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The 1982 Convention and Customary Law of the Sea: Observations, a Framework, and a Warning†

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Now that more than 130 States have signed the 1982 Law of the Sea Convention, inquiry into the relationship between the Convention and customary law of the sea becomes especially important. Because of the Convention's comprehensive and heterogeneous nature, its provisions will differ in the degree to which they codify existing customary international law. This article warns against the simple inquiry of whether the 1982 Convention codifies existing customary law, and proposes a three-category in which to analyze the Convention's provisions.

INTRODUCTION

December 10, 1982, when 117 States signed the United Nations Convention on the Law of the Sea,[1] will be remembered as one of the most important dates in the history of international law. Never have the United Nations, foreign offices, and, for that matter, scholarly literature been so preoccupied with a treaty-creating process.

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1. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc. A/CONF.62/122 [hereinafter cited as 1982 Convention].

Now that the treaty has been signed, a new developmental period in the law of the sea has begun. Regardless of the time required for the 1982 Convention to take effect,[2] the law of the sea has been fundamentally and irreversibly transformed. The 1982 Convention, the most comprehensive code of the law of the sea ever drafted, will have an immense influence on the behavior of States; the implications for customary law[3] of the sea are profound and far-reaching.

Scholars began examining the importance and complexity of the problem addressed in this article — the relationship between the 1982 Convention and customary law of the sea — even before the Convention approached final form.[4] A natural tendency exists to oversimplify the issue; to wit, some researchers simply question whether the 1982 Convention is a codification of customary international law. Such a question may be germane for simpler, less comprehensive conventions. But even the most cursory look at the 1982 Convention suggests that a blanket yes or no answer is inappropriate. Instead, individual provisions must be examined to determine how each relates to customary international law. At least three different relationships exist between the 1982 Convention and customary law. The 1982 Convention may:

1. reinforce traditional customary law of the sea by repeating rules embodied in the 1958 Law of the Sea Conventions;
2. foster new customary law by giving written expression to customary law that has developed since 1958, often in contradiction to the 1958 Conventions; or
3. direct the development of future customary law of the sea by giving expression to concepts not yet accepted as customary law but which are likely to become part of that law.

Application of these three categories to the provisions of the Convention has very practical importance. For instance, the United States, while refusing to sign the 1982 Convention, considers many provisions to be binding as customary law.[5] The framework proposed in this article can be used to examine the legality of the United States' "pick-and-choose" approach.[6] Although all provisions of the

2. The 1982 Convention requires 60 parties to enter into force, *id.* art. 308. As of October 5, 1983, the following States had ratified the Convention: Figi, Ghana, Jamaica, Mexico, Namibia, Zambia, Bahamas, Belize, and Egypt.

3. Customary law is defined as "a general practice accepted as law." J.L. BRIERLY, THE LAW OF NATIONS 60 (1963).

4. *Eg.*, Howard, *The Third United Nations Conference on the Law of the Sea and the Treaty/Custom Dichotomy*, 16 TEXAS INT'L L.J. 321 (1981); Fleming, *Customary International Law and the Law of the Sea: A New Dynamic*, in LAW OF THE SEA: STATE PRACTICE IN ZONES OF SPECIAL JURISDICTION 489 (T. Clingan ed. 1982).

5. U.N. Doc. A/CONF.62/PV.192, at 2 (1983) (statement by Mr. Clingan, U.S. Delegation).

6. *See infra* text accompanying note 72.

1982 Convention do *not* fit clearly and unambiguously into one of the three mentioned categories, the suggested analysis provides a workable framework for examining most of the 1982 Convention.[7]

Before applying the three categories to certain provisions of the 1982 Convention, this article will discuss the concept of customary international law and how it may be germane to the Convention. Following a look at a few provisions of the Convention, the article will examine two phenomena that may shed light on the relationship between the Convention and customary law: (a) differing State perceptions of the customary law content of the 1982 Convention, and (b) recent national legislation on seabed mining. The relationship between the 1982 Convention and customary international law is an organic, interactive process that will preoccupy international legal scholarship for at least the rest of this decade. This article offers a framework for analysis coupled with examples of possibly developing trends. Any attempt now at a definitive treatment of this issue would be impossible.

CUSTOM-TREATY RELATIONSHIPS AND THE LAW OF THE SEA

Article 38 of the Statute of the International Court of Justice states that:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it shall apply:
> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
> (b) international custom, as evidence of a general practice accepted as law;
> (c) the general principles of law recognized by civilized nations . . . .[8]

The International Court of Justice formulation, while technically correct, is unfortunate in two principal ways. First, the organization of article 38 suggests that treaty and custom are separate and unrelated sources of international law while they are, in fact, closely linked.[9] Second, the statute, not surprisingly since it is a legal docu-

7. Categorizing the Convention's provisions can become very complicated depending upon the rigor of one's categorical definitions. For example, provisions in Part XI of the 1982 Convention that establish organizational machinery will remain strictly conventional and not part of customary law since all participation in the organization will be by parties to the Convention under Convention terms only. 1982 Convention, note 1, arts. 156-85.

