University of Miami
School of Law

OCEAN AND COASTAL LAW PROGRAM
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Title: The 1935 Anti-Smuggling Act Applied to Hovering Narcotics Smugglers Beyond the Contiguous Zone: An Assessment Under International Law

Requested by: Captain William Kessler, 7th Coast Guard District Legal Officer, Miami, Florida

Prepared by: Ivan W. Ficken, LL.M. Candidate
Ocean and Coastal Law Program

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A. INTRODUCTION

In proclaiming National Drug Abuse Prevention Week, October 20-26, 1974, President Ford noted that during the past five years the United States has given the highest priority to the elimination of the drug trade which threatens "the very fabric of our society." During this period international drug traffic has seen its complexion change with the establishment of the so-called "Latin-American Connection." As the major port of entry from Latin-America and the southern hemisphere, Miami has fallen heir to much of this illicit traffic to the point where, in early 1974 in response to the interview question, "As the 'Latin-American Connection' grows, has Miami replaced New York as the main port of entry?" John R. Bartels, Administrator of Drug Enforcement, Department of Justice, replied, "It's starting to, yes."[1]

The extensive Florida coastline and the island chain of the Florida Keys present a formidable problem to all levels of law enforcement in attempting to intercept drug smuggling activities. A technique formerly used by rumrunners during and shortly after prohibition is likely to be increasingly employed by narcotic traffickers. This minimizes the risk of arrest or

conviction, by the use of a boat lying to or hovering immediately beyond the 12-mile limit of the United States' customs enforcement zone, beyond the jurisdiction of any state, on the high seas, awaiting either a pickup boat from shore or a cover of fog or darkness to make a landing of the contraband. Under statutory authority however, the Coast Guard is not completely impotent to deal with this problem. Upon finding that vessels are hovering off the coast of the United States, outside customs waters and that unlawful introduction or removal into or from the United States of merchandise or persons is likely to occur, the President is empowered under the 1935 Anti-Smuggling Act[2] to designate temporary extended customs enforcement zones out an additional 50 miles from the 12-mile boundary and laterally up to 100 miles in both directions. But this authority has been used sparingly to say the least. The last such zone designated was in 1935, and the statute has never been used to its fullest extent against a ship of a foreign flag.

In view of this as well as intervening developments during the last forty years, the question is presented as to the propriety, under principles of international law and obligations of international conventions undertaken by the United States, of employing this act against narcotics smuggling by ships of foreign flags. The remainder of this paper explores the arguments supporting and disfavoring the employment of this act, assesses the

probable reaction of states to its use, and recommends several alternative courses of action to deal with the problem if it is determined that the exercise of authority under the act is not in the best international interests of the United States.

B. HISTORY OF ANTI-HOVERING LEGISLATION

An assessment of the propriety of the 1935 Anti-Smuggling Act under international law must necessarily include the historical development of a state's competence to enforce its laws in areas contiguous to its coast. In addition, keeping in mind the changing nature and urgency of social issues of past history, the approaches and solutions to earlier smuggling problems and improper uses of contiguous high seas may prove instructive in avoiding pitfalls liable to be encountered in an attack on narcotics smuggling.

An exhaustive treatment of this subject was prepared by Dr. H. E. Yntema, at that time Professor of Law, University of Michigan, as an opinion on the validity of hovering legislation in international law. It was submitted by the Treasury Department in support of H.R. 5496 (which after enactment became known as the Anti-Smuggling Act of 1935) and appears as a 42 page annex to the record of hearings before the Ways and Means Committee, 74th Congress, 1st Session, March 13, 1935. Referencing this as

well as Masterson, Jurisdiction in Marginal Seas, 1929, one can reconstruct the high points of anti-smuggling legislation and attempts at extension of customs enforcement zones up to 1935. British hovering acts first appeared in the early 18th century and limited the enforcement authority to visitation of ships within 2 leagues of the coast. As the smuggling trade grew and flourished over the next one and a quarter centuries, legislative enactments tried to keep pace both in prescribing new enforcement measures as well as extension of limits to where, by 1807, all vessels which by any previous enactments had been liable to forfeiture if hovering within 4 or 8 leagues (applicable to any vessel) were now forfeitable if within 100 leagues of the coast if so much as part ownership was held by British subjects or one-half of the crew were British subjects.

The legality of this was apparently not questioned until 1851 when upon asking the Queen's Advocate General for an opinion as to certain questions relative to the capture of a French vessel and her crew, the Lords of the Treasury were given the reply that

> "It is now generally understood and admitted that the territory of a country within which the rights of sovereignty may be exercised extends to a distance of 13 miles from the shore and that it would be unwarranted assumption of power against which other nations would have a right to remonstrate, if a government were to attempt to enforce its municipal regulations beyond those limits."[3]

The circumstances surrounding this were that there had been no

French protest and it was only an interdepartmental opinion which apparently was not the consensus of other departments of the government. Furthermore, Great Britain was at this time politically favoring the French, the smuggling trade has declined to where it no longer posed a threat and the Advocate General (being an officer of the Admiralty) likely was reflecting the Admiralty's position of desiring narrow territorial jurisdiction on the seas. (One cannot help but be reminded of the United States Defense Department's present posture in this same regard relative to the Law of the Sea agreements on territorial limits.) While the Advocate General's opinion provoked some subsequent discussion at various levels of government concerning the desirability of repealing the existing law, nothing was done until 1876. Attempting to simplify and consolidate the law, a new customs act was passed in 1876[4] which drew back the jurisdiction limits to 1 league except for certain actions, e.g., prohibiting breaking bulk or destroying cargo within 4 leagues, punishable by fine.

