Norwegian claim to the use of straight baselines following the general direction of the coast, sanctioned by the International Court of Justice in *Fisheries Case*, Judgment of Dec. 18, 1951, [1951] *I.C.J. Rep.* 116, has received the most prominent notice and has been followed by the assertions of Cuba, Yugoslavia, Ecuador, Iceland,

in perspectives, are those to extend the territorial sea in order to secure a variety of very particular interests sought by claimant states.<sup>7</sup> Demands for the occasional exercise of exclusive authority in variously defined adjacent areas of the sea—commonly called contiguous zones—are also on the increase.<sup>8</sup> Exclusive claims to develop ocean resources are manifested in demands for exploitation and conservation of fisheries, both of free-swimming fish and of marine life attached to the ocean bottom.<sup>9</sup> Further, a large number of states presently advance claims to exclusive authority for the exploitation of oil found in the continental shelves.<sup>10</sup> Such demands, now limited to relatively restricted continental shelf areas, may very well be extended outward to create new conflicts and controversy in areas of the open sea not contiguous to any particular state;<sup>11</sup> already, techniques for drilling from nonstationary platforms to a depth of

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and most recently, Indonesia. The Russian claim to enclose Peter the Great Bay within internal waters is another prominent illustration.

7. The numerous claims to exclusive exploitation of fisheries are commonly considered, despite avowals to the contrary by the claiming states, claims to extend the territorial sea. The most famous claims are those of Chile, Ecuador and Peru, the so-called CEP claims, but others have been made by South Korea, Mexico, Argentina, Honduras, Panama, Costa Rica and El Salvador. Most of this legislation is summarized, and reference made to responses of other nations, in Oda, *New Trends in the Regime of the Seas*, 18 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 61-87 (1957). See also U.S. NAVAL WAR COLLEGE 401-501.

In addition to the more exaggerated claims of Latin American states, other nations have provided for more limited extensions to twelve miles, after adhering to narrower widths in the past. FRANCOIS, *op. cit. supra* note 4, at 11-17.

8. See note 4 *supra*. See also MEMORANDUM ON THE REGIME OF THE HIGH SEAS (U.N. Doc. No. A/CN.4/32) (1950). (Since this study is the work of Professor Gidel, it will hereinafter be cited as GIDEL, MEMORANDUM.)

9. The Australian claim to sedentary fisheries on the continental shelf is the chief illustration of this type of claim. See Oda, *supra* note 7. Yugoslavia and Brazil also claim a contiguous zone for fishing, wholly apart from the continental shelf. U.S. NAVAL WAR COLLEGE 444, 500-01. Very recently, the Latin American states have contended that their claims are to an extension of sovereignty only for the purpose of conservation and do not constitute an extension of the territorial sea. See, *e.g.*, 1 VERBATIM RECORD OF THE DEBATE IN THE 6TH COMMITTEE OF THE GENERAL ASSEMBLY 32 (U.N. Doc. No. A/Conf.13/19) (1957) (hereinafter cited as VERBATIM RECORD).

10. Claims of competence over submarine areas for this purpose are very recent in origin; the first was asserted in the Treaty of Paria of 1942 between Great Britain and Venezuela. However, the chief impetus for the many demands now being made came from the proclamation by President Truman on September 28, 1945. See Mouton, *supra* note 4, at 366-79; FRANKLIN, THE WORLD'S CONTINENTAL SHELVES 88-242 (unpublished thesis in Yale Law Library 1956).

11. The International Law Commission's conception of the continental shelf adopts the criterion of exploitability for determining the areas within the exclusive competence of the coastal state, but adherence to some degree of proximity was apparently also intended. International Law Commission, *Report*, U.N. GENERAL ASSEMBLY OFF. REC., 11th Sess., Supp. No. 9, art. 67. (Doc. No. A/3159) (1956) (hereinafter cited as REPORT). This report incorporates the Commission's final draft articles concerning the law of the sea. See comments by Sir Gerald Fitzmaurice in 1 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1956, 135 (U.N. Pub. Sales No. 1956 V.3, Vol.I) (hereinafter cited as YEARBOOK).

1500 feet have been successfully developed.<sup>12</sup> In addition, claims to the control of ocean currents may be expected, with consequent grave effects on the climatic conditions underlying the economic welfare of nations thousands of miles from the control zone.<sup>13</sup> Finally, and most recently, states have made claims to control flight, navigation and fishing in huge sections of the open ocean for at least temporarily exclusive purposes, such as the testing of missiles and nuclear weapons.<sup>14</sup>

Concomitant with this increase in the variety and complexity of demand for new exclusive authority may be observed an increasing confusion in the response of authoritative decision-makers in their efforts to achieve economic compromise and rationally to allocate among the peoples of the world the actual and potential advantages of a great common resource. Despite the efforts of international governmental conferences and of international private associations of experts in the field, neither the long-term interests of the community nor the special interests of particular claimants have been successfully clarified.<sup>15</sup> Perhaps the most striking evidence, although by no means the only illustration that might be cited, is the work of the International Law Commission whose final draft articles concerning the law of the sea, proposing most extensive changes in the historic balancing of exclusive and inclusive claim,<sup>16</sup> were re-

12. See account in N.Y. Times, Oct. 5, 1957, p. 21, cols. 6-7, of patent covering such equipment.

13. Russian scientists have referred to the possibility of construction, in conjunction with the United States, of a dam across the Bering Strait and to the use of atomic pumps to cause a flow of waters in that strait. N.Y. Times, May 18, 1956, p. 5, col. 2, March 4, 1956, p. 37, col. 1.

The tremendous potentialities of the future are explicitly noted in Lasswell, *The Political Science of Science*, 50 AM. POL. SCI. REV. 961, 968 (1956).

14. The most controversial of these has been the United States claim to establish a danger area in the Pacific for conducting nuclear weapons tests. For facts concerning this claim, see McDougal & Schlei, *supra* note 4, at 650-53. The United Kingdom also established a danger zone for a limited period around Christmas Island in the western Pacific Ocean. See N.Y. Times, Jan. 13, 1957, p. 6, col. 5.

The United States and Canada have also asserted authority for limited purposes by creating air defense identification zones off their respective coasts. For details, see McDougal & Schlei, *supra* note 4, at 579-600.

For claim with respect to the testing of missiles, see note 51 *infra*.

15. The codification of the law of the territorial sea attempted by the Hague Codification Conference of 1930 foundered upon the issue of the breadth of the territorial sea. Nothing was achieved, even concerning those problems upon which general consensus was possible. Both the Institut de Droit International and the International Law Association have devoted years of study and debate to various aspects of the law of the sea, particularly the territorial sea, but have failed to generate much agreement on a governmental level. The chief effort in the United States is represented by the draft conventions on the territorial sea and piracy produced by the Harvard Research in International Law.

16. The commission draft invites vast new expansions of "internal waters" and "territorial sea," attempts to rigidify the flexible concept of "contiguous zones" into a single zone of restricted purpose and narrow width and puts forward an absolutistic notion of "the freedom of seas" which bears little relation to the relativity of uses actually established

garded by members of the Commission itself as "very vague."<sup>17</sup> This inadequacy is greatly accentuated by the failure of the Commission to make any effort to clarify the factors which might guide decision-makers in attempting to understand and apply its suggested rules. The restricted viewpoint of the Commission, clearly revealed in the abstract formulae of the draft articles, was underlined in the recommendation accompanying the draft articles in the 1956 Report to the General Assembly. There, the Commission suggested that the General Assembly "summon an international conference of plenipotentiaries to examine the law of the sea, taking account not only of the legal but also of the technical, biological, economic and political aspects of the problem."<sup>18</sup> The Commission thus apparently regarded its task as its specific formulations suggest, as confined to examination and rearrangement of a flow of traditional words without recourse to the only considerations which can give such words significance—the "technical, biological, economic and political aspects."<sup>19</sup>

Some of this confusion in authoritative response is clearly traceable not only to failure to clarify long-term national interest in terms of common interest, but also to widely pervasive misconception of the general process of decision by which controversies concerning the law of the sea have been immemorially resolved. Highly abstract and ambiguous but allegedly precise doctrines, derived from description of certain past decisions and authoritative utterances,

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by the law of the sea and may interfere with appropriate protection of emerging new uses. See text following note 112 *infra*.

In our strictures of the collective product of the Commission, necessarily a compromise of many different views and achieved under difficult conditions, we do not intend to belittle the many brilliant contributions to the clarification of community interest made by different individual members of the Commission. The Special Rapporteur, Professor Francois, as well as others, on occasion fought valiant but losing battles.

Nor do we minimize the potentialities of a collective clarification of policies which takes all relevant interests and conditions into account and which seeks to project appropriate prescriptions and procedures into the future under the probable conditions of that future. The map of the context of relevant interests and factors with which the Commission operated, obscured in large measure by a curious distinction between "law" or "legal considerations" and all the factors which in practice affect decision, was simply too limited and too abstracted from either past or contemporary realities to permit a clear focus upon community interest.

17. See statements by members Fitzmaurice, Sandstrom, and Rapporteur Francois in 1 YEARBOOK 7.

18. REPORT 3. The Rapporteur of the Commission advanced the most radical view of the restricted competence of the Commission in declaring before the Sixth Committee of the General Assembly with respect to the controversy over the breadth of the territorial sea that the International Law Commission had no authority to settle the matter because it is composed of jurists and "a settlement is largely governed by economic and geographical factors, which means that only an international conference of plenipotentiaries has authority to try to work out an agreement . . ." 1 VERBATIM RECORD 10.

19. Despite the frequency with which the Commission disavowed attempts at recommendation because a problem involved "extra-legal" factors, its deliberations make plain that reference was made at times to biological, economic, social and other aspects of problems. On the whole, however, the Commission seems to have adopted an extremely narrow view of its function as a body of jurists.

are put forward in a rigid dogmatic system as the most rational policy for future decisions, which must necessarily be reached under vastly changed conditions. Factors which in fact affect decisions are apparently not considered or at least remain undisclosed; alternative policies made equally authoritative by past decision are not evaluated; and the appropriate role of past experience in clarifying policy and appraising alternative possibilities in decision is not clearly perceived. It hardly seems surprising, therefore, that authoritative response is frequently no more than simple extrapolation of inherited formulae into the future, which does not take account of either changes in scientific knowledge and technology and other significant variables or of the rational long-term interests of contemporary claimants, coastal and general.<sup>20</sup>

Probably the most significant source of confusion for both decision-makers and scholarly observers is the failure to perceive and understand the complementary nature of the inherited prescriptions of the law of the sea which embody and secure two sets of competing, and often conflicting, interests—those of coastal and noncoastal states. The demands of states adjacent to the sea embrace the protection and promotion of all the values of a territorially organized body-politic, customarily summed up in the label “security.” It is apparent, from the perspective of a disinterested observer, that the sea areas adjacent to a coastal state reflect a relatively greater degree of concentration of interests—demands plus supporting expectations—in the coastal state than in any other state.<sup>21</sup> Among the interests so concentrated may be observed the more signifi-

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20. All this confusion is manifest in the many extensive debates about the law of the sea in recent years. The most significant of these debates are those of the International Law Commission, see summary records of commission proceedings, including those herein cited as YEARBOOK, and of the Sixth Committee of the General Assembly, particularly those cited herein as VERBATIM RECORD. See text at notes 111-21 *infra*.

21. The concentration and dispersal of interests is stressed, not simply propinquity. The important point is that even propinquity is a relative concept. Distance from shore may, of course, be expressed in somewhat precise terms of measurement, but what is important for policy is not mere distance or space but the concentrations of activities and interests being located. The point was succinctly put in a discussion of authority in contiguous zones: “The distance from shore at which these powers may be exercised is determined not by mileage but by the necessity of the littoral state and by the connection between the interests of its territory and the acts performed on the high seas.” HARVARD RESEARCH DRAFT CONVENTION ON TERRITORIAL WATERS 334 (1929) (hereinafter cited as HARVARD RESEARCH). Even a brief glance at existing concentrations and dispersals around the globe should reveal that no set of static zone measurements can do justice to the community policies at stake in the regulation of shared use.

So much objection has been raised, however, to any generalization of “coastal interests,” it may perhaps require emphasis that a relative propinquity does make a difference to policy. Of all the elements in community process—people, resources and institutions—the most unchanging are the great immovable resources, such as land masses. It is the abiding strength of the “territoriality principle” of jurisdiction that it authorizes a community affected in its value processes in high degree by certain activities to exercise any necessary competence over such activities to protect itself. The more tightly activities become concentrated near the coasts of a state, obviously the greater the possibilities and probabilities of impact from the waters upon processes upon the land masses. It is accordingly only in recognition of the fundamental policy underlying the territoriality principle that

cant and thoroughly accepted demands for power: control over access to territorial bases of power, defensive measures, regulation of activities and maintenance of order in adjacent waters, enforcement of criminal law; for wealth: exclusive control over disposition of resources, protection of internal wealth-producing processes; for well-being: resource controls, inspection procedures, quarantine, pollution controls; and for enlightenment: scientific investigation and research. Competing and frequently conflicting with these exclusive coastal interests are the more general, inclusive interests of all other states in power: equal access to all the reaches of the oceans, prevention of exclusive domination of sea areas for gaining influence, maintenance of public order upon the high seas; in wealth: promotion of the most rational, wealth-conserving and producing uses of the sea and its resources; in well-being: establishing and preserving safety and freedom of navigation, allocation of the advantages of the world's oceans; in skill: increasing the opportunity for developing potentialities of individuals everywhere; and in enlightenment: preserving the oceans as an inexpensive and efficient means of transportation and communication.<sup>22</sup>

To secure, preserve and accommodate these opposing sets of coastal and non-coastal interests in all their variety and in all their modalities of conflict, a body of complementary, highly flexible prescriptions has evolved through centuries of interaction among claimants and responding authoritative decision-makers. Thus, the special exclusive interests of the coastal state are expressed in such familiar concepts as "internal waters," "territorial sea," "contiguous zone," "continental shelf," "hot pursuit" and so forth; while the more general inclusive interests of all other states find expression in such generalizations as "freedom of navigation and fishing," "innocent passage," "freedom of flight" and so on. The former set of prescriptions was formulated, and is invoked, to honor the great variety of claims, both comprehensive and particular, asserted by coastal states which may interfere with inclusive claims to navigation and fishing. The latter set of prescriptions, generally grouped under the label of "freedom of the seas," was formulated, and is invoked, to honor inclusive claims to navi-

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the law of the sea honors and protects in coastal states the varying exclusive competences summed up in the labels "internal waters," "territorial sea" and "contiguous zones." The point was well made by Sir Gerald Fitzmaurice, in his argument that the extent of the territorial sea should be confined to "what is strictly necessary to protect the legitimate interests of coastal states." He said: "If you [look] back in history to the origins of States, you will probably find . . . that there was a time when no State made any claim to jurisdiction over any part of the sea at all. As time went on and as States became more highly organized, it was found that without some minimum breadth of territorial sea a stable and organized life for a State would not be possible. At that point the principle that a State should have exclusive jurisdiction and sovereignty over a belt of territorial sea surrounding or along its coasts emerged and became definitely accepted." 1 VERBATIM RECORD 238-39. Further, in equal recognition of the declining relevance of the territoriality principle, as distance from the coasts increases, the law of the sea progressively decreases, through its accordion-like series of labels—"internal waters," "territorial seas," "contiguous zones" and "high seas," with their rough geographical reference—, the exclusivity in competence which it will honor in coastal states.

22. For a more detailed formulation of these interests see Boggs, *supra* note 4, at 187-88.

gation, fishing, flying, cable-laying and similar uses, whether in conflict with each other or with exclusive coastal claims.<sup>23</sup>

The grave consequence of the widespread misconception both of the sets of competing, though common, interests and of the complementary prescriptions for accommodating conflicts is that the internationalization of a great common resource, achieved after centuries of effort, is being unnecessarily endangered, even by scholars who profess the goal of preserving that accomplishment. Clear-est indication of this consequence of misconception may be seen in the urging, by both claimant states and supposedly objective observers, of one half of the structure of inherited prescriptions in dogmatic, normative-ambiguous<sup>24</sup> terms which exclude recognition of claims long honored by the opposing and equally authoritative set of prescriptions. Thus, those who seek to protect claims to the more inclusive uses of the sea may be observed to assert a doctrinaire, absolutistic conception of freedom of the seas and to minimize, if not to ignore altogether, the complementary half of the law of the sea which protects the exclusive interests of coastal states, as well as to deny on occasion even the necessity of accommodating competing inclusive uses.<sup>25</sup> This viewpoint, which might be called internationalist myopia, may safely be regarded as having scant prospects of continued widespread acceptance and, indeed, is more likely to produce even more extreme claims by states determined to secure opposing exclusive or inclusive interests. On the other hand, those claimants and observers who seek to achieve increased protection for, and expansion of, the exclusive claims of coastal states make new extravagant, monopolistic demands and lay inordinate stress upon the set of prescriptions designed to protect exclusive interests, while minimizing to the point of extinction the complementary prescriptions developed to secure the more inclusive, noncoastal interests.<sup>26</sup> The adherents of this perspective, which may be appropriately labeled provincial myopia, apparently fail to realize that their own long-term interests will not

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23. See McDougal & Schlei, *supra* note 4, at 658.

