

United States Jurisdiction Over the 200-Mile Maritime Zone†

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As discussed extensively in the May 30, 1985 Opinion of the Solicitor of the Interior, the Department of the Interior has leasing authority with respect to the mineral resources of the "outer Continental Shelf," as defined by the Outer Continental Shelf Lands Act. This grant extends to the full reach of United States "jurisdiction and control." This includes, as a minimum, the 200-mile zone of the continental shelf and the 200-mile Exclusive Economic Zone, as currently recognized in customary international law and as consistent with the 1958 Convention on the Continental Shelf.

INTRODUCTION

Some uncertainty continues to surround the degree and extent of United States jurisdiction over continental shelf resources. Generally, such questions arise in the context of offshore mineral develop-

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ment, either with respect to how far the Department of the Interior's leasing authority extends under the Outer Continental Shelf Lands Act (OCSLA)¹ or in connection with the delimitation of international maritime boundaries.² This Article will consider the first of these two issues, although in a restricted sense: the inquiry will be limited to the 200-nautical-mile zone³ offshore of the United States.⁴

The Department of the Interior's leasing authority under the OCSLA applies to the "Outer Continental Shelf" (OCS).⁵ As defined by OCSLA, OCS refers to the submerged lands beyond those granted to the coastal states by the Submerged Lands Act⁶ that appertain to the United States and are subject to United States "jurisdiction and control."⁷ The plain meaning of this phrase indicates

1. 43 U.S.C. §§ 1331-1356(c) (1982). Since the states were conveyed a three-mile offshore belt by the Submerged Lands Act, 43 U.S.C. §§ 1301-1315 (1982), disputes pertaining to the shoreward limit of federal leasing authority have usually involved uncertainty as to the appropriate baselines or coastline salient points from which to measure this three-mile grant. See *United States v. Alaska*, 106 S. Ct. 776 (1986); *United States v. Louisiana*, 470 U.S. 93 (1985) [hereinafter cited as *Alabama and Mississippi Boundary Case*]; *United States v. Maine*, 469 U.S. 504 (1985) [hereinafter cited as *Rhode Island and New York Boundary Case*]; *United States v. Louisiana*, 394 U.S. 11 (1969) [hereinafter cited as *Louisiana Boundary Case*]. One federal-state maritime boundary dispute was very recently litigated: *United States v. Maine*, 106 S. Ct. 951 (1986) [hereinafter cited as *Massachusetts Boundary Case*]. The appropriate baselines or coastline points from which to measure the three-mile grant are determined pursuant to the 1958 Convention on the Territorial Sea and the Contiguous Zone, done Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 [hereinafter cited as *Territorial Sea Convention*]. See *United States v. Louisiana*, 394 U.S. 11 (1969); *United States v. California*, 381 U.S. 139 (1965).

2. See, e.g., *Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.)*, 1984 I.C.J. 246 (Judgment of Oct. 12), reprinted in 23 I.L.M. 1197 (1984) [hereinafter cited as *Gulf of Maine*]. The seaward limit of Interior's jurisdiction is important, not just because it is coextensive with the outer reaches of United States jurisdiction and control, but also because it is the dividing line between Interior's authority over offshore mineral development and the permitting authority of the National Oceanic and Atmospheric Administration (NOAA) of the Department of Commerce with respect of hard mineral resources of the deep seabed under the Deep Seabed Mineral Resources Act, 30 U.S.C. §§ 1401-1473 (1982).

3. A "nautical" or "geographic" mile is the length of a minute of longitude at the equator and in international practice is equal to 6,076.10333 feet or 1,852 meters. Unless specified otherwise, the term "mile" refers to the international nautical mile. A marine league equals three nautical miles or 3.45 statute miles. 1 A. SHALOWITZ, *SHORE AND SEA BOUNDARIES WITH SPECIAL REFERENCE TO THE INTERPRETATION AND USE OF COAST AND GEODETIC SURVEY DATA* 25 n. 6 (1962) [hereinafter cited as A. SHALOWITZ].

4. Determining the outer limits of the continental shelf where it extends more than 200 miles from the coastline will not be addressed in this Article.

5. 43 U.S.C. § 1334 (1982).

6. Submerged Lands Act, 43 U.S.C. § 1301(a) (1982).

7. 43 U.S.C. § 1331(a) (1982) provides as follows:

The term "outer Continental Shelf" means all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control.

Section 1301(a) defines the "lands beneath navigable waters" conveyed to the coastal

that the outer limit of the OCS expands as United States jurisdiction and control expand. As a consequence, the OCS includes the submerged lands seaward of the fifty states to which the United States presently asserts jurisdiction and control.⁸ This Article will examine in some detail the two sources of law that determine the extent of United States jurisdiction and control over the seabed: customary international law and treaties or conventions binding upon the United States.⁹

A review of customary international law reveals that the continen-

states by the Submerged Lands Act. Section 1301(b) provides that the term "boundaries" includes the seaward boundaries of a state as they existed at the time the state entered the Union (or as approved by Congress or as "extended or confirmed" in accordance with Section 1312) to a maximum distance of three geographical miles off the Atlantic and Pacific coasts and three marine leagues into the Gulf of Mexico. Since "lands beneath navigable waters" is defined in terms of states of the Union, the OCS does not include the United States continental shelf off of United States territories and possessions.

8. For a discussion of the legislative history of § 1331(a) of the OCSLA and post-enactment interpretations, see *DOI's Authority to Lease Polymetallic Sulfides in the Gorda Ridge Area*, 92 INTER. DEC. 459 (1986) (retitled "Authority to Issue Outer Continental Shelf Mineral Leases in the Gorda Ridge Area") [hereinafter cited as Solicitor's Op.]. The United States currently asserts a territorial sea of three nautical miles, although international law would justify a twelve-mile territorial sea claim. See OFFICE OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL FOR THE LAW OF THE SEA, LAW OF THE SEA BULLETIN (Dec. 1983). The United States claims a contiguous zone of twelve miles in accordance with article 24 of the Territorial Sea Convention; a 200-mile exclusive fishing zone; and a 200-mile Exclusive Economic Zone (EEZ). The United States also asserts claims over the full extent of its continental shelf, which in several areas well exceeds 200 miles from the mainland. Magnuson Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801-1861(e) (1982), as amended by Pub. L. No. 98-623, § 404 (Nov. 8, 1984); Proclamation No. 5030, 48 Fed. Reg. 10,605 (1983), reprinted in 19 WEEKLY COMP. PRES. DOC. 384 (Mar. 10, 1983) (Exclusive Economic Zone of the United States of America); Proclamation No. 2667, 3 C.F.R. 67 (1945), reprinted in 59 Stat. 884 (1945), and in 13 DEP'T ST. BULL. 485 (1945) (Policy of the United States with Respect to the Natural Resources of the Subsoil and Seabed of the Continental Shelf) [hereinafter cited as Truman Proclamation]; U.S. DEP'T STATE, *National Claims to Maritime Jurisdiction*, 36 LIMITS IN THE SEAS 180 (1985). The United States has not yet defined the limits of the its continental shelf where it exceeds 200 nautical miles and has used the limits published pursuant to the Magnuson Fishery Conservation and Management Act to define the 200-mile exclusive fisheries conservation zone as the limits for the EEZ. 42 Fed. Reg. 12,937 (1977), as amended by 42 Fed. Reg. 24, 134 (1977); 43 Fed. Reg. 1658 (1978); 43 Fed. Reg. 8606 (1978); 44 Fed. Reg. 74,956 (1979); 49 Fed. Reg. 43,676 (1984).

9. *Gulf of Maine*, 1984 I.C.J. at 290-91. The *Gulf of Maine* case was significant for three reasons: 1) it was the first time the International Court of Justice (ICJ) considered which principles of customary international law were applicable to determine one boundary line for the dual purpose of defining continental shelf and Exclusive Economic Zone (EEZ) jurisdictions; 2) the court was asked to apply those principles to draw an actual boundary line; and 3) the procedural device of a five-member chamber of the ICJ was used. For a discussion of this case, see Legault, *From Sea to Seabed: The Single Maritime Boundary in the Gulf of Maine Case*, 79 AM. J. INT'L L. 961 (1985).

tal shelf doctrine and the Exclusive Economic Zone (EEZ)¹⁰ doctrine are established, interrelated and generally accepted principles of international law. Both of these doctrines recognize a nation's sovereign rights over a 200-mile zone off its coasts. Within that zone, the coastal nation has the exclusive right to explore and exploit the natural resources of the submerged lands. Unlike a coastal state's inherent rights over its continental shelf, such rights under the EEZ doctrine must be asserted. Consequently, as a result of its proclamation of a 200-mile EEZ in 1983, the United States presently has "jurisdiction and control" over the 200-mile zone by virtue of both the EEZ and continental shelf doctrines.

The United States is bound by the 1958 Convention on the Continental Shelf (Continental Shelf Convention).¹¹ Under the Convention, the term "continental shelf" is defined as the seabed and subsoil adjacent to the coastal nation, but beyond the territorial sea, to a depth of 200 meters or beyond "where the depth of the superjacent waters admits of the exploitation of the natural resources"¹² This "exploitability" definition must be construed in the context of recent developments in customary international law. Thus, the Convention incorporates the principle that the continental shelf includes a minimum breadth of 200 miles, irrespective of the physical attributes of the submarine terrain.¹³ As a result, the Continental Shelf Convention incorporates the EEZ doctrine's independent recognition of such rights over the same 200-mile zone.¹⁴

With the exception of this introduction, the discussion of the 1985 decision of the International Court of Justice (ICJ) in the dispute between Malta and Libya concerning the continental shelf boundary, and the conclusion of this Article, the text consists of an extended excerpt from the Solicitor's Opinion, *DOI's Authority to Lease Polymetallic Sulfides in the Gorda Ridge Area*.¹⁵ The sole exceptions are certain minor deletions from this text, minor stylistic changes, and the insertion of two new sentences at the beginning of the section entitled "Development of the Legal Concepts." Minor conforming changes have also been made in the footnotes, but they are substantially the same as those in the Solicitor's Opinion.

10. The EEZ is a zone beyond the territory of a coastal state and adjacent to its territorial sea in which the coastal state may assert certain sovereign rights over natural resources. See United Nations Convention on the Law of the Sea, arts. 55-75, done Dec. 10, 1982, U.N. Doc. A/CONF.62/122 reprinted in 21, I.L.M. 1261 (1982) [hereinafter cited as LOS Convention].

11. Convention on the Continental Shelf, done Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311 [hereinafter cited as Continental Shelf Convention].

12. *Id.* art. 1.

13. *Id.*

14. *Id.*

15. Solicitor's Op., *supra* note 8.

CUSTOMARY INTERNATIONAL LAW

In determining the extent of United States jurisdiction and control over the 200-nautical-mile zone, this Article first focuses on customary international law. Customary international law is generally regarded as binding upon all nations.¹⁶ Essentially, it consists of those legal principles that have become accepted as part of general practice by the international community. As such, these legal principles comprise "a limited set of norms for ensuring the co-existence and vital cooperation of the members of the international community, together with a set of customary rules"¹⁷

Customary international law is recognized as having two distinct elements. First, there must be a "general practice" among nations which is preponderant, but not necessarily universal.¹⁸ Second, customary law is evidenced by its acceptance as law. Stated differently, there is a requirement of *opinio juris*; the existence of a general belief and expectation that a nation will behave in the prescribed manner. The ICJ¹⁹ has phrased this test in the following manner:

[I]n order to achieve this result [and constitute *opinio juris*], two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the exis-

16. This definition of customary international law is based on article 39(1) of the Statute of the ICJ, which requires the court to apply not only "international conventions, whether general or particular" in deciding the disputes submitted on it, but also "(b) international custom, as evidence of a general practice accepted as law; [and] (c) the general principles of law recognized by civilized nations" Statute of the International Court of Justice art. 38, reprinted in I. BROWNLIE, BASIC DOCUMENTS IN INTERNATIONAL LAW 397 (1983). Some argue that this article expresses a hierarchy of sources for determining international law. See Comment, *The Legal Implications of United States Policy Towards Nicaragua: A Machiavellian Dilemma*, 22 SAN DIEGO L. REV. 895, 906 (1985). All members of the United Nations are parties to the Statute of the ICJ, by virtue of article 93 of the United Nations Charter. The Charter of the United Nations and the Statute of the ICJ are set forth at 59 Stat. 1033 (1945).

17. *Gulf of Maine*, 1984 I.C.J. at 299.

18. The ICJ has stated that "a very widespread and representative participation . . . might suffice of itself, provided it included that of States whose interests were specially affected." *North Sea Continental Shelf* (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 3 (Judgment of Feb. 20). This quoted passage concerned the court's consideration of the degree of participation in the Continental Shelf Convention which the court found was insufficient to evidence customary international law. There were then 39 ratifications or accessions to this Convention. *Id.* at 25.

