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THE OUTWARD LIMIT OF THE DEPARTMENT OF INTERIOR'S AUTHORITY OVER SUBMERGED LANDS—THE EFFECT OF CUSTOMARY INTERNATIONAL LAW ON THE OUTER CONTINENTAL SHELF LANDS ACT

The Department of Interior (DOI) has authority to lease areas of the United States Continental Shelf¹ for exploration and exploitation of all minerals.² The National Oceanic and Atmospheric Administration (NOAA) has authority to license exploration and recovery by United States citizens of all hard minerals in the deep seabed outside the Continental Shelf.³ In March 1983 DOI published its intention to prepare an Environmental Impact Statement⁴ for a proposed lease sale of polymetallic sulfides in the Gorda Ridge area.⁵ DOI explained that it had authority to lease the area⁶ although the Gorda Ridge falls outside the geological continental shelf.⁷ It based its authority on, among other things, President Reagan's March 1983 proclamation claiming a 200-mile exclusive economic zone (EEZ) for the United States.⁸

NOAA has no authority regarding polymetallic sulfides, since they are not hard minerals. Nevertheless, DOI's claim of general authority over the 200-mile EEZ encroaches upon NOAA's statutory authority regarding hard minerals in the deep seabed. NOAA responded to DOI's claim by stating that the President's proclamation did not amend existing statutory law creating the respective jurisdictions of the two agencies.⁹

DOI's claim implicates doctrines of statutory and treaty construction, separation of powers, and the domestic effect of customary international law. After briefly establishing the relevant background of the controversy, this Comment suggests that neither the President's proclamation nor the

1. The legal and the geological definitions of the continental shelf are not necessarily the same. This Comment explores the question of what legal definition controls DOI's authority. For convenience, when the legal term is meant, initial capital letters will be used.

2. DOI's authority is established under the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-56 (1982).

3. NOAA's authority is established under the Deep Seabed Hard Minerals Resources Act, 30 U.S.C. §§ 1401-73 (1982).

4. 48 Fed. Reg. 12,840 (1983).

5. The Gorda Ridge area is an active seafloor spreading center located approximately 140 miles west of Oregon and northern California. NOAA General Counsel Memo 1 (Feb. 1984) (Copy on file with the *Washington Law Review*).

6. Letter from J.J. Simmons, Undersecretary of Interior, to Walter B. Jones, Chairman, Comm. on Merchant Marine and Fisheries (Sept. 26, 1983) (Copy on file with the *Washington Law Review*).

7. The Gorda Ridge lies 140 miles west of the coast line. The geological continental shelf of the west coast extends only about 40 miles from the coast line. See S. REP. NO. 441, 83d Cong., 1st Sess. 4 (1953).

8. Proclamation No. 5030, 48 Fed. Reg. 10,605 (1983).

9. See NOAA General Counsel Memo, *supra* note 5, at 13.

new customary law of the EEZ operates to change domestic law and concludes that DOI's claim exceeds its authority under domestic law.

I. BACKGROUND

In 1945 President Truman proclaimed the exclusive right of the United States to exploit the natural resources of its continental shelf.¹⁰ At the same time, President Truman issued Executive Order No. 9633. That order placed the natural resources of the continental shelf under the control of the Secretary of the Interior for administrative purposes, but did not give the Secretary the authority to lease the area.¹¹ Although the proclamation did not define the term "continental shelf," a contemporaneous White House press release provided a geological definition: "submerged land which is contiguous to the continent and which is covered by no more than 100 fathoms (600 feet) of water is considered as the continental shelf."¹²

In 1953 Congress enacted the Outer Continental Shelf Lands Act¹³ (OCSLA), which empowers the Secretary of the Interior to lease tracts on the Continental Shelf.¹⁴ Congress did not adopt the geological definition of the Continental Shelf;¹⁵ rather, it defined the term as all lands seaward of the submerged lands granted to the states¹⁶ "of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control."¹⁷

After President Truman's proclamation, which was the first of its kind,¹⁸ a number of other states asserted similar claims over their continental shelves.¹⁹ The 1958 Geneva Convention on the Continental Shelf²⁰ (Shelf Convention) represented the international community's attempt to codify the emerging doctrine of the Continental Shelf. The Convention defined the

10. Proclamation No. 2667, 10 Fed. Reg. 12,303 (1945).

11. S. REP. No. 441, 83d Cong., 1st Sess. 56 (1945).

12. Press release dated Sept. 28, 1945, Dept. of State Bull. 484, reprinted in S. REP. No. 441, *supra* note 11, at 53.

13. Pub. L. No. 212, ch. 345, 67 Stat. 462 (codified as amended at 43 U.S.C. §§ 1331-43 (1982)).

14. 43 U.S.C. § 1334 (1982).

15. The White House press release, *supra* note 12, stated that the commonly accepted geological definition of the shelf was submerged lands to a depth of 600 feet (or 200 meters).

16. The Submerged Lands Act, Pub. L. No. 31, ch. 65, 67 Stat. 29 (codified at 43 U.S.C. §§ 1301-15 (1982)), enacted prior to the OCSLA, grants to coastal states of the United States control of land beneath navigable waters. Navigable waters are defined as those waters lying within three geographical miles seaward of the coast line. 43 U.S.C. § 1301 (1982).

17. *Id.* § 1331.

18. Holland, *The Juridical Status of the Continental Shelf*, 30 TEX. L. REV. 586, 590 (1952).

19. Carter, *The Seabed Beyond the Limits of National Jurisdiction*, 4 STAN. J. INT'L STUD. 1, 2 (1969).

20. Convention on the Continental Shelf, April 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311 [hereinafter Shelf Convention].

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Continental Shelf as submerged lands “adjacent to the coast . . . to a depth of 200 metres” or beyond that, to where the depth of the ocean permits exploitation of seabed resources.²¹ The Convention entered into force for the United States in 1964.²²

As seabed mining technology advanced, it became possible to recover oil and gas in areas well over 200 meters beneath the ocean surface,²³ and at least conceivable to mine hard minerals in areas beyond the continental margin.²⁴ The possibility of recovering manganese nodules in the deep seabed²⁵ aroused the interest of United States corporations and the United States Congress.²⁶ In 1980 Congress enacted the Deep Seabed Hard Minerals Resources Act²⁷ (DSHMRA), granting authority to NOAA to license and regulate the activity of United States citizens exploring for and recovering hard mineral resources in the area seaward of the Continental Shelf of the United States and seaward of the Continental Shelf or EEZ of any other nation. Section 4(2) of the DSHMRA defines the Continental Shelf in terms identical to those of the 1958 Shelf Convention.²⁸ The DSHMRA grants NOAA authority to issue permits for the recovery of manganese nodules,²⁹ but not for the recovery of oil and gas or polymetallic sulfides.

Under the existing statutory scheme, then, DOI has authority to lease oil and gas and all minerals, including polymetallic sulfides, in any area of the Continental Shelf as defined in the OCSLA. NOAA's authority is restricted to regulation of United States citizens exploring for and recovering hard minerals in areas beyond the Continental Shelf as defined in the DSHMRA.

In 1983 President Reagan proclaimed a 200 mile EEZ³⁰ for the United States, claiming jurisdiction over, among other things, the resources of the

21. *Id.* Art. 1.

22. *Id.*

23. See E. LUARD, *THE CONTROL OF THE SEA-BED* 21 (1977).

24. The continental margin is the whole area of the submerged portion of the continental crust. It includes the continental shelf, continental slope, and continental rise.

25. For a discussion of the minerals found in the deep seabed and their strategic importance to the United States, see E. LUARD, *supra* note 23, at 3–28.

26. See H.R. REP. 94-411 Part II at 26–38, 96th Cong., 2d Sess., reprinted in 1980 U.S. CODE CONG. & AD. NEWS 1650–52.

27. Act of June 28, 1980, Pub. L. No. 96-283, 94 Stat. 553 (codified at 30 U.S.C. §§ 1401–73 (1982)). The DSHMRA enacted partly as a response to the breakdown of negotiations in UNCLOS III over an international seabed regime. Companies were unlikely to invest heavily in developing seabed resources unless they could be guaranteed a minimum time during which they could recover their investment. Congress enacted the DSHMRA as an interim measure, to provide stability until such time as the UNCLOS negotiations developed an acceptable regime. See DSHMRA, 30 U.S.C. § 1401.