24. A term is normative-ambiguous when it attempts in a single reference to describe what past decisions have been, to predict what future decisions will be and to state what future decisions ought to be. For amplification of the confusion engendered by this all-pervasive ambiguity in legal writing, see Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943).

25. The formulation put forward by the International Law Commission adopts such a conception, although an attempt was made to alleviate some of its rigidities. See text at notes 156-64 *infra*. For comparable overemphasis, see statements by Sir Gerald Fitzmaurice and Jean Spiropoulos in 1 YEARBOOK 30, 51, and Sir Gerald in 1 VERBATIM RECORD 63. An even more extreme doctrinal view was put forth by the Indian representative in the Sixth Committee. 1 VERBATIM RECORD 226-33. Among the textwriters, overemphasis on internationalist perspectives may be found in COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA* (3d rev. ed. 1954). See also Oda, *supra* note 7, at 94-95; Reppy, *The Grotian Doctrine of the Freedom of the Seas Reappraised*, 19 FORDHAM L. REV. 243 (1950); Margolis, *The Hydrogen Bomb Experiments and International Law*, 64 YALE L.J. 629 (1955).

26. See Garaioca, *The Continental Shelf and the Extension of the Territorial Sea*, 10 MIAMI L.Q. 490 (1956); Padilla-Nervo, 1 YEARBOOK 24; Zourek, 1 *id.* at 12, 162; Soviet Union, 1 VERBATIM RECORD 84; Ecuador, 1 *id.* at 148, 155.

be served if other states make similar extravagant claims. The consequence would be extension to huge ocean areas, for the exclusion of or interference with former inclusive uses, of the exercise of all those well-known components of comprehensive sovereign authority. Briefly, these include exclusive disposition of animal and mineral resources, exclusion of vessels seeking passage, regulation of navigation, competence over events aboard vessels, competence to prevent belligerent use of neutral waters and application of various coastal laws and regulations. The suicidal character of this provincial myopia becomes even more apparent when it is remembered that the traditional device of contiguous zones is available for protection of all the reasonable interests of the coastal state without endangering the inclusive, common use of the sea.<sup>27</sup> From the perspective of the general community of mankind, each myopia seems equally unfortunate in its consequences, and both pose a threat to the internationalization of the oceans which has long served mankind so well.

The first essential step to rational clarification of the general community interest in both the sharable, inclusive uses and the special, exclusive uses of the oceans of the world, and to the projection of appropriate authority for the securing of all interests, is a clear and unambiguous understanding of both the process of claim, by which interests are asserted, and the process of authoritative decision, by which interests are honored and protected.<sup>28</sup> Each of these

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27. See text at notes 141-54 *infra*. This point was very cogently made by Mr. Garcia-Amador, Cuban representative in the Sixth Committee, when he pointed out that more limited concepts than the territorial sea are available for securing the special interests of coastal states. 1 VERBATIM RECORD 21-23. See also observation of Yugoslavia, 1 *id.* at 143, for a similar conception.

28. The importance of such an understanding may be documented by reference to the article by Professor Gilbert Gidel, in deference to whom we yield to none, on *Explosions Nucléaires Expérimentales et Liberté de la Haute Mer*, in FUNDAMENTAL [*sic*] PROBLEMS OF INTERNATIONAL LAW: FESTSCHRIFT FÜR JEAN SPIROPOULOS 173 (1957), which rejects the conclusions of the earlier article, McDougal & Schlei, *supra* note 4. The principal theme of Professor Gidel's criticism is that our article argued from the analogy of contiguous zones that the hydrogen bomb tests were lawful and that this analogy is not sufficiently relevant to sustain our conclusion. The relevance of an analogy depends of course upon the degree to which common policy is found to underlie both the analogy and the new problem, and we believe that, as later sections of this Article will show, a common policy underlies in high degree both the traditional exercises of authority in contiguous zones and the hydrogen bomb tests. The main argument we made was not, however, so much based upon extension of an analogy as upon the understanding of a whole process of decision in the law of the sea and the appropriate application of that process to a new problem. Our position was, and we hope that the present Article will aid in establishing its incontrovertibility, that the whole process of decision in the regime of the high seas had on all past problems established the test of *reasonableness* for achieving an appropriate balance between exclusive and inclusive claims and that when this test of reasonableness was applied to the hydrogen bomb tests, by a weighting of relevant factors under community criteria, the conclusion should be reached that such tests were lawful. The argument was, in other words, that the established procedures and general policies of the law of the sea afforded opportunity for the solution of new problems by the policies uniquely relevant to them and not by the strained extrapolation of imaginary limitations derived from past analogies.

distinguishable processes presents certain participants seeking a great variety of objectives, acting by different methods, being affected by various constantly changing conditions, and achieving important effects, both intended and unintended.<sup>29</sup> Initial focus upon the process of claim may clarify the two sets of competing interests asserted by claimant states, exclusive and inclusive, and identify the more important conditions which must continue to affect the assertions of such claims.<sup>30</sup> Similarly, concentration upon the major outlines of the process of decision may make possible a clarification of the process as one of flexible adjustment achieved by the appropriate application of a whole series of relevant general prescriptions, rather than as a rigid body of dogmatic rules sanctifying either monopoly or anarchy. Such a study may also increase understanding of the conditions under which the major policy of preserving the oceans of the world for the fullest, rational, abundant use of all peoples may continue to be the guiding spirit of authoritative response.<sup>31</sup>

#### THE PROCESS OF CLAIM

The process of claim may be most conveniently described in terms of certain participants in the world arena, asserting, for many different objectives, a wide range of claims to authority over the oceans of the world. The methods employed include both unilateral assertion and multilateral agreement and are supported by all the contemporary instruments of policy. The claims, made under all the changing conditions of the world social processes, have certain observable effects upon the participants' individual and common values. As an integral part of this continuous process, participants invoke both authoritative decision-makers and the application of a great variety of technical concepts to assert claims concerning the lawfulness or unlawfulness of the various specific demands they make against each other to exercise authority on or over the oceans.

#### *Participants*

The participants in the process of claim include, in one arena or another, all the actors in the world social process—international governmental organiza-

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29. The careful distinction of the two processes is necessary to efficient performance of all the relevant intellectual tasks, to which we make reference in the text and notes to follow. Most important, the distinction is necessary to clarify the ambiguity in such key concepts as "internal waters," "territorial sea," "contiguous zones," "high seas" and so on, which make a confused and shifting reference both to certain geographic factors and to certain assumed legal consequences.

30. Clarity about the process of claim may aid an observer in distinguishing the events to which decision-makers respond from such response (the confusion which permeates all the traditional terms) and in categorizing controversies in a way best to facilitate the study and comparison of trends in decision. It may enable him also to assess the importance, in trend, of the factors giving rise to the multiple contemporary controversies.

31. Clarity about the process of decision may enable an observer to distinguish, and hence more effectively to perform, the very different intellectual tasks of describing past trends in decisions, of studying the factors which have in fact affected decisions, of projecting probable decisions into the future and of recommending what decisions should be—a set of inquiries much too often compressed into a simple question of what "the law is."

tions, nation-states, private groups and associations and individual human beings. The nation-state, as a territorially organized body-politic, continues, of course, to be the most significant participant because of its special demands to prescribe and apply authority for and to the other participants. A more comprehensive inquiry than can be undertaken here might seek to survey the roles of all the other participants as they influence, and are influenced by, the nation-state as a claimant of authority.

### *Objectives*

The objectives sought by claimant states embrace all the characteristic demands of the nation-state for the protection and enhancement of its bases of power as such demands are projected upon the oceans and include also the various particular demands which states habitually put forward on behalf of the other, nongovernmental participants. In brief summary, some of the more significant of these manifold changing objectives may be related to certain general value categories.<sup>32</sup>

Power is sought by states in advancing claims to control access to their own territorial base, to secure effective and economical access to the territorial bases of others and to share in the establishment and administration of a stable public order of the oceans. In time of war, of course, belligerent states seek to obtain command of the sea or to deny it to the enemy in order to interdict enemy commerce and to make his use of the sea for communication as costly as possible.

Wealth may be seen as a goal in the great congeries of claims relating to transportation, navigation, fishing and mineral exploitation. One may observe demands both to limit access to territorial base resources and markets and to foster ease of access to distant resources and markets.

Enlightenment is pursued as a major goal in attempts to preserve the sea as a locale for conducting scientific research and exploration and as a cheap and efficient means of transportation and communication, affording access not only to the homeland but to the whole globe for the acquisition of new knowledge.

Well-being is a fundamental objective in the variety of claims directed toward prevention of plagues and preservation of health, and in certain claims to fishery exploitation.

Respect is sought in the efforts of a claimant to secure access as an equal participant, free from discrimination, in all the power-enhancing and wealth-

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32. The words used to label these categories—power, wealth, enlightenment, well-being, respect, skill, solidarity and rectitude—we employ as in common usage, and we ask the benefit of the presumption of plain and natural meaning. Some set of key terms for talking about objectives appears indispensable, but we attach no importance to the particular words. Any set of terms which admits of operational definition by reference to the manifold, detailed objectives and which aids in ordered inquiry about such objectives would serve equally well. For further indication how operational meanings may be assigned to the terms we use, see Lasswell & McDougal, *supra* note 24; LASSWELL & KAPLAN, *POWER AND SOCIETY* (1950).

producing activities of the world which have special reference to the use of the oceans. The enormous importance attached to fleets, control of ports and the display of flags, as symbols of status, is commonplace.

Skill has been a traditional objective of states in seeking to assure through use of the oceans and access to the experience of others a reservoir of trained maritime and other personnel for purposes of both war and peace.

Solidarity—primary and large group attachments—is embodied in demands which emphasize the oceans as means of promoting broader identification of peoples by providing a focus for organization of transnational loyalties and common sentiment, as in the North Atlantic community.

Rectitude appears as a goal in attempts to reconcile many varying conceptions of right and wrong from many different cultures, both in a law of the sea and in other standards, for the promotion of co-operative activity.

All these general objectives, as well as the various particular claims to the exercise of authority to be described, relate at a lower level of abstraction to very concrete demands by claimants to specific uses of the oceans or ocean areas, such as the movement of vessels, the taking of fish, the laying of cables or pipelines, the extraction of minerals, the testing of weapons, the flying of aircraft, the detention of persons or vessels and so on. In terms of modalities particularly relevant to the clarification of community policy, such concrete demands may be further described in any necessary detail as exclusive or inclusive, as relating to an area close to or distant from the coasts of the claimant state, as substantial or insubstantial in scope of authority demanded, as relating to the vital or nonvital values of the claimant state, as for permanent or temporary enjoyment, as appropriate or inappropriate to the economic use of the area in which asserted, as proportionate or disproportionate to the interests sought to be protected, as interfering or not interfering with uses by other states, as causing serious or minor damage to the interests of other states, as causing avoidable or unavoidable injury and so on. For purposes of anticipating the flexibility required of a process of decision adequate to resolve controversies about such varying concrete demands for specific uses, it may be emphasized that any particular use of the oceans may on occasion interfere with some other particular use or have an impact on activities upon the land masses of a state. Interferences are possible both within a single type of use—as in navigation if ships collide or run into protective installations—and between different types of use—as when cargo or passenger ships move through a fishing fleet or pollute fishing waters, or when aircraft and missiles compete for the same airspace. Absent appropriate accommodation, the range of potential interferences between different uses of the oceans and between all uses of the oceans and activities upon the land masses is obviously enormous.

### *Claims to Authority*

The specific claims to authority asserted by states in seeking their diverse objectives may be categorized in terms of the degree of comprehensiveness of authority claimed and of the geographical area in which it is asserted. For each

specific claim to authority asserted by a state, there is an opposing counterclaim by other states asserting both freedom from the claimant's authority and a competence to exercise their own authority. The comprehensiveness of the claims asserted by coastal states and the intensity with which other states counter with opposing claims may be observed to relate to a varying concentration of exclusive and inclusive interests, which moves roughly from the shore outward. These opposing claims as to the lawfulness of the authority asserted constitute the various specific controversies to which authoritative decision-makers do and must respond. Because of the historic and continuing importance of coastal propinquity to the varying concentrations of interests, and hence to relevant policies and explanatory factors, a convenient categorization of specific controversies may emphasize the geographic reference of asserted claims.

### *Internal Waters*

Coastal states make their most comprehensive claims to authority over certain immediately adjacent waters, called "internal waters." Practically all observers agree that claims in this category are as complete and absolute as those made concerning events upon the land base.<sup>33</sup> In most general statement, the coastal state asserts complete competence to control, in the absence of agreement otherwise, all access of foreign vessels to internal waters, whatever the character of the vessel, even to the extreme of arbitrary exclusion.<sup>34</sup> The opposing claim for freedom from this control finds expression in the allegation of a right of entry, justified more recently only on the ground of "necessity," as by stress of weather.<sup>35</sup> Even when entry is conceded, coastal states still assert complete control over the vessel and the events aboard the vessel,<sup>36</sup> subject only to minor deference to the claims of the flag-state on some issues concerning authority over state-owned vessels and over some events aboard

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33. These claims are usually considered in terms of jurisdiction in ports. For views of governments, see BASES OF DISCUSSION 97-101. See also 1 OPPENHEIM, INTERNATIONAL LAW 460-61, 502-03 (8th ed., Lauterpacht 1955) (hereinafter cited as OPPENHEIM-LAUTERPACHT).

34. See 1 HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 581-82 (2d ed. 1945) (hereinafter cited as HYDE); HALL, INTERNATIONAL LAW 66-68 (8th ed., Higgins 1924); 1 OPPENHEIM-LAUTERPACHT 321-22; cf. FENWICK, INTERNATIONAL LAW 268 (3d ed. 1948).

A very early example of this type of claim in United States practice is the Act of May 15, 1820, 3 STAT. 597, excluding foreign armed vessels from all except a number of named American ports. It is common knowledge that states sometimes prohibit entry of foreign vessels to ports serving as military installations. See U.S. NAVAL WAR COLLEGE 607.

35. See JESSUP 194-208. A common early argument was that states had a right to engage in trade with other states and for this purpose had a right of access to foreign ports. See note 34 *supra*.

36. JESSUP 144-91 summarizes claims advanced by various states.

private vessels.<sup>37</sup> It is but an indication of the continual evolution in claim and counterclaim that the matter of authority over state-owned vessels is presently in flux, with an observable trend toward assertion of greater authority by the port-state.<sup>38</sup>

### *The Territorial Sea*

States commonly claim authority only slightly less comprehensive than that for internal waters over the next adjacent waters, called the "territorial sea."<sup>39</sup> In summary, claims here extend to exclusion of passage under certain conditions, exclusive exploitation and disposition of marine resources, exclusion of flight by aircraft, regulation of navigation in passage, competence over events aboard vessels and authority to control belligerent use of neutral waters.<sup>40</sup> The claim urged in opposition by far the most vigorously is that of a right to be free of interference in the passage of ships through the marginal belt, a right technically referred to as that of "innocent passage."<sup>41</sup> This right is most particularly urged when the territorial sea includes a strait necessarily or conveniently used for navigation between waters outside the belt.<sup>42</sup>

### *Boundary Between Internal Waters and the Territorial Sea*

Claims to demarcate the boundary between internal waters and the territorial sea are made both to determine the outer limit of the former and the inner limit from which the latter is measured. Traditionally, controversies about this claim have related largely to ordinary indentations into the coastline, such as bays, but more recently efforts have been made to enclose within internal waters large expanses off coasts which are deeply indented at more or less frequent intervals or which have a great number of islands and rocks

37. The conditions underlying both the comprehensive claim of control and the limits upon its exercise were given classic statement in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). See also *Wildenhus's Case*, 120 U.S. 1 (1887).

38. Lauterpacht, *Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT'L L. 220 (1951). On United States policy, see letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General, May 19, 1952, 26 DEP'T STATE BULL. 984 (1952).

39. Practically all coastal states characterize their claim over the territorial sea as one of "sovereignty." See BASES OF DISCUSSION 12-17.

40. For a recent collection of national legislation on some of these claims, see U.S. NAVAL WAR COLLEGE 403-501.

41. JESSUP 118-24. For recent claims concerning United States fishing vessels, see Selak, *Fishing Vessels and the Principle of Innocent Passage*, 48 AM. J. INT'L L. 627 (1954). See also BRIGGS, *THE LAW OF NATIONS* 354-55 (2d ed. 1952). For problems of innocent passage during periods of active violence, see MacChesney, *The Altmark Incident and Modern Warfare—"Innocent Passage" in Wartime and the Right of Belligerents To Use Force To Redress Neutrality Violations*, 52 NW. U.L. REV. 320 (1957).