8. I.C.J. Stat. art. 38, *reprinted in* I. BROWNLIE, BASIC DOCUMENTS IN INTERNATIONAL LAW 276 (2d ed. 1972).

9. Gamble, *The Treaty/Custom Dichotomy: An Overview*, 16 TEXAS INT'L L.J. 305, 307 (1981).

ment, obscures the difficulties attendant with evaluating custom as a source of law. Several leading legal scholars have considered the interrelationship between custom and treaty. The International Law Commission put the matter succinctly:

> Perhaps the differentiation between conventional international law and customary international law ought not to be too rigidly insisted upon, however. A principle or rule of customary international law may be embodied in a bipartite or multipartite agreement so as to have, within the stated limits, conventional force for the States parties to the agreement so long as the agreement is in force; yet it would continue to be binding as a principle or rule of customary international law for other States.[10]

Probably the most sophisticated scholarship about the custom-treaty relationship was by Judge Richard Baxter. He focused primarily on "the probative force" of multilateral treaties as evidence of customary law. Baxter analyzed treaties that were "declaratory of customary international law" by: (a) recognizing a rule that existed prior to the treaty, or (b) "being the *fons et origo* of a rule of international law which subsequently secured the general assent of States and thereby was transformed into customary law."[11] Baxter also indicated other types of custom-treaty interaction:

> 1. The creation of usages through multilateral treaties, as, for example, the adoption of a system of diplomatic ranks under the influence of the regulations adopted at the Congress of Vienna.
> 2. The influence of treaties in breaking down the barriers of strict State sovereignty . . . indicat[ing] that the matter is becoming one of international concern and is gradually ceasing to be a question within the domestic jurisdiction of States.
> 3. The role of multilateral treaties as accumulated wisdom. A multilateral treaty may . . . embody a formula or a convenient solution to a legal problem that may commend itself to other States in the solution of like problems. . . .
> 4. The exchange, through a process of bargaining, of economic or political rights, as under the General Agreement on Tariffs and Trade, and the establishment of international organizations through multilateral treaties.
> 5. The accretion about the constitutive instruments of international organizations of a body of customary international law having to do with the internal regulation, the functions, and the competence of the organization. . . .

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10. Report of the International Law Commission to the General Assembly, *reprinted in* [1950] 2 Y.B. INT'L L. COMM'N 368, U.N. Doc. A/CN.4/SER.A/1950/ ADD.1. *See also* Bos, *The Recognized Manifestations of International Law: A New Theory of Sources*, 20 W. GERMAN Y.B. INT'L L. 74 (1977). Professor Sørensen went into somewhat more detail in his description of this "mixed regime":

> Some rules of international law then are of a mixed sort: conventional as regards states parties to treaties in which they are laid down, and customary as regards others. This is far from unusual. It is a situation which constantly arises in connection with codification, as also where a practice originally based on particular treaties acquires those characteristics of generality and continuity which the process of creation of customary rules demands.

Virally, *The Sources of International Law* in MANUAL OF PUBLIC INTERNATIONAL LAW 129 (M. Sørenson ed. 1968).

11. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, BRITISH Y.B. INT'L L. 277 (1968).

> 6. The creation of customary rights under international law, whereby regimes established pursuant to multilateral treaties are recognized and are respected by those States that are not party to the instruments.[12]

Baxter's detailed framework, although powerful and convincing, is probably too cumbersome to apply to the 1982 Convention. A decade of international legal scholarship will be necessary to accomplish this ambitious goal because, among other reasons, the law of the sea is still in such a state of flux. But Baxter's work does highlight the need to address this research problem, while burying forever any notion that researchers need only ask the one dimensional, general question, "Is the 1982 Convention declaratory of customary international law?"

Scholars have widely noted the importance of examining what multilateral treaties themselves say about their relationship to customary international law.[13] Often treaties explicitly declare (or codify) customary international law.[14] One of the best examples of this phenomenon is the 1958 Geneva Convention on the High Seas which "[desires] to codify the rules of international law relating to the high seas."[15] The Vienna Convention on the Law of Treaties is even more explicit. The preamble states that "the codification and progressive development of the law of treaties *achieved* in the present Convention will promote the purposes of the United Nations set forth in the Charter . . . ."[16] But textual references asserting codification of customary international law must be examined critically. Some chance exists that the references may be attempts (albeit usually benevolent) to disguise the creation of new law. Baxter suggests other ways, apart from an explicit reference, to indicate that a treaty is declaratory of customary international law. The *travaux preparatories* may indicate that all or part of the treaty was intended to codify customary international law, or the "terms of a particular article" may be consonant with existing customary law.[17]

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12. *Id.* at 276-77.
13. *Id.* at 278.
14. *See* Gamble, *supra* note 9, at 310-11.
15. Convention on the High Seas, Apr. 29, 1958, preamble, 13 U.S.T. 2312, 2314, T.I.A.S. No. 5200, 450 U.N.T.S. 82, 82 [hereinafter cited as Convention on the High Seas].
16. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, preamble, U.N. Doc. A/CONF.39/27 (1969), *reprinted in* 63 AM. J. INT'L L. 875 (1969) (entry into force Jan. 27, 1980) (emphasis added).
17. Baxter, *supra* note 11, at 290. Most treaties say nothing about their relationship to customary law. *Id.* at 287. Hardly necessary and of little analytical value are clauses affirming that "the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention." This

Before turning more specifically to the law of the sea, the close and interactive relationship between treaty and custom should be reiterated. The two possibly stand as the principal sources of international law, both attempting to "work" with one taking up the slack when the other is less able.[18] Brian Flemming put the issue clearly:

> The heart of the theoretical problem which we face today is to be found in relationship of treaties to custom because, if the revival or renewal of customary international law is to have any meaning at all, there must be a consistent theoretical relationship of one principal form of law creation to the other. They can neither travel in watertight compartments nor can they necessarily always be sequential in the relationship of one to the other. The relationship must be viewed as an organic one and a dynamic one or else one can wind up having a theory which has no meaning whatever in the real world.[19]