28. *Id.* § 1403(2).

29. The DSHMRA defines hard minerals as “nodules which include one or more minerals, at least one of which contains manganese, nickel, cobalt, or copper.” *Id.* at § 1403(6).

30. Proclamation No. 5030, 48 Fed. Reg. 10,605 (1983).

seabed.³¹ The accompanying Oceans Policy Statement³² declares that the proclamation asserts a right belonging to the United States by virtue of customary international law. The Policy Statement asserts that the United Nations Convention on the Law of the Sea provision that establishes a 200 mile minimum EEZ for all coastal states³³ embodies prevailing customary law. Regardless of whether the United States has a right to proclaim a 200 mile EEZ in international law,³⁴ the proclamation raises the question of whether it, or the customary international law of the EEZ that it claims to embrace, changes the domestic regime dividing jurisdiction between DOI and NOAA.

II. THE AGENCIES' POSITIONS

DOI asserts that the definition of the Continental Shelf contained in the OCSLA is a legal, not a geological, definition.³⁵ DOI notes that federal courts look to international law when interpreting the definition of the Continental Shelf, citing two Fifth Circuit cases holding that the terms of the Shelf Convention supersede the OCSLA where they are incompatible.³⁶ From this DOI concludes that the extent of United States jurisdiction

31. The assertion of jurisdiction is probably inconsistent with the acknowledgment of state jurisdiction in the Shelf Convention: It does not rely on an exploitability test and it departs from the legal concept of jurisdiction of a submerged area that is part of the coastal state's land mass. *See infra* Part III.B.

32. Oceans Policy Statement, 19 WEEKLY COMP. PRES. DOC. 383 (March 14, 1983).

33. The United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982. U.N. Doc. A/Conf. 62/122, *reprinted* in 21 INT'L LEGAL MATERIALS 1261 (1982) [hereinafter cited as LOS Convention]. Article 56 of the LOS Convention gives coastal states the sovereign right to explore and exploit the living and nonliving natural resources in the seabed and waters within 200 miles of their coast.

34. President Reagan refused to sign the LOS Convention and therefore the United States should neither have to abide by its terms nor benefit by the rights it confers. Nevertheless, most authorities agree that a coastal state's right to a 200-mile EEZ has become customary international law. *See, e.g.,* The Continental Shelf (Tunisia/Libyan Arab Jamahiriya) 1982 I.C.J. 18, 74 (Judgment of Feb. 24, 1982); RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 514 (Tent. Draft No. 2), reporter's note a (1983); Gamble & Frankowska, *The 1982 Convention and Customary Law of the Sea: Observations, a Framework, and a Warning*, 21 SAN DIEGO L. REV. 491, 501 (1984); Grolin, *The Future of the Law of the Sea: Consequences of a Non-Treaty or Non-Universal Treaty Situation*, 13 OCEAN DEV. & INT'L L. 1, 8-9 (1983); Comment, *Fishery and Economic Zones as Customary International Law*, 17 SAN DIEGO L. REV. 661 (1980); Note, *The United States' Claims of Customary Legal Rights Under the Law of the Sea Convention*, 41 WASH. & LEE L. REV. 253, 272 (1984). The United States probably has the right in international law to assert such a zone although it is not a party to the LOS Convention.

35. Letter from J.J. Simmons, *supra* note 6 (citing *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 338 n.14 (5th Cir. 1978)).

36. *Id.* (citing *Treasure Salvors*, 569 F.2d at 340, and *United States v. Ray*, 423 F.2d 16, 21 (5th Cir. 1970)).

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over submerged land is determined by reference to international law,³⁷ and the President's EEZ proclamation and newly evolved customary international law provide a new definition of the Continental Shelf. That new definition sets the minimum extension of the Continental Shelf at 200 nautical miles from the baseline of the coast.³⁸ Because the definition of the Continental Shelf contained in the OCSLA is informed by international law, DOI asserts that by virtue of current international law its jurisdiction extends at least 200 miles into the ocean.³⁹

NOAA counters this argument⁴⁰ by pointing out that even though the President's proclamation may be effective in international law, an executive declaration cannot change domestic law. NOAA finds that domestic law is controlled by the 1958 Shelf Convention, as the most recent congressional expression of the extent of United States jurisdiction. Moreover, DOI's interpretation of the presidential proclamation as extending DOI's authority beyond the Continental Shelf as defined by Congress in the DSHMRA, would allow an encroachment of NOAA's authority. NOAA further points to pending legislation to implement the presidential proclamation⁴¹ as evidence of the necessity for implementing legislation. Although NOAA does not have authority regarding sulfides, a general extension of DOI's authority over the EEZ would encroach upon NOAA's authority in the deep seabed regarding hard minerals and any potential authority Congress might later give NOAA regarding sulfides.

37. It does not appear to be DOI's position that newly evolved customary international law supersedes either existing legislation or the 1958 Shelf Convention. Rather, DOI appears to argue that Congress purposely left the definition of the Continental Shelf vague in the OCSLA, intending that the precise limits would be established by reference to international law. DOI perhaps does not view the definition of the Continental Shelf in the Shelf Convention as limiting its assertion of authority out to 200 miles. This may be because DOI has long viewed that definition as ambulatory, limited only by the test of exploitability. In a previous situation DOI asserted that it had authority over a submarine ridge separated from the main continental area by a deep canyon. Rather than analyze whether the area was a part of the continental shelf, DOI asserted that because the area was exploitable, it lay within the area defined by the Shelf Convention. Opinion of the Associate Solicitor of the United States Department of Interior M-36615, *reprinted in* GOWER, FED. SERV.—CONTINENTAL SHELF, OCS 1961-25.

38. Letter from J.J. Simmons, *supra* note 6, at 3. The LOS Convention, *supra* note 33, art. 76, defines the Continental Shelf as an area a minimum of 200 miles from the coast, and has a complex formula for calculating shelf areas beyond 200 miles. This new definition has not become customary international law. DOI's argument is therefore flawed because the EEZ and the Continental Shelf are not the same thing.

39. Letter from J.J. Simmons, *supra* note 6, at 3.

40. NOAA's position and analysis are set out in General Counsel Memo, *supra* note 5.

41. H.R. 2061, 98th Cong., 1st Sess. (1983) (a bill to implement an EEZ for the United States).

III. THE STATUTORY SCHEME AND THE SHELF CONVENTION

The OCSLA defines the Continental Shelf only vaguely, and some writers have argued that Congress intended to create a regime under the Act that is coterminous with United States jurisdiction as allowed by international law.⁴² The legislative history and the Act itself do not clearly support this assertion. Nor does the OCSLA appear to delegate to the executive the authority to extend the geographical scope of its application. In addition, the Shelf Convention may limit United States jurisdiction. If either the Act or the Convention places a seaward limit on the Act's operation, the question arises whether newly evolved customary international law or a presidential proclamation can override a prior inconsistent statute or treaty. The extent of the statutory and treaty schemes are explored in this Part, as well as the contention that the presidential proclamation does not operate to change either scheme. The next Part explores what effect customary international law has on domestic law in this context.

A. *The Extent of Jurisdiction Under the OCSLA*

Congress did not include the geological definition of the continental shelf in the OCSLA. Congress may purposely have left the definition vague so that the Act would adapt to developing international concepts regarding the Continental Shelf doctrine. Yet even though Congress may have intended the operation of the Act to be at least partially ambulatory, several factors strongly suggest that Congress did recognize some geographical limit to the regime it was creating.

When President Truman proclaimed the right of the United States to the resources of the continental shelf, he was exercising the power of the executive to assert sovereign rights in the international forum and to participate in forming customary international law. President Truman made legal arguments to support his claim, most notably that such an exercise of jurisdiction was justified by geological reality: "the continental shelf may be regarded as an extension of the land mass of the coastal nation and thus naturally appurtenant to it."⁴³

42. See, e.g., Kreuger, *Management of Federal Petroleum Resources in the United States*, 27 INT'L & COMP. L.Q. 61, 69 (1978); Stone, *Legal Aspects of Offshore Oil and Gas Operations*, 8 NAT'L RES. J. 478, 485-92 (1968).