19. The ICJ is the principal judicial organ of the United Nations. The ICJ's main function is to decide the cases submitted to it, although the ICJ also serves an important function in the development of international laws. C. COLOMBOS, THE INTERNATIONAL LAW OF THE SEA § 5 (1967). The ICJ is one of the most important judicial bodies interpreting issues of customary international law; and for this reason, its pronouncements are accorded great weight.

tence of a rule of law requiring it.²⁰

The existence of *opinio juris* in state practice has been said to be subject to inductive demonstration “based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas.”²¹ Obviously, the reaction of other states to a particular practice is clearly relevant to the existence or nonexistence of the principle of *opinio juris*.²²

The ICJ has formulated guidelines for determining whether various principles of the continental shelf doctrine have become part of customary international law.²³ In the *North Sea Continental Shelf* cases,²⁴ the ICJ was asked to determine the principles to be applied under customary international law to delimit certain areas of the continental shelf underlying the North Sea. At the time, the Continental Shelf Convention was not binding upon the Federal Republic of Germany, one of the parties to the dispute. The question before the court was whether article 6 of the Convention, the provision dealing with boundary delimitations between adjacent or opposite states,²⁵ was binding upon Germany through force of customary in-

20. *North Sea Continental Shelf*, 1969 I.C.J. at 44.

21. *Gulf of Maine*, 1984 I.C.J. at 299.

22. The formulation of the elements required to establish customary international law varies. See, e.g., A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 47-102 (1971); Z. SLOUKA, *INTERNATIONAL CUSTOM AND THE CONTINENTAL SHELF* 5-18, 20-32 (1968) (discussing the wide range of interpretations represented among legal theorists); L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* § 11-12 (H. Lauterpacht ed. 1955) (“[C]ommon consent is the basis of all law.”). Accepted sources used to establish the existence of a principle in customary international law include state papers, diplomatic materials, treaties, the work of international legal bodies, and decisions of international and national tribunals and arbitration proceedings, as well as the writings of international legal authorities. C. COLOMBUS, *supra* note 19, § 6.

23. All of these cases involved the delimitation of the continental shelf. Not until the *Gulf of Maine* case did the ICJ address the problem of delimiting not only the continental shelf, but also exclusive fisheries zones by a single boundary. *Gulf of Maine*, 1984 I.C.J. at 267.

24. *North Sea Continental Shelf*, 1969 I.C.J. at 12-13. The two joined cases were submitted to the ICJ under special agreements which defined the issue before the Court in substantially the same language:

What principles and rules of international law are applicable to the delimitation as between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundary determined by the above-mentioned Convention of 9 June 1965 [or 1 December 1964]?

Id. at 6. The area of the North Sea which was the subject of this litigation involved depths of less than 200 meters. Consequently, the ICJ did not address the question of determining the outer edge of the continental shelf in these cases. *Id.* at 14-15.

25. Article 6(1) of the Continental Shelf Convention, *supra* note 11, provides that in the absence of agreement between such opposite states, “and unless another boundary is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.” Substantially the same provision applies with respect to adjacent states under section 6(2). Generally, this formulation is referred to as “the equidistance-special circumstances” rule. *Id.* art. 6(2).

ternational law.²⁶

In analyzing this issue, the ICJ first considered whether the equidistance provision of the Continental Shelf Convention was consistent with the existing customary law at the time of the Convention. The ICJ reviewed the origin and basic attributes of the doctrine of the continental shelf, the preparatory work of the International Law Commission, and the wording of the Convention. It concluded that this equidistance concept was not "an inherent necessity" of the doctrine, unlike other aspects.²⁷

The ICJ next considered whether the equidistance-special circumstances rule had subsequently become part of customary international law. The court analyzed the language of the provision and concluded that it was not of a "norm-creating" nature. Furthermore, as drafted in the Convention, the primary obligation of the disputants under the article was to negotiate a delimitation agreement and only secondarily to apply the equidistance-special circumstances rule. Consequently, the court ruled that the equidistance standard had not found sufficient acceptance in general practice to constitute a principle of customary international law.²⁸

In the *Tunisia-Libya Continental Shelf*²⁹ case, the ICJ was asked to delimit the respective rights of Tunisia and Libya to the continental shelf adjacent to the two nations' coasts. Since neither Tunisia nor Libya was a party to the 1958 Convention, the court was required to apply generally accepted principles of international law to the delimitation.

The agreement submitting this case to the ICJ required the court to take into account "equitable principles and relevant circumstances which characterize the areas, as well as the recent trends admitted at the Third Conference on the Law of the Sea."³⁰ The first two

26. *North Sea Continental Shelf*, 1969 I.C.J. at 28. It was also argued that the Federal Republic had unilaterally assumed the obligations of the Continental Shelf Convention, but the ICJ ruled that the facts did not justify such a finding. *Id.* at 25-27.

27. *Id.* at 33-41.

28. *Id.* at 41-45. The court did find that customary international law recognized an obligation to settle such delimitation disputes by agreement and, failing agreement, to do so in accordance with equitable principles, which might in a particular case entail application of equidistance. *Id.* at 46-47; accord *Gulf of Maine*, 1984 I.C.J. at 299-300, 302-03.

29. Concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya), 1982 I.C.J. 18 (Judgment of Feb. 24) [hereinafter cited as *Tunisia/Libya Continental Shelf*]. Tunisia and Libya have not yet been able to reach an agreement on the boundary. As a consequence, a Tunisian request for revision and interpretation of the earlier decision is pending before the ICJ. See 23 I.L.M. 1444 (1984).

30. *Tunisia/Libya Continental Shelf*, 1982 I.C.J. at 21.

factors, equitable principles and relevant circumstances, were consistent with the principles governing delimitation under customary law, as determined by the court in the *North Sea Continental Shelf* cases.³¹ The latter consideration, the recent trends at the third United Nations Conference on Law of the Sea (UNCLOS III), was considered by the court in order to determine whether the draft provision of the 1982 United Nations Convention on the Law of the Sea (LOS Convention), was "binding upon all members of the international community because it embodies or crystallizes a pre-existing or emergent rule of customary law."³²

In 1985 the ICJ again applied customary international law to delimit disputed continental shelf claims between Malta and Libya.³³ Although the parties agreed that the LOS Convention's provisions regarding the continental shelf and delimitation between opposite states were expressive of customary international law, they disagreed as to the precise provisions to be so recognized. The court stated:

It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules derived from custom, or indeed in developing them . . . [I]t cannot be denied that the 1982 Convention is of major importance, having been adopted by an overwhelming majority of States: hence it is clearly the duty of the Court, even independently of the references made to the Convention by the Parties, to consider in what degree any of its provisions are binding upon the Parties as a rule of customary law.³⁴

THE CONTINENTAL SHELF AND EEZ IN CUSTOMARY INTERNATIONAL LAW

The issue to be addressed is whether under customary international law the continental shelf doctrine now affords a coastal nation sovereign rights over its offshore subsoil and seabed for a minimum distance of 200 nautical miles from the baselines used to delimit the territorial sea, irrespective of physical features within this zone. This question, in turn, overlaps with the conceptually distinct issue of

31. *Id.* at 37.

32. *Id.* at 38. In considering the trends reflected in the UNCLOS III draft Convention, the court noted that the exploitability standard used to define the continental shelf under the Continental Shelf Convention had been rejected in favor of a new two-pronged definition. The first portion of this new definition was based on the natural prolongation of the land mass; the second, on a minimum distance of two hundred nautical miles from the coast. The court noted that this second criterion of distance might have been relevant to the decision in the case before it but since neither party had advanced an argument based on this trend, the court declined to consider this issue further. *Id.* at 47-49.

33. Concerning the Continental Shelf (*Libyan Arab Jamahiriya v. Malta*), 1985 I.C.J. 13 (Judgment of June 3), *reprinted in* 24 I.L.M. 1189 (1985) [hereinafter cited as *Libya/Malta Continental Shelf*].

34. *Id.* at 1197-98.

whether the 200-mile EEZ is now recognized in customary international law and, if so, invests the coastal state with such jurisdiction independently of the continental shelf doctrine.

Based on the analyses by the ICJ in the *North Sea Continental Shelf* cases, the *Tunisia/Libyan Continental Shelf* case, and the *Libya/Malta Continental Shelf* case, the following factors should be considered in such a review: 1) the development of the legal concepts of the continental shelf and the EEZ, including the preparatory work for UNCLOS III; 2) the provisions of the LOS Convention and the nature of the principles in question as "norm-creating"; 3) state practice with respect to such doctrines; and 4) the United States' declaration of an EEZ as consistent with customary international law. Thus, the starting point for an analysis of whether a minimum 200-mile continental shelf is now accepted in international law under either the continental shelf or the EEZ doctrine is to review the development of the doctrine of the continental shelf and, in particular, the separation of the legal definition from the geographical concept.

Development of the Legal Concepts

The preeminent event in the evolution of the doctrine of the continental shelf was the 1945 Truman Proclamation, by which the United States first asserted its rights over the natural resources of the continental shelf outside its territorial sea.³⁵ This Proclamation formed the basis for the development of the doctrine of the continental shelf, a doctrine now well established in customary international law.³⁶ The doctrine was first codified, however, as an emerging prin-

35. Truman Proclamation, *supra* note 8. This Proclamation stated, in pertinent part, as follows:

[T]he United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control.

Id. The phrase "jurisdiction and control," as employed in the Truman Proclamation, appears to have originated in a memorandum from the Acting Secretary of State and the Secretary of the Interior to President Roosevelt, dated January 22, 1945, *reprinted in 2 Foreign Relations of the United States, 1945* at 1490. The term was used to distinguish the limited nature of the rights claimed from sovereign territorial claims. However, in 1953, the phrase "sovereign rights" began to be generally employed for this purpose. M. MCDUGAL & W. BURKE, *THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA* 696-99 (1962). The Truman Proclamation did not define the term "continental shelf." See 13 DEP'T ST. BULL. 484 (1945) (the press release which accompanied the Truman Proclamation).

36. *Tunisia/Libya Continental Shelf*, 1982 I.C.J. at 43; *North Sea Continental Shelf*, 1969 I.C.J. at 33-34; M. MCDUGAL & W. BURKE, *supra* note 35, at 636-38; Finlay, *Realism v. Idealism as the Keys to the Determination of the Limits of National*

ciple of customary international law by the International Law Commission during the period from 1950 to 1956.³⁷

By 1956, approximately twenty-five countries had made some form of unilateral claim to exclusive control of the natural resources of their continental shelves, but the concepts and labels employed for this purpose varied widely. There was no pattern of defining such claims in terms of any particular water depth or other criterion during this early period. Indeed, the pattern between 1945 and 1956 was to not define "continental shelf" at all.³⁸ Later, the doctrine of the continental shelf was recognized and embodied in the 1958 Continental Shelf Convention,³⁹ although customary international law continued to develop independently of the Convention's provisions.⁴⁰ In any event, as its name implies, the Convention was limited to the seabed and its subsoil.⁴¹

The doctrine of the continental shelf consistently recognized the coastal state's jurisdiction over the full expanse of the geographical continental shelf,⁴² although not necessarily the slope and the mar-

Jurisdiction over the Continental Shelf, in LIMITS TO NATIONAL JURISDICTION OVER THE SEA 75, 105 (G. Yates & J. Young eds. 1974).

37. The International Law Commission (ILC) was established under United Nations General Assembly Resolution 174 (II) on November 21, 1947 for the purpose of codifying and developing international law. A. SHALOWITZ, *supra* note 3, at 203-04.

The ILC recommended three different draft articles defining the extent of the continental shelf. The 1951 report used a definition based on the extent to which the depth of the superjacent waters admitted of exploitation. The 1953 report rejected this exploitability approach and adopted a fix outer limit at the 200-meter depth contour line. Finally, the 1956 ILC report employed the earlier 200-mile depth contour, but extended beyond it whenever the depth of waters admitted of exploitation. For the text of these three proposed articles, see U.S. DEP'T. OF STATE, PUB. NO. 7825, 4 DIGEST OF INTERNATIONAL LAW 829-32 (M. Whiteman ed. 1965) [hereinafter cited as 4 Whiteman]. For a comprehensive review of this early work of the ILC, see M. McDUGAL & W. BURKE, *supra* note 35, at 695-99, and 4 Whiteman, *supra*, at 829-37.

38. M. McDUGAL & W. BURKE, *supra* note 35, at 669. For a survey of such claims, see Lauterpacht, *Sovereignty over Submarine Areas*, 1950 BRIT. Y.B. INT'L L. 376, 379-87.

39. The definition employed in the Continental Shelf Convention was substantially the same as that recommended by the ILC in 1956, except that the Convention's definition extended the ILC's language to include the seabed and subsoil of such submerged lands off the coasts of islands. For the text of the definition contained in the 1956 ILC report to the United Nations General Assembly and the accompanying commentary, see Report of the International Law Commission Covering the Work of Its Eighth Session, 11 U.N. G.A.O.R. Supp. (No. 9) 41-42, U.N. Doc. A/3159 (1956), *reprinted in* [1956] 2 Y.B. INT'L L. COMM'N 253, 296-97, and in 51 AM. J. INT'L L. 154, 243 (1957), *quoted in* 4 Whiteman, *supra* note 37, at 829-32.