That Great Britain apparently felt obligated to draw back her jurisdiction limits by some principle of international law (or more probably, use it as a later excuse for doing so) is shown by the statement made in 1923 in negative response to a proposed treaty with the United States allowing customs inspection

out to 12 miles that "the ancient British Hovering Acts were modified in 1876 to bring them into harmony with the principles of international law and His Majesty's Government cannot admit that the municipal legislation of any country can override these principles."[5]

Leaving the British practice at this point, United States legislative enactments should be discussed. The year 1790 dates the enactment of legislation specifying a 4-league limit on customs manifest examination and prohibition of unloading of any vessel bound for the United States.[6] This was subsequently re-enacted in one form or another and is still applicable today without the requirement that the vessel be bound for the United States. In addition, in 1807, forfeiture was provided as the penalty for any ship found "in any river . . . or on the high seas, within the jurisdiction limits of the United States, or hovering on the coast thereof" having on board any negroes for the purpose of selling them as slaves, or "with intent to land the same."[7]

United States case law has consistently approved the right of a coastal state to protect itself beyond the limits of its territorial sea. Precedent is usually traced to the opinion of Ch. J. Marshall in Church v. Hubbart, 2 Cranch 187, 234 (1804) which concerned the seizure of an American vessel 5 leagues off

the Brazilian coast:

> "Any attempt to violate the laws made to protect this right (to control colonial trade), is an injury to itself, which it may prevent, and it has the right to use the means necessary for its prevention. These means do not appear to be limited within any certain marked boundaries, which remain the same, at all times and in all situations. If they are such as unnecessarily to vex and harass foreign lawful commerce, foreign nations will resist their exercise. If they are such as reasonable and necessary to secure their laws from violation, they will be submitted to."

Although the words were actually obiter dictum, they have been so consistently and frequently quoted as precedent for this principle that that fact no longer diminishes their force and applicability. Referencing British case law, in Queen v. Keyn (1876) (L.R. 2 Exch. Div. 83, 214), Lord Cockburn stated:

> "Hitherto, legislation, so far as relates to foreigners in foreign ships in this part of the sea, has been confined to the maintenance of neutral rights and obligations, the prevention of breaches of the revenue and fishery laws, and, under particular circumstances, to cases of collision. In the two first the legislation is altogether irrespective of the three-mile distance, being found on a totally different principle, namely, the right of a State to take all necessary measures for the protection of its territory and rights, and the prevention of any breach of its revenue laws."

and approvingly quotes Ch. J. Marshall's statement in Church v. Hubbart.

In 1910 and 1911, when Russia extended its customs and fisheries jurisdiction to 12 miles,[8] subjecting "every vessel"

to supervision and met with protest from Japan and Great Britain, it relied on the United States customs jurisdiction of 12 miles and the French marine customs zone of 20 Km. as precedent for its action and stated that the limits to which customs supervision could be extended was not a question of international usage but of domestic regulation. The bulk of the controversy centered around the fisheries issue, however, and by and large the extension of its revenue laws jurisdiction was lost sight of.

There seems to have been but little protest of the United States' exercise of customs jurisdiction out to a 4 league zone until the prohibition era began. With the bulk of the rumrunners flying the British flag, Great Britain bore the brunt of enforcement when in 1922 the United States began seizing British smuggling vessels beyond the 3-mile territorial sea. British protests and the unwillingness of the United States to back down from its position that seizures of hovering vessels were not contrary to international law caused the United States to propose a treaty arrangement and in anticipation of such negotiations, British vessels taken beyond 3 miles from shore were released. Keeping in mind the controversy surrounding the Russian extension of jurisdiction, the British were reluctant to enter a treaty prescribing the same 12-mile jurisdiction limit. In fact, their objection to such a treaty was not to the exercise of United

States jurisdiction against ships outside its 3-mile territorial sea but to the specification, in miles, of any other distance than Britain herself claimed.[9] Thus, to preserve the sanctity of the 3-mile limit, the treaty specified a one hour's sailing distance measured either by the speed of the ship hovering or by the speed of the boats making contact from the shore. Having made this agreement with Breat Britain, the subsequent treaties with fifteen other nations followed essentially the same pattern in terms of a one hour's sailing distance. The treaties essentially were agreements that the foreign flag state would not pose an objection if one of their vessels engaged in smuggling liquor into the United States were seized within one hour's sailing distance of the coast. But not being self-executing, these treaties did nothing to change or extend the limits of internal United States revenue law which still remained under the 12 mile restraint. In order for a ship to be liable for prosecution, the offense still had to be committed within the 12 mile customs enforcement zone.

With the repeal of prohibition, it was anticipated that liquor smuggling would cease. While it temporarily had this effect, the price differential imposed by United States alcohol taxes ensured that smuggling would remain a profitable business. By early 1934, alcohol smuggling started expanding to the levels

of the prohibition era and the aforementioned 12 mile disability in the criminal law began to become important. Since the alcohol treaties were not repealed when prohibition ended, the United States Treasury Department sought to get more mileage out of them by closing the gap of internal law which prevented applying it outside the 12 mile zone. To effect this purpose, as well as providing for designation of temporary customs enforcement zones against hovering vessels of non-treaty nations out a maximum additional 50 miles perpendicular to the outer limits of the 12 mile customs zone and 100 miles laterally and imposing criminal penalties on United States nationals violating customs laws of foreign states if reciprocal legislation was in effect, the 1935 Anti-Smuggling Act was proposed. While it scrupulously was worded to avoid conflict with the liquor treaties, it went beyond them in that against treaty nations the proposed special customs enforcement zones could be designated for non-liquor smuggling activities.

Even before its passage it was met with diplomatic protest by Great Britain[10] who refused to recognize any interference outside the 12 mile zone with respect to ships not covered under the liquor treaty. There does not, however, appear to have been any protests after adoption of the act, but as Whiteman notes: ". . . a circumstance which is not in itself decisive seeing that,

for the purposes of safeguarding rights, a protest is essential at the time of the application of the enactment as distinguished from its adoption."[11] The major item of discussion at the hearings was the propriety of such legislation under international law, to which Professor Yntema's memorandum opinion lent support. Without reviewing all of his cited writings of international law publicists and judicial opinions, in his conclusions he states:

> "It has appeared: . . .
> "8. That the most respected judicial authorities of both England and the United States (Lord Stowell, Dr. Lushington, Sir R. Phillimore, Lord Cockburn, Chief Justice Marshall, Justices Story, Johnson, Livingston, Blatchford, and Harlan) have recognized and approved the principle of hovering legislation.
> . . .
> "10. That all reputable English and American text writers upon international law, with one exception, namely, Dana, who, upon misconceived grounds, admits but deplores the historic practice, recognize the principle involved in hovering legislation, either as establishing a special right to take preventative measures in the interest of the revenue to be exercised within reasonable limits, or as providing a privilege so to do, against the reasonable exercise of which other nations do not protest, on the ground that a state is in comity bound not to protect its subjects who violate the just and necessary revenue laws of other nations, and that, on either view, there can be no question as to the right of a state to enact appropriate hovering legislation.
> In view of this evidence, it is difficult, so far as international practice and precedent is concerned, to conceive how the principle involved in hovering legislation could be more satisfactorily proved.
> . . .
> "In any view, then, the fundamental principle expressed in hovering legislation does not appear open to question. There being, consequently, no sustainable issue,