42. This was, of course, the major claim of the United Kingdom in the *Corfu Channel Case*, Judgment of April 9, 1949, [1949] I.C.J. Rep. 4, and, more recently, has been urged in connection with coastal authority over the Strait of Tiran. See ISRAELI MINISTRY FOR FOREIGN AFFAIRS, INFORMATION DIVISION, *EGYPTIAN VIOLATIONS OF INTERNATIONAL LAW* 2 (1957).

in some degree of proximity to the mainland.<sup>43</sup> Such efforts now extend to the enclosure of whole archipelagos.<sup>44</sup> Technically, these claims appear as assertions of particular methods of drawing lines from one physical feature of the total coastal configuration, including islands and rocks, to other features. Claims in opposition are that the method asserted involves too great an encroachment upon the high seas, with the undesirable result of increasing the area over which exclusive authority is exercised to the detriment of freedom of navigation and fishing.<sup>45</sup> These opposing claims technically appear as averments that the closing line are too long or that to use a particular physical feature as a base point of the closing line is impermissible.

### *Breadth of the Territorial Sea*

Claims to establish a particular breadth for the marginal belt over which the jurisdictional claims already mentioned are to be exercised are today notable for their extreme variety and drastic effect.<sup>46</sup> Although most of these claims, indeed by far the great majority of them, assert a breadth of no more than twelve miles, some states now claim a territorial sea extending out to two hundred miles, and even the claims between three and twelve miles display great diversity. The main thrust of opposing claims is that some particular extent, beyond three miles, asserted for the territorial sea is an impermissible extension of exclusive state authority over the ocean, which secures to the coastal state an extensive control over fishing and navigation that is unnecessary to the protection of its special interests.<sup>47</sup>

### *High Seas Areas Regarded as Contiguous to the Claimant State*

Claims by states to exercise authority for particular purposes beyond the territorial sea have a long history, but one that is, surprisingly, either ignored

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43. For some recent claims, see U.S. NAVAL WAR COLLEGE 452-54, 458-60, 466-73, 483-88. For a survey of numerous claims to internal waters, with accompanying maps, see Brief of California in Relation to Report of Special Master of May 21, 1951, pp. 44-63, *United States v. California*, 332 U.S. 19 (1947) (supplemental brief, United States Supreme Court, Oct. Term, 1951, No. 6, Original).

44. For a survey of claims concerning archipelagos, see EVENSEN, CERTAIN LEGAL ASPECTS CONCERNING THE DELIMITATION OF THE TERRITORIAL WATERS OF ARCHIPELAGOS 19-30 (U.N. Doc. No. A/Conf.13/18) (1957). For the recent claim of Indonesia, see N.Y. Times, Jan. 18, 1958, p. 3, col. 1.

45. This was the burden of the United States response to the Indonesian claim. N.Y. Times, Jan. 18, 1958, p. 3, col. 1. See also text of United States note to Ecuador concerning the base lines around the Galapagos Islands, 4 FISHERIES CASE—PLEADINGS, ORAL ARGUMENTS, DOCUMENTS 603-04 (I.C.J. 1951).

46. Claims are summarized in FRANCOIS, SECOND REPORT ON REGIME OF THE TERRITORIAL SEA 11-17 (U.N. Doc. No. A/CN.4/61) (1953). For more recent claims, see U.S. NAVAL WAR COLLEGE 445-48, 451-56.

47. Representative protest notes may be found in *id.* at 448, 461, 496-98. For a series of protests by Great Britain and the United States to various claims to an extension of the territorial sea, see 4 FISHERIES CASE—PLEADINGS, ORAL ARGUMENTS, DOCUMENTS 574-604 (I.C.J. 1951).

or misunderstood by many observers.<sup>48</sup> The claimed authority in these adjacent sea areas is far less comprehensive and more occasional than that asserted over internal and territorial waters, since the claims are advanced chiefly for special, limited purposes. Claims have been made for customs inspection, antismuggling measures, conservation and exclusive exploitation of animal resources, exclusive exploitation of mineral resources, defensive measures such as radar platforms, defensive areas within which navigation is limited or temporarily excluded and so forth.<sup>49</sup> The areas over which these instances of authority are claimed are also exceedingly diverse and variable in extent and have, in some instances, been expressed in purely functional terms, such as the distance a ship or boat can travel in an hour. The familiar opposing claim is in terms of freedom from the asserted authority for purposes of navigation, fishing, mineral exploitation and so on.<sup>50</sup>

*High Seas Areas Not Regarded as Contiguous to the Claimant State*

The final category of assertions of authority refers to high seas areas which do not bear a close geographical relationship to the claimant state. The principal claim respecting this area is to free and unimpeded navigation and fishing, a demand widely shared among the community of states. States also advance claims, however, to close off or use areas of the sea and the air above for naval maneuvers, for testing nuclear weapons and for testing new developments in missile systems.<sup>51</sup> It appears, further, that states may make special claims to authority concerning fishing grounds far from the home territorial base and in areas contiguous to other states.<sup>52</sup> For the most part, the exclusive authority occasionally asserted over noncontiguous high seas areas is impelled by considerations of increasing security against potential military violence. Opposing claims are most emphatically grounded upon freedom of navigation and fishing and allege that the exclusion of vessels from high seas areas, even for limited times, goes far beyond any authorization of the law of the sea.<sup>53</sup>

48. MASTERSON, JURISDICTION IN MARGINAL SEAS xiii-xiv (1929); 1 YEARBOOK 77.

49. See LAWS AND REGULATIONS ON THE REGIME OF THE HIGH SEAS (U.N. Doc. No. St/LEG/SER.B/1) (1951); FRANCOIS, *op. cit. supra* note 46, at 11-24; U.S. NAVAL WAR COLLEGE 403-501, 573-607; MASTERSON, *op. cit. supra* note 48; Boggs, *supra* note 4, at 192-201.

50. See Netherlands protest to Iceland, 4 FISHERIES CASE—PLEADINGS, ORAL ARGUMENTS, DOCUMENTS 401-02 (I.C.J. 1951); United Kingdom protest to Yugoslavia, 4 *id.* at 575.

51. U.S. NAVAL WAR COLLEGE 573-628.

On Jan. 29, 1958, the United States Department of Defense announced that a new missile range would be established on the Pacific coast. A New York Times report stated: "Details of the new course were not divulged by officials. They said only that the center would involve Pacific waters within a radius of 250 miles, extending north, south and west from Point Mugu. Presumably special restrictions on shipping would be required, especially when firings were taking place. The course would extend for more than 5000 miles westward across the Pacific." N.Y. Times, Jan. 30, 1958, p. 9, col. 3.

52. See statement of Sir Gerald Fitzmaurice in 1 YEARBOOK 91.

53. For collection of citations, see Margolis, *supra* note 25, at n.3. See also statement of Indian delegate to Sixth Committee of the General Assembly, 1 VERBATIM RECORD 226-34.

The claims indicated above are those characteristically made by states against each other when expectations of impending violence are relatively low. When expectations of violence are high, or when violence is in process, the character of claims made by states assumes an entirely different complexion, shifting from claims to a minimum of exclusive authority to claims of complete exclusive authority over whole oceans—in short, from claims permitting relatively widespread inclusive use to claims by opposing belligerents to deny each other, and nonbelligerents as well, any use or benefit of the sea.<sup>54</sup> Within the scope of this Article, no detailed survey of the complex range of claims made during times of violence will be attempted, but, to emphasize the importance to states of security claims, the observation is pertinent that coercion is exercised in many different degrees of intensity and that the allegedly sharp dichotomy between “peace” and “war” put forward by many observers finds no counterpart in the world of reality. Closer observation reveals wide fluctuations in degrees of intensity of coercion with only a constantly shifting line being drawn between “war” and “peace” for varying legal consequences.

### *Methods*

The methods by which these diverse claims are put forward embrace all available instruments of policy, with primary emphasis on diplomatic communication involving either unilateral or joint assertion of claim. Examination of the process of claim indicates that most significant claims have been asserted unilaterally rather than by explicit agreement following negotiations between states.<sup>55</sup> The predominant role of the diplomatic instrument should not, however, obscure the fact that the other instruments of policy—the economic, military and ideological—remain available for supporting claims to authority. The military instrument is, of course, the major method for pressing claims during times of violence, and even at other times, physical violence has been used in exercise of asserted authority, as in some recent efforts to enforce certain South American claims to an enlarged territorial sea. Similarly, the economic instrument has occasionally been brandished, as in boycotts and refusals to import foreign-caught fish. Finally, the ideological instrument has been put to extensive use in seeking mass support for pressing or rebuffing claims.

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54. See, generally, COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA* 359-672 (3d rev. ed. 1954); TUCKER, *THE LAW OF WAR AND NEUTRALITY AT SEA* (1957). For a brief, seldom mentioned, but brilliant exposition of this shift in claims and the relationship between claims during times of “peace” and “war,” see BROWN, *THE FREEDOM OF THE SEAS* (1919).

55. Fishing has been the activity of major significance about which agreements have been successfully concluded. For a compilation of treaties concerning the high seas, see *LAWS AND REGULATIONS ON THE REGIME OF THE HIGH SEAS* 137-295 (U.N. Doc. No. St/LEG/SER.B/1) (1951). Later fishing treaties may be found in U.S. NAVAL WAR COLLEGE 295-396. But as Gidel notes, international conventions are inadequate “as a means of solving the problem of fishery conservation.” GIDEL, *MEMORANDUM* 43. He adds that “the system of conventions is at the mercy of individual egoism.” *Id.* at 44.

### *Conditions*

The conditions under which claims are made include all the important factors affecting the world power process and other world social processes. Among the more general factors may be mentioned the structure of the world arena, including: the number, location and relative strength of participants, with special emphasis upon their spatial relation to the oceans of the world;<sup>56</sup> the state of scientific and technological development of the means of communication, transportation, production and destruction;<sup>57</sup> and the patterns and degrees of interdependence of the peoples in the various territorially organized communities, in their institutional practices of production and destruction.<sup>58</sup>

The factor most significantly affecting the claims which states make against each other is, of course, the physical feature<sup>59</sup> that the oceans, unlike the land masses, admit of common use<sup>60</sup> for a great variety of purposes<sup>61</sup> by many different claimants without uneconomic interference with each other<sup>62</sup> and are relatively indestructible by such use. Access to the oceans may be had from one coast as well as from another; no great barriers obstruct communication and transportation from continent to continent; and where one ship has just been, another can soon come. Even the marine life quickly and bountifully replenishes itself, and, when due regard is had by appropriate conservation measures for the natural conditions of such replenishment, a supply may be

56. Of course, the position of Great Britain and Japan as island powers situated off the continents of Europe and Asia has had an enormous effect upon claims to the use of, and authority over, the sea.

57. These factors alone account in large measure for the spate of recent demands for the use of the ocean. See text at notes 5-14 *supra*.

58. See LASSWELL, *THE WORLD REVOLUTION OF OUR TIME* (1951).

59. This feature might, if one prefers, be characterized as technological, rather than physical, in that man's present instruments for the exploitation of the seas have not yet developed to the point that competition and crowding are as great as on land.

60. The extent and significance of common use is graphically illustrated in the estimate that ocean transportation accounts for more than three quarters of the total tonnage of goods exchanged among nations. WOYTINSKY & WOYTINSKY, *WORLD COMMERCE AND GOVERNMENTS* 429 (1955). This was, of course, one of the major bases of Grotius's argument for freedom of the seas. GROTIUS, *THE FREEDOM OF THE SEAS* 28-30 (Magoffin transl. 1916).

61. Some of the purposes served by the oceans are briefly stated in COKER, *THIS GREAT AND WIDE SEA* (rev. ed. 1949). The potentialities of future uses of the oceans appear greater than the benefits thus far obtained. See SMITH & CHAPIN, *THE SUN, THE SEA AND TOMORROW* (1954); CARSON, *THE SEA AROUND US* 144-54 (1954).

62. Following Grotius's remarks about the impossibility of occupying the seas, Professor Gidel has written: "The idea of freedom of the high seas has been built up on the principle that the high seas constitute a space which does not and cannot come under the juridical order of any particular State . . ." GIDEL, *MEMORANDUM* 12. The important point is not that the spaces of the high seas *cannot* be occupied or brought under the sovereignty of a single state for, as has been proved much too often today, very obviously they *can*; the point is rather that by proper accommodation the seas admit of economic common occupation and use.

maintained in some measure for all.<sup>63</sup> The experience of 150 years or more has shown that the oceans of the world can thus be used concurrently by all for the great common advantage and without undue injury to any.

Other especially significant factors include such varying characteristics of the claimant states as their special configuration of coasts, relative population growth and decline, military requirements, patterns of resource distribution, consumption and production, capital assets and structure, distribution of scientific and technical knowledge concerning the ocean and its resources, adjacent waters and marine life and local customs and traditions of living.<sup>64</sup>

Still other factors requiring particular emphasis are those which most immediately affect the expectations of participants in an arena about the possibilities and probabilities of violence.<sup>65</sup> Such expectations are a function not only of changing technology but also of the patterning and strength of potential belligerents and peacemakers and of many other variables affecting the immediacy and scope of violence expected. Even the claims which states make against each other when expectations of violence are relatively low are thoroughly and continuously permeated by considerations of security,<sup>66</sup> and, as expectations of violence increase, the willingness of states to share the great common resource of the oceans rapidly recedes.

### *Effects*

The effects achieved by claim and counterclaim extend to all the value demands, inclusive and exclusive, advanced by participants. In terms of power, inclusive access both to the oceans and to land areas expands or contracts as

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63. See PAPERS PRESENTED AT THE INTERNATIONAL TECHNICAL CONFERENCE ON THE CONSERVATION OF THE LIVING RESOURCES OF THE SEA *passim* (U.N. Doc. No. A/Conf.10/7) (1956).

64. The incidence of these factors upon claim is, of course, variable. Emphasis upon special coastal configuration has been prominent in those claims to internal waters and generally in drawing the base line from which the territorial sea is measured. Military requirements have been stressed not only with respect to the breadth of the territorial sea but in claims of authority over contiguous and noncontiguous areas of the high seas. All of the other factors have been of varying importance with respect to all the claims to exploitation and conservation of high seas fisheries. For example, the South American claims to an extended territorial sea have all emphasized the special character of adjacent Pacific waters and the allegedly unique importance of such waters to local economic well-being; paucity of capital has been stressed by some states in urging conservation measures which will preserve fisheries for future exploitation by underdeveloped countries. The traditional importance of the sea as a source of food has been the basic influence in Japanese resistance to claims of other states to conserve or exploit fisheries.

65. Recent claims to use of the high seas areas for testing purposes have been greatly affected by these considerations; these expectations have also influenced recent claims to internal waters (Peter the Great Bay) and claims of authority over contiguous sea and air areas, as in the placing of radar platforms and the air defense identification zones.

66. Resistance to extensions of the territorial sea has long been greatly influenced by military considerations. A Board of Trade Memorandum of October 18, 1864, to the British Foreign Office candidly noted that the military disadvantage to Great Britain was too great to permit extensions of the territorial sea. 2 SMITH, GREAT BRITAIN AND THE LAW OF NATIONS 213-15 (1935).

exclusive claims to authority are exercised. Similarly, distribution of wealth among participants is variously affected as access for transportation and resource exploitation is inhibited or made freer. Wealth may be reduced or enhanced, for example, as conservation schemes are developed and applied successfully and unsuccessfully or as exclusionary measures take effect. Well-being may be preserved or threatened as navigation and flight are endangered or made more secure, and as animal and mineral resources are monopolized or conserved or more ruthlessly and wastefully exploited. Enlightenment is promoted or retarded as uses of the sea for communication and scientific purposes is made more or less secure. Finally, the general security of all participants and the individual security of most states are weakened or strengthened as access to the sea for all purposes is progressively reduced or increased.

#### THE PROCESS OF DECISION

The process of decision, established by the world public order for the purpose of resolving the claims which states make against each other, may be conveniently and comprehensively described in terms of certain authoritative decision-makers, seeking to promote certain common community objectives, under all the vastly varying conditions of the world arena. To secure their ends, the decision-makers employ certain methods or procedures in the prescription and application of authoritative community policy, thus achieving effects on the values of all participants including, in addition to claimant states, the great variety of private groups and individuals whose activities are subjected to regulation.

#### *Decision-Makers*

The decision-makers made authoritative by the perspectives of participants in the world arena include not only the various officials of nation-states but also the officials of international governmental organizations as well as judges of international courts and of specially constituted arbitral tribunals. While each of the latter institutions has found relatively frequent use in resolving disputes about authority over the sea, most significant issues are decided by the officials of nation-states who function, on other occasions, as claimants of authority. The performance by state officials of this double function furnishes no justification for the too common conclusion that there are no objective decision-makers on issues concerning the law of the sea. Indeed, the very fact that the state official is on some occasions an authoritative decision-maker for world public order and on other occasions a claimant requires of the official the promise of reciprocity in all his decisions and claims. From this necessary reciprocity arise the recognition and clarification of a community interest which permits an appropriate compromise of competing claims and affords sanction for decision. In acting as an authorized decision-maker, the state official may accordingly be just as objective, and just as much moved by perspectives widely shared in the community of states, as a municipal decision-maker is objective and moved by perspectives shared in the territorial community he represents.