40. Jennings, *The Limits of Continental Shelf Jurisdiction: Some Possible Implications of the North Sea Case Judgment*, 18 J. INT'L & COMP. L. 819 (1969). *See also Outer Continental Shelf: Hearings Before the Subcomm. on Minerals, Materials, and Fuels of the Sen. Comm. on Interior and Insular Affairs*, 91st Cong., 2d Sess. 5-9 (1970) (statement of Mr. Northcutt Ely) [hereinafter cited as *Minerals Hearings*].

41. *Gulf of Maine*, 1984 I.C.J. at 291. For a more detailed discussion of the development of the recognized rights of the coastal state in its continental shelf, see 4 Whiteman, *supra* note 37, at 842.

42. Article 76(5) and 76(6) of the LOS Convention would impose limits on such

gin,⁴³ but under various formulations of what that shelf might be. However, the issue of whether there was some minimum extent of the legal continental shelf arose where there was a complete absence of a geographical shelf or where the shelf was very narrow.

By the early 1950's, an emerging divergence between the legal and the geographical concepts of the continental shelf was apparent.⁴⁴ Although this divergence between the two concepts was clearly exacerbated by the problem of defining the geographical limits of the shelf,⁴⁵ it was also a consequence of the vagaries in the formulation of the concept in international practice at that time⁴⁶ and a function

jurisdiction. See LOS Convention, *supra* note 10, arts. 76(5),(6).

43. The continental margin includes the continental shelf, slope, and rise. Beyond the continental rise is the deep ocean floor. For a general discussion of the scientific meaning of the various terms, see *Special Study on United Nations Suboceanic Lands Policy, Hearings Before the Senate Comm. on Commerce*, 91st Cong., 1st Sess. 119-22 (1969) [hereinafter cited as *Commerce Hearings*]. The foot of the continental slope was indicated by Dr. William T. Pecora, Director of the United States Geological Survey, to vary from 1,400 to 3,200 meters, while the base of the continental rise was said to occur at depths of between 2,000 and 5,000 meters.

44. By 1950, one eminent commentator had already noted the emerging divergence between these two concepts:

"It would appear, accordingly, that so far as most of the relevant proclamations and enactments are concerned [*sic*] the expression 'continental shelf' is no more than a general indication of title to areas of indeterminate extent. This is so far the reason that the concept of the continental shelf, viewed as a term of geography, is itself unsatisfactory and somewhat arbitrary inasmuch as it is limited to the depth of 600 feet. Even if this were not so, the usefulness of the concept of the continental shelf, thus limited, would be impaired for the additional reason that its literal application would result in some states having no continental shelf at all, or practically none, while the continental shelf of others might extend for hundreds of miles almost up to the immediate vicinity of the territorial waters of other states."

Lauterpacht, *Sovereignty over Submarine Areas*, 1950 BRIT. Y.B. INT'L L. 376, 384-85, quoted in 4 Whiteman, *supra* note 37, at 822.

45. The problems in defining the geological or geographical continental shelf are well recognized. See, e.g., Gutteridge, *The 1958 Geneva Convention on the Continental Shelf*, 1959 BRIT. Y.B. INT'L L. 102, 103 n.5; Young, *The Legal Status of Submarine Areas Beneath the High Seas*, 45 AM. J. INT'L L. 225, 233-35 (1951), cited in 4 Whiteman, *supra* note 37, at 835. It is just as difficult to define the outer limit of the continental rise. See Emery, *Geological Limits of the 'Continental Shelf'*, 10 OCEAN DEV. & INT'L L. 1, 8-10 (1981). Another aspect of this problem is the difficulty in defining what is meant by "natural prolongation" which is often cited as one of the main principles underlying the doctrine of the continental shelf. *Id.* at 4. For examples of differing arguments as to the application of the principle of natural prolongation, see *North Sea Continental Shelf*, 1969 I.C.J. at 31-32, and *Tunisia/Libya Continental Shelf*, 1982 I.C.J. at 44, 50-53. In *North Sea Continental Shelf*, 1969 I.C.J. at 32, and in *Tunisia/Libya Continental Shelf*, 1982 I.C.J. at 46, 58, the ICJ declined to apply the various theories regarding the natural prolongation, concluding that this concept alone could not be used to delimit a shelf whose natural prolongation was common to both state claimants.

46. Gutteridge, *The 1958 Geneva Convention on the Continental Shelf*, 1959

of the growing international pressure to recognize the coastal state's jurisdiction over ever increasing marine areas.

In the *Tunisia/Libya Continental Shelf* case in 1982, the ICJ noted how far international law had departed from the geological concept of the shelf:

It was the continental shelf as 'an area physically extending the territory of most coastal States into a species of platform' which 'attracted the attention first of geographers and hydrographers and then of jurists' (*I.C.J. Reports 1969*, p. 51, para. 95); but the Court notes that at a very early stage in the development of the continental shelf as a concept of law, it acquired a more extensive connotation, so as eventually to embrace any sea-bed area possessing a particular relationship with the coastline of a neighboring State, whether or not such area presented the specific characteristics which a geographer would recognize as those of what he would classify as 'continental shelf.' This widening of the concept for legal purposes, evident particularly in the use of the criterion of exploitability for determining the seaward extent of shelf rights, is clearly apparent in the records of the International Law Commission and other *travaux préparatoires* of the 1958 Geneva Convention on the Continental Shelf.⁴⁷

The distinction between these two concepts, the legal and the geographical, was thus clear by 1958.

Buttressed by the development of the analytically distinct EEZ doctrine, some degree of divorce between the legal and geographical concepts appears inevitable retrospectively.⁴⁸ That such a separation has taken place was made clear by the decision of the ICJ in the *Libya/Malta Continental Shelf* case. Recognizing that customary international law now includes a 200-mile minimum distance from the state's coastline as "continental shelf," regardless of geographical

BRIT. Y.B. INT'L L. 102, 104. During the 1958 session in Geneva, various alternatives for defining the legal continental shelf were considered. One of these proposals was to define the shelf in terms of an arbitrary distance from the coastline. Such an approach clearly had no relationship to geography nor to the ability of the coastal state to develop such resources. However, the proposal was abandoned at that time in favor of the 200-meter depth contour and the exploitability test. *Id.* at 106-07.

47. *Tunisia/Libya Continental Shelf*, 1982 I.C.J. at 45. The court further stated as follows:

The fact that the legal concept, while it derived from the natural phenomenon, pursued its own development, is implicit in the whole discussion by the Court in that case [the *North Sea Continental Shelf* cases] of the legal rules and principles applicable to it.

Id. at 46. In its 1956 report, the ILC stated in the commentary on its draft article 67 defining the continental shelf that the proposed definition should not be understood to require the existence of a continental shelf in the geographical sense. 1956 Y.B. INT'L L. COMM'N 253, 296-97, reprinted in 51 AM. J. INT'L L. 154, 245 (1957) [hereinafter cited as 1956 Report of the ILC]; see also 4 Whiteman, *supra* note 37, at 838 (quoting from Summary Records of the 486th Meeting, U.N. GAOR at 27, U.N. Doc. A/C.6/SR. 486 (1956) (statement of Dr. Garcia-Amador of Cuba)); M. McDUGAL & W. BURKE, *supra* note 35, at 672-73.

48. For example, the demise of natural prolongation within the 200-mile zone was heralded by the 1984 *Gulf of Maine* case in which the Chamber of the ICJ criticized the *North Sea Continental Shelf* cases as attributing too much importance to natural prolongation. *Gulf of Maine*, 1984 I.C.J. at 293.

considerations, the ICJ stated the following:

The Court however considers that since the development of the law enables a State to claim that the continental shelf appertaining to it extends up to as far as 200 miles from its coast, whatever the geological characteristics of the corresponding sea-bed and subsoil, there is no reason to ascribe any role to geological or geophysical factors within that distance either in verifying the legal title of the States concerned or in proceeding to a delimitation as between their claims. This is especially clear where verification of the validity of title is concerned, since, at least in so far as those areas are situated at a distance of under 200 miles from the coasts in question, title depends solely on the distance from the coasts of the claimant States of any areas of sea-bed claimed by way of continental shelf, and the geological or geomorphological characteristics of those areas are completely immaterial.⁴⁹

A minor digression may be of assistance in reconciling otherwise contradictory statements by the ICJ regarding the philosophical underpinnings of the continental shelf doctrine. The early doctrine was founded on the theory that somehow a coastal state has preeminent rights over the continental shelf off its coasts because such submerged lands are the "nautical prolongation" of its land mass.⁵⁰ As a consequence, in the *North Sea Continental Shelf* cases and the *Tunisia/Libya Continental Shelf* case, the ICJ conceded the possible importance of geophysical and geographical features with regard to delimitation of the shelf.⁵¹ The ICJ stated in the *Libya/Malta Continental Shelf* case, however, that its earlier pronouncements had been based on a now defunct view of natural prolongation as the basis of a state's rights over the continental shelf within 200 miles of its coasts, a view that has since given way to the distance criterion.⁵² The court expressed this view succinctly, stating that the continental shelf regime had once "allot[ed] those [geophysical and geological] factors a place which now belongs to the past, in so far as sea-bed areas less

49. *Libya/Malta Continental Shelf*, 1985 ICJ at 35, para. 39.

50. This idea appears to have originated with the justifications given to support the Truman Proclamation, *supra* note 8. See, e.g., 1956 Report of the ILC, *supra* note 47, at 297, reprinted in 51 AM. J. INT'L L. at 247.

51. See *Libya/Malta Continental Shelf*, 1985 I.C.J. at 35-36, paras. 39 & 40.

52. Another basis for the coastal state's jurisdiction over the continental shelf involves the principle of geographical adjacency. Under this line of reasoning, the designated submerged lands should appertain to the state nearest to them. The Chamber of the ICJ summarily dismissed this view in the *Gulf of Maine* case, stating that "the mere fact of adjacency" did not produce any legal consequences. *Gulf of Maine*, 1984 I.C.J. at 296-97. Similarly, in the *Libya/Malta Continental Shelf* case, the ICJ refused to place primacy on the method of equidistance for delimitation purposes, on the basis that any other "rule would come near to an espousal of the idea of 'absolute proximity', which was rejected by the Court in 1969 (see *I.C.J. Reports* 1969, p. 30, para. 41), and which has since, moreover, failed of acceptance at the Third United Nations Conference on the Law of the Sea." *Libya/Malta Continental Shelf*, 1985 I.C.J. at 37, para. 43.

than 200 miles from the coast are concerned.”⁵³

This is not to say that “natural prolongation” is no longer of importance in the continental shelf doctrine. Beyond the 200-mile zone, the concept of natural prolongation remains the basis of defining the edge of the legal continental shelf.⁵⁴ The LOS Convention’s complex definition of “continental shelf” adopted just this approach.⁵⁵

Certain basic attributes of the doctrine of the continental shelf are well recognized as customary international law. As discussed by the ICJ in the *North Sea Continental Shelf* cases, the fundamental attributes of the continental shelf doctrine then established in customary international law are that the coastal state had “an original, natural, and exclusive (in short a vested) right to the continental shelf off shore its shores”⁵⁶ As a consequence, no legislation was or is required to vest jurisdiction and control over the subsoil and seabed of the continental shelf in the United States under customary international law. Such rights are recognized as exclusive and inherent, requiring no assertion or other action on the part of the coastal nation in order to vest. Thus, the absence of any specific assertion of jurisdiction over the continental shelf is not determinative. Furthermore, by virtue of the *Libya/Malta Continental Shelf* decision, if not before, it appears settled that the minimum 200-mile extent of the legal continental shelf has become the rule of the customary international law.⁵⁷

At the same time such developments were taking place with respect to the continental shelf doctrine, the EEZ was emerging as a doctrine in its own right. In order to determine the extent to which this doctrine of the EEZ may currently be recognized in international law, a review of its origins and attributes is also appropriate.

The impetus for jurisdictional claims to exclusive fisheries zones also sprang from a 1945 Truman Proclamation.⁵⁸ This proclama-

53. *Id.* at 36, para. 40. The ICJ therefore rejected Libya’s argument that a “rift zone” could constitute such a “fundamental discontinuity” as to be considered “some natural boundary.” *Id.* at 35, para. 39.

54. *Id.* at 33, para. 34. The ICJ stated that natural prolongation and distance were “complementary” concepts and that “both remain essential elements in the juridical concept of the continental shelf.” *Id.*

55. LOS Convention, *supra* note 10, art. 76(1).

56. *North Sea Continental Shelf*, 1969 I.C.J. at 33. It is also well established that delimitation between states should be by agreement and, failing agreement, should be accomplished in accordance with equitable principles. *Gulf of Maine*, 1984 I.C.J. at 299-300. Note in this connection that the Department, acting through the Minerals Management Service, has asserted such jurisdiction over the Gorda Ridge area. 47 Fed. Reg. 55,313 (1982), *amended by* Fed. Reg. 2450 (1983).

57. *Libya/Malta Continental Shelf*, 1985 I.C.J. at 33, para. 34.