> from the viewpoint of international law, as to right of the United States to enact legislation of this character or as to the propriety of its extension to the residual category of nontreaty vessels, the real issue, if there be such, is as to the reasonableness and necessity of the several provisions of the proposed legislation. This is a legislative question, the solution of which, in our system of laws, is vested in Congress, and is beyond the scope of this memorandum.[12]

Professor Yntema goes on to intimate that events have shown existing law to be inadequate and that the legislation under consideration is reasonable to prevent a breach of the revenue laws. This issue of reasonableness was stressed in House Report 868 on the bill where it was stated that (the) "legislation is predicated upon the rule of international law stated by Ch. J. Marshall in Church v. Hubbart that a nation may exercise jurisdiction such distance beyond the 3-mile limit as may be reasonable and necessary to secure its revenue or for national protection." And in explaining section one of the bill:

> ". . . since the bill makes applicable in such areas only a limited number of laws and since only such of those laws may be enforced in such areas upon such vessels as the President finds and declares to be necessary to secure the revenue of the United States . . . it is evident that the extension of our customs control provided in § 1 meets the test of reasonableness required under international law."[13]

Testimony at the hearings reinforces the fact that the Treasury Department was concerned about meeting the reasonableness test. Mr. Hester, the attorney for the Treasury Department speaking:

> "There is another angle that enters into this that might support the vesting of this authority in the President, and that is that foreign nations might be less liable to object if this authority is vested in the head of the Government . . . We are trying in this statute to meet the test of reasonableness required under international law. That is one of the reasons why our customs control is extended only to particular areas where the smugglers are actually present. We think it will be so much easier to meet the test of reasonableness of international law if it is done that way."[14]

Although the State Department did not publically express an opinion on the legislation, merely advising the Treasury Department that it would not oppose the enactment of the bill, by a number of Congress members and observers this was taken to mean a desire to not become involved and an indication that it had some reservations about the bill.[15]

Five customs enforcement zones (involving a seizure of sixteen vessels) were designated shortly after the passage of the Act in 1935, but none have been designated since. Of the sixteen vessels seized, eleven were of American registry and therefore did not raise any international law issues. Of the remaining five foreign vessels, two were seized while in a United States port, two within the 12-mile customs zone and the last, although of British registry and seized between 15 and 36 miles from the coast, was forfeited as a vessel substantially owned and controlled by a United States citizen within the meaning of section 3(b) of the Act.[16] With Britain's own customs laws discriminatorily extending

beyond the 3 mile limit for vessels partially owned by British subjects, they did not register a protest to this seizure and forfeiture. Thus the full panoply of provisions of the 1935 Anti-Smuggling Act has never been exercised and put to the test of acceptance by the international community and the lack of protest by foreign governments can be attributed primarily to a lack of enforcement by the United States in a manner potentially contrary to international law.

C. POST 1935 CONTIGUOUS ZONE COMMENTARY AND REACTIONS TO THE ACT

In 1936 the Canadian Parliament enacted a statute (1 Edw. VIII, c. 30) designed to combat liquor smuggling which bears some resemblance to the United States enactment although on a less daring scale. It designated two zones: 1) "Canadian customs waters" in accordance with the traditional 3-mile limit, and 2) "Canadian customs waters" adjacent to and extending 9 miles beyond "Canadian waters." In regard to ships suspected of liquor smuggling, all ships hovering in Canadian waters fell within its reach while its provisions ". . . in the case of any vessel registered in Canada, or of any unregistered vessel owned by a person resident or domiciled in Canada, or of any other vessel or class of vessels which the Governor in Council may specify or enumerate by proclamation shall also extend to vessels hovering in Canadian

customs waters." So like unto the United States Act, the chief executive was empowered to exercise jurisdiction over foreign vessels found hovering within 12 miles. However, apparently after discussing this section with Great Britain, the ultimate proclamation limited its operation to ships registered in Great Britain and the British Empire exclusive of Canada. Since most of the liquor smuggling into Canada was probably being perpetrated by the same major offenders against the United States, i.e., British flag vessels, the proclamation accomplished the purposes of the Act without risking any international controversies with other countries. This enabled the British to retain their consistent view of not recognizing any exercise of jurisdiction by a coastal state beyond the 3 mile territorial sea in the absence of a contrary treaty.

Referring to writings of publicists following the United States 1935 enactment, Philip C. Jessup (later to become a justice on the International Court of Justice) commented on it in 1937. In reference to Professor Yntema's and the Treasury Department's reliance on the test of reasonableness, he stated, "It is believed that this is a sound position under international law. We then have a mixed question of fact and law as to whether enforcement of this Act will meet the test of reasonableness."[17] In 1939 Professor H. W. Briggs analyzed the seizures made under

the 1935 Act and also favorably agreed with its propriety under international law.[18] This was countered shortly thereafter by T. Baty, an Associate of the Institut de Droit International stating:

> "What is so alarming is that so very learned and open-minded a jurist as Professor Briggs should come forward to justify its unrestricted operation. He is prepared to allow drastic interference on the part of the United States with foreign vessels, bound for foreign ports, for nearly one hundred miles from the American shore and his only restriction is, that interference must be 'reasonable'. "This is no restriction at all against a powerful state; a powerful state will always uphold its interferences as 'reasonable' ones."[19]

His arguments rested on the concept of freedom of the seas which "can not be whittled away by a few obscure instances," and by advancing the "permissive" theory that these past interferences were tolerated out of friendliness without admitting their legality.