43. Proc. No. 2667, *supra* note 10. This concept ultimately formed the justification for the doctrine of the Continental Shelf accepted by the international community. See *North Sea Continental Shelf* (Fed. Rep. Germ./Denmark; Fed. Rep. Germ./Netherlands), 1969 I.C.J. 4 (Judgment of Feb. 20, 1969), where the International Court of Justice declared that "the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land." *Id.* at para. 19.

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The OCSLA defines the Continental Shelf as submerged areas that “appertain to the United States.”⁴⁴ Congress likely intended to incorporate the geological concept embraced by President Truman when it chose this language, which closely tracks his press release. Moreover, Congress indicated when it passed the Act that it was aware of the geological definition of the continental shelf.⁴⁵ The Report of the Senate Committee on Interior and Insular Affairs provided a geological definition.⁴⁶ The Report also quoted testimony given before Congress by the Secretary of the Interior who described the seaward extent in miles, and the total area in square miles, of the continental shelf.⁴⁷ This indicates that Congress relied on a clear statement of the limit to the area it was regulating.

Another piece of evidence supporting the view that the statute is ambulatory only within geological limits is that Congress passed the OCSLA to implement President Truman’s proclamation.⁴⁸ It seems likely that Congress intended the legislation to be coterminous with the proclamation. This does not mean, however, that Congress intended to establish a regime that was coterminous with state jurisdiction recognized by international law.

Finally, Congress used the term “Continental Shelf” in the legislation, tying the legal concept at least loosely to the geological concept of the same name. Moreover, Congress limited the definition to submerged lands that “appertain” to the United States. Because this language tracks that of Truman’s proclamation, it must apply to the area claimed by the proclamation—the submerged portion of the land mass.

44. 43 U.S.C. § 1331(a).

45. Although Congress could rely on a generally accepted definition of the Continental Shelf, it is also possible that Congress did not include that definition in the Act because the precise edge of the continental shelf may vary depending upon geological features. The LOS Convention contains a definition of the Continental Shelf that includes a complex formula for determining the geographical edge of the shelf area a coastal state may claim. LOS Convention, *supra* note 33, art. 76. The complexity of the calculation for defining that edge indicates the difficulty of describing a precise geographic limit to the continental shelf.

46. S. REP. NO. 441, *supra* note 11, at 4 (1953); *see also* H.R. Rep. No. 43, 83d Cong., 1st Sess. (1953), *reprinted in* 1953 U.S. CODE CONG. & AD. NEWS 2178.

47. S. REP. NO. 441, *supra* note 7, at 4 (quoting Hearings on S. 923 and Related Measures Before the Senate Comm. on Interior and Insular Affairs, 81st Cong. 65 (1949)).

48. President Truman in his press release anticipated congressional implementation to prescribe which shelf areas would be allocated to the states and which left to federal control. Press Release dated Sept. 28, 1945, *supra* note 12.

B. *The Shelf Convention*

The Constitution declares that a treaty made by the President and Senate as provided in the Constitution⁴⁹ is the supreme law of the land.⁵⁰ Because both treaties and congressional legislation are the supreme law of the land, the Supreme Court has held that the later in time principle applies as between them.⁵¹ Thus a treaty that is inconsistent with a prior statute overrides the statute to the extent that they are inconsistent.⁵² Before a treaty provision will override a prior statute, the provision must have effect domestically, or be self-executing.⁵³ Thus if the definition of the Continental Shelf in the 1958 Shelf Convention is self-executing, it provides the controlling definition for domestic purposes. To the extent that the definition in the Shelf Convention is more limited than the definition in the OCSLA, the OCSLA is limited.⁵⁴

The Fifth Circuit Court of Appeals has declared that the Shelf Convention "superseded any incompatible terminology in the domestic statute."⁵⁵ Although the Fifth Circuit did not analyze the question of whether the Shelf Convention is self-executing, its conclusion seems justified. A treaty term is self-executing if it requires no legislation to implement it.⁵⁶ A treaty term that establishes a limit to a state party's jurisdiction does not require implementing legislation.⁵⁷ The Shelf Convention states that coastal state rights do not depend upon any action by the coastal state.⁵⁸ The United States apparently viewed the Convention as essentially declaratory of existing law and therefore not requiring implementing legislation.⁵⁹

49. U.S. CONST. art. II, § 2.

50. U.S. CONST. art. VI, § 2.

51. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

52. Similarly, the courts will give effect to an act of Congress that is inconsistent with a prior treaty, even if it results in a violation of international law. *See The Head Money Cases*, 112 U.S. 580, 599 (1884).

53. *Foster v. Nielson*, 7 U.S. (2 Pet.) 415 (1829).

54. It is also possible that even if the Shelf Convention does not limit the definition of the Continental Shelf in the OCSLA, subsequent legislation does. If the definition in the OCSLA is vague, its meaning might be supplied by subsequent acts of Congress defining the same term. Legislation subsequent to the OCSLA defines the Continental Shelf in the same words as the Convention. *See NATIONAL ADVISORY COMMITTEE ON OCEANS AND ATMOSPHERE, THE EXCLUSIVE ECONOMIC ZONE OF THE UNITED STATES: SOME IMMEDIATE POLICY ISSUES*, app. E (May 1984).

55. *Treasure Salvors*, 569 F.2d 330, 340 (5th Cir. 1978); *see also United States v. Ray*, 423 F.2d 16, 21 (5th Cir. 1970).

56. *Foster v. Nielson*, 7 U.S. (2 Pet.) 415 (1829); *see also Cook v. United States*, 288 U.S. 102, 118-19 (1932).

57. *But see United States v. Postal*, 589 F.2d 862 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979), in which the Fifth Circuit held that the contemporaneous treaty on the Territorial Sea and the Contiguous Zone, limiting coastal state jurisdiction for some purposes to twelve miles, was not self-executing. That decision has been widely criticized. *See, e.g., United States v. Green*, 671 F.2d 46, 50 (1st Cir. 1982).

58. Shelf Convention, *supra* note 20.

59. *See Conventions on the Law of the Sea: Hearings on Executives J,K,L,M,N Before the Senate*

If the definition of the Continental Shelf in the Shelf Convention is domestically controlling, it is necessary to determine the extent of coastal state jurisdiction recognized by that definition. The definition is in some respects ambulatory because it incorporates the element of exploitability, implying that the seaward edge of a state's jurisdiction will expand as technology progresses. Commentators agree, nevertheless, that there is a seaward limit inherent in the complete definition.⁶⁰ Decisions of the International Court of Justice (ICJ) also support the contention that there is some limit, and there is evidence in the language of the definition and the history of its drafting to support this reading.

In 1969 the Federal Republic of Germany, Denmark, and the Netherlands asked the ICJ to decide what principles and rules of law applied to boundary disputes over the North Sea continental shelf.⁶¹ The Court concluded that the governing principle was that the continental shelf constitutes the natural prolongation of the state's land territory into the sea.⁶² Therefore, the Court stated, the parties were to delimit the boundary that would give each one the part of the continental shelf that constituted the "natural prolongation of its land territory" so long as it did not encroach upon the natural prolongation of another state's land territory.⁶³ If the application of this principle created areas of overlapping jurisdiction, the parties were to consider the configuration of coastlines, physical and geological structure of the shelf, and the degree of proportionality in accordance with equitable principles.⁶⁴ The Court declared that if a submerged area does not constitute a "natural" extension of the land territory, then "it cannot be regarded as appertaining to that State."⁶⁵

The Court appeared to retreat somewhat from this principle in the 1982 *Continental Shelf* case.⁶⁶ The Court rejected Libya's argument that once the area of natural prolongation is determined, equitable principles are satisfied.⁶⁷ Instead, the Court elevated the satisfaction of equitable principles to a plane above the determination of the area of natural prolongation.⁶⁸ The

Committee on Foreign Relations, 86th Cong., 2d Sess. 92 (1960) (testimony from the State Department that the Conventions did not conflict with existing legislation).