58. Proclamation No. 2668, 3 C.F.R. 68 (1945), *reprinted in* 59 Stat. 885 (1945) (“Policy of the United States with Respect to Coastal Fisheries in Certain Areas of the High Seas”), *accompanied by* Exec. Order No. 9634, 3 C.F.R. 437 (1945) (“Providing for the Establishment of Fisheries Conservation Zones”). This Proclamation on coastal

tion's purpose was not to assert an exclusive zone, as such, but United States' authority to regulate fisheries conservation and activities.

The Truman Proclamation of 1945 on the continental shelf and fisheries resources led to unilateral claims by other nations, though these varied substantially. Of particular note were the claims by Chile and Peru to national sovereignty over a 200-mile zone⁵⁹ and the 1952 Santiago Declaration, in which Ecuador, Chile, and Peru asserted "sole sovereignty and jurisdiction" over this 200-mile zone, while recognizing a right of innocent passage, but not of overflight.⁶⁰ Claims of jurisdiction over living and nonliving resources in a zone beyond the territorial sea spread rapidly in South America, the Caribbean, and Africa.⁶¹

During this period, there developed a consensus that a country possessed limited jurisdiction over a zone contiguous to its territorial sea for the purpose of punishing or preventing infringement of regulations in the nation's territory or territorial sea.⁶² Later, interna-

fisheries was a companion to the Truman Proclamation, *supra* note 8.

59. Presidential Declaration Concerning Continental Shelf, June 23, 1947, *reprinted in* U.N. Doc. ST/LEG/SER.B/1, at 6 (1951); Presidential Decree No. 781, Concerning Submerged Continental or Insular Shelf, August 1, 1947, *reprinted in* U.N. Doc. ST/LEG/SER.B/1, at 16 (1951).

60. Agreements Between Chile, Ecuador, and Peru, signed at the First Conference on the Exploitation and Conservation of the Maritime Resources of the South Pacific, Santiago, Chile, Aug. 18, 1952, *reprinted in*, U.N. Doc. A/AC 135/10/Rev. 1, at 11-12 (1968).

61. For a discussion of the delimitation as between the parties of the areas of the continental shelf in the North Sea which Pacific Basin, see 19 VA. J. INT'L L. 321, 325-28 (1979); Clingan, *Emerging Law of the Sea: The Economic Zone Dilemma*, 14 SAN DIEGO L. REV. 530, 538-39 (1977); Hollick, *The Origins of 200-mile Offshore Zones*, 71 AM. J. INT'L L. 494 (1977). The continental shelf doctrine affords the coastal state rights in the seabed and subsoil of submerged lands, subject to the restriction that the exercise of such rights may not infringe or unjustifiably interfere with navigation or the exercise of rights and freedoms of other states as recognized in customary international law. The coastal state's rights over the continental shelf do not affect the status of the water column or the air space above. The EEZ doctrine also legitimizes claims to the living resources of the water column above the continental shelf within 200 miles of the coast together with certain other rights; but such waters are still subject to many of the traditional freedoms of the high seas. Consequently, claims of sovereignty over the 200-mile zone exceeding those recognized under the EEZ and continental shelf doctrines have consistently met with the disapproval of the world community. It is therefore important to distinguish 200-mile territorial sea or "patrimonial" sea claims from claims to limited sovereign rights over the continental shelf and EEZ.

62. The concept of a contiguous zone of up to 12 miles from the territorial sea baselines was first codified in article 24 of the Territorial Sea Convention, *supra* note 1. (The United States asserted a 12-mile contiguous zone in accordance with this treaty). An early negotiating text in UNCLOS III would have permitted the assertion of up to a 12-mile contiguous zone beyond a 12-mile territorial sea. Informal Composite Negotiat-

tional law recognized that the coastal state also had exclusive fishery jurisdiction within at least this zone⁶³ and that beyond it, the coastal state had certain preferential, but not exclusive, rights with respect to fisheries.⁶⁴

By the time the early preparatory work of UNCLOS III was completed⁶⁵ and the second session convened in Caracas on June 20, 1974, the basic concept of the 200-mile EEZ had gained definition, although it had not yet been accepted in customary international law.⁶⁶ By 1974, the trend of extending fisheries jurisdiction had become firmly rooted in state practice: thirty-three nations had asserted some form of exclusive fisheries jurisdiction beyond the twelve-mile contiguous zone.⁶⁷

The provision that the legal continental shelf should include a minimum breadth of 200 nautical miles, irrespective of the physical attributes of the submerged lands in question, had also gained re-

ing Text, U.N. Doc. A/CONF.62/AP.10/Rev. 1 (1979), reprinted in 10 NEW DIRECTIONS IN THE LAW OF THE SEA 134 (1980). A provision permitting a contiguous zone of up to 24 miles beyond the baselines delimiting the territorial sea is included in the LOS Convention. See LOS Convention, *supra* note 10, art. 33.

63. In the *Fisheries Jurisdiction* case, the ICJ stated as follows:

The 1960 Conference failed by one vote to adopt a text governing the two questions of the breadth of the territorial sea and the extent of fishery rights. However, after the Conference the law evolved through the practice of States on the basis of the debates and near-agreements at the Conference. Two concepts have crystallized as customary law in recent years arising out of the general consensus The first is the concept of the fishery zone, the area in which a State may claim exclusive fishery jurisdiction independently of its territorial sea; the extension of that fishery zone up to a 12-mile limit from the baselines appears now to be generally accepted. The second is the concept of preferential rights of fishing in adjacent waters in favor of the coastal State in a situation of special dependence on its coastal fisheries, this preference operating in regard to other States concerned in the exploitation of the same fisheries.

Fisheries Jurisdiction (W. Ger. v. Ice.), 1974 I.C.J. 175, 191-92 (Judgment of July 25). In this case, the ICJ held that Iceland had acted in violation of international law by unilaterally adopting an exclusive fisheries zone of 50 nautical miles in 1972, although the court also found that Iceland had preferential rights in that zone. *Id.* at 205-06.

64. *Id.* at 195.

65. The preparatory work for UNCLOS III was done by the Committee on the Peaceful Uses of the Sea-Bed and Ocean Floor Beyond the Limits of National Jurisdiction over six sessions in the early 1970s. Aguilar, *The Patrimonial Sea or Economic Zone Concept*, 11 SAN DIEGO L. REV. 579, 580-81 (1974).

66. See, e.g., Krueger, *The Evolution of the 200-Mile Exclusive Economic Zone: State Practice in the Pacific Basin*, 19 VA. J. INT'L L. 321, 325-28 (1979); Clingan, *Emerging Law of the Sea: The Economic Zone Dilemma*, 14 SAN DIEGO L. REV. 530, 539 (1977); Pollard, *The Exclusive Economic Zone: The Elusive Consensus*, 12 SAN DIEGO L. REV. 600, 614 (1975); Aguilar, *The Patrimonial Sea or Economic Zone Concept*, 11 SAN DIEGO L. REV. 579, 581 (1974).

67. Mexico's declaration of a 200-mile EEZ became effective June 6, 1976. In defense of this early claim, see Szekely, *Mexico's Unilateral Claim to a 200-Mile Exclusive Economic Zone: Its International Significance*, 4 OCEAN DEV. & INT'L L. 195 (1977). The United States asserted a 200-mile fishery conservation zone effective March 1, 1977. Fishery Conservation and Management Act of 1976, 16 U.S.C. § 1801 (1982), as amended by Pub. L. No. 98-623, § 404 (Nov. 8, 1984).

spectability by 1976.⁶⁸ The Revised Single Negotiating Text, which was the result of the 1976 session of UNCLOS III, included such a provision,⁶⁹ as did each of the draft conventions that followed it. The emerging consensus regarding the 200-mile EEZ and the minimum 200-mile continental shelf⁷⁰ is further revealed by the similarities between the various negotiating texts of UNCLOS III on these two issues.⁷¹

68. M. NASH, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1979 989, 990 (1983); see also REPORT OF THE COMPTROLLER GENERAL OF THE UNITED STATES, THE LAW OF THE SEA CONFERENCE—STATUS OF THE ISSUES, 1978 24-25 (March 1979) (stating that during the 1974 Caracas session, “there was extensive support” for an EEZ of 200 miles, but that there was some division over the outer limit of the continental shelf beyond 200 miles); U.S. DELEGATION REPORT, *The Third United Nations Conference on the Law of the Sea* (New York, March 15-May 7, 1976), presented in *National Ocean Policy: Hearings Before the Subcomm. on Oceanography and the House Comm. on Merchant Marine and Fisheries*, 94th Cong., 2d Sess. 169 (1976). But see Fleischer, *The Right to a 200-Mile Exclusive Economic Zone or a Special Fishery Zone*, 14 SAN DIEGO L. REV. 548, 565 (1977).

69. Revised Single Negotiating Text, 5 Official Records of the Third United Nations Conference on the Law of the Sea 125, U.N. Doc. A/CONF.62/WP.8/Rev.1/Pt. 2, art. 64 (1976)

70. Other aspects of the EEZ doctrine were not so easily resolved. For an overview, see Report of the Comptroller General of the United States, THE LAW OF THE SEA CONFERENCE—STATUS OF THE ISSUES, 1978 24 (1979). For a discussion of the early difficulties in formulating this concept, see Clingan, *The Emerging Law of the Sea: The Economic Zone Dilemma*, 14 SAN DIEGO L. REV. 530, 539-44 (1977). During this same period, UNCLOS III also struggled with such problem as how to define the seaward limit of the continental shelf when it extended beyond 200 miles under the Irish formula, marine scientific research and installations within this same zone, and high seas freedoms in the continental shelf zone. See *Development of the Hard Mineral Resources of the Deep Seabed: Hearings Before the Subcomm. on Mines and Mining of the House Comm. on Interior and Insular Affairs*, 96th Cong., 1st Sess. 172-73 (1979) (Containing the United States Delegation Report on the 8th Sess. of the UNCLOS III in Geneva, March 19-April 27, 1979).

71. See Informal Single Negotiating Text, U.N. Doc. A/CONF.62/WP.8/PT. III, arts. 45-61 (1975), reprinted in 14 I.L.M. 697 (1975); Revised Single Negotiating Text, 5 Official Records of the Third United Nations Conference on the Law of the Sea 125, U.N. Doc. A/CONF.62/WP.8/Rev. 1/Pt. 2, arts. 44-45, 64 (1976); Informal Composite Negotiating Text, 8 Official Records of the Third United Nations Conference on the Law of the Sea 1, U.N. Doc. A/CONF.62/WP.10/Rev. 1/Pt. 5 (1979); Informal Composite Negotiating Text, Revision 2, U.N. Doc. A/CONF.62/WP.10/Rev.2 (1980), reprinted in H. KNIGHT, THE LAW OF THE SEA: CASES, DOCUMENTS, AND READINGS 9 (1980); Draft Convention on the Law of the Sea (Informal Text), U.N. Doc. A/CONF.62/WP.10/Rev. 3 (1980). As of March 1, 1977, the United States asserted one line as its 200-mile fishery conservation zone boundary and continental shelf boundary with respect to its ocean boundaries with Canada. The official notice proclaimed that the seaward limit of the United States continental shelf would extend beyond 200 miles where the continental shelf did so and international law so permitted “and in a direction determined by application of the principles by which the described boundary segment is determined.” 41 Fed. Reg. 18,619-20 n.2 (1976).

The LOS Convention has now been finalized in form.⁷² The language of its core provisions on the EEZ are little changed from earlier drafts,⁷³ as is the case with regard to the minimum 200-mile provision of the definition of the continental shelf. However, on July 9, 1982, the United States announced that it would not sign the LOS Convention.⁷⁴ The principal reason for this decision was that the deep seabed regime to be established under the Convention would not meet the fundamental objectives and interests of the United States.⁷⁵ Thus, this United Nations Convention will not become binding upon the United States as a matter of treaty law. However, to the extent the LOS Convention embodies customary international law, such provisions are binding upon nonparties to the LOS Convention.

UNCLOS III took place over a ten year period. Approximately 150 nations took part in this mammoth international negotiation. 159 nations and other entities signed the LOS Convention by the closing date of December 9, 1984, although only sixteen have ratified it.⁷⁶ The scope of this tremendous undertaking, involving, as it did, such a widespread participation, has produced a document that represents the consensus of the world community with respect to many of its nondeep seabed mining provisions. On this basis alone, the proposed LOS Convention could be viewed as embodying to a large extent customary international law with respect to the EEZ and the continental shelf.⁷⁷

72. LOS Convention, *supra* note 10.

73. See *supra* note 71 for citations to earlier draft convention documents.

74. Statement by the President, 18 WEEKLY COMP. OF PRES. DOC. 887 (July 9, 1982). Great Britain and West Germany also announced in late 1984 that they would not sign the LOS Convention. Other states and qualified entities that declined to sign the Convention are Albania, Ecuador, the Holy See, Israel, Jordan, Kiribati, Peru, San Marino, Syrian Arab Republic, Tonga, Turkey, Venezuela, Trust Territory of the Pacific Islands, and the West Indies Associated States. OFFICE OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL FOR THE LAW OF THE SEA, 4 LAW OF THE SEA BULLETIN 2-6, PUB. NO. 85-03744 (1985) [hereinafter cited as LOS BULLETIN No. 4].