### *Objectives*

The objectives sought by authorized decision-makers may be described at different levels of abstraction. The most general objective may, perhaps, be stated in terms of the promotion of the fullest, conserving, peaceful use of the sea by all participants for achieving all their individual values in the greatest measure possible.<sup>67</sup> In slightly lower abstraction, decision-makers seek this goal through effecting a continually evolving compromise between exclusive and inclusive claims.<sup>68</sup> The particular kind of compromise which decision-makers historically have regarded as serving their more general purpose is one which restricts exclusive claims to the minimum reasonably necessary to secure the special interests asserted and which promotes to the fullest degree possible in all areas the more inclusive demands shared by the whole community of states.<sup>69</sup> Underlying such broad objectives may be noted still another general objective, sought by decision-makers in all international law: to promote stability in the expectations of participants that power will not be exercised arbitrarily but in certain patterns of uniformity, permitting participants to pursue their objectives rationally, economically and effectively.

### *Methods*

The methods invoked by decision-makers in resolving controversies embrace all the various functions indispensable to the making and application of policy—intelligence, recommending, invoking, prescribing, applying, appraising and terminating. Since the present focus is primarily upon the prescription and application of policy, consideration need not here be given to the other functions mentioned. Note may be taken, however, that all participants, and not merely the nation-state, play a role in the performance of these functions.<sup>70</sup>

The most important, though least easily observed, mode of prescribing authoritative policy for the resolution of controversies about the use of the oceans is to be found in the day to day interactions of claim and tolerance, from

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67. Cf. the formulation by Professor Gidel: "This concept of the common interest of all States in the proper and rational use of the high seas must obviously underlie any progress in regard to maritime law and furnish the guiding principle for its codification and development." GIDEL, MEMORANDUM 10.

Professor Gidel's classic *DROIT INTERNATIONAL PUBLIC DE LA MER* (1932) offers the richest and most authoritative documentation of this theme as well as of the law of the sea generally.

68. For a similar statement of objectives, see declaration of Garcia-Amador, 1 *VERBATIM RECORD* 16.

69. For another formulation of this compromise in respect to a concrete problem, see statement of Sir Gerald Fitzmaurice, 1 *VERBATIM RECORD* 238.

70. Participants include, for example, the Food and Agricultural Organization, the International Council for the Exploration of the Sea, General Fisheries Council for the Mediterranean, and the Indo-Pacific Council, all of which are focused principally upon intelligence and appraising. The International Law Commission plays a major role in recommending prescriptions, and various regional bodies have also been important, such as the Organization of American States.

foreign office to foreign office, by which controversies are most frequently resolved. Although a few signal successes have been achieved through prescription by agreements, such as those about fisheries, very little has been accomplished on most significant issues by this method.<sup>71</sup> The dynamic, multiple, changing demands of states against one another for the use of the oceans have for the most part successfully resisted collective efforts to subdue them into the strait jackets of black-letter definition and rigid policy prescription. Indeed, perhaps more notably in the law of the sea than in most areas of international law, important prescription of policy has been effectively achieved not so much through advance written formulations agreed upon by participants as through the centuries-old slow development by claim and response of a general consensus in community expectations. This consensus has been achieved and maintained by a process of decision sufficiently flexible in procedure and prescription, fortunately for the common interest, to permit the continuous balancing and compromise of exclusive and inclusive interests and the general resolution of claims to conflicting uses, in a way to give reasonable protection to all interests in continuously changing contexts and under continually changing conditions. The process has observably been one of continual, creative readaptation of inherited prescriptions, in the course of application to particular controversies.

The application of policy to specific controversies about the use of the sea may be performed by any of the officials described above, international or national. Most important in both frequency of controversies and significance of issues decided are the interactions among authoritative decision-makers of nation-states in mutual tolerances, as well as in explicit agreements, expressed in decisions by foreign offices and national courts and legislatures. Competing claimants, however, have often had recourse on some important issues to international courts and to especially constituted arbitral tribunals. The application of policy by these international decision-makers has had significant effects on the process of decision concerning authority over the seas.<sup>72</sup>

The intellectual tools available to authoritative decision-makers for guidance in deciding the specific controversies which come before them consist primarily of the sets of complementary and highly flexible prescriptions, created and transmitted through a long historic process. It is the complementary character of this structure of prescription which requires the greatest emphasis, and this character may clearly be seen in each of the categories of claimed exclusive authority and opposing claims.

The claims by coastal states to a comprehensive, exclusive competence over certain waters, most intimately connected with land masses, is commonly honored

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71. GIDEL, MEMORANDUM 43, refers to inadequacy of prescription by agreement on fisheries problems.

72. It is sufficient to recall the *Fur Seal Arbitration*, the *North Atlantic Coast Fisheries Case*, the *Lotus Case*, the *Corfu Channel Case* and the *Anglo-Norwegian Fisheries Case*. See UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA (U.N. Doc. No. A/Conf.13/22) (1957).

under the generic label "internal waters" and bolstered by certain supplementary concepts in terms of "sovereignty," "independence," "territorial jurisdiction," "domestic jurisdiction" and equivalent symbols.<sup>73</sup> The major opposing claims are given protection under such concepts as "right of access"—probably available only under express agreement—"right to trade,"<sup>74</sup> "jurisdiction of flag-state,"<sup>75</sup> "sovereign immunity,"<sup>76</sup> "right of entry" by "distress"<sup>77</sup> and so forth.

The only slightly less comprehensive and exclusive claim to authority over certain adjacent waters immediately beyond the "internal waters" is similarly honored under the label "territorial sea" and protected by the same concepts as are applied to "internal waters," such as "sovereignty" and all its synonyms.<sup>78</sup> The opposing claim to a right of access, however, is here honored wholly apart from agreement and is given a measure of protection under certain circumstances as a "right of innocent passage" or a right to use an "international waterway."<sup>79</sup>

The claim to demarcate boundaries to bring certain areas within "internal waters" as distinguished from the "territorial sea" is upheld by a finding that the particular configuration of coastal features and other "environmental factors" justifies the inclusion of water areas within a state's most comprehensive authority, including the right to deny access.<sup>80</sup> Supporting concepts invoked

73. 1 OPPENHEIM-LAUTERPACHT 502-03; HALL, *INTERNATIONAL LAW* 217, 253-56 (8th ed., Higgins 1924); COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA* 66-67, 128-29 (3d rev. ed. 1954); FENWICK, *INTERNATIONAL LAW* 313-14 (3d ed. 1948); 1 HYDE 726, 735; SMITH, *THE LAW AND CUSTOM OF THE SEA* 6 (2d ed. 1950).

74. The "rights" of "access" and "trade" are usually discussed under the label "right of intercourse." Most commentators agree that no such right can be derived from past practice. See 1 OPPENHEIM-LAUTERPACHT 321-22; 1 HYDE 581-82; HALL, *op. cit. supra* note 73, at 66-68; FENWICK, *op. cit. supra* note 73, at 268. *But see* COLOMBOS, *op. cit. supra* note 73, at 129.

75. This claim also rests mostly on agreement, and a large number of agreements have been concluded. For a summary of practice, see JESSUP 144-94. See also Comment, *Does the Eighteenth Amendment Violate International Law?*, 33 *YALE L.J.* 72 (1923).

76. Riesenfeld, *Sovereign Immunity of Foreign Vessels in Anglo-American Law: The Evolution of a Legal Doctrine*, 25 *MINN. L. REV.* 1 (1940). More recent trends are discussed in Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 *BRIT. Y.B. INT'L L.* 220, 250-72 (1951). See also Brandon, *Sovereign Immunity of Government-Owned Corporations and Ships*, 39 *CORNELL L.Q.* 425 (1954).

77. JESSUP 194-208.

78. CROCKER, *THE EXTENT OF THE MARGINAL SEA* (1919), collects the views of numerous publicists on this and other problems. See *FINAL ACT FOR THE CODIFICATION OF INTERNATIONAL LAW* 15 (League of Nations Doc. No. C.228.M.115.1930.V); JESSUP 115-19; HALL, *op. cit. supra* note 73, at 190-92 (speaks of "property rights"); FENWICK, *op. cit. supra* note 73, at 376-77; 1 OPPENHEIM-LAUTERPACHT 487; COLOMBOS, *op. cit. supra* note 73, at 68-70; HARVARD RESEARCH 288-89; SMITH, *op. cit. supra* note 73, at 6-7; 1 HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 677 (1940) (statement of Lord Curzon).

79. JESSUP 119-44; 1 OPPENHEIM-LAUTERPACHT 493-95; COLOMBOS, *op. cit. supra* note 73, at 98-100; HALL, *op. cit. supra* note 73, at 197-99; 1 HYDE 515-19; HARVARD RESEARCH 295-99; 1 HACKWORTH, *op. cit. supra* note 78, at 645-51; BUSTAMANTE, *THE TERRITORIAL SEA* 113-17 (1930).

80. The *North Atlantic Coast Fisheries Case* and the *Anglo-Norwegian Fisheries Case*, two of the most celebrated decisions in international law, contain pronouncements on this

by decision-makers include "bay,"<sup>81</sup> "historic bay,"<sup>82</sup> "harbors,"<sup>83</sup> "straight line in general direction of coast"<sup>84</sup> and so on. The opposing claim that internal waters should not include such areas is accepted when the decision-maker finds that the particular configuration of the coast and other factors are not sufficient justification for a claim to the most comprehensive authority. Support is added by such labels as "low water mark,"<sup>85</sup> "following sinuosities of the coast"<sup>86</sup> and "10-mile closing line,"<sup>87</sup> as well as by all the general doctrines subsumed under the label of "freedom of the seas."<sup>88</sup>

Concerning the breadth of the territorial sea, a relatively large but apparently decreasing number of decision-makers have in recent decades insisted that customary international law requires a narrow belt of three miles and urged in support of this alleged requirement the explicit policy of securing and maintaining the greatest possible extent of internationalization of the oceans of the world.<sup>89</sup> Doctrinal justification invokes, at its highest level of abstraction, the "freedom of the seas" and all its subsidiary formulations, such as freedom of navigation, fishing, flight and so on.<sup>90</sup> The opposing claims, asserting various more extensive widths, have on occasion gained acquiescence upon historic

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claim, and both make explicit reference to a variety of factors justifying inclusion of areas within internal waters. See SCOTT, HAGUE COURT REPORTS 141, 183-84 (1916); Fisheries Case, Judgment of Dec. 18, 1951, [1951] I.C.J. Rep. 116, 133. See also DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 214-17 (Corbett transl. 1957).

81. North Atlantic Coast Fisheries Case, SCOTT, HAGUE COURT REPORTS 141, 183-85, 187-88 (1916); 1 OPPENHEIM-LAUTERPACHT 504-10; COLOMBOS, *op. cit. supra* note 73, at 131-43; CROCKER, *op. cit. supra* note 78, *passim*. 1 HYDE 468-82; HARVARD RESEARCH 265-74.

82. Fisheries Case, Judgment of Dec. 18, 1951, [1951] I.C.J. Rep. 116, 130-31; Gulf of Fonseca Case, 11 AM. J. INT'L L. 674-730 (1917); CROCKER, *op. cit. supra* note 78, *passim*; 1 HYDE 468-69.

83. COLOMBOS, *op. cit. supra* note 73, at 128-29. BASES OF DISCUSSION 45-47, 61-63, evidences the general consensus of governments on this point. CROCKER, *op. cit. supra* note 78, *passim*.

84. Fisheries Case, Judgment of Dec. 18, 1951, [1951] I.C.J. Rep. 116.

85. *Ibid.* See Waldock, *The Anglo-Norwegian Fisheries Case*, 28 BRIT. Y.B. INT'L L. 114 (1951); COLOMBOS, *op. cit. supra* note 73, at 85-86; HARVARD RESEARCH 265-67.

86. This phrase is often considered as equivalent to the "low-water mark" concept. See Fisheries Case, Judgment of Dec. 18, 1951, [1951] I.C.J. Rep. 116, 129; COLOMBOS, *op. cit. supra* note 73, at 85. However, the low-water mark may also be utilized where the base line departs from the mainland coast.

87. Fisheries Case, *supra* note 86, at 131; 1 OPPENHEIM-LAUTERPACHT 507; CROCKER, *op. cit. supra* note 78, *passim*; HARVARD RESEARCH 265-74.

88. See FISHERIES CASE—PLEADINGS, ORAL ARGUMENTS, DOCUMENTS 58 (I.C.J. 1951). The protest of the United States to Indonesia about the vast extensions of its internal waters was apparently formulated principally in general terms of freedom of the seas. N.Y. Times, Jan. 18, 1958, p. 3, col. 1. See also Waldock, *supra* note 85, at 171.

89. 1 HYDE 452-53; replies of governments in International Law Commission, Report, U.N. GENERAL ASSEMBLY OFF. REC., 10th Sess., Supp. No. 9, at 33-34, 43, 46 (Doc. No. A/2934) (1955).

90. Supporting arguments in the statements in note 89 *supra*, contain reference to these doctrines. See also COLOMBOS, *op. cit. supra* note 73, at 82-83; HARVARD RESEARCH 251; U.S. NAVAL WAR COLLEGE 448-51.

grounds<sup>91</sup> or upon the ground that the high concentration of coastal interests in adjacent waters requires a broader extent of sovereignty and a consequent diminishment of inclusive right. These broader claims are also occasionally supported by reference to an alleged sovereign right of unilateral determination of the marginal belt<sup>92</sup> and to a series of variously determined compromises between coastal needs and community interest.<sup>93</sup> Doctrinal justification is, again, urged in terms of "sovereignty," "independence," "jurisdiction" and similar symbols.

The claims which states commonly make to particular and occasional exercises of authority, for the protection of many special interests, in contiguous areas beyond the territorial sea are protected under a great variety of labels such as "contiguous zone," "customs area," "defensive areas," "continental shelf," "conservation zone" and so forth.<sup>94</sup> States are accorded a competence to declare special zones of many different widths upon the ground that the exercise of such competence is necessary to the protection of exclusive interests and does not unreasonably interfere with more inclusive interests.<sup>95</sup> The opposing claim is sometimes accepted by some decision-makers upon the ground that the competence of the coastal state is largely, if not completely, exhausted by the regimes of internal waters and territorial sea and that the competence of the coastal state is restricted to very few and narrowly delimited zones for

91. Fisheries Case, Judgment of Dec. 18, 1951, [1951] I.C.J. Rep. 116, 120; Waldock, *supra* note 85, at 126.

92. This has been the chief argument underlying the CEP claims and is the view of the Soviet Union, Poland, Rumania, Czechoslovakia, Albania, Bulgaria and others. See statements by these representatives in VERBATIM RECORD.

Such arguments, of course, completely misconstrue the process by which customary practice establishes authority. It is not the unilateral claim but general acceptance by other states which adds the element of authority. See note 102 *infra*.

Authoritative rejection of this concept of unilateral competence was made by the International Court of Justice in the Fisheries Case, *supra* note 91, at 132: "The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law."

93. Replies of Iceland and Sweden in REPORT OF INTERNATIONAL LAW COMMISSION, U.N. GENERAL ASSEMBLY OFF. REC., 10th Sess., Supp. No. 9 (Doc. No. A/2934) (1955). See also commentary in REPORT 12.

94. 1 OPPENHEIM-LAUTERPACHT 497-501, 628-35; 1 HYDE 758-60, 777-85, 789-94; GIDEL, MEMORANDUM 26-36; MASTERSON, JURISDICTION IN MARGINAL SEAS xiii-xv (1929); McDougal & Schlei, *The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security*, 64 YALE L.J. 648, 666-81 (1955); Gidel, *La Mer Territoriale et la Zone Contiguë*, 48 HAGUE RECUEIL 137 (1934).

The extent of claim and tolerance may also be seen in the collections of national legislation cited note 4 *supra*.

