AUTHORITY TO ISSUE OUTER CONTINENTAL SHELF MINERAL LEASES IN THE GORDA RIDGE AREA

M-36952 May 30, 1985

Outer Continental Shelf Lands Act: Generally

The statutory definition of "outer Continental Shelf" applies to submerged lands seaward of those granted to the States in the Submerged Lands Act.

Outer Continental Shelf Lands Act: Generally

The statutory definition of "outer Continental Shelf" includes all submerged lands which the United States currently claims under international law as being subject to its jurisdiction and control.

Outer Continental Shelf Lands Act: Generally

Generally, because the United States currently claims continental shelf jurisdiction to a minimum of 200 nautical miles from its coasts, the Secretary has the authority to issue mineral leases covering areas within 200 miles of the coasts of the 50 States.

United States Department of the Interior

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

MMS.ER.0057

MAY 30 1985

Memorandum

To: Secretary

From: Solicitor Frank K. Richardson

Subject: DOI's Authority to Lease Polymetallic Sulfides in the Gorda Ridge Area

The Department of the Interior currently has under consideration offshore leasing for polymetallic sulfides in the Gorda Ridge area in the Pacific Ocean as far as two hundred nautical miles 1/ west of California and Oregon. The subsoil and seabed of the Gorda Ridge area contain polymetallic sulfides at depths admitting of exploitation. 2/ This proposal, together with the United States declaration of an offshore 200-mile Exclusive Economic Zone ("EEZ"), has led to discussion of the extent of the Department of the Interior's leasing authority within this area. I conclude that the Department has the authority to lease the Gorda Ridge area under the Outer Continental Shelf Lands Act ("OCSLA").3/ Because of the length of this opinion, I begin with a summary of its principal conclusions.

I. Introduction and Summary

The Department of the Interior's leasing authority under the OCSLA applies to the outer Continental Shelf ("OCS"). As defined in this Act, "OCS" refers to the submerged lands beyond those granted to the coastal states by the Submerged Lands Act4/ that appertain to the U.S. and are subject to U.S. "jurisdiction and control." The plain meaning of this latter phrase is that the outer limit of the OCS expands as U.S. jurisdiction and control expand. As a consequence, the OCS includes the submerged lands seaward of the 50 States over which the U.S. asserts jurisdiction

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1/ A "nautical" or "geographic" mile is the length of a minute of longitude at the equator and in international practice is equal to 6,076.10333 . . . feet or 1,852 meters. Unless specified otherwise, the term "mile" refers to the international nautical mile. A marine league equals three nautical miles or 3.45 statute miles. A. Shalowitz, 1 Shore and Sea Boundaries with Special Reference to the Interpretation and Use of Coast and Geodetic Survey Data 25 n. 6 (1962) [hereinafter cited as 1 Shalowitz].

2/ 47 Fed. Reg. 55,313; 55,314 (1982).

3/ 43 U.S.C. § 1331 et seq. (1982).

4/ 43 U.S.C. § 1301 et seq. (1982).

and control at that particular point in time.5/ A review of the legislative history of the OCSLA and post-enactment Congressional interpretations substantiate this conclusion. Furthermore, this construction represents the longstanding interpretation of the Department of the Interior.6/

Two sources of law determine the current extent of U.S. jurisdiction and control over the seabed: customary international law and treaties or conventions binding upon the U.S.7/ A review of customary international law leads to the conclusion that the continental shelf doctrine and the Exclusive Economic Zone ("EEZ") doctrine are established principles in customary international law and that both recognize the coastal nation's rights over a 200-mile zone off its coasts where that nation has the exclusive right to explore and exploit the natural resources of the submerged lands.

The only applicable treaty binding upon the U.S. is the 1958 Convention on the Continental Shelf.8/ Under this Convention, "continental shelf" is defined as the seabed and subsoil adjacent to the coastal nation, but beyond the territorial sea, to a depth of 200 meters or beyond "where the depth of the superjacent water admits of the exploitation of the natural resources." This

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5/ By way of background, the United States currently asserts a territorial sea of three nautical miles. See Office of the Special Representative of the Secretary-General for the Law of the Sea, Law of the Sea Bulletin (Dec. 1983) (Pub. No. 83-35821) [hereinafter cited as Law of the Sea Bulletin]. The coastline from which this three-mile breadth is measured is determined in accordance with the Convention on the Territorial Sea and the Contiguous Zone, in force Sept. 10, 1964, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 [hereinafter cited as the Convention on the Territorial Sea and Contiguous Zone]. United States v. Louisiana, 394 U.S. 11 (1969); United States v. California, 381 U.S. 139 (1965). The U.S. also claims a contiguous zone out to 12 miles, in accordance with Article 24 of the Convention on the Territorial Sea and Contiguous Zone; a 200-mile exclusive fishing zone; and a 200-mile EEZ, in addition to asserting claims over the continental shelf. Magnuson Fishery Conservation and Management Act of 1976, 16 U.S.C. § 1801 et seq. (1982); Pres. Procl. No. 5030, 3 C.F.R. 22, 19 Weekly Comp. Pres. Doc. 384 (1983).

6/ Opin. No. M-36615, Unpublished Opinions of the Solicitor 399 (May 5, 1961) [hereinafter cited as Opin. No. M-36615].

7/ Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), [1984] I.C.J. Reports 246, 290-91, decided Oct. 12, 1984 [hereinafter cited as Canada/U.S. Boundary Case].

8/ Convention on the Continental Shelf, in force June 10, 1964, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311 [hereinafter cited as 1958 Convention].

"exploitability" definition must be construed against the backdrop of developments in customary international law. In this manner, the 1958 Convention incorporates the principle of international law that the legal continental shelf includes a minimum breadth of 200 miles, irrespective of the physical attributes of the submarine area.

Finally, this opinion will review domestic legislation affected by this construction of the exploitability definition of the 1958 Convention: most notably, the Deep Seabed Hard Mineral Resources Act.9/ This review concludes that this Department's interpretation of the phrase "outer Continental Shelf" will create no conflict or inconsistency with any other Federal statute.