Professor P. M. Brown in 1940 discussed the Declaration of Panama whereby twenty-one American republics declared a security zone designed to protect inter-American communications. Defined by latitude and longitude coordinates, it extended up to 300 miles from the coasts. He believed such action was justified under the principle of protective jurisdiction and cited for support the liquor treaties of the prohibition era where in spite of Britain's unwillingness to recognize a United States contiguous

zone, her signing of a one-hour sailing distance treaty amounted to a recognition of the basic sovereign right of every nation to protect itself over an undefinable zone outside conventional territorial waters.[20] (The State Department justified the Declaration as "a practical measure designed to maintain certain vital interests," and a "statement of principle, based on the inherent right of self-protection rather than a formal proposal for the modification of international law.")[21] Later, in 1953, Professor Brown, in discussing together the 1935 Anti-Smuggling Act, the Truman Proclamation and the Submerged Lands Act, condemned American legal authorities and courts who have "timidly and illogically accepted the outmoded interpretation of the doctrine of 3 mile limit" which, in tracing to Grotius, he asserted was not a delimitation of jurisdiction but simply the enunciation of the sound principle of protective jurisdiction which is now firmly established in international law.[22]

Professor H. A. Smith, a British authority, expressed his views on contiguous zones in 1950: "The basic principle upon which the right to exercise jurisdiction outside territorial waters rests in that of self-defense . . . . Up to a reasonable distance outside territorial waters, such distance to be defined and notified, every State may exercise such jurisdiction as may be necessary to protect the security and internal order of the

state over foreign vessels approaching the shore for illegal purposes."[23] During this same time period, from the late 1920's to 1950's, there were attempts made by the international community to codify various parts of international law pertaining to the seas. While a consensus of the states favored a contiguous zone in one form or another, an agreement on the various drafts (which ranged from an open ended right based on custom or necessity to a maximum of 12 miles) was not obtained. In addition to the disagreement concerning the width of such a zone, a consensus could not be obtained concerning the content of the zone, especially security and fishing rights. It was not until 1958 with the four conventions on the Law of the Sea that some agreement was obtained in this area.

Article 22 of the Convention on the High Seas states that:

> "1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is reasonable ground for suspecting:
> (a) That the ship is engaged in piracy; or
> (b) That the ship is engaged in the slave trade; or
> (c) That though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship."

While Article 24 of the Convention on the Territorial Sea and Contiguous Zone provides:

> "1. In a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to:

> (a) Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea;
> (b) Punish infringement of the above regulations committed within its territory or territorial sea.
> 2. The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured."

Considering both the wording of the conventions and their subsequent interpretation, only the High Seas Convention is considered as a codification of pre-existing international law; the Convention on the Territorial Sea and Contiguous Zone is not. Along this same line in 1959 Professor Jessup commented on the Convention on the Territorial Sea and Contiguous Zone:

> "The present writer believes that Mr. Dean (Chairman of the United States delegation to the Geneva Conference) is quite right in saying that the conference did not, and indeed it could not, change an existing rule of international law, certainly not by majority vote. . . . it remains true that 'The validity of the delimitation (of the territorial sea) with regard to other States depends upon international law.'" (Quoting from the Anglo-Norwegian Fisheries Case (1951) I.C.J. Rep. 116, 132.)[24]

Arthur Dean offering more of his views states:

> "The United States would have preferred a stronger position giving the coastal State the power to punish activities within the contiguous zone which had deleterious effects in the territory or territorial sea, even though the offending vessel had never entered the territorial sea. But the present provision is a step forward. By adopting it, the Geneva Conference succeeded where prior conferences had failed. It may be hoped that practice under the present provision will encourage the adoption of a stronger provision at a later time."[25]

---- of States in both prescribing and applying certain laws in its contiguous zone and it is doubtful whether Article 24 has changed that practice. There seems to be little support for this point of view and Professor Shigeru Oda of Japan has

specifically published his non-subscribance to the Fitzmaurice view.[28] Fitzmaurice also agrees with the exclusion of fisheries from the contiguous zone on the bases that: 1) existing contiguous zone rights do not act to exclude vessels from the zone whereas a fisheries zone would; 2) existing contiguous zone rights do not involve a proprietary element whereas a fishery zone would; and 3) existing contiguous zone rights involve the protection of public laws and interests whereas a fisheries zone would protect only private interests of fishermen.[29] Nevertheless, in spite of Article 24, in 1966 the United States extended its fisheries jurisdiction out to 12 miles with the State Department's blessing that in view of recent developments in international practice it would not be contrary to international law. Security, fisheries and the manner of enforcing laws and punishing offenses in the contiguous zone provide three examples of situations where States are not adhering to the literal interpretation of Article 24 due to the international community expectation that no one would be bound in that manner.

During the late 1950's Professors McDougal and Burke published several articles applying the Lasswell-McDougal technique of analyzing the different interacting sociological processes occurring in the international world arena in an effort to better explain and predict outcomes of international disputes to the

developing law of the sea. These, plus their culmination in book form (The Public Order of the Oceans, 1962) offer an alternative approach to predicting the degree of authority which a coastal State might properly apply in areas contiguous to its coast. By stepping back and taking an overview of the entire problem, what international community policy governs the establishment of a contiguous zone? This is answered with:

> "The real 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 reasonable demands through exercise of limited authority which does not endanger the whole gamut of community interests.[30]

Keeping in mind the various interests that states have at their maritime frontier, the concept of contiguity then can only be considered in light of such variable factors as space, time and technology, and demand a certain measure of flexibility.

Professor Jessup concludes that it is impractical to attempt to establish a precise limit of so many miles for a contiguous zone and that some flexibility is necessary.[31] Professor P. M. Brown believed any definition in terms of miles would be futile and illogical,[32] while the Harvard Research, Territorial Waters (1929), which formulated one of the drafts for the 1930 Hague Conference stated that, "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 sea." It is not surprising that few commentators have expressed any satisfaction with the inflexible 12 mile limit as defined in Article 24. Thus in the face of the flexible distances which states have projected their contiguous zone regulations, McDougal and Burke dismiss the I.L.C.'s recommendation of a single 12 mile zone as anachronistic. In attacking this section they believe it:

> ". . . could scarcely confound confusion more. Reference is made to one contiguous zone, not to the many actually existing in practice, and that one zone is limited to 12 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."[33]

Believing that the concept of the contiguous zone offers the most economic method of accommodating a state's exclusive security interest with the more general inclusive interests of other states, McDougal and Burke go on to state:

> "For this reason, continued recognition of special competence in each state to declare reasonable contiguous zones would appear merely as another expression of broad community interest. And what is so 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."[34]

They predict that states accepting the Geneva Convention will not feel obligated to repeal such legislation as contiguous customs enforcement or in the case of the United States, the Anti-Smuggling Act, and that it is more realistic to expect they will continue to prescribe policies for observance in contiguous zones and will continue active enforcement in contiguous zones for securing reasonable protection of important interests without regard to the literal wording of Article 24:

> "From the perspectives of general community policy, there would appear to be nothing inimical in states continuing to act, as in the past, to secure their legitimate interests by exercise of a reasonable authority to apply policy in contiguous areas."[35]

Some doubt however is expressed (as of 1962) after United States ratification and coming into force whether contrary internal laws would remain valid. Although there appears to have been no authoritative decision as to any self-executing effect of Article 24, few people have seriously contended that it has repealed contrary internal legislation.