75. For a statement of United States policy on the LOS Convention, see Malone, Freedom and Opportunity: The Foundation for a Dynamic National Oceans Policy, Address delivered to the 19th Annual Conference of the Law of the Sea Institute, San Francisco, California, on September 24, 1984.

76. The 23 states that have ratified the LOS Convention as of September 30, 1985, are: the Bahamas, Bahrain, Belize, Cuba, Egypt, Fiji, Gambia, Ghana, Guinea, Iceland, Iraq, Ivory Coast, Jamaica, Mali, Mexico, the Philippines, Saint Lucia, Senegal, Sudan, Togo, Tunisia, United Republic of Tanzania, and Zambia. The United Nations Council for Namibia is the twenty-fourth entity that has ratified the Convention. OFFICE OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL FOR THE LAW OF THE SEA, 6 LAW OF THE SEA BULLETIN NO. 1-5 (1985). 60 states and other recognized entities must ratify or accede to the LOS Convention before it will enter into force. LOS Convention, *supra* note 10, art. 308(1).

77. The widespread and representative participation of states in a convention as

The early consensus in UNCLOS III regarding the fundamental attributes of the EEZ⁷⁸ and the minimum 200-mile breadth of the continental shelf are evidence that the final articles of the LOS Convention are expressive of customary international law. A review of the basic attributes of these two doctrines, as codified in the LOS Convention, and the degree of their objective acceptance by the international community follows. Article 56 of the LOS Convention describes such rights over the EEZ generally as including "sovereign rights for the purpose of exploring and exploiting, conserving and managing" the living or nonliving natural resources of the seabed and subsoil and their superjacent waters. Subject to the requirement that the coastal state have "due regard to the rights and duties of other States . . . ," the coastal state also has specially defined jurisdiction with respect to "the establishment and use of artificial islands, installations and structures;" marine scientific research; the protection and preservation of the marine environment; and other rights and duties as specified in the LOS Convention. Article 56 concludes with the statement that the coastal state's rights with respect to the seabed and subsoil must be exercised in accordance with Part VI, the portion of the LOS Convention dealing with the continental shelf doctrine.⁷⁹ Article 57 of the LOS Convention adds that the coastal state may assert such jurisdiction over an EEZ of up to 200 nautical miles.

The emergence of the EEZ doctrine afforded the coastal state rights in the superjacent waters of the EEZ beyond those previously recognized in the contiguous zone with respect to living resources.⁸⁰ However, the EEZ doctrine also reaffirms the coastal state's jurisdic-

parties may be sufficient to constitute the *opinio juris* and the scope of general state practice required to establish a principle as customary international law. *North Sea Continental Shelf*, 1969 I.C.J. at 42. If such a convention fails to enter into force, however, even for reasons related to a severable portion of the treaty, it is difficult to conclude that the generally accepted provisions of the convention represent *opinio juris* by virtue of the participation of so many nations in the negotiations leading to the final text. This conclusion follows particularly where there are, as was the case in the LOS Convention, substantial trade-offs and compromises during the negotiations. Nonetheless, the LOS Convention is recognized as having "an important role to play in recording and defining rules derived from custom, or indeed in developing them." *Libya/Malta Continental Shelf*, 1985 I.C.J. at 20.

78. The rights of land-locked (article 69) and geographically disadvantaged states (article 70) are peculiarly creatures of the LOS Convention. Such provisions are clearly not expressive of existing customary international law.

79. LOS Convention, *supra* note 10, art. 56.

80. More specifically, articles 61 and 62 give the coastal state extensive rights concerning fisheries conservation and utilization. *Id.* arts. 61 & 62.

tion over the natural resources of the zone's seabed and subsoil for the purpose of exploration and exploitation. Similar "sovereign rights" are, of course, also conferred by the continental shelf doctrine, although the source of the rights claimed remains important.⁸¹ Indeed, Article 56(3) of the LOS Convention, quoted above, provides that such general rights with respect to nonliving resources in the EEZ must be exercised in accordance with part VI, the section of the LOS Convention dealing with the continental shelf.

Article 77 of the LOS Convention restates the basic doctrine of the continental shelf and codifies it: namely, that the coastal state has exclusive and inherent "sovereign rights" over its shelf for the purpose of exploring and exploiting its natural resources. This authority is subject to the general obligation to refrain from unreasonably interfering with freedom of navigation and the laying and maintenance of submarine cables.⁸²

The principal definition of the continental shelf in the LOS Convention is contained in article 76(1):

The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.⁸³

This definition specifies a minimum distance for a continental shelf that is the same as the maximum distance for the EEZ: 200 nautical miles from the baselines used to determine the territorial sea. Where the outer edge of the continental margin⁸⁴ exceeds 200 miles, it is used as the edge of the legal shelf.⁸⁵ As such, this general

81. There are differences in these two concepts beyond the obvious ones. For example, with respect to the natural resources of the subsoil and seabed in the EEZ, the LOS Convention's provisions apply to all living and nonliving resources. *Id.* art. 56(1)(a). The continental shelf provisions apply only to nonliving resources and "living organisms belonging to sedentary species . . ." *Id.* art. 77(4). Furthermore, the EEZ doctrine does recognize certain rights with respect to the water column, as such, while the continental shelf doctrine does not. Consequently, the EEZ doctrine restricts the traditional freedoms of the high seas more extensively than does the continental shelf doctrine in terms of the 200-mile zone. *Id.* arts. 58, 78, 86 & 87-120. On the other hand, the coastal state's rights regarding artificial islands, installations, and structures (articles 60 and 80) and the principles for delimiting overlapping claims between opposite and adjacent states (articles 74 and 83) are the same for the EEZ and the continental shelf. *Id.* arts. 60, 74, 80 & 83. However, the boundaries delimiting overlapping EEZ and continental shelf jurisdictions within 200 miles of each state's coast may be different. *See Gulf of Maine*, 1984 I.C.J. at 267.

82. *See North Sea Continental Shelf*, 1969 I.C.J. at 32-33, 39.

83. LOS Convention, *supra* note 10, art. 76(1).

84. "Continental margin" is defined as "the submerged prolongation of the land mass of the coastal State," consisting of the "sea-bed and subsoil of the shelf, the slope and the rise," excluding "the deep ocean floor with its oceanic ridges." *Id.* art. 76(3).

85. The coastal state has the responsibility for establishing the outer edge of the continental margin beyond the 200-mile zone by either one of two approaches. Under the

provision embraces the basic concept of the continental shelf extending throughout the natural prolongation of the coastal nation's land mass, although the LOS Convention imposes some maximum limits on such jurisdiction.⁸⁶

Articles 56(1)(a) and 57 and articles 76(1) and 77 are, thus, the basic provisions defining the general rights of the coastal state to a 200-mile EEZ and a minimum 200-mile continental shelf. By their express terms, they are fundamentally normcreating, so that they may form the basis of a general rule of customary law; that is, these provisions are not so detailed that they are unlikely to emerge as principles of international law. Both are "primary" in their provisions and definite in their language.⁸⁷

State Practice with Respect to Continental Shelf and EEZ Claims

Unilateral acts on the part of states, not followed by protests from other states, may be so numerous and consistent in practice as to

so-called Irish Formula:

(i) a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope; or (ii) a line delineated in accordance with paragraph 7 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope.

(b) In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base.

Id. art. 76(4).

86. *Id.* arts. 76(2), (5) & (6). Article 76(5), the so-called "biscuit" formula, provides as follows:

The fixed points comprising the line of the outer limits of the continental shelf on the sea-bed, drawn in accordance with paragraph 4 (a) (i) and (ii), either shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres.

Subsection 6 contains a further limitation:

Notwithstanding the provisions of paragraph 5, on submarine ridges, the outer limit of the continental shelf shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured. This paragraph does not apply to submarine elevations that are natural components of the continental margin, such as its plateaux, rises, caps, banks and spurs.

The extent to which such specialized provisions may represent customary international law is beyond the scope of this Article.

87. *Cf. North Sea Continental Shelf*, 1969 I.C.J. at 41-42 (finding that article 6 of the 1958 Convention on the Continental Shelf was not "fundamentally norm-creating").

evidence customary law.⁸⁸ Such acts must represent something more than the will of the states in question, however, even if tacitly accepted by the international community.⁸⁹ An additional element is required. Not only must such acts "amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."⁹⁰

Article 57 of the LOS Convention permits a state to claim up to a 200-mile EEZ; a state is not required to do so nor does a state have such rights in the absence of a claim. Article 77, on the other hand, restates the settled principle of customary international law that rights over the continental shelf are inherent and exclusive, requiring no action or assertion on the part of the state to vest. Thus, this requirement for customary international law of a sense of legal obligation may not necessarily be revealed directly by an overt claim in the case of continental shelf jurisdiction, but indirectly through the acceptance of such 200-mile claims by other nations and by the recognition of the existence of an element of reciprocity. On the other hand, since an assertion of a 200-mile EEZ, required to protect such rights, carries with it an assertion of rights over the continental shelf within the 200-mile EEZ, such a declaration and pattern of respecting reciprocal declarations would indicate not just acceptance of the EEZ in customary international law, but also acceptance of a 200-mile minimum limit for the continental shelf in international law.⁹¹

The rapid evolution of state practice with respect to EEZs is striking. UNCLOS III is recognized as having accelerated the acceptance of the EEZ and the 200-mile minimum continental shelf concept, primarily through education and enhanced communication. As a consequence, state practice in this area has changed rapidly as

88. Amin, *The Regime of the Sea-bed and Ocean Floor: A Legal Analysis*, 28 JURID. REV. 51, 62-63 (1983); "Memorandum on the Regime of the High Seas," prepared by the Secretariat, U.N. DOC. A/CN.4/32 (July 14, 1950), [1950] 2 Y.B. INT'L L. COMM'N 104, cited in 4 Whiteman, *supra* note 37, at 810-11 (unilateral acts are "one of the means by which international custom is formed"); Lauterpach, *Sovereignty over Submarine Areas*, 1950 BRIT. Y.B. INT'L L. 393-94. Bilateral agreements may also reflect state practice.

89. Sorenson, *Law of the Sea*, 520 INT'L CONCILIATION 195, 226-27 (1958), cited in 4 Whiteman, *supra* note 37, at 811-12.

90. *North Sea Continental Shelf*, 1969 I.C.J. at 44.

91. As of late 1983, 19 states asserted jurisdiction over their continental shelves on the basis of distance of 200 miles or less. Of these, only four did not already claim a 200-mile EEZ. 51 states still formally adopted the formula of 200 meters plus exploitability, and an additional state used exploitation alone. OFFICE OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL FOR THE LAW OF THE SEA, LAW OF THE SEA BULLETIN ii-vi PUB. NO. 83-35821 (1983) [hereinafter cited as LAW OF THE SEA BULLETIN]. For a compilation of continental shelf claims as of January 1, 1982, see R. CHURCHILL & A. LOWE, *THE LAW OF THE SEA* app. (1983).

these parallel concepts have become widely accepted.⁹²

There are three broad categories of exclusive jurisdiction asserted over the 200-mile belt: declarations of exclusive fishery zones, EEZs, and territorial sea claims, in increasing order of the degree of jurisdiction involved. Figures vary; however, by September 1, 1977, approximately sixty-five nations claimed exclusive fisheries zones of fifteen miles or more, of which fifty-one states claimed zones of 200 miles breadth. Such 200-mile fisheries zone claimants then included the United States, Canada, Iceland, Norway, the U.S.S.R., the United Kingdom, and other countries of the European Economic Community.⁹³

By November 1978, these figures had changed dramatically. Fourteen countries claimed 200-mile territorial seas; thirty-one additional states claimed 200-mile exclusive fisheries zones, while seven others claimed fifteen to 150 mile zones; and another thirty-seven claimed at least 200-mile EEZs, while three other states claimed EEZs of lesser widths. Thus, eighty-two nations claimed exclusive fisheries jurisdiction, directly or indirectly, over a 200-mile zone; and fifty-one states asserted exclusive resource jurisdiction over this zone.⁹⁴

As of July 15, 1979, forty-two countries claimed 200-mile fisheries zones, twenty-four additional countries asserted 200-mile EEZs and fourteen additional states claimed 200-mile territorial seas.⁹⁵ Thus, at that time, eighty states claimed some form of exclusive fisheries jurisdiction over zones of 200 miles, while thirty-eight of these states asserted exclusive jurisdiction over the resources of the subsoil and seabed within a 200-mile zone.

As of December 1983, the weight of practice was even more apparent. Thirteen nations still claimed a 200-mile territorial sea, and eleven others claimed territorial seas with breadths of fifteen miles to

92. See LAW OF THE SEA BULLETIN, *supra* note 91, at ii.

93. G. KNIGHT, THE LAW OF THE SEA; CASES, DOCUMENTS, AND READINGS 12-60 (1980). *But see* Hollick, *The Origins of 200-Mile Offshore Zones*, 71 AM. J. INT'L L. 494 n.2 (stating that as of March, 1977, 27 countries claimed 200-mile fisheries zones).

