Ocean Regimes as Reflected in 500 Years of Multilateral Treaty-Making

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Introduction

The idea of “regime” has been prevalent in the political science and, to a lesser extent, international legal literatures for decades. However, it is necessary to be certain we are on the same page, as it were, when discussing regimes. One of the broadest definitions of regimes was provided by Charlotte Ku and Paul Diehl: “the rules agreed to by states to regulate their exchanges.”¹ This definition is parsimonious and can accommodate a wide range of situations. Further, it can be applied easily to international law, e.g., if the “rules” are treaties. Others have added requirements to their definitions of regime. The most widely used text in international relations defines a regime as “the rules agreed to by two or more states, aimed at working collectively on shared problems, even at the short-term risk of suffering relative losses, which are offset by the expectation that all parties will benefit and realize absolute gains.”² An even more elaborate formulation was provided by Edward Miles who defined regimes in a similar way – “the norms and rules which govern expectations and behaviour in particular issue areas and stipulate decision making processes

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and procedures,”^3 but subsequently discussed what must occur after rules, norms, or laws are agreed upon.

Once agreement is reached at the constitutive level, these norms and rules, processes and procedures must be implemented by States parties at their respective national levels. Hence there are very strong connections between regime implementation, compliance and effectiveness.^4

If implementation, understood here to include enforcement, is completely ineffective, does a regime exist? There are areas of ocean policy, e.g., whaling and fisheries, where some have argued that this is the case.^5

Miles’ notion of “particular issue areas” is pertinent here. How does one delimit “ocean regimes” and distinguish between them and other kinds of regimes? A major goal of this essay is to ascertain how ocean regimes differ from those existing in other areas. One of the earliest examples of an ocean regime, although the word regime was not used, can be seen in claims for freedom of the seas championed most prominently by Grotius. “Grotius wrote that the seas must be free for navigation and fishing because natural law forbids the ownership of things that seem to have been created by nature for common use.”^6 A regime of freedom of the seas may still exist today, but it certainly is asserted for less of the world’s oceans and has been qualified and limited in ways that would astound Grotius.

The problem of a workable definition of regimes cannot be dismissed. Is there one macroscopic, global ocean regime? If so, are there also sub-regimes for fisheries, pollution, navigation, etc? Are the norms advanced globally and regionally compatible with one another? William Burke provides a good example of a possible clash between global and regional norms, specifically between the 1995 U.N. Fish Stocks Agreement and

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^4 Ibid.