Most of the general observations of the custom-treaty relationship probably will be applicable to the 1982 Convention. But examining how the law of the sea might be different or idiosyncratic is desirable. Traditionally, the law of the sea developed mostly through custom, and was "one of the most settled areas of international law."[20] The 1982 Convention, as many have observed, owes its genesis to the confluence of: (a) many more participating States, most of which were developing nations; and (b) technology that easily allows the use and abuse of the oceans.[21] These differences warn that the custom-treaty dynamic in the 1982 Convention should not be oversimplified. But MacRae did exactly that in stating, "The United Nations Law of the Sea Treaty, despite protestations to the contrary, has codified with almost unanimous international consent, customary law of the sea."[22]

As a general proposition, MacRae's statement is accurate, but more precision is required. The complexity of the 1982 Convention eschews such facile statements. "UNCLOS III has created a 'cosmic legal soup' which has fertilized and stimulated the growth of customary international law in a way not seen for centuries."[23] The following section will offer some observations about how that soup is cooking and who might consume it.

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clause was adopted by the Vienna Convention on Diplomatic Relations, *done* Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95, 96; Gamble, *supra* note 9, at 310. Some treaties deliberately create new law different and/or in conflict with customary international law.

18. Gamble, *supra* note 9, at 317-18.
19. Flemming, *supra* note 4, at 494.
20. *Id.* at 497.
21. *Id.*
22. MacRae, *Customary International Law and the United Nations' Law of the Sea Treaty*, 13 CAL. W. INTERNAT'L. L. J. 181, 221-22 (1983).
23. Flemming, *supra* note 4, at 498.

THE PROVISIONS OF THE 1982 CONVENTION

At this very early stage in the interaction between the 1982 Convention and customary international law, spelling out how each provision relates to customary international law is impossible. Instead, this article will examine each of the three previously mentioned categories of customary law and illustrate how certain provisions might fit fairly comfortably into each category.[24]

In the 1982 Convention, like many modern conventions, relatively few clauses explicitly deal with the relationship between the new instrument and other sources of international law. Perhaps most striking about the 1982 Convention is the lack of direct references to custom. Custom is alluded to at the *very* end of the preamble where the Convention "[affirms] that matters not regulated by this Convention continue to be governed by the rules and principles of general international law."[25] Another reference is in section 1, where the Convention states that "sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law."[26] Moreover, the first paragraph of the preamble begins, "*Prompted* by the desire to settle, in a spirit of mutual understanding and co-operation, all issues relating to the law of the sea . . . ."[27] If the 1982 Convention deals with *all* law of the sea issues, what role remains for custom? Although the 1982 Convention gives little explicit attention to custom, the importance of looking at the various possible relationships is not diminished.

Reinforcing Traditional Customary Law of the Sea

The 1958 Conventions, with the possible exception of the Convention on Fishing and Conservation of Living Resources of the High Seas,[28] took a very cautious approach that usually codified existing

24. Frequent reference shall be made to the 1958 Conventions since these often serve as a benchmark against which the new provisions can be measured. *See supra* note 28.

25. 1982 Convention, *supra* note 1, at preamble.

26. *Id.* art. 2, para. 3. The Convention makes very few other references to custom. A reference logically could have been placed towards the close of the Convention, where article 311 discusses the 1982 Convention's relationship with other conventions. But no reference was made. *See id.* art. 311.

27. *Id.* at preamble (emphasis in original).

28. The four Geneva Conventions of 1958 are: Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205; Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82; Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311; Convention on Fishing and Conserva-

law. The new law that was developed generally has "solidified" into custom since 1958. The degree to which many of the 1958 provisions have been retained in the 1982 Convention may be surprising. For example, the first substantive part of the 1982 Convention deals with the territorial sea and the contiguous zone. Most of the operative definitions are identical to those in the 1958 Convention on the Territorial Sea and the Contiguous Zone:

> The sovereignty of a coastal State extends, beyond its land territory and internal waters and in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea . . . .[29] This sovereignty extends to the air space over the territorial sea as well as its bed and subsoil.[30]

Of course, the 1958 Convention on the Territorial Sea and the Contiguous Zone failed to specify a breadth for the territorial sea, while the 1982 Convention stipulates a twelve nautical mile limit.[31] But in general, the territorial sea provisions in the 1982 Convention are reflective of traditional customary international law. To a degree, this reflectivity applies to the right of innocent passage through the territorial sea, although the 1982 Convention goes further than the 1958 Convention by listing activities that might make passage prejudicial.[32]

The provisions of the 1982 Convention dealing with the high seas are also similar to the rules laid down by the 1958 Convention.[33] Of course, the portion of the oceans that constitutes high seas today is much less than in 1958. The list of freedoms of the high seas in the 1982 Convention includes the four "leftovers" from 1958[34] plus two new freedoms: (1) the "freedom to construct artificial islands and other installations permitted under international law, subject to part VI;"[35] and (2) the "freedom of scientific research, subject to Parts

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tion of Living Resources of the High Seas, Apr. 29, 1958, 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285.

29. 1982 Convention, *supra* note 1, art. 2, para. 1; The 1958 Convention on the Territorial Sea is nearly identical: The Sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea. Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, art. 1.1, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205, 206 [hereinafter cited as Convention on the Territorial Sea].