94. Krueger & Nordquist, *The Evolution of the 200-Mile Exclusive Economic Zone: State Practice in the Pacific Basin*, 19 VA. J. INT'L L. 321, 390-99 (1979) (but compare Appendix "A" at 373, indicating that 32 nations claimed 200-mile fishery zones and another 47 had 200-mile EEZs). For a review of state practice as of January 1, 1977, see R. CHURCHILL, M. NORDQUIST & S. LAY, 6 NEW DIRECTIONS IN THE LAW OF THE SEA 843-84 (1977). The variations in the various compilations of national claims are due to differing identifications of the states surveyed and the paucity of information with respect to the maritime claims of some coastal states.

95. M. NORDQUIST & K. SIMMONDS, 10 NEW DIRECTIONS IN THE LAW OF THE SEA 478 (1980).

200 miles. Fifty-five nations claimed 200-mile EEZs or less,⁹⁶ and another twenty-six claimed 200-mile exclusive fisheries zones or less. Seventy-seven nations claimed jurisdiction over 200-mile exclusive fisheries zones, directly or indirectly; and sixty-seven claimed 200-mile EEZs or even more extensive jurisdiction within the 200-mile zone.⁹⁷ Thus, while allowing for some differences in tabulation, by late 1983, sixty-seven nations claimed at least 200-mile EEZ jurisdiction, as against thirty-eight mid-1979. Based on this broad, early acceptance of the basic attributes of the EEZ and continental shelf during UNCLOS III and the widespread adoption and recognition of such principles in state practice, it is clear that customary international law currently affords a coastal nation sovereign rights over the seabed and subsoil in a 200-mile zone by virtue of the continental shelf doctrine and through the doctrine of the EEZ.

If any doubt were possible on this point, it has recently been removed by the ICJ:

It is in the Court's view incontestable that, apart from those provisions [Article 76's distance principle and natural prolongation provisions], the institution of the exclusive economic zone, with its rule of entitlements by reason of distance, is shown by the practice of States to have become a part of customary law. . . . Although the institutions of the continental shelf and the exclusive economic zone are different and distinct, the rights which the exclusive economic zone entails over the sea-bed of the zone are defined by reference to the regime laid down for the continental shelf. Although there can be a continental shelf where there is no exclusive economic zone, there cannot be an exclusive economic zone without a corresponding continental shelf. It follows that, for judicial practical reasons, the distance criterion must now apply to the continental shelf as well as to the exclusive economic zone; and this quite apart from the provision as to distance in paragraph 1 of Article 76.⁹⁸

Thus, the ICJ concluded that the continental shelf doctrine is recognized in customary international law as extending a minimum 200 miles by virtue of the acceptance of the 200-mile EEZ doctrine, without need for reference to the consensus demonstrated on this

96. The U.S.S.R. was not included in these figures because the Soviet Union did not assert a 200-mile EEZ until February 28, 1984. LOS BULLETIN No. 4, *supra* note 74, at 32.

97. LAW OF THE SEA BULLETIN, *supra* note 91, at vi. For an in depth survey of national practice with respect to 137 of the 141 coastal nations, see *id.* at ii-v. *Compare NATIONAL ADVISORY COMMITTEE ON OCEANS AND ATMOSPHERE, THE EXCLUSIVE ECONOMIC ZONE OF THE UNITED STATES: SOME IMMEDIATE POLICY ISSUES 25-27 (1984)*, stating that 59 nations have claimed EEZs, 57 of which extend to a distance of 200 miles. There are coastal states with significant fisheries and offshore natural resources that have not yet asserted a 200-mile EEZ. These states include Australia*, Canada*, Finland, the German Democratic Republic, the Federal Republic of Germany*, Greece, Japan*, The Netherlands*, the Republic of Korea, Sweden, and the United Kingdom*. Those states followed by an asterisk, however, claim an exclusive 200-mile fisheries zone. Of the states listed, all but Korea and Japan still claim continental shelf jurisdiction based on the exploitability formulation of the 1958 Continental Shelf Convention.

98. *Libya/Malta Continental Shelf*, 1985 I.C.J. at 24; see also *Gulf of Maine*, 1984 I.C.J. at 294.

point by the adoption of article 76 of the LOS Convention.

Sovereign rights over the continental shelf are inherent and exclusive. By contrast, an actual assertion of jurisdiction is required to perfect rights under the EEZ doctrine. In accordance with the requirement that rights over an EEZ must be asserted, the United States declared such jurisdiction in early 1983, in conformity with international law.

The Presidential Proclamation on the EEZ

On March 10, 1983, President Reagan issued a Proclamation declaring a 200-mile EEZ for the United States.⁹⁹ The Proclamation provided, in relevant part, as follows:

NOW, THEREFORE, I, RONALD REAGAN . . . do hereby proclaim the sovereign rights and jurisdiction of the United States of America and confirm also the rights and freedoms of all States within an Exclusive Economic Zone, as described herein.

The Exclusive Economic Zone of the United States is a zone contiguous to the territorial sea, including zones contiguous to the territorial sea of the United States, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands (to the extent consistent with the Covenant and the United Nations Trusteeship Agreement), and United States overseas territories and possessions. The Exclusive Economic Zone extends to a distance 200 nautical miles from the baseline from which the breadth of the territorial sea is measured.¹⁰⁰

The Presidential Proclamation on the EEZ was not simply a unilateral assertion of rights over an EEZ. It explicitly recognized reciprocal rights in other states.¹⁰¹ Further, the Proclamation itself

99. Proclamation No. 5030, *supra* note 8. Until the issuance of this Proclamation, the United States did not officially recognize EEZs, as such. The United States, however, had negotiated and signed treaties delimitating overlapping maritime claims extending to 200 miles with the Cook Islands, Cuba, Mexico, New Zealand (concerning Tokelau), and Venezuela and had submitted the issue of its overlapping claims with Canada in the Gulf of Maine to the ICJ.

100. *Id.*

101. *Id.* The Proclamation further declared as follows:

Within the Exclusive Economic Zone, the United States has, *to the extent permitted by international law*, (a) sovereign rights for the purpose of exploring, exploiting, conserving and managing natural resources, both living and non-living, of the seabed and subsoil and the superjacent waters and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; and (b) jurisdiction with regard to the establishment and use of artificial islands, and installations and structures having economic purposes, and the protection and preservation of the marine environment.

Id. (emphasis added). This quoted paragraph is almost identical to the text of article 6(1)(a) and (b) of the LOS Convention, although references in article 56 to the more detailed provisions of the Convention were omitted in favor of the Proclamation's general

stressed that it was based on recognized principles of international law.¹⁰² The accompanying statement provided that the proposed United Nations Convention contain “provisions with respect to traditional uses of the oceans which generally confirm existing maritime law and practice and fairly balance the interests of all States.” The EEZ declaration was said to be “consistent with those fair and balanced results in the Convention and international law.”¹⁰³

The fact sheet stated as follows:

The concept of the EEZ is already recognized in international law and the President's Proclamation is consistent with existing international law. Over 50 countries have proclaimed some form of EEZ; some of these are consistent with international law and others are not.

The concept of an EEZ was developed further in the recently concluded Law of the Sea negotiations and is reflected in that Convention. The EEZ is a maritime area in which the coastal state may exercise certain limited powers as recognized under international law

. . . The President has also established clear guidelines for United States oceans policy by stating that the United States is prepared to accept and act in accordance with international law as reflected in the results of the Law of the Sea Convention that relate to traditional uses of the oceans, such as navigation and overflight. The United States is willing to respect the maritime claims of others, including economic zones, that are consistent with international law as reflected in the Convention, if U.S. rights and

avowal that the rights claimed are limited to those “permitted by international law.” During the proceedings in the *Gulf of Maine* case, Judge Gros asked whether the phrase in the EEZ Proclamation “to the extent permitted by international law” should be construed in light of the guidelines reflected in the LOS Convention, to which the United States representative, Davis Robinson, responded affirmatively. Verbatim record, International Court of Justice 1/CR 84/23, 9 May 1984, pp. 9-14, reprinted in Briscoe, *Federal/State Offshore Boundary Disputes: The State Perspective*, speech delivered before the 18th Annual Law of the Sea Institute Conference, San Francisco, Calif. (Sept. 26, 1984); see also Malone, *The United States and the Law of the Sea*, 24 VA. J. INT'L L. 785, 802 (1984), stressing that the LOS Convention reflects, but is “entirely independent of,” customary international law.

102. The preamble to the Proclamation stated as follows:

WHEREAS the Government of the United States of America desires to facilitate the wise development and use of the oceans consistent with international law;

WHEREAS international law recognizes that, in a zone beyond its territory and adjacent to its territorial sea, known as the Exclusive Economic Zone, a coastal State may assert certain sovereign rights over natural resources and related jurisdiction; and

WHEREAS the establishment of an Exclusive Economic Zone by the United States will advance the development of ocean resources and promote the protection of the marine environment, while not affecting other lawful uses of the zone, including the freedoms of navigation and overflight, by other States . . .

Proclamation No. 5030, *supra* note 8. The Proclamation further provided that the rights asserted would be exercised in accordance with “the rules of international law.” *Id.* At the same time, the Proclamation reaffirmed the right of all states to exercise “the high seas freedoms of navigation, overflight, the laying of submarine cables and pipelines, and other internationally lawful uses of the seas” within this zone. *Id.*

103. Statement by the President, 19 WEEKLY COMP. PRES. DOC. 383, reprinted in 22 I.L.M. 464 (1983). Such provisions did not include those dealing with deep seabed mining.

freedoms in such areas under international law are respected by the coastal state.¹⁰⁴

This last paragraph is particularly significant. By its terms, the United States assured the world community that the United States would respect the EEZ claims of other states "that are consistent with international law as reflected in the Convention, if United States rights and freedoms in such areas under international law" were respected, in turn. This statement demonstrates the requisite degree of reciprocity and assumption of obligations which is required in order for such unilateral assertions of jurisdiction to evidence customary international law.

The reaction of other states to the United States assertion of an EEZ as being consistent with customary international law is, of course, significant. In this case, although several nations¹⁰⁵ raised concerns regarding the timing of the Proclamation and its possible impact on the negotiations then taking place in UNCLOS III, no state protested this declaration as being contrary to international law.

It is clear that the submerged lands of the EEZ off the states of the Union do "appertain" to the United States¹⁰⁶ and have been declared by Presidential Proclamation to be subject to United States "jurisdiction and control," as consistent with international law.¹⁰⁷ This presidential assertion alone is clearly sufficient to bring such submerged lands within the jurisdictional provision of the OCSLA.¹⁰⁸

104. OFFICE OF THE PRESS SECRETARY, WHITE HOUSE FACT SHEET ON UNITED STATES OCEAN POLICY, (Mar. 10, 1983) reprinted in 22 I.L.M. 461, 462 [hereinafter cited as WHITE HOUSE FACT SHEET]. This passage clearly reveals the element of reciprocity required for *opinio juris*, that is, the acceptance of duties as well as the claim of rights.

105. These states included Australia, Canada, New Zealand, Iceland, and The Netherlands. *11 States Okay U.S. Plan for EEZ: Canada Australia Object: U.S.S.R. Mum*, PLATT'S OILGRAM NEWS, Feb. 22, 1983. In the *Gulf of Maine* case, Canada accepted the legitimacy of the United States assertion of this EEZ, even though Canada has not elected to assert such maritime jurisdiction. 1984 I.C.J. at 294.

106. Since the portion of the EEZ contiguous to United States commonwealths, territories, and possessions is not off the coast of a state, this portion of the EEZ is not within the definition of the OCS under 43 U.S.C. § 1331(a). See 43 U.S.C. § 1301(a)(2), (g) (1982). Thus, such submerged lands do not presently fall within the leasing authority of the Department of the Interior under the OCSLA.

107. H.R. 2061 and S. 750 were introduced in March, 1983 during the 98th Congress to implement the EEZ Proclamation. These bills would have amended OCSLA section 1331(a), imposing a fixed outer limit to the OCS. For this and other reasons, the Justice, State, and Interior Departments recommended against their enactment.

108. This was the result intended by the President. In his State of the Union Address on January 25, 1984, President Reagan stated that "the Department of the Interior

The Presidential Proclamation on the EEZ stated that it would "not change existing United States policies concerning the continental shelf, marine mammals and fisheries, including highly migratory species of tuna which are not subject to United States jurisdiction" ¹⁰⁹ The accompanying statement by the President also declared that the newly announced EEZ policy would "not affect the application of existing United States law concerning the high seas or existing authorities of any United States government agency." ¹¹⁰

In further clarification, the Fact Sheet distributed in conjunction with the announcement of the EEZ included a statement that the Proclamation did not alter "existing policies with respect to the outer continental shelf and fisheries within the U.S. zone." After referring to the 1945 Truman Proclamation and the enactment of the Outer Continental Shelf Lands Act in 1953, the Fact Sheet states that "[t]he President's proclamation today incorporates existing jurisdiction over the continental shelf." ¹¹¹

This reference to the incorporation of "existing jurisdiction over the continental shelf," together with the statements that the application of existing policies and governmental agency authorities also would be unaffected by the Proclamation, have led some to argue that the jurisdictional provision of the OCSLA should not be construed as being enlarged in any manner by this declaration of jurisdiction and control over the EEZ. ¹¹² However, this argument mis-

will encourage careful, selective exploration and production of our vital resources in an exclusive economic zone within the 200-mile limit off our coasts" 20 WEEKLY COMP. PRES. DOC. 87, 91 (Jan. 25, 1984).