60. See D. O'CONNELL, *THE INTERNATIONAL LAW OF THE SEA* 492-94 (1982); R. OGLE, *INTERNATIONALIZING THE SEABED* 105-06 (1984); Stone, *supra* note 42, at 494-96.

61. *North Sea Continental Shelf* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), 1969 I.C.J. 4 (Judgment of Feb. 20, 1969).

62. *Id.* at para. 43.

63. *Id.* at para. 101.

64. *Id.*

65. *Id.* at para. 43.

66. *Concerning the Continental Shelf* (Tunisia/Libyan Arab Jamahiriya), 1982 I.C.J. 18 (Judgment of Feb. 24, 1982).

67. *Id.* at para. 44.

68. *Id.*

Court should not be read, however, as having rejected the principle of natural prolongation; rather, it found that because the submerged area in controversy constituted a single continental shelf, the principle of prolongation was insufficient to delimit each state's shelf area.⁶⁹ In explaining and distinguishing its holding in the *North Sea* case, the Court acknowledged that the concept of natural prolongation is still relevant, even if it may not be sufficient to determine the boundary between adjoining states.⁷⁰ The implication is that natural prolongation as the legal justification for the Continental Shelf doctrine is determinative when it is sufficient to delimit a submerged area.⁷¹

Further evidence that the Shelf Convention limits the seaward extent of coastal state jurisdiction exists in the history and wording of the Convention. The International Law Commission submitted draft articles on the high seas convention as well as the Shelf Convention. In its commentary to the draft, the Commission listed high seas freedoms but noted that its list was not meant to be exclusive.⁷² The Commission stated that it did not mention "the freedom to explore or exploit the subsoil of the high seas" because such activity, off the continental shelf, was not of sufficient practical importance to justify regulation.⁷³ This indicates that the Commission viewed the seabed outside continental shelf areas as part of the high seas and therefore not susceptible to a claim of jurisdiction by any state.

The final evidence of limitation is the definition of continental shelf used in the Convention. The definition refers to "submarine areas adjacent to the coast."⁷⁴ Although "adjacent" is not defined, this terminology appears to qualify the definition that follows, which includes the exploitability test.⁷⁵ Read as a whole, the definition limits the area to those submerged continental shelf lands that are adjacent to the state's coast.

69. *Id.* at Finding 3.

70. *Id.* at para. 43 ("The concept of natural prolongation thus was and remains a concept to be examined within the context of customary law and State practice."); *id.* at para. 44 ("identification of natural prolongation may, where the geographical circumstances are appropriate, have an important role to play . . . in view of its significance as the justification of Continental Shelf rights").

71. It is unclear how the EEZ doctrine will modify the Continental Shelf doctrine in customary law. Insofar as the operative definition of the Continental Shelf in domestic law derives from the Shelf Convention, however, it should not make a difference that international legal rights based on customary law are evolving.

72. Report of the International Law Commission to the General Assembly, 11 U.N. GAOR Supp. (No. 9) at 24, U.N. Doc A/3159 (1956).

73. *Id.* See Stone, *supra* note 42, at 494-96.

74. Shelf Convention, *supra* note 20.

75. See Stone, *supra* note 42, at 495-96.

C. *The President's Proclamation*

Although the President asserts rights for the United States in the international forum, the President may make domestic law only in very limited circumstances. Courts recognize the President's power to take action that is essentially legislative when Congress has delegated such power⁷⁶ or when the President acts pursuant to foreign affairs powers explicitly granted in the Constitution. In the latter case courts are more likely to uphold a particular action when Presidents have traditionally taken such action and Congress has traditionally acquiesced or approved.

None of these circumstances are present to justify an interpretation of the EEZ proclamation that would alter existing domestic legislation. First, Congress appears not to have delegated to the executive the power to extend the jurisdiction of DOI. In the 1978 amendments to the OCSLA, Congress gave the President the authority to establish procedures for settling boundary disputes regarding the Continental Shelf.⁷⁷ The legislative history clearly indicates that this power was directed at outstanding disputes with Canada.⁷⁸ Moreover, the power was to be exercised within a given time.⁷⁹ The language of the statute itself speaks of boundary disputes and therefore appears to provide authority over adjoining boundaries rather than those between United States jurisdiction and the deep seabed.

Second, President Reagan's EEZ proclamation is not ancillary to an independent foreign affairs power of the executive.⁸⁰ An attempt by the President to extend jurisdiction over new submerged areas is not closely

76. See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–20 (1936) (upholding Congress' delegation to the President of power to declare and enforce an arms embargo because of the importance to international relations).

77. Pub. L. No. 95-372, § 203(b), 92 Stat. 635 (codified at 43 U.S.C. § 1333(a)(2)(B) (1982)).

78. See H.R. REP. NO. 95-590 128–29, 95th Cong., 2d Sess., reprinted in 1978 U.S. CODE CONG. & AD. NEWS 1534–35.

79. 43 U.S.C. § 1333(a)(2)(B) states that the President shall establish such procedures “[w]ithin one year after September 18, 1978.”

80. For example, in *Madsen v. Kinsella*, 343 U.S. 341 (1952), the Court recognized that the President could establish courts in occupied territory to try civilians, although Congress had established an alternative system. The Court found that the President had the power to make law in occupied territory because of the emergency of war and as an adjunct to the express power granted by the Constitution as Commander-in-Chief of the armed forces. *Id.* at 348 (“The President has the urgent and infinite responsibility not only of combating the enemy but of governing any territory occupied by the United States by force of arms.”). The Court also noted that Congress had expressly recognized the jurisdiction of the executive's occupation courts and had not attempted to limit the President's power in this respect. *Id.* at 350–52. See also *United States v. Belmont*, 301 U.S. 324 (1937), and *United States v. Pink*, 315 U.S. 203 (1942), discussed *infra* notes 120–25 and accompanying text, upholding a presidential agreement based on the executive's constitutional power to recognize foreign governments.

related to one of the President's enumerated foreign affairs powers.⁸¹ Even though the President might occupy and govern enemy territory in a state of war, the Supreme Court has held that only an act of Congress or a treaty can annex territory to the United States.⁸²

Moreover, there is no history of Presidents acquiring and governing submarine areas with congressional acquiescence.⁸³ President Truman, in the press release accompanying his Continental Shelf proclamation, stated that he was asserting rights of the United States in the international forum, but leaving to Congress the matter of creating a regime for the area over which he was asserting rights.⁸⁴ President Reagan's EEZ proclamation asserted rights over important new resources in essentially new territory; the argument from precedent indicates that it is left to Congress to establish the laws for developing those resources.

The proclamation itself also does not support the interpretation that it is a legislative act. First, the proclamation states that it does not change existing law. Under existing law embodied in the DSHMRA, NOAA alone has the authority to regulate the activity of United States citizens regarding manganese nodules in the deep seabed.⁸⁵ The EEZ proclamation therefore would be internally inconsistent if read to extend DOI's jurisdiction. Second, the proclamation states that it asserts rights over important new resources. The President therefore recognized that he was asserting rights over territory outside of existing United States jurisdiction.

81. Compare *Madsen v. Kinsella*, 343 U.S. 341 (1952) (President's express power as commander-in-chief of the armed forces) with *United States v. Pink*, 315 U.S. 203 (1942) (President's express power to recognize foreign governments) and *United States v. Belmont*, 301 U.S. 324 (1937) (same).

82. *Fleming v. Page*, 18 U.S. (9 How.) 278 (1850). The President's assertion of jurisdiction over the subsoil and seabed beyond the continental shelf fall short of "annexation"; nevertheless, like annexation it has the effect of acquiring rights over territory and creating a need for laws and regulations to govern that territory.

83. Compare *Dames & Moore v. Regan*, 453 U.S. 654, 680 (1981) (history of congressional acquiescence supports President's power to make claims settlements with foreign governments) with *Madsen*, 343 U.S. at 350-52 (history of congressional acquiescence supports President's power to establish occupation courts).