30. 1982 Convention, *supra* note 1, art. 2, para. 2; Convention on the Territorial Sea, *supra* note 29, art. 2, states: "The sovereignty of a coastal State extends to the air space over the territorial sea as well as to its bed and subsoil."

31. 1982 Convention, *supra* note 1, art. 3.

32. *Id.* at art. 17; Convention on the Territorial Sea, *supra* note 29, art. 14, para. 1.

33. One significant difference is the lack of an overarching provision in the 1982 Convention about codifying rules. *Compare* 1982 Convention, *supra* note 1 *with* Convention on the High Seas, *supra* note 15, arts. 27-29.

34. The four traditional freedoms are those of navigation, fishing, laying submarine cables and pipelines, and overflight. Convention on the High Seas, supra note 15, art. 2.

35. 1982 Convention, *supra* note 1, art. 87, para. 1(d).

VI and XIII."[36]

These changes represent merely a "finetuning" adjustment; the customary rules remain intact. In fact, the newer freedoms arguably could have been inferred from the 1958 Convention which stated that the four traditional freedoms "and others which are recognized by the general principles of international law shall be exercised by all States."[37]

Another example of the 1982 Convention's similarity to the 1958 high seas provisions is article 91, dealing with the nationality of ships:

> 1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.[38]

The wording is virtually identical in both conventions, except that the 1958 version contains an additional statement: "in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."[39] The 1982 Convention does contain a nearly identical provision with much more detail elsewhere,[40] but this stipulation is no longer associated directly with the "genuine link" concept.

Often in this first category, treaty law is used to refine custom or to enunciate customary law more precisely after being tested over time. In fact, many portions of the 1982 Convention appear to be operating clearly within the bounds created by the 1958 Conventions and custom, but with more specificity and certainty. Custom sketches the broad legal outline; the 1982 Convention fills in the details.

Fostering New Customary Law through Written Expression

Many of the provisions falling within the second category are derived from claims either different from or substantially greater than those permitted under the 1958 Conventions. Conspicuous examples are transit passage through international straits, the regime for archipelagic States, and, of course, the exclusive economic zone (EEZ). Each of these examples represents either significant changes from the 1958 Conventions or, more often, issues that were not dealt

36. *Id.* art. 87, para. 1(f).
37. Convention on the High Seas, *supra* note 15, art. 2.
38. 1982 Convention, *supra* note 1, art. 91, para. 1; Convention on the High Seas, *supra* note 15, art. 5, para. 1.
39. Convention on the High Seas, *supra* note 15, art. 5, para. 1.
40. 1982 Convention, *supra* note 1, art. 94, para. 4.

with in 1958.

For example, the need for transit passage provisions developed since 1958 from wider claims for territorial seas which could close many international straits, and the belief that a new balance was needed between navigation and coastal State rights. The transit passage provisions in the 1982 Convention apply "to straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone."[41] The Third United Nations Conference on the Law of the Sea (UNCLOS III) hammered out a compromise that, while markedly different from anything contained in the 1958 Conventions, probably already is entering customary law. The relevant provisions state:

> all ships and aircraft enjoy the right of transit passage, which shall not be impeded; except that, if the strait is formed by an island of a State bordering the strait and its mainland, transit passage shall not apply if there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience . . . .[42]
>
> Transit passage means the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait . . . .[43]
>
> Ships and aircraft, while exercising the right of transit passage, shall:
> (a) proceed without delay through or over the strait;
> (b) refrain from any threat or use of force . . . ;
> (c) refrain from any activities other than incident to their normal modes of continuous and expeditious transit . . . .[44]
>
> . . .
>
> In conformity with this Part, States bordering straits may designate sea lanes and prescribe traffic separation schemes for navigation in straits where necessary to promote the safe passage of ships.[45]

Perhaps most intriguing about this section of the 1982 Convention is the clear balance struck between the demands of maritime interests (free passage almost anywhere) and coastal interests (control of adjacent waters). In fact, the compromise is so clear and definite that the balancing of claim and counterclaim usually occurring in the developmental process of customary international law appears to occur *within* the text of the 1982 Convention. The virtually unanimous support of the transit passage provisions by conference participants after years of negotiations is evidence of the provisions' emerging status as customary law.[46]

The 1958 Conventions also paid almost no attention to archipe-

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41. *Id.* art. 37.
42. *Id.* art. 38, para. 1.
43. *Id.* art. 38, para. 2.
44. *Id.* art. 39, para. 1(a), (b), (c).
45. *Id.* art. 41, para. 2.
46. *See* U.N. Doc A/CONF.62/PV.192, at 2 (1983) (Statement of U.S. Delegation).

lagic States.[47] Archipelagic States had insufficient numbers and political power to influence the 1958 Conventions. But during UNCLOS III, archipelagic States reached compromises that assured them special status. The 1982 Convention states:

> 1. An archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1.
> 2. The length of such baselines shall not exceed 100 nautical miles, except that up to 3 per cent of the total number of baselines enclosing any archipelago may exceed that length, up to a maximum length of 125 nautical miles.[48]

Of course, the compromise was "sold" to non-archipelagic States by the guarantee of innocent passage[49] and archipelagic sea lanes passage.[50] Movement of this compromise into the realm of customary international law can be inferred from the care taken to reach the compromise and the paucity of objections to the result.