D. SMUGGLING PROBLEMS UNDER THE MCDOUGAL-LASSWELL ANALYSIS

At the beginning of this paper it was noted that approaches and solutions to past smuggling problems and improper uses of

contiguous high seas would be instructive to an approach taken to narcotics smuggling. In the following section an attempt will be made to analyze three smuggling problems, importation of slaves, alcohol smuggling (both during and after prohibition), and narcotics smuggling under the Lasswell-McDougal approach.

In the interests of keeping it of a manageable length and also due to the author's inability to gather and interpret all of the various claims, counterclaims, and other relevant facts, the analysis is less than rigorous and perhaps on many points superficial which may be an injustice to the methodology. The purpose of employing it however is not as an exercise in using this mode of analysis but merely as an aid to determining what law prescription and enforcement measures would meet the test of reasonableness.

As a starting point, McDougal and Burke's analysis requires an understanding of three different processes: The process of interaction which serves to develop the factual background which is significant for the policy of enjoyment of the oceans; the process of claim which identifies the two sets of competing interests which states assert to inclusive and exclusive uses; and the process of authoritative decision whereby interests are honored, protected or rejected.[36]

The earlier part of this paper reviewed much of the

historical background of hovering statutes, extensions of limited jurisdiction offshore and states' interactions in that regard. Suffice it to say here that traditionally when a territorial interest of a state has been threatened by an element from the sea, the coastal state has felt justified in asserting its laws and enforcement procedures seaward a distance sufficient to subdue that element and that in the main and where the coastal state's claim is not manifestly unreasonable, this has been acquiesced in by other states in the international community whether by the simple act of non-protest or the conclusion of treaties authorizing such extensions of limited jurisdiction. Thus it was the rise and continuance of smuggling that caused Great Britain to extend its customs jurisdiction in leapfrog like fashion out to sea, it was only <u>after</u> the smuggling problem had declined that the Queen's Advocate General in 1851 rendered his opinion that it was an "unwarranted assumption of power" to extend Britains jurisdiction beyond the 3-mile limit, and it was not until 1876 when organized smuggling was all but eradicated that Parliament pulled back the customs jurisdiction over foreign vessels to 1 league, a principle which she so tenaciously held to thereafter as representing the proper statement of international law. Similarly it was not prohibition itself which led to the conclusion of liquor treaties but rather the gathering of

hordes of rumrunners off the coast and the concommitant recognition by the concluding nations that the United States had a right to protect itself from an instrumentality which could within the span of one hour land contraband cargo. (Putting this in the proper perspective, it should be noted that the treaties had the element of a bargain contained in them in that with respect to the treaty nations, the United States made the concession of permitting foreign vessels containing liquor cargo bound for non-United States ports or sea stores liquor to enter the waters and ports of the United States as long as the alcohol remained under seal. This enabled treaty states to get around the unpopular decision of Cunard v. Mellon (1922)(262 U.S. 100) holding to the ~~contrary~~ which had become a source of irritation with foreign governments.) And it was the unexpected continuance of liquor smuggling after prohibition ceased which led to the enactment of the 1935 Anti-Smuggling Act. While that Act latently remains on the books ready for application should the need arise, it is apparently due to the decline in organized smuggling by means of hovering vessels which has led to its disuse since 1935. On the issue of the United States' willingness to recognize another state's right to pass similar legislation, one has only to turn to the words of the Act and the Congressional hearings. One of the Act's provisions, § 2(a), (now 18 U.S.C. § 546) provided for the prosecution of United States citizens engaged in

smuggling activities against the laws of a foreign government if under that foreign government's laws penalty or forfeiture was provided for the violation of United States customs laws. This was expressly included with the hope that it would encourage other states to enact reciprocating similar legislation.

The objectives of the coastal state in enacting limited jurisdiction in contiguous zones should be identified. Although the following do not conform exactly with the McDougal terminology, it is flexible enough to accommodate terms which are more descriptive of the objectives impinging on this problem. Referring to the three smuggling situations, the 1807 statute prescribing for forfeiture of any vessel hovering on the coast with the intent to introduce slaves into United States territory apparently was rooted in some moral ethic that human beings should not unwillingly be placed in subjugation. This, in spite of the fact that within the territory of the United States at this time slavery, although not officially advocated, was tolerated and in the world community many states practiced it. The evil being sought to be corrected was as pernicious on board the vessel itself (perhaps more so) than the evil which would befall the slaves once they were landed, justifying a greater degree of exclusive interference into the inclusive free use of the sea. There would appear an economic objective here also:

given a policy of discouraging the practice of slavery, it would be more efficient and less expensive to attack it prior to its introduction into the country before the "cargo" had been dispersed and "property rights" had become vested in buyers. As interaction among civilized countries developed in regard to this problem and the principles against slavery began to be accepted in the international community, the recognition of a right to interfere with the slave trade became so universal that it became recognized in numerous early treaties and later the Convention on the High Seas as an act which may be interfered with by any warship anywhere on the high seas. The inclusive right of freedom of the seas had to give way to the exclusive right of any state to free enslaved human beings. Looking at the hovering and smuggling acts of Great Britain during the 18th and 19th centuries, while the range of goods being smuggled varied widely and reflected changing tastes, etc. over a long time period, the primary objective was economic---to protect the customs revenues of the Crown. Thus the extensions out to 100 leagues appeared to be grounded in little more than economic objectives which met with the acquiescence of the world community.