84. Press Release dated Sept. 28, 1945, *supra* note 12.

85. See *supra* note 2 and accompanying text. The President's proclamation is not necessarily contrary to the spirit of the DSHMRA because that Act gives NOAA authority over citizens operating in the deep seabed, not over the seabed itself. The Act defines seabed as that area seaward of "the Continental Shelf of any nation; and . . . any area of national [sic] resource jurisdiction of any foreign nation." 30 U.S.C. § 1403(4)(A) & (B) (1982). The Act thus gives NOAA authority over United States citizens in areas outside of any state's jurisdiction. If the United States recognizes another state's extension of its jurisdiction, then NOAA's authority is arguably diminished. As it is the President who would recognize another state's extension of jurisdiction, one might argue that the President may likewise diminish NOAA's authority by proclaiming an extension of United States jurisdiction. Nevertheless, because President Reagan's proclamation states that it does not affect existing law, it should be narrowly construed.

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One final piece of judicial evidence weighs against interpreting the EEZ proclamation to incorporate new maritime territory into the existing legislative regime. In *Justheim v. McKay*,⁸⁶ plaintiffs were oil companies whom DOI had denied leases on the continental shelf. Some of their applications had been made after Truman's proclamation, but all were before the OCSLA. Plaintiffs asked the court to declare that the Interior Department must grant the leases because the submerged areas were "public lands" within the meaning of the Mineral Lands Act.⁸⁷ Instead, the court examined the legislative background of the Act and found that Congress did not intend "public lands" to include submerged lands of the continental shelf.⁸⁸ The court in *Justheim* thus did not recognize Truman's proclamation as affecting domestic law involving DOI's authority to lease minerals.

IV. THE IMPACT OF CUSTOMARY INTERNATIONAL LAW ON THE STATUTORY SCHEME—IS SUPREME LAW EQUAL LAW?

A final argument that can be inferred from DOI's reasoning is that the new customary international law of the EEZ overrides existing domestic law. Professor Henkin supports this position in a recent article, in which he argues that newly evolved customary international law should be construed to override existing domestic law.⁸⁹ Professor Henkin's argument is that customary international law is federal law, as are treaties, acts of Congress, and federal common law. Professor Henkin concludes that all federal law is of equal stature because of Supreme Court holdings that later inconsistent treaties prevail over statutes.⁹⁰ Therefore, Professor Henkin argues, the latest in time rule should apply to customary international law as well.⁹¹

The fact that courts have held that treaties are equal to acts of Congress does not compel the conclusion that customary international law is equal to an act of Congress or to a treaty. Professor Henkin's conclusion is not supported by the Constitution, nor by the relationship of international law

86. 229 F.2d 29 (D.C. Cir. 1956).

87. 41 Stat. 437 (codified as amended at 30 U.S.C. § 181-287 (1982)).

88. 229 F.2d at 31 ("Congress did not intend to apply the . . . Act to lands under the marginal seas where problems of survey and administration would be wholly different").

89. Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984). Professor Henkin suggests that customary law may "effectively modify" the OCSLA "and numerous statutes that refer to waters under U.S. jurisdiction, which are now substantially extended." *Id.* at 1564 n.34. Professor Henkin's view is refuted in Goldklang, *Back on Board the Paquete Habana: Resolving the Conflict Between Statutes and Customary International Law*, 25 VA. J. INT'L L. 143 (1984).

90. Henkin, *supra* note 89, at 1564. The traditional common law rule of deference to the legislature, however, prevents the courts from superseding prior acts of Congress by making inconsistent common law. *Id.* at 1563.

91. *Id.*

to federal common law. It is moreover contrary to the principle of separation of powers and the prohibition on presidential legislation. Finally, particularly in the case of the EEZ, there are strong policy reasons against interpreting customary international law as extending the domestic regime governing seabed resources.

A. *Customary International Law Contrasted with Treaties*

As between treaties and statutes, the later in time rule applies because both are the supreme law of the land.⁹² Professor Henkin argues that there should be no difference in this respect between customary international law and treaties.⁹³ But there are important differences between treaties and customary law that argue for different treatment of the two in domestic law.

First, the Constitution declares a treaty supreme, but mentions the “law of nations” only with respect to Congress defining and punishing piracies and crimes against the law of nations. More importantly, a treaty is made by the President with the consent of two-thirds of the Senate. Because of the participation of one house of Congress, a treaty is akin to a legislative act. But in forming customary international law, the President’s role is primary;⁹⁴ the legislature need not act at all. The conclusion that a treaty may supersede an earlier legislative act is justified on two grounds: first, the Constitution declares treaties supreme, and second, two-thirds of the Senate participates in its making. Neither ground supports the proposition that customary international law may supersede domestic legislation.

B. *The Relation of Customary International Law to Federal Common Law*

That “international law is part of our law” is a familiar phrase, invoked but not elaborated upon by the modern Court.⁹⁵ Professor Henkin relies on this concept to argue that international law is federal common law, or like federal common law, and therefore supreme.⁹⁶ But this argument ignores

92. See *supra* notes 49–52 and accompanying text.

93. Henkin, *supra* note 89, at 1565 (“There seems to be no authority in jurisprudence, nor any reason in principle, for giving customary law less weight than a treaty in relation to an earlier act of Congress.”).

94. Professor Henkin acknowledges that “it is the executive branch . . . that acts for the United States to help legislate customary international law.” Henkin, *supra* note 89, at 1562.

95. See, e.g., *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 103 S.Ct. 2591, 2598 (1983) (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)).

96. Henkin, *supra* note 90, at 1557–61. Although federal courts will not supersede federal statutes with common law, see, e.g., *Milwaukee v. Illinois*, 451 U.S. 304, 312–13 (1981), federal common law is supreme over state law. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 378 U.S. 398 (1964), discussed *infra* note 106.

the eighteenth century origins of this concept.

To eighteenth century jurists and lawyers, international law was a part of the general common law, to be administered by state courts and federal courts alike.⁹⁷ Notions about the common law process and the role of federal courts in administering the common law have changed dramatically in the last two centuries. To appreciate the role customary international law does or should play in federal courts, it is useful to examine eighteenth century conceptions of the general common law, and the extent to which those conceptions can or should influence modern jurisprudence. There are essentially two views of the general common law applied by the early federal courts: the organic view and the positivist view.⁹⁸ Professor Henkin takes the organic concept that international law is part of federal common law, then grafts the positivist argument onto that—international law is part of our law, but it is not like common law because it is not judge made; therefore, the common law tradition of judicial deference should not apply. A proper analysis of the impact of customary international law on domestic law must separate the organic from the positivist view, however, to see the implications of each for the problem.

1. *The Organic View*

Eighteenth century jurists viewed the common law as not just a unified body of rules, but as a process of applying rules to a specific conflict between identifiable parties.⁹⁹ It was seen as a customary system, designed

97. See generally Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26 (1952) Pt. 1; Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513 (1984). The general common law was considered to include merchant law, maritime and admiralty law, conflicts of law, and what is today considered public international law.

In the eighteenth century, individuals were viewed as much the proper subjects of international law as were states. See Dickinson, *supra*, at 27. Thus commercial dealings between citizens of different nations were decided upon principles of international law existing within the general common law and administered by federal and state courts. Dealings between individuals and nations were also decided upon international law principles.

Because there was one general common law that could be administered by state and federal courts alike, there was no concept of a supreme federal common law. It was only later, when controversy over the extent of federal power developed, that common law was viewed as state or federal, with federal common law supreme in those areas where it existed.

98. The term "organic" is not generally used in the literature, but it captures the sense of this view. For a thorough exposition of the organic view, see R. BRIDWELL & R. WHITTEN, *THE CONSTITUTION AND THE COMMON LAW* (1977). For the classic statement of the positivist view, see *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 378, 332–34 (Holmes, J., dissenting) (there is no body of general common law; "law in the sense in which courts speak of it today does not exist without some definite authority behind it").