95. JESSUP 95; GIDEL, MEMORANDUM 28; SMITH, THE LAW AND CUSTOM OF THE SEA 20 (2d ed. 1950); McDougal & Schlei, *supra* note 94, at 667. This fundamental point appears to have been the basic theme of Garcia-Amador's outstanding contribution to the debate in the Sixth Committee. 1 VERBATIM RECORD 14-24.

limited purposes,<sup>96</sup> even excluding security purposes, according to the International Law Commission.<sup>97</sup> These claims are supported by invoking "freedom of the sea" and all equivalent formulations in highly absolutistic terms.<sup>98</sup>

With reference to the outer expanses of the oceans, the basic demand of states for freedom of navigation and fishing is now, as in the past, honored by authoritative decision-makers through application of the doctrine of "freedom of the seas," still more hallowed than precise.<sup>99</sup> The opposing claims, those which interfere in greater or lesser degree with peaceful navigation and fishing, are accepted and protected not only in terms of the same broad doctrine honoring inclusive use but also in other terms directed more at the short-term interests of the claimant state, such as "self-defense," "hot pursuit," "danger areas" and so on.<sup>100</sup>

The most important points to note about these inherited intellectual tools which decision-makers employ in the resolution of particular controversies are that they make reference more to the responses of the decision-makers—to the decisions actually taken—than to the factors and policies affecting that response, and that, because of their complementary and flexible character, they do not so much prescribe certain definite future responses as pose for decision-makers a variety of alternatives. The factors and policies which in fact significantly affect response and guide a decision-maker in his choice of alternatives are indicated only most imprecisely and incompletely. It is true that with respect to a few issues, such as that of access by nonnationals to what are called "internal waters," there is such a consensus about factors and policies among decision-makers that certain rather definite patterns of past decision may with some confidence be projected into the near future. Yet even the factual reference of "internal waters" remains in some measure undetermined. And when the issue moves beyond such waters to controversies about other areas or concentrations of interest, decisions become most obviously a function of the balancing of many different factors and policies and a compromise of competing interests.

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96. The most notable contemporary illustration of this attitude is the view adopted by the International Law Commission. See text at notes 145-46 *infra*. See also JESSUP 241 for the protests by the British government against American assertions of authority beyond the three-mile limit for purposes of enforcing antiliquor laws. For apparent relaxation of traditional British objection to contiguous zones, see British reply in International Law Commission, *Report*, U.N. GENERAL ASSEMBLY OFF. REC., 10th Sess., Supp. No. 9, at 40 (Doc. No. A/2934) (1955). *But see* the statement of Sir Gerald Fitzmaurice, in this instance also representing the view of the British government, that the coastal state has no "jurisdiction" over the contiguous zone and that its laws and regulations do not apply to the zone. 1 YEARBOOK 50. The attitude of most of the commission members was similarly restrictive.

97. REPORT 39.

98. See, generally, JESSUP 241-76.

99. 1 OPPENHEIM-LAUTERPACHT 589-617; COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA* 39-65 (3d rev. ed. 1954); 1 HYDE 751-63; GIDEL, MEMORANDUM 1-5.

100. See SMITH, *op. cit. supra* note 95, at 54-56; 1 HYDE 763, 794; COLOMBOS, *op. cit. supra* note 99, at 123-28; Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 HAGUE RECUEIL 455, 464-66 (1952).

The actual task which confronts a decision-maker in a particular controversy is, accordingly, not that of automatically applying inherited prescriptions but of giving such prescriptions a new operational meaning by weighing all the different factors and policies which are significant in the context before him. The range of factors, mentioned briefly above as characteristics of particular opposing claims, which are potentially significant in any particular context, is of course extensive and various. It includes such items as the interests sought to be protected by the claims, the relative location and extent of the ocean area affected, the extent of authority or immunity claimed, the activities subjected to authority or affected by it, the degree and duration of interference with existing uses, the historical factors involved such as custom and priority in usage, the relationship between the authority or immunity claimed and the interests sought to be protected, and the significance of all the interests affected, exclusive or inclusive, to all the participants, including the whole community as well as the claimants. The weight to be given any one or more of these factors must vary as particular contexts vary, since the significance of any particular factors depends upon the presence or absence of other factors and the peculiar configuration of all factors in context. With all the assistance that inherited prescription can offer in pointing to significant factors and policies and in anticipating recurring types of contexts, a decision-maker must in the end make his own appraisal of the total context and his own choice in priority among the competing interests. For all types of controversies, the one test in guiding final choice that has been available in the past to decision-makers, whatever the degree of consciousness or explicitness in invocation, has been "that simple and ubiquitous, but indispensable, standard of what, considering all relevant policies and all variables in context, is *reasonable* as between the parties."<sup>101</sup> Indeed, it is in the measure that decision-makers have been conscious of this necessity of weighing and balancing all factors in context to determine which of opposed claims are most reasonable by the criteria of community policy that decisions have been rational and reasoned rather than arbitrary and dogmatic.<sup>102</sup>

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101. McDougal & Schlei, *supra* note 94, at 660; see JESSUP 95; SMITH, *op. cit. supra* note 95, at 20.

102. Because of certain contemporary misconceptions, it may be emphasized that this formulation does not mean that each state may itself unilaterally decide what is reasonable with respect to its exclusive claims and lawfully impose its decision upon the community. It is not the unilateral claim, but the acceptance by other states, even when manifested in reciprocal tolerances, which creates the expectations of uniformity and "rightness" in decision which we commonly call international law. The determination of what is reasonable in a particular controversy requires, accordingly, both (1) an authoritative decision-maker (in customary international law, the general community of states) and (2) decision by community criteria. It is only by a weighing and balancing of relevant factors by authorized decision-makers in terms of community criteria that reasonableness, if the word is to be given its historic and common meaning, can be determined.

Another factor that the states claiming a competence to the unilateral determination of the lawfulness of their claims ignore is that in the making of such claims they are attempting to determine not only their own interests but also the interests of other states.

*Conditions*

The conditions under which authoritative decision-makers prescribe and apply policy to claims to authority include all those previously outlined in the process of claim, but certain factors bear more immediately upon prescription and application than upon claim. In broadest statement, prescription and application reflect the structure and more general process of power relationships in the world arena. Thus, a high degree of internationalization of the oceans was first achieved in a multipolar arena in which no state had the effective power to chase all other states off the oceans.<sup>103</sup> Internationalization was developed and strengthened in an era when major maritime powers conceived internationalization to be in their own long-term interests and, in addition to ordinary reciprocity and retaliation, utilized their fleets as a sanction. In particular, during the important formative years of the 18th and 19th centuries, the pre-eminent policy of freeing the oceans of claimed exclusive authority received primary support from Great Britain, the major naval power during most of that period. This support was, in turn, derived from the characteristics of naval power both as a flexible instrument for projecting British policy to distant parts of the globe and as an instrument of marked economy of force in application, enabling a relatively small, strategically located island territory to wield an extraordinary influence in shaping world events. This structure of the world arena and the distinctive characteristics of sea power played leading roles in developing the structure of prescriptions available to present-day decision-makers, and to the extent that the arena remains multipolar and sea power retains these characteristics of flexibility and economy in use, they will continue to be significant factors affecting decision.

Today, however, not only does no centralized agency exist for prescribing and applying policy, but no single state or group of states has the effective power necessary to enforce policy without wholly uneconomic violence. The continued maintenance of a common policy recognizing and protecting inclusive interests in the oceans of the world must, accordingly, depend upon the continued maintenance of a general consensus among participants on what such policy should be. The experience of recent decades has certainly demonstrated that the states of the world have a community interest in accommodating and protecting in measure both the exclusive and inclusive claims asserted by states. It remains, nonetheless, an indispensable condition to the effective pre-

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By extending their own exclusive claims, they invade the historic inclusive rights of other states. By undeniable reciprocity, these other states may in turn claim a competence unilaterally to determine the extent of their interests. Thus, the end of claimed unilateral competence can only be irresolvable conflict. Multilateral concurrence, whether by customary consensus or by explicit undertaking, is indispensable to accommodation.

The general point is made specific by Sir Gerald Fitzmaurice when he states that "the plea of sovereignty cannot of itself give a country any right to appropriate waters which are not, according to law, its territorial waters any more than the plea of sovereignty can give a country a right to territory which is not already its territory . . ." 2 VERBATIM RECORD 538; see 1 *id.* at 296.

103. See note 2 *supra*.

scription and application of a common policy that the states continue to recognize their community of interest and the conditions under which a consensus can be maintained to preserve such common interest. Excessive claims by some states for exclusive control which interferes with reasonable use by others and violates long-established expectations about lawfulness may confidently be expected to lead to more extensive claims by others, with the ultimate disintegration of common authority and immeasurable loss in the particular values of all claimants.

### *Effects*

The effects achieved by decision-makers in compromising and accommodating the great variety of claims to authority correspond in greater or lesser degree with the objectives they seek. Most vitally, as affecting all participants, the internationalization of the oceans for all purposes decreases or increases as decision-makers respond to the multiple exclusive and inclusive demands of claimants, honoring and protecting the one or the other in greater measure. More concretely, the fuller peaceful, rational use of the oceans is promoted or retarded as decision-makers are more or less successful in perceiving and weighing adequately all the variables which are in fact relevant to the most economic accommodation of conflicting demands.

A complete appraisal of the process of decision in broadest community perspectives would, of course, require a more systematic and detailed clarification of the global policies at stake in both the inclusive and exclusive claims of states, a careful survey of past trends in decision on the various types of specific controversies and of the many different factors affecting such decision in different contexts, calculation of the probable impact of this past experience upon future developments, and assessment of past trends and future probabilities in terms of clarified policies and possible alternatives.<sup>104</sup> All this Article will attempt is some further clarification of the community interest in the continued maintenance of the highest possible degree in internationalization of the oceans, a more comprehensive itemization of the factors which authoritative decision-makers have in the past taken into account in achieving a workable balance between inclusive and exclusive claims, and certain suggestions of what a rationally conceived community interest under probable future conditions may require in the way of general solutions of the various types of specific controversies presently under debate.

#### THE COMMON INTEREST IN AN ECONOMIC BALANCE OF EXCLUSIVE AND INCLUSIVE USES

The common interest of all states in both exclusive and inclusive uses of the oceans of the world and in an economic accommodation of all uses is not

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104. For a more comprehensive statement of the necessary intellectual tasks, see McDougal, *International Law, Power, and Policy: A Contemporary Conception*, 82 HAGUE RECUEIL 137 (1953); McDougal, *The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order*, 61 YALE L.J. 915 (1952).

difficult to demonstrate. If the several centuries of experience of territorially organized communities is to be trusted, it is reasonably clear that all states which border upon the oceans have a special interest in those traditional exclusive assertions of control in nearby areas which permit a state both to protect its territorial base and organized social life from too easy invasion or attack from the sea and to take advantage of any unique proximity it may have to the riches of the sea bed and marine life. It is no less clear that each state, whether coastal or not, has an interest in the fullest possible access, either for itself or for others on its behalf, to all the inclusive uses of the ocean, such as navigation, fishing, cable-laying and so on, for the richest possible production of values. From this mutual interest of all states in all types of uses, it follows that each state has an interest in an accommodation of such uses when they conflict, as inevitably they must, which will yield both an adequate protection to exclusive claims and yet the greatest possible access to inclusive uses. The net total of inclusive uses available for sharing among all states is directly dependent, further, upon the restriction of exclusive claims to the minimum reasonably necessary to the protection of special claimants. If all states asserted and were protected in extravagant, disproportionate, exclusive claims, there would be little, if any, net total of inclusive use for common enjoyment. The ancient fable of a group of monkeys on one end of a seesaw is relevant: a single monkey may be able to race to the other end and pluck grapes from vines on an overhanging tree, but if all the monkeys suddenly race, no monkey gets any grapes. From the perspective of the whole community of states, it may be added that the encouragement of appropriately conserving inclusive uses, which bring to bear the efforts and resources of many different states, is more productive of values than the encouragement of exclusive uses not reasonably necessary to the protection of a particular state. For states tightly locked in a global arena in an irrevocable interdependence with respect to all values, and highly dependent upon specialization among themselves for the production of many values, the conclusion would seem inescapable: the common interest is in an accommodation of exclusive and inclusive claim which will produce the largest total output of community values at the least cost.<sup>105</sup>

The continued community interest in maintenance of the highest possible internationalization of the oceans may perhaps be most clearly demonstrated, in the absence of supervening conditions requiring a monopolization of power in common interest, by reference to the achievements of past internationali-

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105. In this formulation, we postulate as a community goal the greatest production and widest possible sharing of values among all peoples. This is the goal to which we subscribe and which we recommend. We do not believe it necessary to engage in an endlessly regressive justification of this postulate by logical derivations from other premises. This goal is in fact widely shared in the world today, and experience suggests that people who prefer very different justifications—from religion, science, history, common sense, cultural faiths and so on—can co-operate effectively in giving it operational meaning in terms of particular allocation of competence. The burden might be put, we suggest, upon one who rejects this goal to state his own postulate and justification of it acceptable to the general community.

zation. The oceans, which admit of economic sharing, have manifestly been made to serve the peoples of the world as a great common resource, actually being shared for the mutual benefit of all in the greater production of all values. Both the inclusive interests of all states and the special exclusive interests of coastal states have been successfully accommodated through the historic, inherited public order of the oceans. A brief recapitulation may serve as a reminder of the full significance of the achievement.

In terms of power, exclusive control of the oceans by one or a few states for national aggrandizement has been largely precluded, and the oceans have been maintained as great natural buffer zones, reducing the confrontation of the states and insulating power rivalries. Power over events upon the oceans has in fact been shared by all states to an extraordinary degree even without recourse to a centralized institutional mechanism for decision-making. By appropriate accommodation and compromise, a public order of the seas has been maintained to permit states to send their argosies to all the four corners of the world and to take adequate account of both the general security interest of the community of the states and the special security interest of particular states. States have also been afforded competence, without excessive interference with productive activities on the sea, to protect their police, fiscal and other special interests through reasonable measures of authority. It is suggestive of the striking achievement of the public order of the sea in reconciling disputed claims to power that it has furnished a model for balancing exclusive and inclusive claims which some have recommended for transfer to potential controversies over the activities in outer space.<sup>106</sup>

The historic process of decision has similarly achieved a very wide sharing in the allocation of resources and in access to the oceans and markets of the world. Though coastal states have been given a reasonable measure of protection in control of immediately adjacent activities and resources, the larger expanses of the oceans have been mostly preserved as accessible to all with only a relatively miniscule portion of the total area allocated for exclusive exploitation. States have been enabled to take advantage of the opportunities of transport, trade and communication afforded by access to the oceans, and, by the application of certain common standards, the riches of the ocean have been in large measure shared.

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106. See Craig, *National Sovereignty at High Altitudes*, 24 J. AIR L. & COM. 384 (1957); Cooper, *The Russian Satellite—Legal and Political Problems*, 24 J. AIR L. & COM. 379 (1957); McDougal, *Artificial Satellites: A Modest Proposal*, 51 AM. J. INT'L L. 74 (1957); Jenks, *International Law and Activities in Space*, 5 INT'L & COMP. L.Q. 99 (1956); Cooper, *Legal Problems of Upper Space*, 1956 PROC. AM. SOC'Y INT'L LAW 854; Schachter, *Who Owns the Universe?*, *Colliers*, March 22, 1952, p. 36.

In an article published October 17, 1957, in *Sovetskaya Rossiya*, a Russian newspaper, Dr. G. Zadorozhny stated: "By analogy with the principle of the freedom of the open sea which, beyond the limits of territorial waters and special sea zones, belongs to nobody and is at the general disposal of all nations, the upper atmosphere, lying outside the bounds of effective air control by states, may also be considered an open sky zone and for the use of all nations."

Enlightenment has also been conspicuously served on a global scale by maintaining the oceans as open channels of communication and thus promoting the free circulation of peoples and ideas. Cable-laying has been of such import that it has been given a special protection in practically all authoritative formulations of the doctrine of freedom of the seas.

Well-being, as well as wealth, has been enhanced in substantial measure through preservation of the oceans as a common storehouse of riches. By according some degree of special competence to coastal states, the public order of the oceans has given protection to peoples particularly dependent upon the sea for food and livelihood. Coastal states have also been accorded authority to pursue measures for protection of health, such as sanitation and quarantine controls.

Skill has been promoted, and specialization encouraged in high degree, through securing free access to all for the productive utilization of the ocean and its resources. Rich and varied outlets have thus been provided for developing individual potential both through manifold methods of exploiting the oceans and through movement of the peoples to other, more promising areas of the globe.

Respect has been enhanced in the sense that states have been enabled, without discrimination as to flag, to have unimpeded access to the oceans for pursuing all their reasonable value demands, inclusive and exclusive. Equality of states has had its richest exemplification in the fact that all states, irrespective of relative wealth and power position, have been largely free to utilize the oceans, each restrained only by the limitation of particular environmental conditions.

Solidarity and expanding loyalties have been furthered as the oceans have been made to function not as barriers between peoples, such as mountains, but as easily available links of communication and transportation fostering a cosmopolitan sense of identification between peoples of otherwise distant and foreign lands.

Contributions to rectitude are manifest in the law of the sea itself: the interactions of the states upon the oceans have afforded a great laboratory for the testing of procedures in the formulation and application of common standards of right and in the accommodation of varying standards from many different cultures.