Considering the United States' experience with alcohol smuggling, one is given the opportunity to analyze it in a dual mode---both during and after prohibition. The Volstead Amendment

imposing prohibition was brought about by moral sentiment condemning the evils of spiritous drink. The objectives in attacking liquor smuggling then were primarily the protection of the country's morals and to a lesser degree the economic efficiency objective of attacking the problem at its source. But since the moral evil was consumed after its entry and did not linger on (as in the case of slavery) the primary concern was preventing its introduction in the first place. Also unlike slavery which, even in the early 19th century, was condemned by most civilized countries, there was little international sentiment favoring the United States experiment with prohibition. Foreign

eign nationals from engaging in the sale of liquor to prohibit for
12-mile limit since, in the minds of foreign beyond the 3 or
s entirely legitimate commerce, and constituted states, this wa
ngement of their rights to engage in commerce a serious infri
aas. It is surprising then that the United States upon the high s
n agreement as it did (in completing sixteen obtained as muc
permitting enforcement within one hour's sailing liquor treaties
n the international community in recognizing the distance) withi
right to protect this moral objective which was United States'
lly shared (although as noted earlier, the United not internationa
---a reversal of the effect of Cunard v. Mellon States trade-off

may have had much to do with this). In 1933, however, repeal of prohibition changed the complexion of the United States' envorcement objectives. While it was no longer morally objectionable to introduce liquor into United States territory, failure to pay the alcohol tax and customs duties would still render it illegal. During the hearings on the 1935 Anti-Smuggling Act, movements of known alcohol smugglers during the latter one-third of 1934 were extrapolated to show an annual revenue loss of $30 million.[37] The objectives were correspondingly changed from moral to economic. The objectives of attacks on drug smuggling are primarily grounded in health and moral considerations but also the economic efficiency of attacking the problem before it enters United States territory and becomes more expensive and difficult to deal with. While this sounds similar to the objectives in attacking alcohol smuggling during prohibition, a key difference lies in the increased seriousness of the health and moral hazard as well as the existence of almost universal support in the international community for the suppression of narcotics traffic. While in this respect it is similar to its counterpart in slavery traffic, the urgency of attack is less demanding, since the presence of a narcotics laden ship on the high seas (without coming into port) does not present the same human threat as does a slave

galley operating anywhere.

This brings us to the claims process, where the two competing interests asserted by states in claiming inclusive and exclusive authority are considered and the important conditions are identified which must continue to affect the claims. This claims process by which states seek their objectives, considers the degree of inclusiveness or exclusiveness of the use demanded, the degree of comprehensiveness of authority asserted, and the geographic area in which such use and authority are demanded. For each of these claims there exists a counterclaim, generally freedom from the claimant's authority and competence to exercise their own authority to protect their own use, the term freedom of the seas.[38] Referring t situations, the various British acts referred vities or ships which fell under their extend certain dutiable commodities, ships hovering tain construction. The initial United States was limited to ships carrying slaves with the the counterclaim being that of states wishing slave trade which declined in strength as the ment was recognized world-wide. The liquor tr ships suspected to be endeavoring to commit an expressed the distance in functional terms of

both subsumed under
past smuggling
to types of acti-
ed provisions, e.g.,
or ships of a cer-
slavery statute
intent to land them,
to engage in the
anti-slavery move-
eaties specified
offense and
the offending ships'

ability to escape to achieve uniformity. The use of a treaty as a vehicle to accomplish this end ensured a clear understanding of the rights and obligations of both parties to prevent its misapplication to other inclusive uses. While the 1935 Act, in an abundance of caution to avoid any interference with legitimate freedoms on the high seas, limits the areal extent, the time such a zone shall be in effect and requires a hovering vessel believed to be engaged in or liable to be engaged in smuggling activities as the necessary evidence before the President shall designate a customs enforcement zone outside the normal 12-mile contiguous zone, even when it is applied against the offenders or potential offenders that it was designed to deal with, i.e., ships carrying liquor, it may, in the eyes of many states in the international community, constitute a serious infringement on the inclusive use that many states would claim: that of transporting and selling alcoholic beverages on the high seas. When specifically applied to the narcotics trade, however, one would anticipate near universal agreement among states that such an inclusive use, i.e., transporting and selling narcotics on the high seas, demands far less protection vis-a-vis a coastal state's right to prevent a landing on its shores. Thus any counterclaim here should lack strength in its assertion or should not be asserted to the limit of the high seas fringes.

Lastly, looking at the process of authoritative decision making, the international community has sought to establish certain objectives which in terms of decreasing levels of abstraction may be formulated as: the promotion of full, peaceful use of the ocean by all participants; or the securing of common interests of all participants in both inclusive and exclusive uses and maintaining a balance between different common interests; or the promotion of stability in expectations of participants that power will be exercised uniformly and not arbitrarily.[39] It follows that to maintain a common policy regarding protection of inclusive interests the general community consensus of what that policy should be must be maintained, and it becomes essential that states recognize their community of interests. To identify what, if any, community interest exists in attacks on smuggling one must identify the evil being attacked. Community interest in regard to the transportation and sale of liquor on the high seas would tend to lean far more toward inclusive uses and freedom of the seas than it would in narcotics smuggling where community interest (based on near universal condemnation of the use of narcotics) would tolerate a much greater exercise of exclusive competence by the coastal state to exclude the smuggling from its shores.

While this entire analysis has been at a somewhat abstract

level, the upshot of it is that only by looking at a particular context of conflicting exclusive and inclusive uses can one determine what is reasonable in terms of the assertion of an exclusive use and competence. The analysis seems to favor applying the 1935 Anti-Smuggling Act against hovering vessels engaged in narcotics smuggling. But beyond this there are certain impediments to its application: primarily the provisions of Article 24 of the 1958 Convention on the Territorial Sea and Contiguous Zone as well as possible misinterpretations by other states of what the United States was actually doing if the Act should be applied. As an aside here it should be noted that this same analysis was applied by McDougal and Burke to the problem of oil pollution with the conclusion that general community policy would probably tolerate a coastal state's requirement of ships installing any effective and available equipment to reduce or eliminate effects of pollution discharge.[40] Yet, when Canada passed their Arctic Pollution Prevention Act[41] which imposed certain safety and construction standards on any ship coming within 100 miles of the Arctic coast, the United States State Department protested vehemently that international law did not recognize such a unilateral extension of jurisdiction, that it may lead other countries to make other invalid claims, and that it adversely affected the right of freedom of the seas and

efforts to reach international agreement on the use of the seas. Even though the Canadian Act is distinguishable in terms of its application to all ships and the zone being permanent, this reaction shows a definite preference on the part of the State Department to establish such zones under international agreement rather than unilateral action even though the United States shares a concern for prevention of Arctic pollution (see for example provisions in the United States Draft for a 200 mile economic resource zone under consideration at the Law of the Sea Conference.)