99. The organic view summarized here is derived primarily from R. BRIDWELL & R. WHITTEN, *supra* note 98. Citations to early authorities are given where appropriate.

to give judicial recognition to the legitimate expectations of parties to a controversy, based upon custom and usage. Under this system, judicial decisions were not seen as the law, but only as evidence of the law.¹⁰⁰ The system acknowledged that custom and usage might change from one location to another, and that giving effect to the intentions of the parties might require a court to apply a local rule that varied from the general rule.¹⁰¹

Thus in the absence of a “fixed and permanent” local rule controlling a transaction, a court would apply the general common law, which included principles of the law of nations. But when a local customary rule clearly existed, which controlled the controversy under conflicts of law principles, the courts would apply that local rule to the controversy.¹⁰² This was so both in the case of state local rules and American local rules.¹⁰³ A local rule could be established either by decisions of the local court, or by statutory enactment.¹⁰⁴

100. This view is expressed in *Swift v. Tyson*, 10 U.S. (16 Pet.) 865, 871 (1842). See also 1 F. HAYEK, *LAW, LEGISLATION, AND LIBERTY* 94–95 (1973) (discussing the role of the judge in a customary law system); S.G. TUCKER, *COMMENTARIES ON THE LAWS OF VIRGINIA* 22 (Winchester 1836).

101. See S.G. TUCKER, *supra* note 100, at 26 (*lex loci contractus* applies to give effect to intentions of parties when they entered contract); see also *Brown v. Van Braam*, 3 U.S. (3 Dall.) 629 (1797) (applying Rhode Island law to a case involving a note made between Rhode Island residents in Rhode Island and later negotiated to a foreign citizen); see generally J. STORY, *COMMENTARIES ON THE CONFLICTS OF LAWS* 21–39 (8th ed. 1883). Under the organic view, the Judiciary Act of 1789 § 34 embodied the *lex loci* principle, rather than the principle, later adopted in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), that state common law per se was something different from a general common law.

102. See *The Paquete Habana*, 175 U.S. 677, 700 (1900) (international law applies only in absence of controlling municipal law) (emphasis added); R. BRIDWELL & R. WHITTEN, *supra* note 98, at 78–87 (discussing the application of conflicts of law principles to disputes arising from commercial transactions); see also J. STORY, *supra* note 101, at 21–39.

103. See *The Lottawanna*, 88 U.S. (21 Wall.) 654, 661–62 (1875) (disregarding international customary law in the matter of a maritime lien because the Supreme Court had previously recognized a different rule); *Tag v. Rogers*, 267 F.2d 664, 666 (D.C. Cir. 1959) (“it has long been settled in the United States that the federal courts are bound to recognize any one of these three sources of law [treaties, statutes, and the Constitution] as superior to canons of international law”), *cert. denied*, 363 U.S. 904 (1960); see also *Fletcher*, *supra* note 97, at 1520 (by the 1820’s “American lawyers began to speak fairly regularly of a distinctly American law merchant, different in significant respects from the international law merchant”). Compare *Brown v. Van Braam*, 3 U.S. (3 Dall.) 629 (1797) (Rhode Island law applies to foreign plaintiff when note sued on made between Rhode Island citizens in Rhode Island) with *Van Reimsdyk v. Kane*, 28 F. Cas. 1062 (C.C.D.R.I. 1812) (No. 16,871) (Rhode Island discharge of insolvent does not apply to a foreign plaintiff when instrument sued on made in a foreign country whose laws do not recognize such a discharge), *rev’d on other grounds sub nom.* *Clark v. Van Reimsdyk*, 13 U.S. (9 Cranch) 688 (1815).

104. A local rule of law, however, could not have extraterritorial effect. For example, in a prize case the court relied on international prize law in disregard of a federal statute because the statute could not control a transaction that occurred in a British port. *The Sally*, 12 U.S. (8 Cranch) 579 (1814). Justice Story reasoned that “the municipal forfeiture under the Non-intercourse Act, was absorbed in the more general operation of the law of war. The property of an enemy seems hardly to be within the purview of mere municipal regulations; but is confiscable under the *jus gentium*.” *Id.* at 384.

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It is difficult to overlay the organic view of the general common law with its conflicts of law principles on the operation of federal courts today. Federal courts no longer apply general common law.¹⁰⁵ Rather, they apply state common law when sitting in diversity cases, or an extremely limited variety of federal common law, which apparently includes international law.¹⁰⁶ Nevertheless, it is possible to argue that the principles of the organic system regarding the relationship between customary norms and local statutes still have some relevance in the area of international law.¹⁰⁷

In the organic view of common law, where a clear municipal rule exists, and where that rule governs under conflicts principles, the case should be decided based upon the municipal rule. It should make no difference that there is a later conflicting customary law principle.¹⁰⁸ Thus international

105. *Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981) (Supreme Court is not a general common law court with power to develop and apply its own rules of decision).

106. This appears to be the implication of the Supreme Court's decision in *Banco Nacional de Cuba v. Sabbatino*, 378 U.S. 398 (1964), in which the Court held that the Act of State doctrine prohibited United States courts from disregarding property ownership based upon the expropriation decree of a foreign sovereign. The Court stated that because ordering relations between the United States and other members of the international community is exclusively an aspect of federal law, only the federal judiciary could decide whether the Act of State doctrine applied to a particular case, and that decision would bind the states. *Id.* at 425; see also *Zschernig v. Miller*, 389 U.S. 429 (1968) (foreign policy is area of exclusive federal power); RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 131, comment d (Tent. Draft No. 5) (customary international law is federal law, supreme over state law) [hereinafter cited as DRAFT RESTATEMENT].

107. This Comment is concerned only with the question of whether a customary international law principle can override an act of the legislature. A broader question, not addressed here, is what role customary international law should play in the absence of controlling domestic law. The issue has generated controversy in the field of human rights litigation. Recently human rights advocates have argued that customary international law proscribing human rights abuses affects the domestic law of the United States. They may argue that human rights norms are substantive domestic law, or that they inform the interpretation of "cruel or unusual punishment" in the eighth amendment. See Hartman, "Unusual" Punishment: the Domestic Effects of International Norms Restricting the Application of the Death Penalty, 52 U. CIN. L. REV. 655 (1983).

For a case relying on international human rights norms to order release of a detained alien, see *Fernandez v. Wilkinson*, 505 F. Supp. 787 (D.Kan. 1980), *aff'd on other grounds*, 654 F.2d 1382 (10th Cir. 1981). For a discussion of human rights cases in general, see Comment, *The Domestic Application of International Human Rights Law: Evolving Species*, 5 HASTINGS INT'L & COMP. L.Q. 161 (1981). For a discussion of conflicts of law principles regarding the human rights issue, see *infra* note 109.

108. Such a notion may raise the objections of those who have long since rejected the dualist conception of municipal and international law. See Sprout, *Theories as to the Applicability of International law in the Federal Courts of the United States*, 26 AM. J. INT'L L. 280 (1932). What is suggested here is not a notion of our law, and a separate body of international law from which our law "borrows." Rather, it is an acknowledgment that under an organic view of customary law, conflicts of law principles may require that the *lex loci* control a given controversy. The locale may be the nation, or it may be the state, when federal interests are not implicated. See, e.g., *Abdul-Ruhman Omar Adra v. Clift*, 195 F. Supp. 857, 886 (D.Md. 1961) (Lebanese custody decree not given effect, court implicitly used conflicts of law principles to determine that Maryland law governed child in the state). Customary international law, like eighteenth century general common law, is the "brooding omnipresence" that

law should govern only in a case where there is no applicable municipal law, or where municipal law does not govern either because it has no extraterritorial effect or no effect with respect to the parties.¹⁰⁹ In the case of the United States' Continental Shelf, the relevant conflicts of law principle is that a state's laws have complete authority over all real property within its territory.¹¹⁰ Thus the extent of the United States' Continental Shelf should clearly be determined by the law of the United States and not the law of nations.

supplies the general rule when no local rule or treaty controls.

This is not to say that federal courts are free to select from among international law principles those that they wish to apply. In the organic system there are well-established rules for determining, first, whether a local rule exists and, second, whether the local rule should govern the controversy. *See* R. BRIDWELL & R. WHITTEN, *supra* note 98, at 68–87. In a case in which there is no controlling local rule, and no law of a foreign jurisdiction governs, then principles of international law should apply. A decision by Justice Story while on circuit demonstrates this system. In *United States v. The Schooner La Jeune Eugenie*, 26 F. Cas. 832 (C.C.D. Mass. 1822) (No. 15,551), the question was whether a ship should be forfeited, having been seized while engaged in slave trade. Justice Story noted that the African slave trade was inconsistent with the law of nations and engagement in such trade rendered a vessel confiscable, *unless* municipal law of the vessel's flag state approved of the trade. Thus Justice Story examined French law because the vessel sailed under the French flag. As French law was not contrary to the law of nations on this point, Justice Story found the vessel confiscable and ordered that it be delivered to the French government.