#### FACTORS INFLUENCING AUTHORITATIVE DECISION-MAKERS

All this great net advantage in community values has been achieved, it may now be emphasized in further detail, by a very distinctive process of decision, a process in which conflicting claims to authority and use have been deliberately balanced, by a consideration of relevant factors in specific contexts under community perspectives, for the explicit promotion of the fullest, conserving, peaceful use of the seas by all.<sup>107</sup> Such economic accommodation in com-

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107. The broad outlines of the following history are documented in McDougal & Schlei, *supra* note 94.

munity interest has been sought by authoritative decision-makers both by a heavy weighting of the balance, save in the areas most immediately adjacent to states, in favor of inclusive rather than exclusive uses and by the maintenance for the resolution of conflicts between inclusive claims, in areas beyond those conceded to exclusive authority, of a completely flexible, open-ended balance, permitting account to be taken of all the nuances of specific contexts and the continuous admission of new uses. Even the historic crystallization of authoritative expectations in favor of the relatively comprehensive, exclusive authority of a state over waters immediately adjacent to its shores may be viewed as but a continuous community weighting of the factor of propinquity or contiguity: states, as territorially organized communities, are permitted to include such immediately adjacent waters within their permanent bases of power, over which they may assert comprehensive and continuous authority, because without such authority they could not protect the security of their value processes upon their land masses. It is, however, when conflicts move out beyond such immediately adjacent waters and the importance of exclusivity declines as that of inclusivity increases, that the process of balancing many different variable factors in context becomes the most necessary and most explicit: the public order of the oceans then protects a state only in such occasional assertions of authority and use as are determined to be reasonable under the criteria of common interest in relation to the competing, similar claims of other states.<sup>108</sup>

To determine what is reasonable in any particular context of conflicting uses, an authoritative decision-maker must, of course, make reference to the whole congeries of factors relevant in that context—and contexts vary greatly. The factors relevant to decision are many and varied, and the significance of any particular factor in any particular controversy depends upon the total configuration of factors and its place in that configuration. Fortunately, the complementary and highly ambiguous character of inherited, authoritative doctrine has made it possible for a decision-maker to take all these variables into account and to achieve in particular controversies an appropriate relation of factors to context. The great range of possibly relevant factors may perhaps be best indicated by a rough grouping into three broad categories: the claim to authority asserted; the counterclaim on behalf of a use interfered with by such exercise of authority; and the modality and degree of interference involved.<sup>109</sup> Under each heading, an itemization of the type of relevant factors may be offered.

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108. For most explicit application of this test, see *Fisheries Case*, Judgment of Dec. 18, 1951, [1951] I.C.J. Rep. 116; *North Atlantic Coast Fisheries Case*, SCOTT, HAGUE COURT REPORTS 141 (1916).

109. It may be hoped that a detailed itemization of the factors which authoritative decision-makers observably take into account will do much to dispel the misconception, so pervasive in contemporary discussions of the law of the sea, that "economic," "sociological" and "political" considerations are not "legal" considerations and that there is an unbridgeable gap between legal and other considerations. If all that is meant by the limited notion of what legal considerations include is that past practice has established certain crystallized expectations about what factors a decision-maker is authorized to

*The Claim to Authority Asserted*

1. The scope of authority claimed in terms of the range of events sought to be subjected to authority, the range of events actually subjected to authority, the extent and location of the area subject to claim with particular reference to the relationship to the claimant state and the duration of the claim.
2. The interest sought to be protected by the claim to authority in terms of the objective sought, such as security, power, wealth, well-being and so forth.
3. The relationship, in terms of appropriateness, between the authority claimed and interest sought to be protected. Inquiry here has been directed at the extensiveness of the claim, in all its facets, as compared or contrasted with the significance of the interest to be protected.
4. The significance to the claimant state of the interest at stake with reference to the following specific considerations:<sup>110</sup>
  - a. Demographic factors.
  - b. Economic structure, particularly the degree of dependence upon sea resources or use of the sea.
  - c. Resource consumption and needs—sources of food, industrial development and requirements.
  - d. Technological developments in fishery techniques and mineral exploitation.
  - e. Scientific knowledge—geology, oceanography, mineralogy, biology and so forth.
  - f. Living customs and traditions.
  - g. Historical patterns of claimed authority and usage.
  - h. Military position and requirements.

*The Counterclaim*

1. The type of activity or activities with which claim to authority might or does interfere.
2. The intensity of occurrence of such activity in terms of the number of participants, the frequency of occurrence and the likely future pattern.

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take into account, it may do no harm. If, however, what is meant by the notion is that these crystallized expectations do not point to economic, sociological and political factors and that a decision-maker is not authorized to apply inherited formulations by reference to such contemporary factors in the context before him, then it may be suicidal illusion. The rules of the law of the sea, like other legal rules, exhaust their effective power when they guide a decision-maker to relevant factors and indicate presumptive weightings. Even the most definitive of past crystallizations, those about competence over internal waters and territorial sea, are but commonly accepted weightings of the economic, sociological and political importance to coastal states of propinquity, and on occasion even these are made to yield to other factors and other weightings.

110. The weight which some of these factors may have in influencing decision is graphically illustrated in the North Atlantic Coast Fisheries Case, SCOTT, HAGUE COURT REPORTS 141 (1916), with respect to bays and in the Fisheries Case, Judgment of Dec. 18, 1951, [1951] I.C.J. Rep. 116, with respect to internal waters and the territorial sea.

3. The significance of such activity to states affected in terms of the variables mentioned above.
4. The extent and location of the area in which activity occurs, if different from the area over which authority is claimed.
5. The burden of avoiding interference.
6. The suitability of existing use to the area concerned.

#### *Modality and Degree of Interference*

The primary reference here has been to the types of competing uses, in particular to whether the claim to authority involves:

1. A conflicting use, such as navigation or fishing, which may nevertheless be accommodated with other uses.
2. A conflicting use which is incompatible with some, but not all, other uses. Thus, claims to exploitation of oil in the continental shelf exclude others from use for that special purpose but do not necessarily exclude use by others for other purposes, such as navigation.
3. A conflicting use which, while it endures, is incompatible with all other uses, such as the use of the sea for testing nuclear weapons.
4. A claim to limit the uses, such as measures for conserving living resources of the sea.
5. A claim to prescribe the conditions of use, such as antipollution measures and other prescriptions governing passage through the territorial sea.

An additional consideration is the duration of interference resulting from the claim to authority, which may range from momentary through temporary to permanent assertions of authority.<sup>111</sup>

#### THE COMMUNITY INTEREST UNDER PROBABLE FUTURE CONDITIONS

The final task is to examine briefly each of the six major types of controversy arising in the process of claim, for the purpose of attempting to clarify, by an appropriate application of community perspectives and a general weighting of relevant factors, what a rationally conceived community interest may, under probable future conditions, require in the way of general solutions. Certain degrees of crystallization in past expectations about appropriate standards for such controversies will be noted. Reference will also be made to certain recent recommendations, most especially those by the International Law Commission, which tend to reverse the traditional weighting in favor of inclusive uses by uneconomic concession to exclusive uses. Finally, a few suggestions will be offered in support of a continued accommodation of conflicting claims by a balancing best designed to achieve the maximum advantage in community

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111. Less systematic presentation of these factors may be found in Boggs, *National Claims in Adjacent Seas*, 41 GEOGRAPHICAL REV. 185 (1951); GIDEL, MEMORANDUM *passim*.

values. Although the most serious issues in policy relate to the last four types of controversies, each will be considered.

#### *Authority Over Internal Waters*

That a state has all the competence over its internal waters that it has over land areas within its boundaries has long been accepted.<sup>112</sup> If the waters designated as internal are not unduly extended, one need not quarrel with this policy; such comprehensive control in immediately adjacent areas is indispensable for the protection and promotion of reasonable interests of a coastal state.

If the community purpose in including certain areas within internal waters is, as we suggest, to enable a state to exercise the comprehensive control necessary to protect access to its territorial base, the one major recommendation of the International Law Commission concerning internal waters cannot but appear mystifying. Apparently in view of its proposed vast extension of areas which might be included within the internal waters of a state, the Commission recommended the recognition and accordance of a right of innocent passage through some of the water areas so designated, those which prior to inclusion within internal waters had normally been used for international navigation.<sup>113</sup> Acceptance of such a recommendation would, of course, require that such areas be regarded for all practical purposes as identical in legal status with the territorial sea, since the major difference between the two areas lies in the general recognition of a right of innocent passage through the territorial sea but not through internal waters.<sup>114</sup> The result of the Commission's suggestion is, among other things, to create a considerable doubt whether the newly created "internal waters" fulfill any special function sufficient to justify their establishment, a doubt considerably intensified by the Commission's failure to set forth any explanatory factors.<sup>115</sup>

#### *Authority Over the Territorial Sea*

The proposals presently being made about the scope of state authority over waters agreed to be within the "territorial sea" exhibit no drastic changes from the practice of recent decades, which achieved a workable balance between exclusive and inclusive claim. In certain respects, however, the recommendations of the International Law Commission concerning the right of innocent passage are more confusing than enlightening. One proposal, for instance, suggests that the right of innocent passage should extend to passage for purposes of entry into internal waters.<sup>116</sup> Elsewhere, however, the Commission

112. See note 73 *supra*.

113. REPORT art. 5, at 3, 14.

114. This point was also suggested by Finland in the Sixth Committee debates. See 1 VERBATIM RECORD 78.

115. Readers of the commission draft will find that doubt intensified by the absence, at any place in the draft, of any mention of the purpose served by internal waters, leaving the further impression that the Commission had no clear notion on this point either.

116. REPORT art. 15(2), at 19.

has inserted a provision explicitly recognizing the competence of the coastal state to impose conditions upon the admission of ships to internal waters, an authority so broadly stated that little appears left of the supposed right of innocent passage.<sup>117</sup> In any event, the formalistic character of the proposed right would seem apparent in the universal recognition, surprisingly not mentioned by the Commission, that a coastal state has sufficient authority over entry of persons and resources into its territory to deprive any supposed right of entry of any practical consequence.<sup>118</sup> In the absence of consideration of much more basic policies involving exclusive state control over imports and exports, immigration, and temporary entry of aliens, a provision on a right of innocent passage to internal waters can hardly be meaningful.

In still another respect, the International Law Commission might have attained a somewhat higher degree of clarity in its prescriptions about innocent passage. The article dealing with the meaning of this concept provides that "passage is innocent so long as a ship does not use the territorial sea for committing any acts prejudicial to the security of the coastal state or contrary to the present rules, or to other rules of international law."<sup>119</sup> Neither the "present rules" nor "other rules of international law" are given any concrete reference in the ensuing articles on innocent passage; hence security is the only specific interest a vessel is forbidden to prejudice on pain of losing a right of passage. The range of possibly prejudicial activities left undetermined by these vague criteria was even acknowledged by commission members in their deliberations when they agreed<sup>120</sup> to the necessity of making explicit mention in the commentary that ships entering the territorial sea "for the purpose of smuggling or with the intent to avoid import or export controls of the coastal state could not be regarded as being on innocent passage."<sup>121</sup> If it was a matter of doubt in the minds of commission members, as it clearly was, whether even these widely acknowledged legitimate interests were to be within the competence accorded by the Commission to coastal states in the territorial sea, future decision-makers could hardly be expected to find clear guidance in the commission formulations. A far more realistic and enlightening course would have been to make an explicit admission that the authority accorded a coastal state in the territorial sea is, and must be, very comprehensive indeed, extending even to a substantial measure of discretion in determining the innocent character of a particular passage, with only the ordinary sanctions of reciprocity and retaliation available to assure reasonable exercise of discretion. Instead of attempting the impossible task of confining state authority within the supposedly restrictive confines of illusory categories, the International Law Commission

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117. *Id.* art. 17(2).

118. "It is believed that the proposition is unquestionable that under international law every nation may prohibit the introduction into its territory of any commodity which it sees fit to exclude." JESSUP 219; see 1 OPPENHEIM-LAUTERPACHT 323.

119. REPORT art. 15(3), at 19.

120. 1 YEARBOOK 200-01.

121. *Ibid.*

might have achieved much more significant clarification by a presentation of the more important factors or conditions to be taken into account in weighing the coastal interest in restriction of or interference with passage and the community interest in freedom from such restriction or interference. It might have emphasized, for instance, the relationship of the coastal state with its neighbors and other states, the importance of the waters to international transportation and communications, the interest supposedly threatened and the possible alternative methods of achieving protection.

*Boundary Between Internal Waters and Territorial Sea*

In drawing the lines enclosing internal waters and thus providing baselines for measuring the width of the territorial sea, the traditional prescriptions about following the sinuosities of the coast and about the length of the line enclosing bays have weighted decision in favor of the utmost practical limitation of the extent of internal waters. As may be observed in several sections of its draft, the International Law Commission seems to be reversing this traditional preference. Thus, in attempting to generalize the decision in the *Anglo-Norwegian Fisheries Case*, the Commission has sanctioned the use in certain circumstances of straight base lines drawn in the general direction of the coast and joining certain points of the general coastal configuration in a way to include relatively extensive areas within internal waters.<sup>122</sup> Elsewhere, the Commission recommends, without reference to supporting conditions, that the waters of a bay, enclosed by the shores of a single state, to the landward of a fifteen-mile closing line be included within internal waters.<sup>123</sup> Finally, in a cryptic provision omitting any mention of conditions or consequences, the Commission recommends that drying rocks and shoals within the territorial sea be used as "points of departure for measuring the extension of the territorial sea."<sup>124</sup> Concerning all these recommendations, one may reasonably recall that the traditional prescriptions greatly limiting internal waters appear to have served the interest of the community of states well and suggest that very weighty new factors should be required to justify such wide departures from past practice. Reference to such factors is not only absent from the Commission's draft, but the stipulation of a right of innocent passage through some of the new areas of internal waters seems to suggest that these extensions of internal waters were recommended without reference to any factors at all.<sup>125</sup>

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122. REPORT art. 5, at 4.

123. *Id.* art. 7, at 5. The representative of Finland put this issue sharply before the Sixth Committee: "Why invite States to appropriate the maximum, regardless apparently of any other considerations?" 1 VERBATIM RECORD 79.

124. REPORT art. 11, at 5.

125. The Commission understandably was influenced by the decision in the *Fisheries Case*, yet observers might have some reason to doubt that the decision was properly understood or, if understood, approved. If the factors justifying inclusion of certain Norwegian waters within internal waters were regarded by the Commission as capable of generalization to apply to water areas near other states, as apparently was the case, the Commission nevertheless seems to have ignored such factors in approving a right of innocent passage

*Breadth of the Territorial Sea*

Despite all the argument about the three-mile limit, until relatively recent times the consensus was clear that states were authorized to claim only a very narrow belt for the comprehensive competence honored under "territorial sea." The states with the largest coasts and with the preponderance of vessels in tonnage asserted and were willing to tolerate a width of no more than three miles. The exceptional claims to a broader belt were also relatively modest, such as the Scandinavian claims to a four-mile width<sup>126</sup> and others, chiefly Mediterranean, to six, with an occasional claim being made to twelve.<sup>127</sup>

The recommendations of the International Law Commission, which amount to an invitation to a full reconsideration of the policy of a narrow belt in this time of resurgent national egoism, may make it very difficult to establish any wide measure of agreement upon the modest belt necessary to the reasonable protection of the special interests of the coastal state. In suggesting that extension of the marginal belt to twelve miles would not constitute a breach of international law,<sup>128</sup> the Commission appears in effect to invite extensions to that limit, since the import of the proposal is either that a twelve-mile belt is in accord with international law or that international law does not presently make provision on this point other than to deny validity to claims to an extent greater than twelve miles.<sup>129</sup> In one further particular, the International Law Commission has recommended what is, in substance, an extension of the territorial sea. As noted earlier, the Commission proposes potentially vast extensions of internal waters, the effect of which, by projecting the base line outward, is to extend the outer limit of the territorial sea into waters which would otherwise have been part of the high sea.<sup>130</sup> The expansive effect of the Commission's recommendations is further emphasized in the provision for a

through certain internal waters, thereby assimilating them to the territorial sea. To this extent, the provisions of article five depart from the decision in the *Fisheries Case* and attach a different meaning to the factors thought by the court to support that decision.

126. The Scandinavian claim to a four-mile width resulted merely from a different method of measuring a marine league and was not intrinsically a claim to a width broader than three miles. MEYER, *THE EXTENT OF JURISDICTION IN COASTAL WATERS* 517 (1937); see Kent, *The Historical Origins of the Three-Mile Limit*, 48 AM. J. INT'L L. 537 (1954); Walker, *Territorial Waters: The Cannon Shot Rule*, 22 BRIT. Y.B. INT'L L. 210 (1945).

127. Professor Spiropoulos declared before the Sixth Committee that Greece extended its territorial sea merely because its neighbors had done so, leading to speculation that perhaps much of the current demand for extension stems from a desire to keep up with neighbors. See 1 VERBATIM RECORD 58. See also Boggs, *supra* note 111.