109. Proclamation No. 5030, *supra* note 8. With respect to the Proclamation's stated absence of effect of United States fisheries policies, the Fact Sheet accompanying the Presidential Proclamation and Statement describes the United States exercise fisheries management and conservation authority within the zone since 1976, under the Fishery Conservation and Management Act, 16 U.S.C. § 1801, mentioning that the United States had exercised certain other types of limited jurisdiction within the 200-mile zone. The Fact Sheet, like the Proclamation, only specifically described United States fisheries policy with respect to highly migratory species of tuna, over which the United States neither asserts nor recognizes coastal state jurisdiction. WHITE HOUSE FACT SHEET, *supra* note 104, reprinted in 22 I.L.M. 461.

110. Statement by the President, 19 WEEKLY COMP. PRES. DOC. 383 (Mar. 14, 1983), reprinted in 22 I.L.M. 464 (1983). This Statement by the President referred to two specific areas of United States policy which would not be affected by the Proclamation: 1) jurisdiction over marine scientific research within the EEZ; and 2) the United States commitment to continue to work through the International Maritime Organization "and other appropriate international organizations" on the problem of protecting the marine environment. The Statement also declared that the United States would continue to participate in international negotiations to develop a deep seabed mining regime, reasserting that deep seabed mining was a freedom of the high seas and that United States companies would be permitted to continue the exploration and exploitation of such resources.

111. WHITE HOUSE FACT SHEET, *supra* note 104, reprinted in 22 I.L.M. at 461.

112. Letter from Clifton E. Curtis, Center for Law and Social Policy, to David Russell, Acting Director of the Minerals Management Service, Department of the Interior (December 8, 1983) at A-9.

construes the intent behind these statements.

The statement that existing jurisdiction over the continental shelf was incorporated in the EEZ Proclamation deserves further consideration. First, "incorporation" does not in any sense imply "limitation." Rather, the statement was intended to clarify the fact that jurisdiction exercised by the United States under the OCSLA was entirely consistent with the broader rights being claimed by the United States over the EEZ (such as living resources).¹¹³

Secondly, the President's declaration of an EEZ did not actually expand the limits of the Department of Interior's jurisdiction under the OCSLA. Indeed, no change in the statutory language defining the OCS was necessary to accomplish this purpose, since the United States already had "jurisdiction and control" over this 200-mile zone by virtue of the United States inherent rights under the continental shelf doctrine.¹¹⁴ Thus, even if the Proclamation could somehow be construed as freezing agency authority, the Department of Interior had such jurisdiction prior to the Proclamation.

Customary international law and the 1983 Presidential Proclamation both support the conclusion that United States "jurisdiction and control" currently extend over a minimum 200-mile zone. International treaty law, in the form of the 1958 Convention, the final source of law generally defining the extent of United States jurisdiction and control over the 200-mile zone, further supports this conclusion.

113. The Fact Sheet and Statement accompanying the Proclamation contain similar statements that the Proclamation provided for United States jurisdiction over all mineral resources "out to 200 miles that are not on the continental shelf." Statement by the President, 19 WEEKLY COMP. PRES. DOC. 383, reprinted in 22 I.L.M. 464 (1983); accord WHITE HOUSE FACT SHEET, *supra* note 104, reprinted in I.L.M. 461. Such statements might suggest that the Department lacks jurisdiction over the Gorda Ridge. As previously discussed, however, customary international law recognizes the principle that every coastal state has, as a minimum, a legal continental shelf of 200 nautical miles irrespective of the physical shelf and that such sovereign rights are inherent. Since minerals within 200 miles of the coastline would be on the legal "continental shelf," the term "continental shelf," as used in the Fact Sheet and the accompanying Statement, cannot have been used in its legal sense.

114. Prior to the issuance of the EEZ Proclamation, the Minerals Management Service of the Department of the Interior issued a notice of jurisdiction asserting regulatory authority over the subsoil and seabed of the submerged lands in the Gorda Ridge area seaward of the territorial sea up to and including those lands "which admit of the exploitation of the natural resources of such submarine areas." However, such areas were construed as limited to the 200-mile zone, pending completion of a Department of Interior study on the limits of such authority. 47 Fed. Reg. 55,313 (1982), amended by 48 Fed. Reg. 2450 (1983).

The 1958 Continental Shelf Convention

The 1958 Continental Shelf Convention is the only multilateral treaty which applies to the delimitation of the outer edge of the continental shelf and is binding upon the United States.¹¹⁵ This treaty entered into force on June 10, 1964.¹¹⁶ The effect of the Convention as to parties is to define their claims to jurisdiction over the continental shelf.¹¹⁷ It should be stressed, however, that the Convention, by its own terms, does not limit claims under the EEZ doctrine in any manner.¹¹⁸

The question therefore arises as to the meaning of the Continental Shelf Convention's provision defining the legal shelf, since that provision binds the United States and other parties. The pertinent definition in the Convention is as follows:

For the purpose of these articles, the term "continental shelf" is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.¹¹⁹

115. Continental Shelf Convention, *supra* note 11. 54 states are parties to this Convention. U.S. DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 1985 (1985).

116. Under article VI, clause 2, of the United States Constitution, a self-executing treaty is part of the supreme law of the land. No further legislative action is required, and, as such, it supersedes prior inconsistent domestic legislation. *Cook v. United States*, 288 U.S. 102, 118-19 (1933). Congress may supersede an international agreement for purposes of domestic law if such an intention is clearly expressed; but such an action will not affect the international obligations of the United States under the treaty. *Cook*, 288 U.S. at 120; *accord Reid v. Covert*, 354 U.S. 1, 18 (1957); Vienna Convention on the Law of Treaties, Reg. No. 18232, *reprinted in* 8 I.L.M. 679 (1969) art. 27; RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 145 (1965); U.S. DEP'T OF STATE, PUB. NO. 8547, 14 DIGEST OF INTERNATIONAL LAW 316 (M. Whiteman 1970). However, as discussed more fully *infra*, no such inconsistency exists between the Continental Shelf Convention, customary international law, and the OCSLA. Two federal cases have considered the extent of United States jurisdiction over the outer continental shelf under the OCSLA, but in very limited contexts. *See United States v. Ray*, 423 F.2d 16 (5th Cir. 1970) (coral reefs on the United States continental shelf were held to be part of the seabed for purposes of the OCSLA and, therefore, within the exclusive jurisdiction of the United States to explore and exploit); *Treasure Salvors v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978) (a sunken vessel on the outer continental shelf was found not to be the type of "natural resource" of the seabed and subsoil subject to exclusive exploitation by the federal government under the OCSLA. For this reason, the vessel was not subject to the protection of the Antiquities Act because it was not on lands owned or controlled by the United States).

117. For the Continental Shelf Convention to have a wider application, the provisions in question would have to be accepted as customary international law.

118. *Gulf of Maine*, 1984 I.C.J. at 303.

119. Continental Shelf Convention, *supra* note 11, art. 1. For the history of this provision, see 1956 Report of the ILC, *supra* note 47; M. McDOUGAL & W. BURKE, *supra* note 35, at 695-99; 4 Whiteman, *supra* note 37, at 829-42.

The Convention further provides that the coastal state's "sovereign rights" over the continental shelf are for the purpose of exploration and exploitation of its natural resources.¹²⁰ Such rights are stated to be exclusive and inherent in the coastal state, requiring no assertion of jurisdiction to vest.¹²¹

The 1958 Continental Shelf Convention's use of the 200-meter depth contour did not provide the measure of certainty that had been anticipated.¹²² By 1970, technological advances had already permitted exploitation in water depths well beyond 200 meters.¹²³ As a result, the 200-meter definitional provision of the 1958 Convention had become "as obsolete as the dirigible" and with "neither geologic nor technologic nor legal significance . . ."¹²⁴ Thus, the alternative standard of exploitability has controlled since 1970 and has defined the outermost limits of the legal definition of the continental shelf under the Continental Shelf Convention.

The rapid technological advances of the 1960's and 1970's made it apparent that exploitation of the deep seabed of the ocean floors would be possible.¹²⁵ These advances made it critical to determine whether there was some implied limitation on the exploitability test

120. Continental Shelf Convention, *supra* note 11, art. 2(1).

121. *Id.* arts. 2(2), 2(3).

122. Concern regarding the impact of technological development on the usefulness of an exploitability standard was voiced during the proceedings of the Sixth Committee of the General Assembly in 1956, but these warnings were dismissed. See 4 Whiteman, *supra* note 37, at 839. The 200-meter depth contour also presented definitional problems. See Trumbull, Definitions of the Continental Shelf and Allied Features, paper prepared by the U.S. Geological Survey for use by the Department of State at the Geneva Conference on the Law of the Sea, 1958, US/CLS/SP 5, 3-5 (1958), cited in 4 Whiteman, *supra* note 37, at 815-20.

123. In 1969, a United States oil company drilled an exploratory well at 395 meters. For a review of the United States technical capabilities and practices at that time, see *Commerce Hearings*, *supra* note 43, at 83-84 ("Coastal-State Mineral Jurisdiction, and the Continental Margin: Survey of National Practice"), 102-04 (statement of Hon. Russell E. Train, Under Secretary, Department of Interior) (Sept. 24, 1969). In 1970 after these hearings concluded, Exxon drilled a well in 456 meters of water off the California coast. By 1983, Shell had drilled a well in the Atlantic Ocean in 1,965 meters of water. "Offshore Drilling Water Depth Records," dated 1984, prepared by Exxon Company, U.S.A., on file with the Minerals Management Service.

124. *Hearings Before the Subcomm. on Minerals, Materials, and Fuels of the Sen. Comm. on Interior and Insular Affairs*, 91st Cong., 2d Sess. 9 (1970). For a discussion of the exploitability standard and the problems it engendered, see Z. SLOUKA, INTERNATIONAL CUSTOM AND THE CONTINENTAL SHELF 101-21 (1968).

125. By 1982, the United States possessed the technology necessary to mine manganese nodules commercially in depths exceeding 15,000 feet, or approximately 4,500 meters. Based on such technology, the definition of the "Continental Shelf" could be construed as encompassing the deep oceans, limited only by the maximum depth capability of such nodule mining systems at the time in question.

of the 1958 Continental Shelf Convention. Phrased differently, was the application of the exploitability test limited to the continental margin or to some other limit, so that the coastal state would not be entitled to claim dominion over the natural resources of the deep seabed under the Continental Shelf Convention?¹²⁶ This question quickly narrowed to concern with the "adjacency" language of the Convention's definition: did the requirement of "adjacency" imply such a geographical restriction on this definition of the continental shelf, or did "adjacency" represent no more than a general requirement that the claimant state be the one (or one of the ones) contiguous to the submerged lands in question?

Generally, legal authorities interpreted "adjacency" as embodying the principle of the natural prolongation of the continental land mass of the coastal nation, to conclude that there was a fundamental geographical limitations.¹²⁷ Of these authorities, some argued that this limit was the edge of the continental margin,¹²⁸ while others maintained that the limit should be something less.¹²⁹ Yet others sug-

126. The 1970 Report of the Committee on Deep-Sea Mining of the International Law Association stated as follows: "The determination of the boundary between the continental shelf and ocean floor is urgent, because any further delay, taking into account the rapid progress of technology especially with regard to exploitation at greater depths, will result in large parts of the ocean floor coming within the scope of Article II owing to the operation of the exploitability test." INTERNATIONAL LAW ASSOCIATION, REPORT OF THE COMM. ON DEEP-SEA MINING 11, in *Report of the Special Subcomm. on Outer Continental Shelf to the Comm. on Interior and Insular Affairs*, 91st Cong., 2d Sess. 110 (Comm. Print 1970) [hereinafter cited as *Report of the Special Subcomm.*].

127. For example, the Interim Report of the Committee on Deep Sea Mineral Resources of the American Branch of the International Law Association (ILA) adopted this view and rejected any need to amend the Continental Shelf Convention's definition. *Report of the Special Subcomm.*, *supra* note 126, at 79-80 app. E. The National Petroleum Council also interpreted "adjacency" as requiring the exclusion of the abyssal ocean floor from the continental shelf's definition under the 1958 Continental Shelf Convention. *Commerce Hearings*, *supra* note 43, at 93. The American Bar Association's position was similar to that of the Interim Report of the ILA *Hearings Before the Special Subcomm. on Outer Continental Shelf of the Sen. Comm. on Interior and Insular Affairs*, 91st Cong., 1st and 2d Sess. 10 (1969).

128. The Report of the Special Subcommittee on the Outer Continental Shelf, as well as the American Branch of the ILA, concluded that "adjacency" would limit the ultimate reach of the exploitability test "at any given time" to "encompass the entire continental margin." *Report of the Special Subcomm.*, *supra* note 126, at 3.