II. The OCS Extends As Far Seaward As United States' Jurisdiction and Control Over the Seabed

The Department of the Interior is authorized to issue leases on the OCS. Section 2(a) of the OCSLA defines the "outer Continental Shelf" as follows:

> The term 'outer Continental Shelf' means all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title, 10/ and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control. 11/

9/ 30 U.S.C. § 1401 et seq. (1982).

10/ Section 1301(a) defines the "lands beneath navigable waters" conveyed to the coastal states by the Submerged Lands Act. Submerged Lands Act, 43 U.S.C. § 1301(a) (1982). Section 1301(b) provides that the term "boundaries" includes the seaward boundaries of a state as they existed at the time the state entered the Union (or as approved by Congress or as "extended or confirmed" in accordance with Section 1312) to a maximum distance of three geographical miles off the Atlantic and Pacific coasts and of three marine leagues into the Gulf of Mexico. The discussion which follows refers solely to submerged lands beyond such "lands beneath navigable waters."

11/ 43 U.S.C. § 1331(a) (1982). The key terms employed in the OCSLA's definition of the "OCS" were first publicly used in the September 28, 1945 Truman Proclamation on the Continental Shelf. Pres. Procl. No. 2667, 3 C.F.R. 67 (1943-1948 Compilation), 10 Fed. Reg. 12,303 (1945), 59 Stat. 884 (1945), 13 Dep't State Bull. 485 (1945) ("Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf") [hereinafter cited as Truman Proclamation]. This Proclamation stated, in pertinent part, as follows:

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The question presented by this language is when may the subsoil and seabed of submerged lands be said to "appertain" to the United States and to be "subject to its jurisdiction and control."

On its face, the area described by this statutory definition is an expanding one: if a given area of subsoil and seabed becomes subject to the United States jurisdiction and control and appertains to the United States, then that area falls within this definition. 12/ The plain meaning of section 2(a) must be

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

Id. The phrase "jurisdiction and control," as employed in the Truman Proclamation, appears to have originated in a memorandum from the Acting Secretary of State and the Secretary of the Interior to President Roosevelt, dated January 22, 1945, reprinted in 2 Foreign Relations of the United States, 1945 at 1490. The term was used to distinguish the limited nature of the rights claimed from sovereign territorial claims. However, in 1953, the phrase "sovereign rights" began to be generally employed for this purpose. M. McDougal and W. Burke, The Public Order of the Oceans: A Contemporary International Law of the Sea 696-99 (1962) [hereinafter cited as McDougal and Burke]; 1 Shalowitz, supra note 1, at 190 n. 21. The Truman Proclamation did not define the term "continental shelf." See also "Proclamation Concerning United States Jurisdiction Over Natural Resources in Coastal Areas and the High Seas;" 13 Dep't State Bull. 484 (1945) (the press release which accompanied the Truman Proclamation).

12/ This definition of the OCS requires the Secretary to consider the current extent of the seabed as claimed by the United States. Associate Solicitor Thomas J. Cavanaugh expressed this view in a 1961 opinion:

> [T]he Act is applicable to all submerged lands seaward of the States' boundaries of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control. Since the United States [by ratifying the 1958 Convention on the Continental Shelf] has now asserted rights to the seabed and subsoil as far seaward as exploitation is possible, it is clear that the Outer Continental Shelf Lands Act is now applicable to all these areas.

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followed, unless some unstated limitation must be inferred. As demonstrated below, the legislative history of the OCSLA indicates no such implied limitation.

A. The Legislative History of the OCSLA of 1953 Demonstrates that Congress Chose Not To Impose a Fixed Outer Limit for the OCS.

The legislative history of the 1953 Outer Continental Shelf Lands Act and its companion, the Submerged Lands Act, contain few references to the problem of defining the outermost limits of the OCS.13/ What references do exist reveal no intention to define "OCS" in any manner other than the broad language used in the statute. Indeed, the legislative history suggests that the very novelty of the continental shelf doctrine led Congress to define "OCS" so as not to commit the U.S. inextricably to any one theory of the seaward limit of the shelf.

The legislative commentary may be classified into three categories. First are statements describing the physical characteristics of the continental shelf, based on the limited information then available; second are expressions of the novelty and complexity of designing a legal regime for the continental shelf; and third are expressions of awareness and concern that any legislation should comport with international law.

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Opin. No. M-36615, supra note 6, at 398. At the time of this opinion, the 1958 Convention had not yet entered into force, although it had been ratified by the U.S.

13/ Titles I and II of H.R. 4198 and S.J. Res. 13 became the 1953 Submerged Lands Act. Title III of H.R. 4198, as it passed the House on April 1, 1953, was substantially similar to H.R. 5134 of the 83rd Congress and to Title III of H.R. 5992 and Title III of H.R. 4484 of the 82nd Congress, as it passed the House on July 30, 1951. H.R. 5134, originally somewhat similar to S. 1901, was amended to be identical to S. 1901 and passed the Senate on June 25, 1953 as the OCSLA. Daily Digest-Senate, 83d Cong., 1st Sess. (June 25, 1953). Titles I & II of H.R. 4484 were identical to S.J. Res. 20, as amended, which was vetoed May 29, 1952. S.J. Res. 20 was substantially identical to S.J. Res. 13, introduced by Senator Holland, which became the Submerged Lands Act. Because of the similarities between these early bills, their legislative histories should be considered supplementary to the materials directly dealing with S. 1901 and H.R. 5134. Regarding the history of the Submerged Lands Act and the OCSLA, see [1953] U.S. Code Cong. & Ad. News 1385, 2177. For the legislative history of these bills, see H.R. Rep. No. 215, 83d Cong., 1st Sess. 1-4 (1953), the Report of the House Committee on the Judiciary on H.R. 4198, which incorporated the Report of the House Committee on the Judiciary on H.R. 4484, H.R. Rep. No. 695, 82d Cong., 1st Sess. (1951), itself containing the Report of the House Committee on the Judiciary on H.R. 5992, H.R. Rep. No. 1778, 80th Cong., 2d Sess. (1948).