Part V of the 1982 Convention deals with the exclusive economic zone, perhaps the clearest example of the Convention giving written expression to new and rapidly growing State practice. In fact, the 1982 Convention arguably stands in relation to the EEZ nearly as the 1958 Continental Shelf Convention stood to the continental shelf. As recently as five years ago, international legal scholars may have debated whether the concept of the EEZ was within the realm of customary international law. That issue now is much closer to resolution with the proclamation of the United States' 200-mile EEZ.[51] The EEZ, similar to most zones, consists of two components, one quantitative (the size of the claim) and the other qualitative (a description of States' rights). Article 57 of the 1982 Convention specifies that the EEZ "shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is

47. Article 4 of the Convention on the Territorial Sea may be applicable to archipelagic States. The article states that "where the method of straight baselines is applicable under the provisions of paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by a long usage." Convention on the Territorial Sea, *supra* note 29, art. 4, para. 4.

48. 1982 Convention, *supra* note 1, art. 47, paras. 1-2.

49. *Id.* art. 52.

50. *Id.* art. 53.

51. The Reagan Proclamation of the exclusive economic zone was issued March 10, 1983. Proclamation No. 5030, 48 Fed. Reg. 10605 (1983), *reprinted in* 1983 U.S. CODE CONG. & AD. NEWS A28.

measured."[52] This represents a substantial change from the 1958 system when " 'high seas' [meant] all parts of the sea that are not included in the territorial sea or the internal waters of a State."[53] Thus, the 1982 Convention represents a huge transfer of territory from the high seas category to a new form of coastal State jurisdiction called the EEZ.

Coastal States enjoy within the EEZ an impressive list of rights:

> (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, 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;
> (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
>
> > (i) the establishment and use of artificial islands, installations and structures;
> > (ii) marine scientific research;
> > (iii) the protection and preservation of the marine environment. . . .[54]

This stipulation probably would not have moved so swiftly into customary international law if certain limits had not been placed on coastal claims within the EEZ. Again, within the Convention a claim/counterclaim balancing occurred similar to that found in the development of customary international law. Some of the more significant limits placed on the exercise of coastal State rights include:

> In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms . . . .[55]
>
> . . .
>
> Where the coastal State does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements . . . give other States access to the surplus of the allowable catch . . . .[56]
>
> . . .
>
> Coastal States shall, in normal circumstances, grant their consent for marine scientific research projects by other States . . . in their exclusive economic zone or on their continental shelf to be carried out in accordance with this Convention exclusively for peaceful purposes . . . .[57]

Clearly, the balance is weighted in favor of the coastal State — provisions exist allowing coastal States to do nearly anything within

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52. 1982 Convention, *supra* note 1, art. 57.
53. Convention on the High Seas, *supra* note 15, art. 1, para. 1(a),(b).
54. 1982 Convention, *supra* note 1, art. 56.
55. *Id.* art. 58, para. 1.
56. *Id.* art. 62, para. 2.
57. *Id.* art. 246, para. 3.

their EEZs. But nevertheless, eventual customary law status has been assured by the large number of 200-mile claims.[58]

Directing the Development of Future Customary Law

The provisions of the 1982 Convention that have almost no links with the 1958 Conventions and represent the most revolutionary break with the legal past involve the seabed beyond national jurisdiction (the Area). Not surprisingly, many States that failed to sign the Convention did so because of aspects of Part XI, the section concerned with the Area.[59] Thus Part XI may be the only section of the Convention that a small yet vocal and important group of States steadfastly maintains is *not* part of customary international law. This article will not examine the minutiae of how the system for seabed mining would work,[60] but a few basic aspects of the seabed should be discussed:

> 1. No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized.
> 2. All rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act. . . .
> 3. No State or natural or juridical person shall claim, acquire or exercise rights with respect to the minerals recovered from the Area except in accordance with this Part. Otherwise, no such claim, acquisition or exercise of such rights shall be recognized.[61]

The provisions dealing with the Area differ from others in the 1982 Convention in that no balancing of conflicting interests occurred. Except for article 135 assuring that "superjacent waters" will not be affected,[62] the Area provisions have a "take it or leave it" aspect. Many Third World representatives in support of the Area

58. To date about 93,200-mile claims exist, including 58 EEZ claims: Ant. and Bar., Bangladesh, Barbados, Burma, Cameroon, Cape Verde, Colombia, Cook Islands, Costa Rica, Cuba, Djibouti, Dominica, Dominican Republic, Figi, France, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Iceland, India, Indonesia, Ivory Coast, Kampuckea, Kenya, Korea, Malaysia, Mauritania, Mauritius, Mexico, Morocco, Mozambique, Nauru, New Zealand, Nigeria, Norway, Oman, Pakistan, Papua New Guinea, Philippines, Portugal, Somoa, São Tomé e Príncipe, Seychelles, Solomon Islands, Spain, Sri Lanka, Suriname, Thailand, Togo, United States, Vanuatu, Venezuela, Vietnam, Yemen. LIMITS IN THE SEAS, NATIONAL CLAIMS TO MARITIME JURISDICTION (R. Smith ed. 1981).

59. U.N. Doc. A/CONF.62/PV.192, at 2-6 (1983) (statement of Mr. Clingan, United States delegation).

60. For an excellent discussion see K. SHUSTERICH, RESOURCE MANAGEMENT AND THE OCEANS: THE POLITICAL ECONOMY OF DEEP SEABED MINING (1982).

61. 1982 Convention, *supra* note 1, art. 137.