129. This Interim Report of the ILA Committee on the Deep Sea Mineral Resources stated that "[a]s a general rule, the limit of adjacency may reasonably be regarded as coinciding with the foot of the submerged portion of the continental land mass." The report then suggested equating this line with the 2,500 meter isobath, because of the difficulty of determining the foot of the submerged land mass "from director observation." *Id.* at 80. However, the 1970 Report of the Deep-Sea Mining Committee of the ILA stated that the committee was unable to make any recommendation as to the proper outer limit of the continental shelf under the Continental Shelf Convention. *Id.* at 103; see also Finlay, *Realism vs. Idealism as the Key to the Determination of the Limits of National Jurisdiction over the Continental Shelf*, in *LIMITS TO NATIONAL JURISDICTION OVER THE SEA* 75, 111 (G. Yates & J. Young eds. 1974) (concluding that the effect of the adjacency requirement was to limit the outer edge of the continental shelf to the continental terrace (the shelf and slope)).

gested that "adjacency" might add no meaningful limitation at all.¹³⁰

Questions raised by the Convention's somewhat ambiguous language¹³¹ and the resultant proliferation of unilateral and varied national claims¹³² led to the desire for a new international agreement to establish a fixed outer limit for the continental shelf.¹³³ This desire, coupled with the failure of the Convention to deal adequately with fisheries jurisdiction, the lack of an agreed maximum breadth for the territorial sea, the problem of navigational rights in international straits, and the perceived need to establish an international deep seabed mining regime, led to the Third United Nations Conference on the Law of the Sea (UNCLOS III).¹³⁴

The 140-odd nations attending UNCLOS III quickly rejected the exploitability test of the Continental Shelf Convention in favor of a different approach to defining the continental shelf. Nonetheless, there still remains the question of how the exploitability test should be construed as to parties to the Continental Shelf Convention, such as the United States.¹³⁵ Certain basic principles of treaty construc-

130. For a discussion of some of the various theories and the 1969 position of the Department of the Interior, see *Commerce Hearings*, *supra* note 43, at 106-11.

131. For a brief discussion of some of the problems regarding application of the exploitability definition, see Goldie, *Delimiting Continental Shelf Boundaries*, in *LIMITS TO NATIONAL JURISDICTION OVER THE SEA* 3, 47-48 (G. Yates & J. Young eds. 1974).

132. 39 nations had ratified the Continental Shelf Convention as of September 1969. Another eight nations had adopted the Convention's definition for some purposes, and another three had adopted some form of the exploitability test. However, 38 countries had adopted different definitions or no definition at all. See *Commerce Hearings*, *supra* note 43, at 80. Unilateral assertions of jurisdiction continued, and throughout the legislative record of this period there were expressions of concern that such unilateral claims would impinge upon the freedom of the high seas with respect to the water column. See, e.g., *Commerce Hearings*, *supra* note 43, at 22-23 (statement of the Hon. G. Warren Nutter, Assistant Secretary of Defense for International Security Affairs, Department of Defense: "These are all observable examples of the growing chaos in the law of the sea.").

133. See *Commerce Hearings*, *supra* note 43, at 106-11 (statement of Hon. Russell E. Train, Under Secretary, Department of the Interior: "In any event, a precise boundary must be agreed upon if the development of a set of substantive rules related to exploration and exploitation of deep seabed resources is to be a productive exercise.") and *id.* at 4 (Statement of Joseph N. Greene, Jr., Deputy Assistant Secretary for International Organization Affairs, Department of State). Accordingly, the State Department recommended that no Congressional action be taken at that time. *Id.* at 7-8; accord *Commerce Hearings*, *supra* note 43, at 23 (G. Warren Nutter, Assistant Secretary of Defense for International Security Affairs).

134. See Nye, *Political Lessons of the New Law of the Sea Regime*, in *LAW OF THE SEA: U.S. POLICY DILEMMA* 113, 135 (B. Oxman, D. Caron & C. Buder eds. 1983).

135. The relationship of the Continental Shelf Convention to the LOS Convention, in the event it becomes effective, is the subject of some uncertainty. For a brief discussion of some of the issues involved, see Gamble, *The Significance of Signature to the 1982*

tion embodied in the Vienna Convention on the Law of Treaties are of assistance.¹³⁶

The Vienna Convention on the Law of Treaties codifies the principal rules of interpretation of treaties as recognized in customary international law.¹³⁷ Subsection 1 of article 31 of the Vienna Convention provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹³⁸ Subsection 3 further requires that, in addition to any subsequent agreements between the parties, account be taken of “(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; [and] (c) any relevant rules of international law applicable in the relations between the parties.”¹³⁹

Montego Bay Convention of the Law of the Sea, 14 OCEAN DEV. & INT'L L. 121 (1984).

136. Vienna Convention on the Law of Treaties, Reg. No. 18232, reprinted in 8 I.L.M. 679 (1969) [hereinafter cited as Vienna Convention]. The Vienna Convention was the result of a 110-nation conference spanning many years and one in which the United States took a very active role. The treaty was signed by the United States on April 24, 1970 and submitted to the Senate in late 1971. It has not been ratified, however, due to two principal concerns: 1) the convention's treatment of executive agreements as indistinguishable from treaties ratified by the Senate, posing constitutional concerns, and 2) uncertainties regarding the *jus cogens* doctrine as embodied in the Convention. *Congressional Research Service, 98th Cong., 2d Sess., Treaties and Other International Agreements: The Role of the United States Senate* 15-16 (Sen. Print 98-205 1984) [hereinafter cited as *Treaties and Other International Agreements*]. The United States generally recognizes that the Vienna Convention codifies customary international law. *Id.* In the President's transmittal letter to the Senate, dated November 22, 1971, reprinted in 11 I.L.M. 234 (1972), it was stated that this convention satisfied the need for “clear, well-defined, and readily ascertainable rules of international law applicable to treaties” As of May 10, 1984, 63 countries had ratified or acceded to the Vienna Convention. *Treaties and Other International Agreements, supra*, at 312-13; *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1982* 13-14 (1983) (U.N. Pub. Sales No. E.83.V.6).

137. Arbitral Tribunal for German External Debts: Judgment in the Case of Belgium, France, Switzerland, the United Kingdom and the United States v. the Federal Republic of Germany, May 16, 1980, reprinted in 19 I.L.M. 1357, 1370 (1980). Although the United States is not a party to this Convention, the United States has accepted this general proposition. *Id.* The Vienna Convention is binding to the extent it codifies customary international law, but it is not otherwise controlling as to nonparties, nor is it retroactive.

138. Vienna Convention, *supra* note 136, at 691-92. One commentator suggests that proper construction of ambiguous treaty provisions is that “the reasonable meaning is preferred to the unreasonable, the more reasonable to the less reasonable, the consistent meaning to the meaning inconsistent with generally recognized principles of International Law and with previous treaty obligations towards third States.” 1 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE, § 554, at 953 (H. Lauterpacht ed. 1955).

139. Vienna Convention, *supra* note 136, at 692. *COMPARE* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 147 (1965), listing factors (in no particular order) to be taken into account when interpreting a treaty. Item (h) of the Restatement's list is “the compatibility of alternative interpretations of the agreement with (i) the obligations of the parties to other states under general international law and other international agreements of the parties” Item (f) is “the subsequent practice of the parties in the performance of the agreement, or the subsequent practice of

With respect to subsequent practice as evidencing the parties' agreement as to the meaning of a treaty provision, it is sufficient under the Vienna Convention to establish that each party has at least tacitly accepted the practice.¹⁴⁰ Applying this principle, if all the parties to the Continental Shelf Convention had subsequently accepted the 200-mile zone of the EEZ and continental shelf doctrines, even implicitly, this would evidence their agreement as to the proper interpretation of the Convention's definition of the continental shelf. However, since not all of the parties to the Continental Shelf Convention may be said to have acted in such a manner,¹⁴¹ the subsequent practice of the parties to the Convention will not directly resolve this question.

Customary international law must be considered when interpreting the meaning of an ambiguous term in a treaty, such as the term "adjacent" in the Continental Shelf Convention's exploitability definition.¹⁴² In a recent case, a chamber of the ICJ stated that general

one party, if the other party or parties knew or had reason to know of it." *Id.* Article 32 of the Vienna Convention provides that "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion," may be used to confirm a treaty construction. Vienna Convention, *supra* note 136, at 692. Since at the time of the preparatory work for the 1958 Convention, the EEZ doctrine was only in very early stages of development, as was the concept of a minimum breadth for the continental shelf, resort to such supplementary materials is not particularly helpful in this case.

140. T. ELIAS, *THE MODERN LAW OF TREATIES* 76 (1974). The 1980 Draft of the RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES of the American Law Institute adopts a contrary position, denying that subsequent practice may modify a treaty.

141. As of January 1, 1985, 54 countries were parties to the 1958 Convention. *TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE JANUARY 1, 1985* 265 (1985). Of these, at least 25 have asserted EEZs or have signed or otherwise acceded to the LOS Convention. *See* U.S. DEP'T OF STATE, *National Claims to Jurisdictions, LIMITS IN THE SEA* NO. 36 2-6 (1985). Thus, almost half of the parties to the Continental Shelf Convention have recognized the coastal nation's rights to a minimum 200-mile continental shelf and EEZ.

142. I L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 554, § 952-53 (H. Lauterpacht ed. 1955); I G. SCHWARZENBERGER, *INTERNATIONAL LAW* 529 (1957); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 147 comment h, at 454 (1965) ("International agreements are to be interpreted within the general framework of the international legal order."). The application of customary international law in construing an ambiguous treaty provision under the principles of general international law is distinct from the question of whether subsequent developments in customary international law may terminate or modify a conflicting treaty provision. Note, in this connection, that some authorities have adopted the position that later developments in customary international law will supersede such inconsistent treaty provisions. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 comment j, at 28 (Tent. Draft No. 1, 1980). *Contra* Chessman, *On Treaties and Custom: A Commentary on the Draft Restatement*, 18 INT'L LAW. 421, 437 (1984).

conventions codifying the law of the sea "must, moreover, be seen against the background of customary international law and interpreted in its light."¹⁴³

Furthermore, it is settled that the customary international law standard against which the Continental Shelf Convention's definition must be construed is that which prevails at the time of interpretation, not that which existed as of the effective date. The ICJ addressed this problem in another context:

Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant - "the strenuous conditions of the modern world" and "the well-being and development" of the peoples concerned - were not static, but were by definition evolutionary, as also, therefore, was the concept of the "sacred trust" [I]ts interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.¹⁴⁴

When customary international law is employed in this manner to construe the otherwise ambiguous exploitability term, a manifestly reasonable result is reached.¹⁴⁵ As previously discussed, customary international law has recognized for many years that the concept of natural prolongation of the coastal state's land mass is a basic principle underlying the continental shelf doctrine.¹⁴⁶ However, this doctrine also includes the 200-mile minimum breadth concept.¹⁴⁷ Thus, when the principles of customary international law regarding the

143. *Gulf of Maine*, 1984 I.C.J. at 292.

144. Legal Consequences for States of the Continental Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J. 16, 31 (Advisory Opinion) (emphasis added); accord T. ELIAS, *THE MODERN LAW OF TREATIES* 77 (1974); compare RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 147 comment h, at 454 (1965) (stating that international agreements "are to be interpreted within the general framework of the international legal order").

145. Customary international law is also part of the domestic law of the United States to the extent that it "is universally recognized or has at any rate received the assent of [the United States]" 1 L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* § 21a, at 39 (H. Lauterpacht ed. 1937). This statement is subject to the proviso that customary international law may be superseded by act of Congress with respect to its domestic application. *Id.* at 42. Employing this principle, any domestic statute using the language of an international agreement binding upon the United States directly or indirectly should be construed as consistent with customary international law, absent the clear intention to supersede international law domestically.

146. See *Tunisia/Libya Continental Shelf*, 1982 I.C.J. at 43-54; *North Sea Continental Shelf*, 1969 I.C.J. at 31-32. While arguably this limit may not be defined in customary international law at this time, article 76 of the LOS Convention furnishes the only broadly recognized legal definition of this concept. LOS Convention, *supra* note 10, art. 76.

147. Significantly, no party to the Continental Shelf Convention protested the United States assertion of the 200-mile EEZ as violating the United States treaty obligations under this 1958 Convention.

continental shelf are read into the exploitability/adjacency definition of the Convention, the continental shelf, as defined by the Continental Shelf Convention, extends for a minimum distance of 200 nautical miles from the coast and beyond to the extent such lands admit of exploitation and are within the maximum permissible limit of the continental shelf, if any, under customary international law. Through this interpretative process, the Convention's definition of the continental shelf accords with customary international law, recognizing United States "jurisdiction and control" over the 200-mile zone off its shores.

CONCLUSION

There is today very little question that all coastal nations have exclusive jurisdiction over the natural resources of the 200-mile maritime zone off their shores. Both the EEZ and the continental shelf doctrines, as recognized in customary international law, support such jurisdictional claims. The issues that will pose the most serious problem for the international community in the coming years will be how to define the limit of the legal continental shelf where it exceeds this 200-mile zone and the rights and obligations of the coastal state as against the community of nations.