Statements within the latter two categories suggest that Congress found itself in something of a quandary. On the one hand, Congress did not wish to define the shelf so broadly that the definition employed would exceed the limit which might later emerge in general state practice or would foster more expansive state claims. On the other hand, Congress did not wish to define the shelf narrowly, for it remained possible that international law might later justify more expansive claims. Nor did Congress wish to relinquish any of the jurisdiction previously asserted by the United States.14/ In this uncertain situation, Congress selected a definition embodying and reaffirming the language of President Truman's seminal proclamation on the continental shelf, thus avoiding the twin pitfalls of unduly limiting U.S. claims or fuelling more expansive claims, during a period of uncertainty as to the outer reaches of the continental shelf doctrine.

1. Congress Did Not Adopt a Geographical Definition of the OCS

The legislative history contains a variety of statements regarding the physical attributes of the continental shelf. There are many direct and indirect references to the geographical nature of the continental shelf; but these references evidence only a layman's understanding of what the physical, not the legal, continental shelf was then thought to be. No attempt was ever made to define "OCS" precisely in geographical terms. On the contrary, the intention behind such general descriptions appears to have been merely to aid the Congress in visualizing the submerged lands in question. A few representative examples follow.

In response to the question of how one could determine the outer boundary of the continental shelf, the Secretary of the Interior, Julius A. Krug, responded in his 1948 testimony before the House and Senate Committees on the Judiciary with the following statement:

> It is a rather arbitrary limit at the present time which has been determined as about 600 feet in depth, 100 fathoms. I think it might be helpful if I showed you a chart which would at least give you my definition of what we are talking about in these different areas. . . . 15/

14/ Truman Proclamation, supra note 11.

15/ "Joint Hearings Before the Subcomm. of the House and Senate Comm. on the Judiciary on S. 1988 and Companion House Bills," 80th Cong., 2d Sess. 735 (1948) (statement of Julius A. Krug). Senate Bill 1988 actually dealt with the three-mile belt of submerged lands later covered by the Submerged Lands Act; this bill was later amended and reintroduced as H.R. 5992 in the 81st Congress.

In later testimony before a Subcommittee of the House Committee on the Judiciary, Secretary Krug made a similar statement:

> These lands begin at the low-water mark along the open sea, or at the seaward boundary of inland waters . . . and extend seaward for varying distances at different places.
>
> The continental shelves are slightly submerged portions of the continents that surround all the continental areas of the earth. Along some portions of the coasts, they are very broad, gently sloping platforms; and, at other places, they are narrow. The outer boundary of each shelf is marked by an increase in the gradient of slope of the sea floor. This occurs generally at a depth of approximately 100 fathoms, or 600 feet. Beyond the 100-fathom line, the outer slopes of the Continental Shelves are inclined more steeply toward the ocean deeps. 16/

This imprecise approach of generally describing what might be considered as the continental shelf appears clearly in one passage, which is contained in several congressional reports on substantially identical bills:

> Continental shelves have been defined as those slightly submerged portions of the continents that surround all the continental areas of the earth. They are a part of the same continental mass that forms the lands above water. They are that part of the continent temporarily (measured in geological time) overlapped by the oceans. The outer boundary of each shelf is marked by a sharp increase in the slope of the sea floor. It is the point where the continental mass drops off steeply toward the ocean deeps. Generally, this abrupt drop occurs where the water reaches a depth of 100 fathoms or 600

16/ "Conservation and Control of Submerged Coastal Lands Beneath Inland Waters and of Certain Resources of Said Lands, Hearings Before Subcomm. No. 1 of the Comm. on the Judiciary of the House of Representatives on H.R. 5992 and H.R. 5991," 81st Cong., 1st Sess. 166 (1949) (statement of Julius A. Krug). His statement then continued with a general description of the shelf areas off the coastal United States. The same statement was given in "Hearings on S. 923 and Related Measures before the Senate Comm. on Interior and Insular Affairs," 81st Cong., 1st Sess. 65-66 (1949).

> feet, and, for convenience, this depth is used as a rule of thumb in defining the outer limits of the shelf. 17/ 18/

The following exchange illustrates the uncertainty Congress faced in defining the outer limits of the geographer's shelf.19/ Mr. Tate, the Deputy Legal Adviser of the Department of State, was testifying before the Senate Committee on Interior and Insular Affairs:

> **Mr. Tate.** . . . The Federal Government claims on the Continental Shelf the right of exploration and control of the sea bed and subsoil.
> **Senator Malone.** How far out?

17/ Report of the House Comm. on the Judiciary on H.R. 5134, H.R. Rep. No. 413, 83d Cong., 1st Sess. 2 (1953) (H.R. 5134 was passed in lieu of S. 1901); H.R. Rep. No. 215, 83d Cong., 1st Sess. 6-7 (1953); H.R. Rep. No. 695, 82d Cong., 1st Sess. 16 (1951); H.R. Rep. No. 2078, 81st Cong., 2d Sess. 4-5 (1950). (H.R. Rep. No. 2078 dealt with H.R. 8137, which was substantially the same as H.R. 5991.)

18/ The one exception to the format of the first sentence ("have been defined") is found in Senate Report No. 411 on Senate Bill 1901, which was later enacted as the OCSLA. S. Rep. No. 411, 83d Cong., 1st Sess. 4 (1953). (This same report quotes the 1949 Krug testimony partially quoted above.) Senate Report No. 411 then describes the size and resources involved, noting the lack of accurate information, but giving the rough estimate from the U.S. Geological Survey that "the outer shelf can be estimated to contain 261,000 square miles, which is, in turn, almost 10 percent of the upland area of continental United States." Id. at 5. Although the tone of this passage is less equivocal than those in the earlier committee reports, this description is no more definite. More importantly, none of the passages purports to vary the definition of "outer Continental Shelf" contained in the various bills. This conclusion is supported by the fact that neither version attempts to provide an alternative for determining the outer limit of the geographical shelf with any precision.

19/ Throughout this legislative history, references are made to the 200-meter depth contour, or its practical equivalent, the 100-fathom and 600-foot isobath. There was never any magic regarding this contour line: it was used initially as a matter of convenience, since nautical charts generally showed this contour and it was a better approximation of the geological shelf than the 100-meter or 300-meter line. Lyman, "Technical Limitations on Designation of 200 meters as the Outer Edge of the Continental Shelf," cited in M. Whiteman, 4 Digest of International Law 838 (1965) [hereinafter cited as 4 Whiteman].