62. *Id.* art. 135.

provisions argue that the provisions were "bought" with concessions in other sections of the Convention. But the lack of balancing in Part XI is the principal reason the United States did not sign the Convention.[63] The United States has stated that the provisions are not reflective of customary international law and that the deep seabed should be governed by the 1958 Conventions.[64] Specifically, the United States cites article 2 of the 1958 High Seas Convention which states that freedoms of the high seas "shall be exercised . . . with reasonable regard to the interests of other States."[65] The United States' representative to UNCLOS III explained:

> Deep seabed mining is a lawful use of the high seas which any state has a right to carry out subject to reasonable regard to the interests of other states. The United States continues to enjoy the right to carry out seabed mining. This right will not be affected by the U.S. decision not to sign the LOS convention.[66]

This position alone casts doubt on the customary law status of the provisions dealing with the Area. The administrative machinery developed for the Area may remove many of these provisions from the realm of customary international law.[67] Overall, the three mentioned categories of customary law provide a useful framework for analyzing the 1982 Convention.[68] While most provisions fall into one of the categories, scholars may disagree exactly where a given article should be placed.[69] Further, the dynamic of the customary law process means that, over time, certain provisions may "move" from one category to another. At the very least, the categories may provide some guidance to others who approach the task of relating the 1982 Convention to customary law.

Perceptions of and Reflections from the 1982 Convention

Other indicators exist that may clarify the relationship between the 1982 Convention and customary international law. Because of the myriad of relevant indicators, this discussion will be limited to: (a) statements by national delegations when the 1982 Convention was signed; and (b) recent national legislation dealing with seabed mining. These two indices may provide different insights into the

63. U.S. Mission to the U.N. Press Release, 163-(82), Dec. 3, 1982 (statement by Amb. K. L. Adelman).

64. *Id.* at 2.

65. Convention on the High Seas, *supra* note 15, art. 2.

66. U.S. Mission to the U.N. Press Release, 163-(82), Dec. 3 1982. (statement by Amb. K. L. Adelman).

67. *See supra* note 7.

68. *See supra* text accompanying notes 4-5.

69. For example, placement of the 12-mile territorial sea width in the second or third category is speculative. The 12-mile standard appears to have been embryonic customary law perhaps as early as 1970, with the birth of the principle indicated by the large number of signatories to the 1982 Convention.

custom-treaty dynamic.

The signing of the 1982 Convention provided an opportunity for States to explain their decisions. Often in the process delegates expressed their views about the degree to which the Convention codified existing customary international law. The divergence of perceptions indicated a tendency of some to ask the oversimplified question whether the Convention codifies existing customary international law. One of the strongest statements denying the codificatory nature of the 1982 Convention was made, perhaps surprisingly, by Conference President Tommy T.B. Koh:

> The argument that, except for Part XI, the Convention codifies customary law or reflects existing international practice is factually incorrect and legally insupportable. The regime of transit passage through straits used for international navigation and the regime of archipelagic sea lanes passage are two examples of many new concepts in the Convention . . . . Many are of the view that article 137 [seabed mining provisions] of the Convention has become as much a part of customary international law as the freedom of navigation.[70]

The representatives of the People's Republic of China also saw little customary law basis in the 1982 Convention:

> Through a review of the progress of the Conference, we have seen clearly that the third-world countries waged unremitting struggles to oppose maritime hegemonism and reform the unreasonable and unjust old maritime regimes . . . .[71]

Most delegations assumed a "middle of the road" posture, acknowledging that certain provisions codify existing customary law while others break new legal ground. The Japanese position was very matter of fact:

> The Convention's provisions represent either codification of the existing rules of international law applied to the various aspects of the use of the sea or rules newly established in order to regulate new problems relating to the use of the sea.[72]

More interesting are those statements that attempt to categorize provisions along this dimension. The contribution of the United Kingdom is perhaps the best example:

> Many of the Convention's provisions are a restatement or codification of existing conventional and customary international law and State practice. Within this category are the articles concerning the right of innocent pas-

70. U.N. Dept. of Public Information, Press Release, SEA/MB/14, at 2 (Dec. 10, 1982) (T.T.B. Koh).

71. U.N. Doc. A/CONF.62/PV.191, at 11 (1983) (statement of Mr. Han Xu, Chairman of the Chinese Delegation).

72. U.N. Doc. A/CONF.62/PV.187, at 48-50 (1983) (statement of Mr. Nakagawa, Head of the Janapese Delegation).

sage through the territorial sea, which is not subject to prior notification or authorization by the coastal State.

. . .

There is also a third category of provisions in the Convention which are new, indeed unique. The most obvious examples are those which seek to make new law which would give obligatory effect for participants in the Convention to the idea of the common heritage of mankind.

. . .

In consequence we have to contemplate that the Convention may come into force without enjoying general acceptance. In that event the legal position would be complicated. With regard to those provisions which express, codify or clarify existing law, the substantive norms which govern behaviour and define rights and duties will be the same for both parties and for non-parties even though the source of the norms, which is the basis of States' obligations, may differ. . . . Until there is universality, we will need to seek accommodation between those who have adopted new conventional rules and those who act on the basis of existing law.[73]

States using the signing ceremony to emphasize their particular interests and priorities is neither surprising nor malevolent. In some cases, such statements bear directly on the custom-treaty interface. For example, Canada asserted its belief that the 1982 Convention "fills a void in international law with regard to the prevention of marine pollution."[74] The position taken by the United States was more transparently self-serving:

The United States recognizes that certain aspects of the Convention represent positive accomplishments. Indeed, those parts of the Convention dealing with navigation and overflight and most other provisions of the Convention serve the interests of the international community. These texts reflect prevailing international practice. They also demonstrate that the Conference believed that it was articulating rules in most areas that reflect the existing state of affairs — a state we wished to preserve by enshrining these beneficial and desirable principles in treaty language.