128. REPORT 12-13 (commentary to art. 3).

129. Some states have already interpreted the Commission's actions as sanctioning a twelve-mile limit. In explaining the recent extension of the Venezuelan territorial sea to twelve miles, the representative of that country stated that the Venezuelan Congress was "interpreting the concept expressed by the International Law Commission itself in its recent reports . . ." 1 VERBATIM RECORD 291. Both Professor Francois and Sir Gerald Fitzmaurice denied that the Commission conceded any validity to the twelve-mile limit. 1 *id.* at 9-10, 236.

130. See note 122 *supra*.

fifteen-mile closing line for coastal indentations from which the breadth of the territorial sea is to be measured.<sup>131</sup>

Careful calculation of relevant factors suggests that world community policy should continue to be heavily weighted in terms of accepting only a very narrow width of waters as territorial sea. Perhaps the most significant factor to be considered in determining an appropriate balance between exclusive and inclusive claim is the relationship between the interest which the coastal state is seeking to protect and the scope of authority normally incident to the territorial sea.<sup>132</sup> The real impetus behind most of the demands for a broader territorial sea appears to derive from a demand to monopolize the exploitation of fish or to obtain revenue by requiring payment for exploitation by nonnationals.<sup>133</sup> Certainly, this interest is most explicitly stated in the modern demands for extension of the territorial sea, and indeed it overshadows all other particular interests that might be advanced to justify the extension. In attempting to secure a special interest in exclusive exploitation of the animal and mineral resources of the marginal belt, coastal states may thus be seen to demand extension of a regime of the most comprehensive authority over wide adjacent sea areas. The extravagance of this claim becomes manifest when the broad comprehensiveness of such authority is recalled in more detail as including:

1. Exclusive rights of exploitation and control over animal and mineral resources of the marginal belt.
2. The competence to exclude passage through the marginal belt by qualifying the character of the passage sought or by suspending any passage at all. This competence is widely acknowledged to be most extensive in the case of warships, however inoffensive the projected passage may be. And it includes competence to exclude all passage by aircraft.
3. Authority to subject navigation in the belt to the regulation of the coastal state.
4. An indeterminate competence over events and persons aboard passing vessels.

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131. See note 123 *supra*.

132. The more detailed inquiry for determining this relationship was set forth in text following note 109 *supra*.

133. The representatives of Peru, Ecuador and Costa Rica, whose claims have been widely regarded as attempts to extend the territorial sea to 200 miles, asserted before the Sixth Committee that such claims were merely to an extension of sovereignty only for the purpose of conservation. 1 VERBATIM RECORD 32, 157; 2 *id.* at 473. These averments were accompanied, however, by claims of unilateral competence to determine the breadth of the territorial sea. An accompanying, totally inconsistent argument was made that a "territorial sea" of 200 miles in the Pacific constituted only 3% of the width of that ocean whereas the territorial seas claimed by Great Britain and France extended to 20% of the English Channel. 1 *id.* at 158.

Professor Francois has declared that the International Law Commission was convinced that claims to a broad territorial sea stemmed from a desire for conservation rather than exclusive fishing. 1 *id.* at 8. The ambiguities and contradictions noted above do much to create doubt whether the Commission's sanguine belief is warranted.

5. An equally indeterminate competence over the vessel itself for the purpose of judging claims against it.
6. A competence commensurate with the obligation to maintain safety of navigation in the belt.
7. Authority to protect against pollution from passing ships.
8. Authority to prescribe and apply regulations concerning security, customs and health.
9. Authority to control belligerent use of neutral waters, a control that might be onerous and even embarrassing to the claimant during times of violence.<sup>134</sup>

The potential impact upon inclusive, community uses in the proposed expansion of all these aspects of comprehensive authority to vast new areas may be highlighted by reference to the comment of one member of the Commission that an extension of the territorial sea to twelve miles "would result in most of the maritime highways of the world falling within territorial waters."<sup>135</sup>

An additional consequence of widening the marginal belt may be noted in the increase of internal waters, caused by the meeting of territorial seas extending from different coasts of the same state. The effect of this meeting is to close off ever larger areas, the transformed territorial seas, as internal waters over which the authority of the coastal state is even more comprehensive in the sense both that no passage or entry need be permitted and that once entry is conceded, the application of coastal authority is almost purely discretionary, extending to any control the local authority may want to exercise, with but minor exceptions relating to the immunity of warships.<sup>136</sup> Moreover, as larger areas are enclosed within internal waters, the territorial sea is, in turn, extended even further out upon the high sea—a result following almost in geometrical progression. All this increase in coastal authority, in terms both of range of events and geographical area,<sup>137</sup> is being claimed despite the fact that practically none of it is necessary to achieve the actual interest sought to be secured by the coastal state.

Thus, if, from the perspective of the historic balancing of interests, one applies the test requiring that the assertion of authority be reasonably proportionate to the interest sought to be protected and that account be taken of the degree of interference with community uses, many of the recent demands for extension

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134. These various attributes of authority in the territorial sea appear to have been overlooked by Professor Baxter in his suggestion "that the contiguous zone and sweeping claims regarding the width of the territorial sea are interchangeable devices for achieving the same result." Baxter, *The Territorial Sea*, 1956 PROC. AM. SOC'Y INT'L L. 116, 122. The same may be said for numerous others who equate the contiguous zone with the territorial sea.

135. Faris Bey el-Khoury, in 1 YEARBOOK 213; see GIDEL, MEMORANDUM 41-42.

136. See text at note 73 *supra*; JESSUP 144-94.

137. Widening the territorial sea affects passage by aircraft. The New Zealand representative in the Sixth Committee noted that extension of the territorial sea may have more severe consequences for air navigation than for that on water since there is no right of innocent passage in airspace. 2 VERBATIM RECORD 330.

of the territorial sea in order to secure a monopoly of fisheries should clearly be rejected as unreasonable encroachments on the public domain, without any justification in the special needs of the claimant. In other contexts, furthermore, where the claims of exclusive exploitation appear reasonable by community criteria because of certain special factors such as the degree to which the claimant's economy is dependent upon the exploitation of adjacent fisheries or the extent to which a claim to a special interest is buttressed by historic practice, a much more economical legal device, in the recognition of new contiguous zones, is available for taking such interests into account.<sup>138</sup>

Whatever the true origin of the narrow belt of territorial sea, the function which today justifies the territorial sea is that of permitting a state to exercise certain important controls over access to and from its shores. Under contemporary conditions, only a narrow belt supplemented by certain occasional exercises of authority in contiguous zones is necessary for this purpose. When the conception of security is expanded beyond control of access to include defense against military attack, the contemporary technology of destruction makes all widths largely obsolete.<sup>139</sup> As in the case of fisheries, where a coastal state can show that a particular width of control is on occasion peculiarly necessary to its defense, the recognition of a special contiguous zone for its security would serve its purpose, without the permanent imposition upon other states of all the disadvantages of an extended territorial sea. Thus, whatever the particular interests motivating claims to extension by individual states, the necessary measures for securing such interests hardly require community recognition in the claimant state of all the exclusive authority customarily associated with the territorial sea. To deny broad, inclusive community uses in certain areas by honoring the exercise by a coastal state of the most comprehensive authority imaginable merely to secure a single, narrow interest, whatever its special significance to the claimant state, is comparable to cutting off a healthy arm in order to heal a pimple on the tip of a finger.<sup>140</sup>

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138. Canada has already formally suggested recognition of a twelve-mile contiguous zone for exclusive fishing. 1 *id.* at 298. Mr. Padilla-Nervo made an analogous recommendation during commission deliberations, asking for explicit recognition of a contiguous zone for conservation and noting the fundamental identity of the contiguous zone concept and the Commission's recommendations concerning conservation of the living resources of the sea. 1 YEARBOOK 77. As noted earlier, this general idea was most cogently expressed by Mr. Garcia-Amador in the Sixth Committee in his emphasis on the availability of more limited concepts enabling a state to secure its special interests without extending the territorial sea. 1 VERBATIM RECORD 21-23.

139. This point was made most forcefully by Judge Pal, during commission discussion, in his observation that the advance of science had made security "meaningless" as one of the considerations determining the breadth of the territorial sea. 1 YEARBOOK 169. Sir Gerald Fitzmaurice offered the same opinion before the Sixth Committee. 1 VERBATIM RECORD 238-39.

140. See the remarks of Mr. Escudero, of Ecuador: "The alleged equality of all States with respect to their right of access to the high sea and their right to exploit its resources is somewhat illusory, because only the great maritime and shipping Powers exercise this right on a really large scale. Thus the exercise of the right depends on

*Authority Over High Seas Areas Contiguous to the Claimant State*

When the concept of the contiguous zone is observed descriptively, it may be seen to be a technical term which authoritative decision-makers invoke to honor many various occasional and particular exercises of authority by coastal states beyond the territorial sea.<sup>141</sup> Despite the powerful opposition of Great Britain<sup>142</sup> and the reluctance of influential writers to admit the facts of past practices in reciprocal claim and tolerance,<sup>143</sup> recent decades have shown a very wide claim to and acceptance of this concept. Examples of authority claimed, and widely accepted, over contiguous areas are many and diverse. The more prominent instances include authority for purposes of security, enforcement of customs regulations, fiscal laws, antismuggling measures, safety of navigation, exploitation of mineral and animal resources, conservation of fisheries and naval maneuvers.<sup>144</sup> Easily the most spectacular, and indicative of the great flexibility of the concepts of contiguous zones, are the claims to the continental shelf now advanced by numerous states and accepted by most others. The real

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economic power and this equality before the law loses all reality in the face of the economic inequality of States. Consequently, it is indispensable that coastal States with scanty physical resources should have the right to extend their territorial sea in order to safeguard their economies. This has the effect of a compensatory measure to correct an injustice." 1 *id.* at 155.

The fact that a country has not had the industrial development itself to take fullest advantage of inclusive uses does not mean that others have not engaged in inclusive uses to its benefit. In an interdependent world, all states are dependent upon a global net production of inclusive values.

141. The historic function of the concept of contiguous zones as a term of art for economic escape from the rigidities of the territorial sea is indicated in Gidel's definition: "The notion of the high seas zone contiguous to the marginal sea is a technical legal notion aimed at justifying special powers exercised by the littoral State on the high seas beyond the limit of the marginal sea." GIDEL, MEMORANDUM 28. It will be noted that both "contiguous" and "zone" lose much of their reference to geographic factors and take on a reference to legal consequences—the consequences that certain exclusive claims are lawful. This function of the concept, and of other concepts, clearly eludes the members of the International Law Commission when they seriously debate whether recognition of a "contiguous zone" removes ocean areas from the "high seas." 1 YEARBOOK 80.

More important, the manifold service which the concept today performs was, apparently, never recognized by the Commission. Thus, in a cryptic discussion of conservation zones, "Mr. Pal observed that the term 'contiguous zone' should be confined to its technical sense and should not be used in any other." 1 YEARBOOK 82. The grave question is whether a "technical sense" which is not even accurately descriptive of past or present practice can be arbitrarily projected into the future to straitjacket the demands of coastal states which do not unreasonably interfere with inclusive interests. Remarks by Judge Pal elsewhere make it clear that the full contemporary scope of contiguous zones, accepted by the general community of states, was never really considered by the Commission. 1 *id.* at 77.

142. See note 96 *supra*.

143. See 1 OPPENHEIM-LAUTERPACHT 495-99; COLOMBOS, THE INTERNATIONAL LAW OF THE SEA 82-84 (3d rev. ed. 1954).

144. See note 94 *supra*.

function of the contiguous zone concept has been to serve as a safety valve from the rigidities of the territorial sea, permitting the satisfaction of particular demands through exercise of limited authority which does not endanger the whole gamut of community interests.

The greatest inadequacies of the International Law Commission draft are, unfortunately, to be found in its recommendations about this very flexible and serviceable concept of the contiguous zone. Under the explicit label "contiguous zone" only one section is offered, and this section could scarcely confound confusion more.<sup>145</sup> Reference is made to one contiguous zone, not to the many actually existing in practice, and that one zone is limited to twelve miles, without regard to differences in factors affecting the multiple demands of coastal states. Perhaps the most explicit evidence of the Commission's narrow view lies in the restricted range of interests which it suggests a state ought to be authorized to protect in contiguous areas: "customs, fiscal or sanitary regulations." The most surprising of the omissions, one explicitly mentioned in the commentary as deliberate, is that of security, surely the most serious concern of every state.<sup>146</sup>

In other sections, provision is made for exclusive exploitation by the coastal state of the mineral resources of the continental shelf,<sup>147</sup> without any apparent recognition of the fact that this is but another example of the occasional exercise of authority, not precluding traditional inclusive uses, beyond the territorial sea in the manner commonly protected under the label "contiguous zone" with, of course, various special factors adding justification to its acceptance. Similarly, the sections on high seas fisheries provide for authority which is tantamount to recognition of a contiguous zone with a certain limited, unilateral competence in coastal states. Such states are authorized to adopt conservation measures to prevent undue exploitation of fisheries, whether by national or nonnational fishing vessels.<sup>148</sup>

In the sections on the continental shelf and on conservation of fisheries, the International Law Commission recognizes the true function of the contiguous zone and attempts appropriate balancing of exclusive and inclusive interests.<sup>149</sup> The insight here achieved might well, however, have been generalized both to permit other contemporary interests to be taken into account and to preserve a flexible device for the accommodation of continuously emerging interests.

The rigid conceptualism in fact adopted by the Commission, introducing a wholly artificial distinction between the contiguous zone, on the one hand, and the continental shelf and conservation zones on the other, denies the fluidity of the general concept and affords opportunity for irrational attempts to fore-

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145. REPORT art. 66.

146. *Id.* at 39-40 (commentary to art. 66).

147. *Id.* arts. 67-73.

148. *Id.* arts. 49-59. The Commission rejected the suggestion that these articles and that on the contiguous zone should be explicitly linked. See *id.* at 33; 1 YEARBOOK 77.

149. The whole course of discussion in the Commission clearly reveals that individual members were aware of this process. See, particularly, 1 YEARBOOK 90 (¶¶ 26-30), 180 (¶ 64). See also 1 VERBATIM RECORD 11, 16, 21.

close future claims to newly developed uses of the sea.<sup>150</sup> The dynamic nature of technological progress and state demands are completely inconsistent with such a restricted view. In future collisions between the two, the former may confidently be expected to prevail. For future maintenance of economic balance between exclusive and inclusive claim, the general concept of contiguous zones must be preserved in all its fluidity with respect to both purposes and widths.<sup>151</sup>

The interest in security demonstrates, as clearly as any interest, this need for fluidity. In the present decentralized structure of the world arena, each state has an overriding interest in protecting itself from military attack. Hence, the interest in security is common to all states, however unique it may appear in particular instances. Furthermore, even in the age of satellites and missiles, perhaps even more urgently in such an age, states, in order to preserve their security, must continue to make occasional, limited assertions of authority, as by establishing radar stations or enforcing requirements of identification, in areas beyond the bounds of the territorial sea.<sup>152</sup> The continuing danger to

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150. Not all members of the Commission shared the view that the contiguous zone was a severely restricted concept. 1 YEARBOOK 74 (¶ 55, Hsu), 76-77 (¶¶ 8-13, Padilla-Nervo).

151. Mr. Jelic, Yugoslavia, spoke with deep wisdom when he stated that "only if the security and interests of the coastal State in the contiguous zone are guaranteed will it be possible to check the trend towards the enlargement of the territorial sea and so to work out a compromise on the breadth of the territorial sea." 1 VERBATIM RECORD 145. For appropriate emphasis upon the importance of continuous adaptation, see Lauterpacht, *Sovereignty Over Submarine Areas*, 27 BRIT. Y.B. INT'L L. 376 (1950).

152. Admittedly, even the comprehensive control of whole oceans, much less the occasional exercise of limited authority in narrow zones, will not today assure states of an absolute security. But, that the recognition of a competence to declare contiguous zones for security purposes may serve no general interest does not follow. If one were to carry the freedom of the seas argument to its limit, opposing major powers could ring each other's shores with missile-launching platforms or ships. Surely, no one would deny that the coastal state possesses the necessary authority to prohibit this.

Even in the age of supersonic aircraft and missiles, the United States and Canada have found it necessary to establish air identification zones off their respective coasts. The potentialities of submarine-launched missiles may yet inspire special sea zones related to protection against this threat. The establishment of radar platforms in contiguous high seas areas constitutes a claim to authority not dissimilar to that involved in establishing installations for mineral exploitation of the continental shelf. For some facts on this point with reference to exploitation of the continental shelf, see MOUTON, *THE BREADTH OF THE SAFETY ZONE FOR INSTALLATIONS NECESSARY FOR THE EXPLORATION AND EXPLOITATION OF THE NATURAL RESOURCES OF THE CONTINENTAL SHELF* (U.N. Doc. A/Conf.13/26) (1958).

Illustration of contiguous zones for security purposes in the missile age is indeed as accessible as the front page of the daily newspaper. It has recently come to light that France has declared a thirty-two-mile wide contiguous zone for security off the coast of Algeria which no nation protested until Yugoslavia did so after seizure of a Yugoslav vessel carrying arms to Casablanca. See N.Y. Times, Jan. 21, 1958, p. 1, col. 3.