Mr. Tate. To the extent of the Continental Shelf.
Senator Malone. How do you define the limits of the Continental Shelf?
Mr. Tate. I am no geographer. I think the slope out to a certain depth is usually considered part of the Continental Shelf.
Senator Malone. Up to 100 fathoms?
Mr. Tate. I believe that is the general consideration that has been suggested, but it never has been defined.
Senator Malone. That would be your general idea of the end of the Continental Shelf?
Mr. Tate. In discussion of what the Continental Shelf is, it has sometimes been suggested that it is shelf that goes out from the coast, to the point where it exceeds 100 fathoms. That definition has not been adopted by this Government or, as far as I know, by any government, nor do I know that there is a definition that I can give you as a substantial and accepted definition. 20/ 21/

20/ "Submerged Lands: Hearings Before the Senate Comm. on Interior and Insular Affairs on S. J. Res. 13, S. 294, S. 107 and S. 107 Amendments, S. J. Res. 18," 83d Cong., 1st Sess. 1055-56 (1953) (statement of Jack B. Tate, Deputy Legal Adviser, Department of State) [hereinafter cited as "Hearings on S.J. Res. 13"]. Accord, "Hearings on S. J. Res. 20 Before the Senate Comm. on Interior and Insular Affairs Including Conferences with Executive Departments on S. 940," 82d Cong., 1st Sess. 447 (1951) (statement of S. Whittemore Boggs, Adviser on Geography to the Department of State, testifying as an individual).

21/ Another class of general geographical descriptions of the continental shelf found throughout the legislative history consists of references to the amount of territory generally understood as being part of the OCS. During this period, these statements normally refer to the United States acquiring approximately 235,000 to 290,000 square miles of territory. See, e.g., S. Rep. No. 411, 83d Cong., 1st Sess. 4-5 (1953), quoting the 1949 testimony of the Secretary of the Interior and Insular Affairs Committee (290,000 square miles, excluding the 600,000 square miles off the coast of Alaska; 261,000 square miles in the outer shelf); "Hearings on S. 1901 Before the Senate Comm. on Interior and Insular Affairs, 83d Cong., 1st Sess. 184 (1953) (statement of John Shepperd, Attorney Geneal of Texas) [hereinafter cited as "Hearings on S. 1901"]; 99 Cong. Rec. 7482 (June 25, 1953) (remarks by Sen. Daniel) "an area of approximately 235,892 squares miles"; "almost one-third as large as the Louisiana Purchases"). But again, there is no indication that such general descriptions were intended to be definitive. Very little was known about the resources of the continental

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Thus, Congress was aware of the standard criteria for describing the geographical shelf. In light of Mr. Tate's testimony that the government had not adopted any definition establishing the seaward limit of the nation's jurisdiction, Congress' failure to use these criteria in the definition of the "outer Continental Shelf" is particularly significant.22/

Other passages from the extensive legislative history of the OCSLA reveal why Congress declined to establish fixed limits to the OCS. The legislators frequently commented that the problems in creating a legal regime over the continental shelf were complex,23/ sui generis24/ and devoid of pat answers.25/

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shelf, and the estimates made by the United States Geological Survey were described as "extremely speculative." "Hearings on S. J. Res. 13," supra note 20, at 581 (statement of Ralph L. Miller, Chief, Fuels Branch, Geological Div., U.S. Geological Survey, Dept. of the Interior).

22/ There are various references in the legislative history to the continental shelf doctrine as being founded on the theory of prolongation of the land mass of the coastal state. See, e.g., 99 Cong. Rec. 7482 (June 25, 1953) (remarks of Sen. Daniel). Such constructions were based on the justifications given in the Truman Proclamation, supra note 11, for the United States unilateral assertion of jurisdiction over the continental shelf. This geographical aspect of the doctrine underlay its early development and has continued to play an important role in the legal concept of the continental shelf. However, such discussions of underlying legal principles evidenced no intention to define the continental shelf in such terms; and it is significant that the definition of the OCSLA was not framed in this manner.

23/ S. Rep. No. 133, 83d Cong., 1st Sess. 9 (1953), quoted in S. Rep. No. 411, 83d Cong., 1st Sess. 4 (1953), and 99 Cong. Rec. 7226 (June 25, 1953) (remarks of Sen. Ellender). See also 99 Cong. Rec. 4106-07 (April 28, 1953) (remarks of Sen. Cordon, Chairman of the Senate Committee on Interior and Insular Affairs).

24/ S. Rep. No. 133, 83d Cong., 1st Sess. 9 (1953), quoted in S. Rep. No. 411, 83d Cong., 1st Sess. 4 (1953), and 99 Cong. Rec. 7226 (June 25, 1953) (remarks of Sen. Ellender). "Hearings on S. 1901," supra note 21, at 6 ("We are wildcatting in the field of law").

25/ "Hearings on S. 1901," supra note 21, at 603 (Jack B. Tate, Deputy Legal Advisor of the Department of State). Mr. Tate in his testimony before the Senate Committee on Interior and Insular Affairs stated as follows:

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Throughout the legislative record, there was, also, a clear concern to act in accordance with the developing international doctrine of the continental shelf. 26/ Various international legal materials 27/ and cases 28/ were considered, as was the

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> The international problems arising from the discovery and exploration of the resources of the Continental Shelf are for the most part new problems. Some of our problems are still hypothetical, problems which have not yet arisen in practice. Thus, I do not come here with ready answers to all of the possible questions which may come up. I propose to set forth in general terms the conclusions and suggestions which represent the experience of the Department up to the present date in this field of international relations.

Id. at 572.

26/ See, e.g., 99 Cong. Rec. 7482 (June 25, 1953), where Senator Daniel stated as follows:

> In view of these actions by leading nations of the world and the acceptance of the Continental Shelf doctrine by the leading authorities and organizations concerned with international law, it is now safe to say that the theory first advanced by two States of the American Union has grown into general acceptance as a principle of international law. . . . This theory has been approved by the United Nations Commission on International Law and the International Law Association.