. . .

In addition, the Conference record supports the traditional United States position concerning innocent passage in the territorial sea. The rules that reflect the international community's expectations are sound and, therefore, they will endure . . . .[75]

While the convention contains new legal elements, notably the regime for the deep seabed, much of the Convention is not new but rather reflects existing international law and the long-established practice of states, such as the right of passage through, over and under straits used for international navigation.[76]

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73. U.N. Doc. A/CONF.62/PV.189, at 78-81 (1983) (statement of Mr. Powell-Jones, Head of the U.K. Delegation).

74. U.N. Doc. A/CONF.62/PV.185, at 27 (1983) (statement of Hon. A. Maceachen, Deputy Prime Minister and Secretary of State for External Affairs, Canada).

75. U.N. Doc. A/CONF.62/PV.192, at 2, 5 (1983) (statement of Mr. Clingan, United States Delegation).

76. U.S. Mission to the U.N. Press Release, 163-(82), Dec. 3, 1982, at 2 (state-

The United States' tendency to equate its interests with those portions of the 1982 Convention that codify existing law is not unreasonable. What is less reasonable and neither good law nor good diplomacy is the United States' tendency to equate its national interests with those of the international community. Brazil, on the other hand, was particularly satisfied with the wide acceptance of 200-mile zones and the common heritage of mankind principle, but stopped short of explicitly ascribing customary law status to these concepts:

> Today the Latin American countries that pioneered the adoption of measures in defence of legitimate national interests in the wider areas of the sea that bathes their coasts feel a sense of satisfaction at the universal acceptance of the system which, as a matter of practice, has already been in effect for a number of years.[77]
>
> . . .
>
> Universal recognition of the principle of the common heritage of mankind is one of those events that few generations have the privilege of witnessing. The birth of a principle of international law assumes that for a specific objective nations agree to put aside their individual powers and channel their own interests through the path of the common interests of all.[78]

Overall, most States recognize the complex nature of the 1982 Convention resulting in codification of existing custom alongside newer (or even completely new) law. Some of the perceived differences are traceable to national interests; others seem to have a legal or even philosophical basis. Some delegates believe that adding specificity to existing concepts does not create new law; others believe that the changes loom so large that codification of customary law is illusory.

A necessary complement to the examination of State perceptions is the discussion of concrete State behavior. Many types of national legislation bear on the custom-treaty relationship, such as the territorial sea, EEZ, and continental shelf claims. Legislation dealing with deep seabed mining provides an interesting and controversial example.

Virtually all recent seabed legislation is tentative and short-termed. Examples include: the United Kingdom, "Deep Sea Mining (Temporary Provisions) Act 1981";[79] the Federal Republic of Ger-

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ment of Amb. K. L. Adelman).

77. U.N. Doc. A/CONF.62/PV.187, at 12 (1983) (statement of Amb. S. M. Thompson Flores, Brazilian Delegation).

78. *Id.* at 16.

79. Ch. 53; *reprinted in* 20 I.L.M. 1217 (1981).

many, "The Act of Interim Regulation of Deep Seabed Mining";[80] Japan, "Law on Interim Measures for Deep Seabed Mining";[81] and the Soviet Union, "Edict on Provisional Measures to Regulate Soviet Enterprises for the Exploration and Exploitation of Mineral Resources."[82]

The legislative titles indicate that the regulations are interim, stop-gap measures. Other legislative acts make their provisional, interim nature clear in the texts themselves. For example, the French seabed mining act begins with the stipulation, "[p]ending the entry into force of an international convention to which the French Republic would be a party . . . ."[83] The relationship between these legislative acts as possible evidence of customary international law and the 1982 Convention may be subtle. Since the goal of the Convention is to have *all* deep seabed mining activity regulated exclusively by its provisions, custom may be unable to react positively to Part XI. The Convention blocks custom's traditionally-conceived principle of freedom of the high seas, a different conventional role from stimulating customary behavior consistent with, and supportive of, the Convention's provisions.

Although most of the legislative acts are designed to be superseded automatically by the 1982 Convention, all respond to the Convention in one very significant way. All interim seabed mining legislation asserts, that no claim of sovereignty over the seabed should be inferred or recognized.[84] Nevertheless, the actual legislative proce-

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80. Bundesgesetzblatt, Part I, 9080, No. 50, at 1457 (Aug. 22, 1980), *reprinted in* 20 I.L.M. 393 (1981).

81. July 20, 1982, *reprinted in* 22 I.L.M. 102 (1983).

82. Apr. 17, 1982, *reprinted in* 21 I.L.M. 551 (1982).

83. France: Law on the Exploration and Exploitation of Mineral Resources of the Deep Seabed, Law No. 81-1135, Journal Officiel de la République Française, at 3499, Dec. 23, 1981, *reprinted in* 21 I.L.M. 808 (1982).

84. While the wording and approaches differ somewhat, the intent is clear:

France: "The delivery of these authorizations does not constitute a claim of sovereignty over any part of the seabed . . . ." *Id.* at 808.

United Kingdom: " 'deep sea bed' means that part of the bed of the high seas in respect of which sovereign rights in relation to the natural resources of the sea bed are neither exercisable by the United Kingdom nor recognised . . . as being exercisable by another Sovereign Power . . . ." U. K., Deep Sea Mining (Temporary Provisions) Act, 1981, ch. 53, art. 1(b), *reprinted in* 20 I.L.M. 1217, 1218-19.