109. The difficulty with this analysis is that in each case the court must determine whether a given municipal law will control. For example, traditional conflicts of law principles recognize that a state has absolute authority over property and persons within its territory. But when a question arises that implicates the rights of a foreigner, municipal law will not automatically apply, presumably even if the foreigner is present in the United States. *See, e.g., The Lottawanna*, 88 U.S. (21 Wall.) 654, 661–62 (1875) (“[I]n each country, peculiarities exist . . . on the outside boundaries of the law, where it . . . affects only its own merchants or people in their relations to each other. Whereas, in matters affecting the stranger or foreigner, the commonly received law of the whole commercial world is more assiduously observed, as, in justice, it should be.”).

If one applies traditional conflicts principles in the human rights context, *see supra* note 107, different results might apply depending upon the context. For example, an illegal alien detained under United States immigration laws might complain that arbitrary detention violates international human rights norms. *See Fernandez v. Wilkinson*, 505 F. Supp. 787 (D. Kan. 1980), *aff'd on other grounds*, 634 F.2d 1382 (10th Cir. 1981). Although the United States might argue that a sovereign has absolute control over immigration matters, *see, e.g., The Chinese Exclusion Case*, 130 U.S. 581, 604 (1889), the alien might counter that arbitrary detention is not strictly related to a nation's decision over whom to allow inside its borders. The alien's status as a foreigner might dictate treatment under an international norm. *Cf. The Lottawanna*, 88 U.S. (21 Wall.) 654, 661–62 (1875).

A United States citizen relying on international law to overcome a municipal law could not make a similar argument. A United States citizen might argue that evolving international human rights laws have wrought a fundamental change in conflicts of law principles. That is, a state's laws are binding on all within its territory, except in those areas where the international community has determined that a fundamental human right exists.

110. *See* J. STORY, *supra* note 101, at 21. This is not to say that United States courts do not apply international law to resolve disputes over real property within United States territory. *See, e.g., Jones v. United States*, 137 U.S. 202, 212 (1890) (holding that the United States could acquire new territory because the law of nations recognised such a right). The point is that courts will apply municipal law instead of international law when a controlling municipal law exists.

2. *The Positivist View*

A second view of the common law tradition relies on the notion that all law is made, and must proceed from some sovereign authority.¹¹¹ The positivist view suggests that early common law judges mistakenly believed they discovered law by reference to the monolith of common law principles, but that modern judges recognize that they make law based upon their view of wise social policy.¹¹² In the positivist scheme courts will not make common law that supersedes a statute because the legislature is granted sole legislative power and courts may only make law interstitially.¹¹³ In the positivist scheme, then, one might argue, as Professor Henkin does,¹¹⁴ that because judges truly do “discover” international law it should supersede a legislative act.

But this view is not true to its own underlying premise—that all law must proceed from some authority. Customary international law would not be law for the United States but for the acquiescence or participation of the executive in its formation.¹¹⁵ As such, the authority from which customary international law proceeds, insofar as it applies to the United States, is the executive.¹¹⁶ Under such an analysis, one must examine the international law principle as if it were an executive agreement.¹¹⁷

111. See *Black & White Taxi*, 276 U.S. at 322–24, *quoted supra* note 98. The Supreme Court accepted this view in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938). Because the Constitution confers no power on the federal courts to make common law for the states, the court held, federal courts must follow the common law rule as announced by the highest state tribunal when sitting in diversity actions.

112. See *R. BRIDWELL & R. WHITTEN*, *supra* note 98, at 130–37. The modern Court thus makes law when it disregards the expectations of the parties in favor of formulating wise social policy. See, e.g., *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943) (Court disregarded Pennsylvania law preventing recovery where there was forged indorsement because instrument was check issued by United States government and uniform rule for such instruments is desirable).

113. See *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 218, 222 (1917) (“judges do and must legislate but they can only do so interstitially”) (Holmes, J., dissenting).

114. Henkin, *supra* note 89.

115. Under the doctrine of the persistent protester, a state can avoid becoming bound by a principle of customary law by consistently objecting to it. See DRAFT RESTATEMENT, *supra* note 106, § 102 comment d.

116. Congress also participates in the formation of customary law, as it did, for example, when it created a 200 mile fishery zone for the United States. Fishery Conservation Act of 1976, Pub. L. No. 94-265, 90 Stat. 331 (codified at 16 U.S.C. §§ 1801–82 (1982)). In that instance, however, courts may rely on the domestic statute for legal authority and need not turn to the international law principle.

117. If carried to the extreme such an analysis might dissolve into absurdities. It is helpful in analyzing the problem here because the customary law in question is one of recent origin. It would seem inappropriate to follow an ancient principle of customary law, long accepted and relied upon, only if it comported with the requirements for domestic enforceability of a sole executive agreement.

C. *Customary International Law Viewed as a Sole Executive Agreement*

Although customary international law does not have the character of a formal contract, the United States is bound by it to the same extent, because of the element of *opinio juris* in the formation of customary law. Thus the United States is obligated under customary international law as much as it is obligated under a treaty or executive agreement.¹¹⁸ If customary international law binding upon the United States proceeds from the authority of the executive, those cases analyzing the President's power under sole executive agreements shed light on the authority of customary law.

In two cases the Supreme Court has held that a sole executive agreement superseded inconsistent state law. Both *United States v. Pink*¹¹⁹ and *United States v. Belmont*¹²⁰ involved the nationalization of Russian businesses by the revolutionary government of Russia. Some of these businesses had funds on deposit with a United States bank in New York. The President, in recognizing the new government of the Soviet Union, negotiated an agreement by which the Soviet Union assigned to the United States government its interest in the funds in the New York bank. The United States government then attempted to recover those funds.

In *Belmont* the Court held that the agreement prevailed over New York's policy of avoiding confiscation decrees,¹²¹ and in *Pink* it held that the agreement prevailed over a New York court decree awarding payment from the funds to another party.¹²² In these cases the Court maintained that power over international relations is vested exclusively in the national government and cannot be interfered with by the states.¹²³ So long as the federal government was acting within the field of its powers, it could consummate whatever act it undertook. The Court could not conceive that any constitution, law, or policy of a state could be interposed as an obstacle to the operation of a federal constitutional power,¹²⁴ here the constitutional power of the President to recognize foreign governments.¹²⁵ The decision in *Belmont* rests on principles of federalism: the primacy of the federal government in the conduct of foreign affairs and the notion that "state lines disappear" in international relations.

118. DRAFT RESTATEMENT, *supra* note 106, § 102 comment j.

119. 315 U.S. 203 (1942).

120. 301 U.S. 324 (1937).

121. *Id.* at 330, 332.

122. 315 U.S. at 234.

123. *Belmont*, 301 U.S. at 330, 332.

124. *Id.* at 331-32; *see also Pink*, 315 U.S. at 231 (enforcement of New York decree would "subtract from the federal policy").

125. *Belmont*, 301 U.S. at 330 ("We take judicial notice of the fact that coincident with the assignment set forth in the complaint, the President recognized the Soviet Union.").

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Even though the Court in *Belmont* and *Pink* held a sole executive agreement supreme over state law, it does not follow that an executive agreement should supersede prior congressional legislation. In the leading case addressing this issue, the Fourth Circuit held in *United States v. Guy W. Capps, Inc.*¹²⁶ that a sole executive agreement between the President and Canada would not take precedence over an act of Congress. The Supreme Court reversed on other grounds. The question has not been brought to the circuit courts of appeals since *Guy W. Capps*, and the *Restatement* suggests that the issue is unsettled.¹²⁷

As a general proposition it does not seem contradictory to find that a sole executive agreement supersedes state law but not congressional legislation. The decisions in *Belmont* and *Pink* rested on concepts of national sovereignty and grappled with the issue of federalism. The conflict was between an act of an individual state and an act of the federal government in an area affecting foreign relations. The Supreme Court upheld the act of the federal government so long as it was a constitutional act of power. Because the agreement with Russia was a valid act of power based on the President's independent constitutional authority to recognize foreign governments, it prevailed over state law.¹²⁸

Where a sole executive agreement contradicts prior congressional legislation, the issue is not one of federalism but of separation of powers. If the President concludes an agreement closely related to an independent constitutional power, the authority of the agreement as law would seem stronger than if it arose out of the President's general implied foreign affairs power.¹²⁹ In the recent case of *Dames & Moore v. Regan*¹³⁰ the Supreme Court upheld President Carter's suspension of federal court cases against

126. 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955).