27/ See, e.g., "Hearings on S. 1901," supra note 21, at 382-84 (the August 1, 1947 Peruvian Executive Decree No. 781 proclaiming sovereignty out to 200 geographic miles and the United States response) and 438-43 (statement of Joseph Bingham, former professor, Stanford Univ.).

28/ In the Matter of an Arbitration Between Petroleum Development (Trucial Coast) Ltd. and the Sheikh of Abu Dhabi, 1 Int'l & Comp. L.Q. 247 (1952), was extracted and read into the record in "Hearings on S. 1901," supra note 21, at 443-45, and before the Senate, 99 Cong. Rec. 7444-46 (June 25, 1953), during which Senator Ellender also discussed briefly the 1951 International Court of Justice decision in United Kingdom v. Norway, [1951] I.C.J. Reports 116, popularly known as the Anglo-Norwegian Fisheries Case.

conduct of other nations in asserting claims over the continental shelf. 29/

One aspect of this concern for international law was the desire to safeguard the United States interests in any international race for the vast wealth of the continental shelf.30/ Senate Report No. 215 on House of Representatives Bill 4198 illustrates this point:

> Another factor which gives support for the enactment of such legislation appears in the activities of other sovereign nations . . . in extending their jurisdiction seaward over these lands off their respective shores. Such extensions vary from a few miles to 200 miles. It is the opinion of the committee [on the Judiciary] that delay or failure to so extend the jurisdiction and control of the United States to the submerged lands of the Continental Shelf off its coast can only prejudice our rights and interests therein and might possibly be used to our detriment should some future international controversy arise between the United States and another foreign power over these lands.31/

While Congress did not wish to define the shelf more broadly than international law would support, it plainly did not wish to define it too narrowly.

29/ See, e.g., S. Rep. No. 133, 83d Cong., 1st Sess. 26 (1953); "Hearings on S. 1901," supra note 21, at 378-82 (statement of W.M. Chapman, Director of Research, American Tunaboat Ass'n); 99 Cong. Rec. 7448 (June 25, 1953) (Sen. Ellender citing from "Hearings on S. 1901," supra note 21, at 572-73, 584-87 (statement of Jack B. Tate)); "Hearings on S.J. Res. 20 Before the Senate Comm. on Interior and Insular Affairs," 82d Cong., 1st Sess. 447-52 (1951) (statement of S. Whittemore Boggs, Special Adviser on Geography to the Department of State).

30/ 99 Cong. Rec. 7483 (June 25, 1953) (remarks of Sen. Daniel). Accord, "Hearings on S. 1901," supra note 21, at 45-46 (statement of Sen. Daniel discussing the possible application of state laws, to the extent not inconsistent with federal law).

31/ S. Rep. No. 215, 83d Cong., 1st Sess. (1953). Title III of H.R. 4198 was substantially similar to H.R. 5134 and S. 1901, although the definition of "outer Continental Shelf" contained in Section 2(h) of H.R. 4198 used the term "subsoil and natural resources," rather than "subsoil and seabed," as used in the final version of S. 1901 and H.R. 5134.

The best evidence against any implied limitation on the OCSLA's definition of "OCS" is that Congress was well aware of the various theories that could have been used in place of the definition chosen. The legislative history contains specific references to the following approaches: (1) a definition based on geology (2) a definition based on depth, such as the 200-meter isobath; (3) a definition based solely on distance from the coastline, such as 200 miles; and (4) a definition based upon the exploitability of the resources, involving no fixed depth or distance from the coast. 32/ Congress chose, however, to use the language of the Truman Proclamation, which had been accepted internationally33/ and was within the framework then adopted by

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32/ See "Hearings on S. 1901," supra note 21, at 724-27 (1953) ("Dissenting Opinion of the Delegates of Brazil, Colombia, and the United States of America" to the "Draft Convention on Territorial Waters and Related Questions" of the Inter-American Juridical Committee, which was presented to the Inter-American Council of Jurists at their April-May.1953 meeting).

33/ "Hearings on S. 1901," supra note 21, at 572-73, 584-87 (statement of Jack B. Tate, Deputy Legal Adviser of the Department of State); "Hearings on S. J. Res. 13," supra note 20, at 27-28 (1953) (letter dated March 4, 1953 from Thurston B. Morton, Assistant Secretary, Department of State, to Senator Hugh Butler, Chairman, Senate Committee on Interior and Insular Affairs).

The Truman Proclamation represented a landmark in international law: the assertion by a nation of rights to the natural resources of the subsoil and seabed of the submerged lands outside of the territorial sea contiguous to its coasts. As such, this Proclamation formed the basis for the development of the doctrine of the continental shelf, a doctrine now well established in customary international law. Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), [1982] I.C.J. Reports 18, 43, reprinted in 21 Int'l Legal Materials 225, 238 (1982) [hereinafter cited as Tunisia/Libyan Case]; North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/The Netherlands), [1969] I.C.J. Reports 3, 33-34, 8 Int'l Legal Materials 340, 366 (1969) [hereinafter cited as North Sea Continental Shelf Cases]; McDougal and Burke, supra note 11, at 636-38 ; Finlay, "Realism vs. Idealism as the Keys to the Determination of the Limits of National Jurisdiction over the Continental Shelf," Limits to National Jurisdiction Over the Sea 75, 105.

In part, the intention in enacting the OCSLA was to confirm the United States earlier assertion of jurisdiction over the continental shelf enunciated in the 1945 Truman Proclamation. Senator Cordon, in commenting on S. 1901, stated as follows: "[T]he bill is intended to make operative the Proclamation of the President of the United States, on September 28, 1945, and the jurisdiction asserted therein is extended to include the whole of

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the International Law Commission ("I.L.C.").34/

From this review of the legislative history of the OCSLA, the dilemma confronting Congress becomes clear. To define the OCS in precise geographical terms was at best very difficult. What technical information was available was limited, and there were not even generally accepted principles to use for guidance. The newness and complexity of the continental shelf doctrine made anticipation of the ramifications of any particular definition hard.