Japan: "None of the provisions of this Law are meant to place the deep seabed under the sovereignty of jurisdiction of Japan . . . ." Law on Interim Measures for Deep Seabed Mining, July 20, 1982 (Japan), *reprinted in* 22 I.L.M. 102 (1983).

Soviet Union: "When issuing permits in accordance with Article 1 of the present Edict, the Soviet state does not claim the establishment of sovereignty, sovereign or exclusive rights, jurisdiction, or the right of ownership with respect to any seabed areas or the resources thereof and does not recognize claims of this nature on the part of other states . . . ." Edict on Provisional Measures to Regulate Soviet Enterprise for the Exploration and Exploitation of Mineral Re-

dures for exploring and exploiting the mineral resources are totally outside the machinery of the Convention. The Soviet Union justified its legislative action as an obligation to protect national interests.

> Recently a number of states, without waiting for the conclusion of a new international convention . . . are adopting acts authorizing their physical and juridical persons to explore and exploit the mineral resources of seabed areas beyond the limits of the continental shelf . . . .
>
> The Soviet Union favors and will continue to favor the settlement of urgent problems of the legal regime of the World Ocean on an international basis and the conclusion for this purpose of a Convention . . . .
>
> At the same time, taking into account that other states are unilaterally commencing the practical exploitation of seabed mineral resources beyond the limits of the continental shelf, the Soviet Union is obliged to take measures to protect its interests with respect to the exploration and exploitation of the said resources.[85]

The Soviet Union and other nations have established seabed mining systems that pay relatively little heed to the 1982 Convention, except for the establishment by some countries of funds that may later be transferred to the International Seabed Authority.[86] Many other acts contain at least an implication that financial measures will be taken. Overall, State actions support the contention that the seabed mining provisions are forging new law. The intricate institutional machinery spelled out in Part XI minimizes or eliminates the role of custom at least at this stage. To participate legally in deep seabed mining, a State must be a party to the Convention, which reduces the role of custom to one of blocking certain types of counter-Convention actions.

Two points stand out from the examination of State perceptions and national legislation. First, the United States' pick-and-choose approach to the 1982 Convention is strengthened by the acknowledgment of most States that the Convention is a mixed regime in its relation to customary international law. Second, the complex, perhaps unique, nature of Part XI suggests that attempts to relate certain provisions to customary international law are meaningless, at least in the sense of expecting the 1982 Convention, once in force, to inspire consonant customary behavior.

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sources, Apr. 17, 1982 (U.S.S.R.), *reprinted in* 21 I.L.M. 551, 551 (1982).

85. Edict on Provisional Measures to Regulate Soviet Enterprises for the Exploration and Exploitation of Mineral Resources, Apr. 17, 1982 (U.S.S.R.), *reprinted in* 21 I.L.M. 551, 551 (1982).

86. The Soviet legislation establishes a fund for the International Seabed Authority, although the size of the fund is unspecified. *Id.* at 553. The International Seabed Authority is "the organization through which States Parties shall . . . organize and control activities in the Area, particularly with a view to administering the resources of the Area." 1982 Convention, *supra* note 1, art. 157, para. 1.

CONCLUSION

The signing of the 1982 Convention on the Law of the Sea is an historic, pivotal point in international law. An unavoidable result of such a complicated, comprehensive convention is renewed interest in customary international law of the sea. For most treaties signed during this century, the question whether a treaty codified existing international law could be answered with an acceptable amount of oversimplification. However, the scope and complexity of the 1982 Convention make this question almost meaningless. Portions of the 1982 Convention stand in a completely different relationship *vis-à-vis* customary law. At least three different kinds of relationships exist:

1. The 1982 Convention reinforces traditional customary law of the sea by repeating rules embodied in the 1958 Conventions;
2. The Convention fosters new customary law by giving written expression to customary law developing since 1958, often in contradiction to the 1958 Conventions; and
3. The Convention directs the development of future customary law by giving written expression to concepts not yet accepted as customary law but which may become part of that law.

The distinctions are necessary because the 1982 Convention probably will not be universally accepted. Some of its provisions will bind only parties to the Convention, while other portions, reflective of customary norms, will bind both parties and non-parties. For example, the deep seabed mining regime of the Convention, not yet a customary rule, may nevertheless *stop* a customary right to exploit seabed resources outside the Convention. In essence, the Convention cannot force a State to play by new rules, but may be able to outlaw the old game.

The three-category framework may be used to analyze other provisions of the 1982 Convention, although this scheme, or any other, is not without difficulty. Certain provisions may straddle two categories. Other provisions, particularly those in Part XI, may minimize the usual interplay of custom and treaty and, hence, not fit within any category. Further, the custom-treaty interface constantly changes and readjusts as the Convention moves toward entry into force. A provision that in 1983 falls into category (3) may by 1990 fit just as clearly into category (2).[87]

Not surprisingly, the relationship between the 1982 Convention

87. Category (1) is less variable because of its concrete referent, the four 1958 Conventions. *See supra* note 28.

and customary law cannot be settled definitely. Custom itself is a difficult concept, suffering under the dual handicap of a bad reputation and intrinsic conceptual ambiguity. International legal scholarship must devote considerable attention to the custom-treaty relationship by questioning whether individual provisions can be applied universally (a reflection of custom) or only to State parties. The three-category framework will guide other scholarship in approaching this problem with the admonition that simple, blanket statements are ill-advised and inappropriate.