127. DRAFT RESTATEMENT, *supra* note 106, § 308 comment d. Two subsequent decisions have adhered to the rule announced in *Capps*. *Swearingen v. United States*, 565 F. Supp. 1019 (D. Colo. 1983) (executive agreement cannot confer tax exemption on American employees in derogation of Internal Revenue Code); *Seery v. United States*, 127 F. Supp. 601 (Ct. Cl. 1955) (executive agreement cannot bar remedy under fifth amendment), *cert. denied*, 359 U.S. 943 (1956).

128. The Restatement reporter appears to argue against the *Guy W. Capps* holding, citing the often quoted passage from the Federalist Papers that “[a]ll Constitutional acts of power, whether in the executive or the judicial department, have as much legal validity and obligation as if they proceeded from the legislature.” DRAFT RESTATEMENT, *supra* note 106, § 135 reporter's note 6. This argument ignores the principle accepted by the Supreme Court that presidential acts of power have more authority when carried out pursuant to a specific delegation of Congress, and less authority when contrary to a congressional expression. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Frankfurter, J., concurring), discussed *infra* note 134. For a recent criticism of the *Draft Restatement* position, see Dalton, *International Agreements in the Revised Restatement*, 25 VA. J. INT'L L. 153, 159–63 (1985).

129. *United States v. Guy W. Capps*, 204 F.2d 655, 660 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955).

130. 453 U.S. 654 (1981).

Iran. The Court relied in part on the President's general foreign affairs power,¹³¹ but rested its decision primarily on the longstanding practice of Presidents and the abundant evidence of congressional acquiescence and approval.¹³² The Court emphasized that its holding was narrow, and cautioned against any broader construction of presidential power than necessary.¹³³ The Court implied that in the face of congressional disapproval or a contrary legislative act the case would have been far more difficult.¹³⁴

If sole executive agreements may be compared to the formation of customary law principles, then the same analysis should apply. The President participates in the formation of customary law pursuant to the general foreign affairs powers of the executive, and in the role as "sole organ" of the sovereign. If federal courts gave domestic effect to customary international law over a prior act of Congress, they would give effect essentially to legislative acts of the executive. The Constitution gives neither the President nor the international community the authority to make domestic law. The Executive may make domestic law only in narrow circumstances; it would be difficult to argue that such a circumstance exists in the face of a contradictory act of Congress¹³⁵ in an area outside the President's independent constitutional powers and within Congress's express constitutional powers.

D. *Practical and Policy Considerations*

There are also practical and policy arguments against giving customary international law in general, and the customary law of the EEZ in particular, precedence over an act of Congress. Customary law works like

131. *Id.* at 682-83. The Court cited *Pink* and *Ozanic v. United States*, 188 F.2d 228, 231 (2d Cir. 1951). Both cases relied on the President's power to recognize foreign governments, but in *Dames & Moore* recognition was not an element in President Carter's claims settlement agreement with Iran.

132. 453 U.S. at 680 ("Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement.").

133. *Id.* at 688.

134. The Court was careful to restrict the scope of its holding. *Id.* In addition, the Court relied on Justice Frankfurter's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Justice Frankfurter declared that the President's power was highest when exercised pursuant to explicit congressional delegation, in the twilight zone in the absence of any congressional statement, and at its lowest ebb when exercised contrary to the will of Congress. *Id.* at 637 (Frankfurter, J., concurring).

135. The valid legislative act being considered here may be either the OCSLA or the Shelf Convention. *See supra* Part IIIB. One might argue that because the Shelf Convention has been superseded by customary law in the international forum, it should no longer be controlling domestic law. Clearly the United States would no longer be bound in international law by the Convention to the extent that it is superseded. But because the treaty is effective domestically, it has the same status in domestic law as a statute. There is no reason to treat it any differently than a statute that has fallen out of step with newly evolved customary law. Even assuming the treaty is no longer domestically effective, the OCSLA itself still stands as an expression of congressional will. That expression appears to place a limit on DOI's authority far short of 200 miles. *See supra* Part IIIA.

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common law in many ways,¹³⁶ but unlike common law it is extremely difficult to determine precisely at what point it arises.¹³⁷ Acts of Congress occur at specific times, and parties claiming that customary international law supersedes acts of Congress would have to show with some accuracy when a customary law arose.¹³⁸

In the context of the OCSLA and the EEZ another policy reason exists for not interpreting customary law as extending the existing statutory scheme. Regulation of ocean resources is governed by a complex and intertwined group of statutory schemes.¹³⁹ The EEZ proclamation claims for the United States enormous new areas of the seabed. Not only is the area greatly increased, but the implications of exploiting its resources may be quite different than for the continental shelf. Only about three percent of the United States' continental shelf itself has been explored;¹⁴⁰ the EEZ proclamation presents the United States with a vast new area even less explored. Development of this new area should be orderly and well-planned, with consideration for the long-range implications. Unilateral extension of DOI's jurisdiction, without careful statutory development, does not provide the long-range order that is required.

V. CONCLUSION

Neither the President's proclamation nor the customary law of the EEZ should be interpreted to extend the existing scheme of the OCSLA. Although the jurisdiction established in the OCSLA is partially ambulatory, it should not be interpreted to extend beyond the edge of the geological continental shelf. Moreover, the Shelf Convention controls the definition of the Continental Shelf in the OCSLA, and is limited to the submerged portion of the continental land mass. For DOI to unilaterally extend its authority under the OCSLA amounts to an illegitimate executive extension of its own authority without implementing legislation.

136. See *supra* notes 95–111 and accompanying text.

137. See *North Sea Continental Shelf* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), 1969 I.C.J. 4 (Judgment of Feb. 20, 1969), paras. 60–78, for an example of the difficulties encountered in determining even the existence of a customary principle.

138. As an example, in 1976 Congress enacted legislation extending the United States' exclusive fishing zone to 200 miles. Fishery Conservation Act of 1976, Pub. L. No. 94-265, 90 Stat. 331 (codified at 16 U.S.C. §§ 1801–82 (1982)). Sometime shortly before, during, or after enactment, customary law arguably recognized a state's right to extend its exclusive fishing zone to 200 miles. If Congress had established a zone other than 200 miles, it would be difficult to determine whether the customary law superseded the Act, or whether the Act superseded customary law.

139. See NATIONAL ADVISORY COMMITTEE ON OCEANS AND ATMOSPHERE, *supra* note 54, at app. E.

140. *Id.* at 1.

Furthermore, the new customary law of the EEZ should not override the OCSLA or the domestic force of the Shelf Convention. Although customary international law may control in a case in which no domestic law is controlling, it should not have force in the presence of a contrary domestic law, regardless of whether that law precedes it. This is the case under an interpretation of customary law that follows eighteenth century notions of the role of customary law in domestic courts. It is also the case under an interpretation of customary law as a sole executive act, because the President does not have constitutional authority to annex new territory to the United States and prescribe laws to govern it.

Congress is considering legislation to implement President Reagan's EEZ proclamation.¹⁴¹ The proclamation claims important new resources for the United States, and vast new areas. There are already numerous acts of Congress and regulatory schemes of other executive agencies affecting the submerged territory of the United States. Exploitation of the deep seabed claimed by President Reagan should be orderly and carefully planned. But the current legislation was not intended nor designed to accomplish this. Congress should take steps to create a regime for the orderly exploitation of the deep seabed and, as importantly, should act to prevent future claims of power by the executive based on a precedent of congressional acquiescence.

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141. H.R. 2061. In addition, Congress is considering legislation to temporarily prohibit any hard mineral leasing in the Gorda Ridge area. H.R. 5403, 98th Cong. 2d Sess. (1984) ("Ocean Minerals Resources Development Act").