Also, the emerging and changing nature of the doctrine in customary international law made it improbable that any OCS definition based on a geographical description would accord with that eventually adopted by the international community of nations. If the area defined were either too narrow or too broad, the United States might find itself out of step with international law. If language too broad were used, the United States would be contributing to creeping jurisdictional claims; if too narrow, the U.S. might prejudice its later claims.35/ A balancing of these concerns led to the definition enacted in the OCSLA: the outermost limits of the OCS would be determined by the current extent of U.S. jurisdiction and control over the subsoil and seabed of the submerged lands. As such, the definition was one that both comported with existing international law and was flexible enough to adjust to the

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the seabed and subsoil of the outer Continental Shelf." 99 Cong. Rec. 6967 (June 22, 1953).

34/ The I.L.C. was established under United Nations General Assembly Resolution 174 (II) on November 21, 1947, for the purpose of codifying and developing international law. 1 Shalowitz, supra note 1, at 203-04. The I.L.C. recommended three different draft articles defining the extent of the continental shelf. The 1951 report used a definition based on the extent to which the depth of the superjacent waters admitted of exploitation. The 1953 report rejected this exploitability approach and adopted a fixed outer limit at the 200-meter depth contour line. Finally, the 1956 I.L.C. report employed the earlier 200-meter depth contour but went beyond it whenever the depth of waters admitted of exploitation. For the text of these three proposed articles, see 4 Whiteman, supra note 19, at 829-32.

The phrase "jurisdiction and control," used in the Truman Proclamation and in the OCSLA, was originally employed until 1953 to distinguish the limited nature of the jurisdiction claimed. However, in 1953, the I.L.C. adopted the term "sovereign rights" for this purpose, describing such jurisdiction as "sovereign rights for the purpose of exploring and exploiting its natural resources . . .." Id. at 762.

35/ See H.R. Rep. No. 215, 83d Cong., 1st Sess. 2-3 (1953).

emerging doctrine of the continental shelf. As United States jurisdiction and control over the submerged lands of the continental shelf broadened, the OCS would grow correspondingly, without any need to amend the statute.

B. Post-1953 Congressional and Administrative Interpretations of "OCS" Support the Conclusion that Congress Did Not Intend a Fixed Outer Limit

A review of Congressional and administrative interpretations of the term "OCS" as used in the OCSLA reveals a progressive expansion in the underlying physical concept of the continental shelf and a corresponding enlargement in the submerged areas believed to be included within the OCS. This fact, in turn, supports the conclusion that the "OCS" does not have a fixed outer boundary.

1. The Department of Interior's Interpretation

It has been the consistent interpretation of the Department of the Interior that section 2(a)'s definition of the OCS is an expanding one, whose outermost limits are determined by the current extent of United States jurisdiction and control over the subsoil and seabed of submerged lands seaward of the territorial sea. On May 5, 1961, Associate Solicitor Thomas Cavanaugh issued an opinion on the extent of the Department of the Interior's jurisdiction under section 2(a) of OCSLA. The question he addressed was whether the Department had authority to lease phosphate deposits located in an area approximately forty miles off the southern California coast at depths generally in excess of 200 meters and in a location separated from the coast by a deep channel. If the outer Continental Shelf were defined under the Act, by the 200-meter depth contour as had sometimes been suggested, this area would have been beyond the OCS. 36/ Concluding that the Department had such leasing authority, the Associate Solicitor's opinion noted that the legal definition of "OCS" contained in the Act did not appear to be limited to a geographical meaning of the term:

> Thus the term 'outer Continental Shelf' appears to be used in the Act not as a geographic term generally understood by geographers, but as having been given a special statutory definition in order that it may apply to all submerged lands over which the United States has asserted jurisdiction and control seaward of the boundaries of the States. 37/

36/ Opin. No. M-36615, supra note 6, at 399.

37/ Id. at 400.

The opinion reviewed the legislative history of the OCSLA, but found that the few geographical descriptions of the shelf were vague. 38/

The difficulty in defining the point where the continental shelf changes to the continental slope was a factor influencing Mr. Cavanaugh's conclusion. With respect to the separation of the area from the coastline, the opinion stated as follows:

> The Senate Report [No. 411 of the Interior and Insular Affairs Committee on S. 1901] also refers to the shelf as extending to a point where the gradient of the decline of the sea floor has a marked increase and where the slope to the true ocean floor begins. Language to this effect is also found in footnote 3 of United States v. Louisiana, 363 U.S. 1 (1960). The determination of such a point presents difficulty and would require the careful study of experts in this field. We do not presume to be competent to determine this point. However, we note that the sea floor in this general area does not slope steadily to the true ocean floor. Instead, it is cut up with channels, ridges, and plateaus. This does not, therefore, appear a satisfactory test of the seaward limit of the continental shelf. It is not required by the statute, and was abandoned in the definition of the continental shelf recently adopted by the United States [in the 1958 Convention]. 39/

Mr. Cavanaugh concluded that even though the 1958 Convention on the Continental Shelf was not yet effective, it had been ratified by the United States. As a consequence, the Convention's provisions indicated the extent of the area over which the United States had then asserted jurisdiction and control:

> This is the first definition of 'continental shelf' officially adopted by the United States which sets any seaward limit. Though it is not an amendment of the Outer Continental Shelf Lands Act, it is an indication of the extent of the area of seabed and subsoil over which the United

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38/ Id.

39/ Id. at 402-03. The reference in this text is to the 1958 Convention on the Continental Shelf. The 1958 Convention, supra note 8, was opened for signature on April 29, 1958 and became effective June 10, 1964. The 1958 Convention was approved for ratification by the United States Senate on May 26, 1960. 106 Cong. Rec. 11,192 (1960).

> States asserts jurisdiction, control, and power of disposition. As we have pointed out above, the Act is applicable to all submerged lands seaward of the States' boundaries of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control. Since the United States has now asserted rights to the seabed and subsoil as far seaward as exploitation is possible, it is clear that the Outer Continental Shelf Lands Act is now applicable to all these areas. 40/

Thus, as early as 1961, it was the opinion of the Department of the Interior that OCSLA's definition of the OCS was an expanding concept that would broaden automatically whenever the U.S. enlarged its claims under the continental shelf doctrine.