For protection against the more traditional weapons, still the only weapons at the disposal of most of the states of the world, security zones of limited extent quite obviously have lost none of their historic relevance.

coasts from more conventional weapons is concisely stated or understated, even by that most articulate opponent of all contiguous zones, Sir Gerald Fitzmaurice, who argues that "under modern conditions . . . warships could bombard a coast with the utmost accuracy from a distance of 40 miles or more, and aircraft carriers could operate from a distance of 200 or 250 miles or more."<sup>153</sup> In the calculable future, states will hardly regard their security interests, that is, their interests in protecting all their values from attack and possible destruction, as of any less vital importance to them than their particular economic and other interests. The problem of reconciling such exclusive security interests with the more general inclusive interests of other states must accordingly remain, and the device of the contiguous zone, which can be fashioned precisely to fit the particular and perhaps even temporary security needs of claimant states, would once again appear to afford the most economic mode of effecting accommodation. For this reason, continued recognition of a special competence in each state to declare reasonable contiguous zones would appear merely as another expression of broad community interest.<sup>154</sup> And what is so

153. 1 YEARBOOK 215. The argument by Sir Gerald that no contiguous zone for security is needed since all states have a "right of self-defence" even upon the high seas is self-defeating. It recognizes the vital interest of states in security but remits them for protection to a concept which is subjected by some commentators to a most restrictive interpretation. The severe limits that might be imposed upon the concept of self-defence are indicated in the recent article by Professor Gidel, *Explosions Nucleaires Experimentales et Liberté de la Haute Mer*, in *FOUNDAMENTAL [sic] PROBLEMS OF INTERNATIONAL LAW: FESTSCHRIFT FÜR JEAN SPIROPOULOS* 191 (1957).

Of course, an alternative, more expansive interpretation of "self-defence" is possible. For a collection of the authorities, see McDougal & Schlei, *The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security*, 64 *YALE L.J.* 648, 684-87 (1955). General acceptance of a sufficiently expansive concept of "self-defence" could indeed make controversy academic since it is of little consequence to states whether their vital interests are protected under the label "contiguous zones" or under that of "self-defence."

154. The degree to which the International Law Commission, in omitting security as a permissible purpose for contiguous zones, rejects past and contemporary practice is readily apparent from even a casual glance at the following authorities:

1. *LAWS AND REGULATIONS ON THE REGIME OF THE HIGH SEAS* (U.N. Doc. No. ST/LEG/SER.B/1) (1951). In this collection of national legislation on contiguous zones, security is second only to customs in frequency of mention.
2. The *Harvard Research on Territorial Waters* declares that necessary measures on adjacent high seas for a state's immediate protection are "entirely reasonable" and a part of "the long established practice of many states." *HARVARD RESEARCH* 334.
3. GIDEL, *MEMORANDUM* 28-36, cites many precedents for recognition of a contiguous zone for security. In summarizing his doubts about the lawfulness of a claim as extensive as that in the Declaration of Panama, Professor Gidel concludes that contiguous zones for security only appear "admissible in limited areas, for limited periods and up to limited distances from the points which appear to require protection." *Id.* at 36. This statement is accompanied, however, by one difficult to reconcile: "It does not seem that the contiguous zone for security interests can be considered as a principle of international law which a littoral State can invoke, beyond its territorial waters, in respect of foreign governments without their consent." *Id.* at 31-32.
4. The International Law Commission has itself recognized the exclusive competence of the coastal state over exploitation of the mineral resources of the continental shelf. It

demonstrably economic, in the area of security, could by appropriate detail be shown to be similarly economic, if in varying measure, in regard to other problems as well.

*High Seas Areas Not Contiguous to the Claimant State*<sup>155</sup>

In past practice, the freedom of the seas has meant that each state was free to use the oceans in accommodation with other uses, not that each state was given a license to engage in any activity, irrespective of effects upon the interests of others. By the judicious management of the complementary sets of flexible concepts previously discussed, authoritative decision-makers have accommodated many different types of uses, not only those of transportation and fishing.

Unfortunately, the International Law Commission has accepted and embodied in its draft certain absolutistic conceptions of the freedom of the seas wholly at variance with both past experience and sound future policy. The most general black-letter provision, article twenty-seven, could hardly offer less guidance to particular decision. It states merely that no state may subject any part of the high seas to its sovereignty and that freedom of the seas includes, among other things, freedom of navigation, fishing, and flight and freedom to lay submarine cables and pipelines.<sup>156</sup> The commentary to this article not only fails to add any guiding principles for the resolution of particular conflicts but even leavens the initial formulation with a further measure of confusion. Thus, it is said that "no State may subject any part of the high seas to its sovereignty; hence no State may exercise jurisdiction over any such stretch of water,"<sup>157</sup> although the *non sequitur* in the leap from absence of sovereignty

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should therefore be recalled that one of the primary justifications for the unilateral pronouncement of the United States about the continental shelf, which triggered the abundance of claims subsequently made, was that of "self-protection" which compelled the "coastal state to keep close watch over activities off its shores which are of the nature necessary for utilization of these resources." Probably no one would deny that this expectation was prominent in the subsequent continental shelf claims and was a chief consideration underlying the Commission's recommendation of exclusive competence in the coastal state.

5. Even in the very early years of the nineteenth century, Chief Justice Marshall, in a case still regarded as pre-eminent authority as to the lawfulness of contiguous zones, recognized it as a "universally acknowledged" principle that a state's "power to secure itself from injury may certainly be exercised beyond the limits of its territory." *Church v. Hubbard*, 6 U.S. (2 Cranch) 187, 234 (1804).

155. The degree to which circularity in reference to legal consequences sought to be justified pervades even this apparent geographical reference may be seen in Professor Hyde's definition of "high seas." "The term 'high seas,' " he writes, "may be said to refer, in international law, to those waters which are outside of the exclusive control of any State or group of States, and hence not regarded as belonging to the territory of any of them." 1 HYDE 751. When the issue is whether certain waters or certain activities are or are not under the control of a state, such a definition is hardly helpful. The same circularity obviously infects the concept of "freedom of the seas," when it is paired off against "self-defence," "contiguous zones" and so on.

156. REPORT 24.

157. *Ibid.*

to absence of jurisdiction could hardly be more obvious.<sup>158</sup> Continuing from such unpersuasive derivation, the Commission further muddies the waters of authority by declaring that "States are bound to refrain from any acts which might adversely affect the use of the high seas by nationals of other states,"<sup>159</sup> a statement which, at most, begs the question completely. The Commission then proceeds to list,<sup>160</sup> under the euphemistic label of "regulation" of the freedom of the seas, certain instances of authority conceded to states, despite the literal prohibitions in other portions of the commentary, which if exercised could very well adversely affect use of the high seas by nonnationals.<sup>161</sup> This itemization of the competence of coastal states—called rules recognized in "positive" international law—appears to be the end product of an unrevealed balancing process, in which some interests were weighted more heavily than others and given priority over freedoms of use previously recited. The itemization offered is, however, characterized by the Commission as "regulation" of the freedom of the seas which does not "limit or restrict the freedom of the seas," a consequence which is even disproved by the Commission itself, in

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158. Much of this confusion appears to derive from a failure to distinguish between claims to all that comprehensive and continuous competence which is summed up as "sovereignty" and claims to exercise only the occasional and limited competence over certain particular events which is commonly called "jurisdiction." The fact that world public order denies "sovereignty" over certain ocean areas to any single state does not mean that it denies to states competence to apply their authority to certain particular events, such as the activities of vessels and aircraft whether national or foreign. Conversely, the fact that states are authorized to exercise some such authority upon the high seas over navigation, fishing, flying, cable-laying and so on, does not mean that they are authorized to exercise such authority at all times and all places, under all conditions, without any interference from similar uses by others and without regard for the consequences of their ocean uses upon others. The competence conferred upon states by "freedom of the seas" is not an absolute competence, but a relative, shared competence which can survive only if it is exercised in accommodation with the similar competence of others. Cf. MOUTON, *THE CONTINENTAL SHELF* 185 (1952); Houston, *Freedom of the Seas: The Present State of International Law*, 42 A.B.A.J. 235 (1956).

It may be suggested that in its formulation the Commission was making a distinction between jurisdiction over "waters *as such*" and jurisdiction "over ships or activities on or under water." In terms of semantic reference, the two modes of expression would appear, however, to point to precisely the same particular competence. Power is just as sweet, or bitter, by one name as another.

Particularizing the consequences of such confusion, Mr. Pathak, of India, in his comments upon the nuclear tests, entirely fails to distinguish claims to sovereignty and claims to occasional jurisdiction and assumes an absolutistic conception of the freedom of the seas. 1 VERBATIM RECORD 230.

159. REPORT 24.

160. *Ibid.*

161. Professor Francois correctly points out that certain activities, "though they might adversely affect other States, might be justifiable" and hence, that the concept of "reasonableness" must be introduced. 1 YEARBOOK 33. The dream of absolute uses that do not interfere with each other or require accommodation is, of course, just as much a delusion as is the notion that the "freedom of the seas" is an absolute which can be defined without taking into account certain complementary concepts and the policies they express.

including provisions for compulsory arbitration of disputes over fishery conservation and for submission of differences regarding the continental shelf to the International Court of Justice.<sup>162</sup> Although the measures of unilateral competence recommended by the Commission would most certainly limit or restrict the extent of freedom of use, it was apparently impelled to incorporate a denial of that effect in order to be consistent with the previous declaration that "no State may exercise jurisdiction over the high seas," a statement with little claim either to accuracy in description or to safe prediction or to desirability in preference.

All this confusion in recommendation and tergiversation in expression may thus be traced to the initial adoption of an absolutistic doctrine of freedom of the seas which explicitly denies the necessity of achieving an appropriate weighing and balance of competing claims to authority, and, in any particular case, of honoring the use judged more reasonable in the particular context.<sup>163</sup> One grave consequence of this type of conceptualism, in addition to obscuring the relativity of all uses and interests, may be to add to the danger of the conceptualism about the contiguous zone: serious obstacles may be posed to reasonable accommodation of the new claims certain to emerge from the onrushing developments of science and technology.<sup>164</sup> To the extent that the conceptual rigidity displayed by the Commission precludes flexibility in responding to claims of limited authority for special purposes over noncontiguous high seas areas, the Commission may have created new occasions for conflict instead of removing old.

If clarification be a goal in codification, the solution to the difficulty of "defining" freedom of the seas does not appear to lie in a mere listing of the various freedoms which it is said to comprise; as already observed, even these freedoms conflict in particular instances and must, therefore, also be accommodated. Appropriate reconciliation here, as elsewhere, appears feasible only through a conscious and explicit consideration of the relevant factors to be weighed in balancing the competing interests. Hence, an adequate formulation of freedom of the seas might offer, in addition to highly abstract black-letter definitions of inclusive interests: an explicit recognition of the lawfulness of certain ex-

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162. REPORT arts. 51-59, 73. It is not intended to underemphasize these provisions. To provide adequate procedures for presentation, consideration and decision of disputed claims is fully as important as to clarify the criteria by which decisions are to be made.

163. Discussing the use of the seas for conducting nuclear tests, Professor Francois urged the Commission to adopt the test of reasonableness, see text at note 101 *supra*, and noted that this test "had been frequently introduced by the Commission," 1 YEARBOOK 11.

164. Thus, in the course of the Commission's discussions, Mr. Zourek, apparently referring to McDougal & Schlei, *supra* note 153, stated, *inter alia*: "[A]n article published in the YALE LAW JOURNAL, had concluded that such experiments, even if they violated the freedom of the high seas, were permissible if they could be claimed to be 'reasonable.'" 1 YEARBOOK 31. This was completely to miss the point of the article. The point was that "freedom of the seas" could be authoritatively defined only by a balancing of opposing claims and interests and by according an appropriate meaning to equally historic legal concepts designed to protect interests other than navigation and fishing.

clusive claims; a careful demonstration of the relativity of all interests, inclusive as well as exclusive, in terms both of physical use and of potential values; an invitation, more solicitous than that expressed in the Latin *inter alia*, to the acceptance and honoring of new uses, made possible by advancing technology; an explicit weighting of the balance of decision in favor of inclusive rather than exclusive uses; a detailed indication of the different factors to be taken into account in different contexts in resolving conflicts both between exclusive and inclusive interests and between different inclusive interests; and perhaps, finally, even the elaboration of some lower-order generalizations about the specific weightings to be accorded the various relevant factors in differing contexts and different disputes.<sup>165</sup> It is by recognition of its relativity and expansibility, and not by proclamation of an impossible absolutism, that "freedom of the seas" may best be preserved as abiding authority for continued and possibly even greater service to the community of mankind.

#### RECIPROCAL INTERESTS DEMAND MUTUAL RESTRAINT

These observations have not been designed to minimize the potentialities either of collective clarification of community policies about the use of the oceans or of explicit multilateral agreement, when such agreement can be obtained, for projecting such clarified policies into the future. It has rather been our purpose to emphasize the overwhelming self-interest of all states in continuing to maintain a community consensus which weights decision in favor of inclusive rather than exclusive claims and which requires of all states an offer of reciprocity in the assertion of claims and the exercise of severe restraint in the application of naked power. The importance of such continued community consensus we have sought to document principally by recalling the tremendous net gain in community and particular values achieved by such consensus and by indicating the kind of process of decision, a process which affords a continuous balancing of competing claims in terms of reasonableness under community criteria, upon which such net gain depends. The lesson of this

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165. The objection may be raised that the Commission in its formulations in terms of "freedoms" on the one hand and "regulation" on the other was merely trying, by certain traditional language, to do all these things. The strain that the imputation of such comprehensive purpose to the Commission imposes upon the words actually employed by it may, however, be indicated by direct juxtaposition of the major propositions in sequence as follows:

1. Freedom of the seas refers to freedom of navigation, fishing, flying, etc.
2. No state may exercise jurisdiction over any part of the high seas.
3. International law recognizes the exercise of certain forms of exclusive coastal jurisdiction over the high seas, but this jurisdiction is not designed to limit or restrict freedom of navigation, fishing, etc.
4. The specific incidents of jurisdiction a coastal state may exercise may limit or restrict the freedom of navigation, fishing, etc.

Even by traditional usage, statement two is contradicted by statement three, and the latter is contradicted by statement four. Surely, language can be devised which would better serve the purposes of clarification.

collective experience in the past is, however, only fortified when one reflects upon the probable conditions of the future and upon the alternatives to such a consensus. It would seem certain that increasing scientific knowledge and improving technology will continue to increase tremendously the net values recoverable from the oceans, and that the rapidly accelerating industrialization of the world will with equal acceleration increase the effective capacity of all states to participate in the recovery of these values. It would also seem reasonable to expect that, despite the increasing relative importance of control of the air, access by sea and the maintenance of buffer zones will continue to be of great importance to the security of states. All the factors which have in the past made the internationalization of the oceans important in maximizing the values of states would thus seem, when projected into the future, to make a similar consensus and process of decision indispensable. The alternative to such consensus—the unrestrained exercise of naked power, so dramatically illustrated in all the recent unilateral assertions and enforcements of exclusive claims against general consent—should be carefully considered, or reconsidered, by any state, and this might include all states, not certain in the contemporary world arena of its ability to assert more effective power than any possible rival claimant.<sup>166</sup> Once our inherited authoritative consensus upon internationalization is irrevocably breached, and it has already suffered grievous injury, the great ocean riches which historically have been available to all will be up for grabs by the most powerful and the most ruthless.<sup>167</sup> States concerned for their long-term national interest might be better advised not to destroy their equality of access to inclusive uses of the oceans, but to increase their effective capacity for the fuller enjoyment of their existing common rights. The law of the sea, like all international law, serves only the function of protecting common interest against the dissentient powerful and lawless. Its only ultimate sanction, in a decentralized world, is in the mutual restraint and tolerance which inhere in a recognition of common interest.<sup>168</sup> The choice before the states of the world in the present crisis of the law of the sea is whether, for the illusory mess of pottage obtainable in an uneconomic extension of exclusive right, they will forego their heritage of inclusive rights and its promise of even greater future achievement in community and particular values.

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166. The continued interest of smaller powers in inclusive uses was eloquently stated by Sir Gerald Fitzmaurice in the Sixth Committee debates. 1 *VERBATIM RECORD* 244-45. Even landlocked countries have an interest in having the oceans kept open for inclusive uses by others on their behalf.

167. Thus, paradoxically, for a great power seeking to preserve consensus upon a narrow territorial belt, the best immediate tactic might be to assert a claim for hundreds of miles.

168. The same point has been well made by Professor Katzenbach about all private international law. "Comity implies a similar objective measured in public terms: reciprocal self-restraint rather than mutual policy frustration." Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 *YALE L.J.* 1087, 1107 (1956).