With regard to the United States' fear that using the 1935 Act may lead to other states passing similar valid or invalid legislation, as noted earlier, the 1935 Act was passed with the hope and expectation that other countries would in fact reciprocate. However during the ensuing forty years the complexion of international politics may have changed sufficiently that this is no longer a declared United States objective. If the Act were used sparingly and only with sufficient reasonable cause to believe that narcotics smuggling was actually being engaged in, it seems doubtful that such one-shot temporary assertions of competence would lead to invalid extensions of competence by other states. In regard to the inhibiting effect of Article 24, the authorities cited earlier who

pointed out its weaknesses in terms of flexibility and failure to provide for such contiguous coastal interests as security and fishing rights seem to feel that it has no substantial effect on established state practices. Nevertheless, many signers of the Convention would not so interpret Article 24 and furthermore would believe it to be an act of inconsistency on the part of the United States to with one hand protest Canada's Arctic pollution control statute and with the other try to justify a temporary customs enforcement zone up to 62 miles seaward. Assuming that the United States would want to strictly adhere to the commitment it signed under Article 24, the question arises whether it would be bound by that Article vis-a-vis a state which had not signed the convention. In view of the principles set forth by the International Court of Justice in the North Sea Continental Shelf Cases,[42] where it was held in delimiting the continental shelf median line between Denmark, Holland and Germany, since Germany was not a signatory of the Convention on the Continental Shelf, that the method of boundary delimitation prescribed by the convention would not be applicable, one would be led to conclude that the United States would not be bound as against non-signatories. In dealing with the argument that such a principle had become part of customary international law and that Germany should be bound anyway, the court found that custom

would be found to exist only if the acts amounted to a settled practice and that the practice emanated from a belief that it was rendered obligatory by the existence of a rule of law requiring it. Being mindful of the disagreement among states over the width of their territorial sea (which in many cases extends beyond the 12-mile contiguous zone permitted by Article 24) as well as disagreements as to the width of the contiguous zone and the assertion of other contiguous claims such as security, fishing rights, etc. by signatory and nonsignatory states that are not recognized by Article 24, it seems doubtful that the principles of Article 24 have fallen into the domain of customary international law and by virtue of the principle of reciprocity, the United States should not feel bound by Article 24 as against a state that is not a signatory to the Convention and thus not bound by it. Arguably the United States could declare its adherence to Article 24 and still find support for applying the 1935 Act: Under the principle that a treaty should be interpreted, if at all possible, to not conflict with a statute, it is reasonable to interpret Article 24 as contemplating only continuous, permanent contiguous zones and not the temporary exertions of jurisdiction under the 1935 Act requiring a heavy burden of proof of potential smuggling activities. These could be considered as completely outside the realm contemplated by

Article 24 which was not aimed at such simple short term restrictions on inclusive uses.

The more international cooperation and agreement existing on the subject, the greater the liklihood of international acceptance. Noting the earlier reciprocity provisions of the Act which encouraged other states to pass similar legislation, the success of this would act as a barometer measuring the international community's tolerance and acceptance of such legislation. An exhaustive review of foreign legislation was not attempted. Consideration should also be given to the particular states against which this act would most likely be applied. While the majority of foreign flag narcotics smuggling has so far come from Jamaican or Colombian vessels, nationals of any number of other Latin and South American states may just as likely act as a link in the "Latin-American Connection." Due to the large number of Latin and South American states either claiming or being sympathetic with a 200 mile territorial sea, reciprocity principles would prevent their asserting a violation of international law against the United States. However, keeping in mind the United States preference to settle such issues by international agreement and considering the inconclusiveness of what contents may be inserted in the new conventions on the Law of the Sea, this may be an inopportune time to exercise the provisions

of the 1935 Act due to possible prejudice of the United States' negotiating position.

E. ALTERNATIVE PROPOSALS

A number of alternatives should be taken under consideration. Most obviously would be the inclusion of a provision in any new convention on the high seas or contiguous zone which would either add illicit narcotics traffic to the list of acts for which principles of universal jurisdiction may be extended (similar to the slave trade) or which would offer more flexibility on the part of a coastal state to protect its coastal interests. Due to the desire to achieve consensus in the new Law of the Seas conventions however, it is doubtful whether that would meet with much success since by distilling each article down to the lowest common denominator capable of achieving consensus, it is likely that the required flexibility would be lost. (Suppression of international drug traffic is in many ways analogous to the pursuance of peace: all states profess it as a common goal, but there exists wide differences of opinion on the proper means of securing it.) Furthermore, by couching it under the provisions of a law of the sea convention, the specter of abuse and harassment of ships on the high seas would be raised to a greater extent than if the same

agreement were made in a different context. Such a different context might be the 1961 Single Convention on Narcotic Drugs. While the original text of that convention contains language alluding to international, cooperative action, e.g., the Preamble:

> ". . .
> Considering that effective measures against abuse of narcotic drugs requires coordinated and universal action,
> Understanding that such universal action calls for international cooperation guided by the same principles and aimed at common objectives,
> . . ."

and Article 35:

> ". . . the Parties shall: . . .
> (b) Assist each other in the campaign against the illicit traffic in narcotic drugs;
> (c) Cooperate closely with each other and with the competent international organizations of which they are members with a view to maintaining a coordinated campaign against the illicit traffic; . . ."[43]

It apparently has not been interpreted as falling under the phrase, "Except where acts of interference derive from powers conferred by treaty, . . ." of the Convention on the High Seas which would permit states to exercise jurisdiction on the high seas under the principle of universality. The 1961 Single Convention does however have 106 signatories at present indicating a high degree of agreement with the principles embodied in its text. There have been several protocols to this convention

since 1961 and it would seem likely that another would be met with approval by a number of states who would be willing to agree to an extended enforcement zone on the part of reciprocating coastal states in regard to narcotic drug smuggling. By attaching such a protocol on to the narcotic drugs convention, one would anticipate a greater number of agreeing states in addition to not being burdened by the consensus target prevailing at the Law of the Sea Conventions.