2. Congressional Interpretations

The Congressional record of this period also indicates such an understanding of the term "OCS". In 1969 and 1970, the Special Subcommittee on the Outer Continental Shelf of the Committee on Interior and Insular Affairs held hearings on "Issues Related to Establishment of Seaward Boundary of United States Outer Continental Shelf." 41/ As the subcommittee's first order of business, a letter from Senator Henry M. Jackson, Chairman of the Senate Committee, addressed to Senator Lee Metcalf, Chairman of the Special Subcommittee, dated July 23, 1969, was introduced into the record to describe the Special Subcommittee's purpose.42/ The letter stated, in pertinent part, as follows:

40/ Op. No. M-36615, supra note 6, at 403. On the basis of this opinion, the Department in November of 1966 asserted jurisdiction to the Cortes Bank area off southern California.

41/ "Hearings Before the Special Subcomm. on Outer Continental Shelf of the Sen. Comm. on Interior and Insular Affairs," 91st Cong., 1st and 2d Sess. (Dec. 17, 1969; Jan. 22, 1970; Mar. 4, 1970) (C.I.S. No. S441-5) [hereinafter cited as "Hearings Before the Special Subcomm."]. The Senate Committee on Interior and Insular Affairs was charged with oversight responsibility under the OCSLA.

42/ Id. at 1-2. The Special Subcommittee was formed to deal with issues relating to the OCS only, for the purpose of aiding the executive branch in formulating policy with respect to United Nations' proposals for deep seabed development and monitoring developments. Preliminary studies led the subcommittee to concentrate on five areas, including the question of the adequacy of the 1958 Convention on the Continental Shelf and the necessity or desirability of amending the OCSLA. Id. at 1-3.

> No specific outer boundary to our limited claims to sovereignty over the outer continental shelf is set forth in the 1953 Act, and at the time it was generally understood that the limits were those of exploitability of the mineral resources. Essentially, this same concept is in the definition that was adopted by the Geneva Convention in 1958. 43/

Senator Jackson's statement clearly repudiated any notion that the 1953 Act somehow embodied a fixed outer limit for the OCS.44/

The December 21, 1970 Report of the Special Subcommittee reiterated that the OCSLA did not establish "definitive boundaries for the seaward limits of the shelf, but did explicitly preserve the character of the waters above as high seas." The report further stated as follows:

> Although it did not delineate the boundaries of this jurisdiction by defining the seaward limits of the Continental Shelf, the September 28, 1945, press release from the White House indicated that '* * * the 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.' It should be noted, however, that subsequently the U.S. Government has issued leases in areas where the water depth is substantially greater than 100 fathoms under ample legal authority as noted below. 45/

43/ Id. at 1. Senator Butler was Chairman of the Senate Committee on Interior and Insular Affairs in 1953, but Senator Jackson was a member of the committee at that time. Senator Lee Metcalf was Chairman of the Subcommittee during these hearings.

44/The legislative history of the 1953 OCSLA reveals very few references to exploitability and only one considering the use of exploitability to define the outer edge of the continental shelf. See supra, note 32. Those few references that do exist indicate only an awareness that this standard had been advocated in 1951 by the International Law Commission. See supra note 34. Thus, Senator Jackson's statement is understandable only as a description of what was true in 1969: United States jurisdiction and control over the outer Continental Shelf was then defined by the exploitability test of the 1958 Convention on the Continental Shelf, at least with respect to other parties to the treaty.

45/ Special Senate Subcomm. on the Outer Continental Shelf, 91st Cong., 2d Sess., Report by the Special Subcomm. on Outer

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Thus, although by 1969 the Department already had leases covering submerged lands beyond the 200-meter isobath, there was no suggestion in this 1970 Congressional report that such activity was in excess of the Department of the Interior's jurisdiction. 46/

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Continental Shelf to the Comm. on Interior and Insular Affairs 3 (Comm. Print 1970) [hereinafter cited as Report of the Special Subcomm.]. The "ample legal authority" included the OCSLA and the 1958 Convention. This Report of the Special Subcommittee was based not only on the hearings of the Special Subcommittee, but also on the related September 22-23, 1970 hearings of the Subcommittee on Minerals, Materials, and Fuels of the Senate Committee on Interior and Insular Affairs. Id. at III. The Special Subcommittee also attended joint hearings with the Senate Committee on Commerce. "Special Study on United Nations Suboceanic Lands Policy, Hearings Before the Sen. Comm. on Commerce," 91st Cong., 1st Sess. 2 (1969) [hereinafter cited as "Hearings Before the Sen. Comm. on Commerce"]. It should be noted that the Truman Proclamation itself made no reference to a depth criterion. See Truman Proclamation, supra note 11. But see "Territorial Sea Boundaries, Hearings Before the Subcomm. on Seapower of the House Comm. on Armed Services and the Subcomm. on Seapower," 91st Cong., 2d Sess. 9295 (1970), in which Leigh Ratiner, Chairman of the Defense Advisory Group on the Law of the Sea, while testifying in connection with the Nixon proposal, discussed infra note 46, stated that the Truman Proclamation was "a unilateral decision by the United States that the resources of the continental shelf out to a depth of water of 200 meters deep appertained to the United States . . .."

Senator Lee Metcalf, Chairman of the Special Subcommitte on the Outer Continental Shelf, by letter dated December 23, 1969, requested the State Department to describe what rights, if any, the United States had under federal law and the 1958 Convention with respect to the continental margin beyond the 200-meter isobath. The Legal Adviser's reply did not address this question directly, but instead responded that such rights depended upon the definition of the seaward limit of the shelf contained in Article 1 of the 1958 Convention. These letters are contained in "Hearings Before the Special Subcomm.," supra note 41, at 209-11 (1970).