Another approach may lie with single bilateral agreements similar to the liquor treaties of the 1920's. Although the treaties were limited solely to alcohol smuggling and did not include narcotic drugs, the 1935 Anti-Smuggling Act, though gaining its primary impetus from liquor smuggling, is not limited to that as evidenced by the testimony at the hearings:

> "Mr. McCormack. 'But this goes beyond liquor, as it should. You have other things in mind besides liquor, as you should.'
> Mr. Hester. 'Yes.'
> Mr. McCormack. 'Particularly if you have drugs in mind you have a much stronger case. That is really one of the main things you have in mind, is it not?'
> Mr. Hester. 'No, the particular thing that we have in mind is the stopping of the liquor smuggling into the United States. That is what this bill is really aimed at.'
> Mr. McCormack. 'Yes, but you also have drugs in mind, have you not?'
> Mr. Hester. 'This is an enabling act which later on can be extended and enlarged if it is necessary.'
> Mr. McCormack. 'But you have also drugs in mind, have you not?'
> Mr. Hester. 'Yes, we have drugs in mind.'"[44]

Tracing the experience of the attack on slave trading, the development assumed the pattern of initial internal prohibiting legislation, followed by bilateral and multilateral international agreements until a general consensus was obtained and it was incorporated as an act under universal jurisdiction of the High Seas Convention. If the United States believes that ultimately it would be desirable to place narcotics traffic under that same principle of universality, but it is doubtful whether the international community is now ready to take such a large step, it may be the best beginning to engage in treaties and protocols as a means of swaying international sentiment in that direction. If attempts at treaties or protocols are unsuccessful or if for any reason it is determined that those approaches would not be in the United States' best interests, the only remaining method of dealing with hovering vessels suspected of engaging in smuggling would be on a case by case basis, requesting permission to board the vessel from the flag state through diplomatic channels. Although this would involve a greater amount of effort and a loss of time (although probably no more than forwarding a request to the Head of the Treasury Department as the President's representative to designate a customs enforcement zone under the 1935 Act), upon furnishing assurances that all proper protection would be afforded the vessel in terms of requiring probable cause for a

search and seizure, most states would grant permission to the United States Coast Guard to investigate and as long as they restrained their investigative efforts to the scope granted by that permission they would be assured of not provoking an international protest.

F. CONCLUSIONS

1. Historically, hovering legislation and assertions of coastal state competence for limited purposes of protecting its revenues, morals, security or enforcement of its internal legislation upon the high seas in areas contiguous to its coast have been accepted under customary international law.

2. The 1935 Anti-Smuggling Act was meticulously drafted to comply with the standard of reasonableness required of hovering or contiguous zone legislation under international law. Congressional hearings gave primary attention to assuring that the Act complied with international law and it was passed in the belief that it was a reasonable exercise of jurisdiction under international law. The U.S. State Department did not submit an objection to the enactment nor did they favorably support it.

3. Post 1935 commentary by international law writers in general confirm its compliance with and reasonableness under

international law.

4. Article 24 of the 1958 Convention on the Territorial Sea and Contiguous Zone has generally not been interpreted as self-executing. I.e., the 1935 Anti-Smuggling Act's continued efficacy as valid internal legislation has not been destroyed by the 1958 Law of the Sea Conventions.

5. There is a substantial body of international law writers and publicists who believe that, in view of the literal wording (authorizing punitive measures in the contiguous zone only for violations committed in the coastal territory or its territorial sea) of Article 24 not gaining acceptance by most signatories to the Convention and states' assertion of fisheries contiguous zones and taking security measures beyond the territorial sea, states will continue to act as they did before the 1958 Conventions came into force, and as long as the coastal state's claim is not unreasonable it will probably continue to be accepted by the international community. This is based on the premise that the coastal state's interests and objectives must of necessity be of variable strength and distance and that a 12-mile boundary to protect any and all interests is too inflexible.

6. However, to the extent the United States does feel bound by the 12-mile provision of Article 24 and thus unwilling

to exercise its enforcement jurisdiction to the extent authorized by the 1935 Anti-Smuggling Act, with respect to non-signatories of the Convention on the Territorial Sea and Contiguous Zone, the principles of reciprocity and mutuality should release it from the 12 mile limitation of Article 24 (unless its provisions have fallen into the domain of customary international law which is doubtful, considering that it has only 43 signatories and even they are not adhering to the literal language of Article 24.)

7. Considering the U.S. State Department's policy of settling issues of a coastal state's competence to apply its laws in areas of the high seas through agreement rather than unilateral declarations, and considering the sensitiveness of the issue of unilateral declarations of high seas competence upon positions and negotiations currently under consideration within the international community in attempting to reach an agreement on a new set of Law of the Sea Conventions, it may be advisable not to use the extended provisions of the 1935 Anti-Smuggling Act at this time.

8. To achieve firmer footing under international law and some measure of international uniformity, the United States should consider dealing with the issue of an international attack on narcotics smuggling under a new Law of the Sea Convention.

9. If a consensus of agreement (a stated objective of any new Law of the Sea Convention) is doubtful or unsuccessful, placing the issue of a coastal state's right to attack narcotics smuggling in areas extending more than 12 miles into the high seas in a different context, e.g., a protocol to the 1961 Single Convention on Narcotics or separate multi or bilateral treaties, should be considered, providing assurance that adequate protections would be observed prior to instituting a search or seizure of a foreign flag vessel.

10. An ultimate enforcement mode objective in supressing international narcotics traffic should be determined, e.g., whether it would be desirable to place such an offense under principles of universal jurisdiction or merely permitting reciprocal enforcement between certain states, and then proceed with the course of action best calculated to achieve that objective.

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[41] Arctic Waters Pollution Prevention Act, 18-19 Eliz. II, S.C. 1970, c. 47.

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