46/ President Nixon proposed in 1970 that the international community adopt the 200-meter isobath as the outer limit of the continental shelf and renounce the more extensive claims that might have been justified under the exploitability test or customary international law. Under the proposal, coastal nations would have acted as trustees for the international community with respect to the zone extending from the 200-meter boundary to the edge of the continental margin. "Presidential Announcement on U.S. Oceans Policy," dated May 23, 1970, reprinted in "Hearings Before the Special Subcomm.," supra note 41, at 214-15 (Appendix
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In the context of the consideration of the United States policy regarding the international law of the sea, the Special Subcommittee also reviewed the 1958 Convention on the Continental Shelf. The report of the Special Subcommittee noted that there had been "considerable disagreement" regarding the meaning of the 1958 Convention's definition of the continental shelf. 47/ The subcommittee took the position, however, that this definition was adequate and endorsed the approach of the American Branch of the International Law Association, which advocated that rights over the continental shelf should extend "to the limit of exploitability existing at any given time within the ultimate limit of adjacency which would encompass the entire continental margin." 48/ Such post-1953 comments make it clear that during the 1960's and early 1970's the concept of the shelf had broadened in popular Congressional understanding to include at least the continental margin. 49/ This changing interpretation

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J). The Special Subcommittee on the Outer Continental Shelf rejected the Nixon proposal, however. Report of the Special Subcomm., supra note 45, at 5.

47/ Report of the Special Subcomm., supra note 45, at 3.

48/ Id. The subcommittee concluded that the Committee on Interior and Insular Affairs faced two major issues: the continued review of the U.S. working paper submitted in August before the U.N. Seabed Committee and the consideration of the best interim policy for the United States with respect to the continued exploitation of the continental margin and deep seabed. Id. at IV. The report also stated that the "expanding boundary" approach of exploitability avoided the two major errors which it believed commonly occurred in interpreting the 1958 Convention: the conclusion that the standard of exploitability was "so vague as to be meaningless" and the idea that the seaward limit of the shelf was somehow "already fixed at the edge of the entire continental margin." Id. at 16.

49/ The Report of the Special Subcommittee stated as follows: "Some have argued that the United States should limit its claim to the Continental Shelf. We believe this argument to be based on misconceptions of fact and law. We feel that undisputed access to the vast energy resources (oil, in particular) located on the U.S. continental margin is of paramount importance." Report of the Special Subcomm., supra note 45, at 5.

The continental margin includes the continental shelf, slope, and rise. Beyond the continental rise is the deep ocean floor. For a general discussion of the scientific meaning of the various terms, see "Hearings Before the Sen. Comm. on Commerce," supra note 46, at 119-22 (statement of Dr. William T. Pecora, Director of the U.S. Geological Survey). The foot of the continental slope was indicated by Dr. Pecora to vary from 1,400 to 3,200

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by the Congress would only be justified if the OCS definition were an expanding one, changing with the altering perception of the U.S. jurisdiction over the continental shelf under international law.

Another indication that Congress viewed the OCS definition as an expanding one, able to adjust by its own terms to changing conditions, is that Congress never amended this key definitional provision, even though the OCSLA itself was extensively amended in 1978.50/ The OCSLA Amendments of 1978 were adopted to establish a more precise regulatory framework for the leasing and development of the outer Continental Shelf. 51/ Significantly, however, these amendments did not change the 1953 definition of "outer Continental Shelf," despite recognition that the circumstances surrounding the 1953 passage of the OCSLA were vastly different from those existing in 1978.52/
There are few references to the problem of defining the outer limit of the OCS in the legislative history of the OCSLA Amendments of 1978. 53/ However, what references there are follow the general patterns described with regard to pre-1953 history, with one exception: both the House and Senate committee reports on the bills which were considered in 1977 contain statements indicating the committees' view that "OCS" should be understood as encompassing at least the continental margin. The Report of the Senate Committee on Energy and Natural Resources stated as follows:

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meters, while the base of the continental rise was said to occur at depths of between 2,000 and 5,000 meters.

50/ Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. 95-372, 92 Stat. 629 (1978).

51/ Ad Hoc Select Committee on the Outer Continental Shelf, "Outer Continental Shelf Lands Act Amendments of 1977," H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 122 (1977), reprinted in [1978] U.S. Code Cong. & Ad. News 1450, 1528 (on H.R. 1614) [hereinafter cited as H.R. Rep. No. 95-590].

52/ Id. at 101-03, [1978] U.S. Code Cong. & Ad. News at 1508-09. Such changed circumstances included major technological advancements; the decline of onshore production and the increased importance of OCS resources; the existence of the 1958 Convention on the Continental Shelf; the U. S. participation in UNCLOS III's efforts to establish the outer limit of the continental shelf; and the emerging EEZ doctrine.

53/ One indication of the concern of Congress regarding the determination of fixed maritime boundaries for the United States was the adoption of 43 U.S.C. § 1333(a)(2)(B), requiring the President by September 18, 1979 to establish procedures "for setting [sic] any outstanding international boundary dispute respecting the outer Continental Shelf."

> The total shelf and continental margin area of the Outer Continental Shelf is estimated to be approximately 1,175,680 [sic] acres (including areas beyond the 200-meter water depth to 2,500-meter water depth). If [sic] this total, the area under Federal jurisdiction is approximately 1,146,680,000 acres. 54/

Thus, between 1953 and 1978, the area Congress understood to be subject to the OCSLA had doubled. Yet Congress recognized that it was unnecessary to amend the definition of "outer Continental Shelf" to accommodate this expansion.55/ This conclusion could

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54/ S. Rep. No. 95-284, 95th Cong., 1st Sess. 49 (1977) (Sen. Comm. on Energy and Natural Resources). This report on S. 9, the Senate bill which was later passed after substantial amendment in lieu of H.R. 1614, contained a statement which referred to the definition of the continental shelf contained in the 1958 Convention as being "open-ended," but the report did not discuss the meaning or application of this fact with respect to the OCSLA. Id. at 48. (The figure given in the quoted text should have been 1,175,680,000 acres.)

55/ During the mid-1970's, the U.S. negotiated bilateral executive agreements and treaties with Mexico, Cuba, and Venezuela establishing general boundaries out to 200 miles from the coast, a fact of which Congress was well aware. See H.R. Rep. No. 95-590, supra note 51, at 128-29, [1978] U.S. Code Cong. & Ad. News at 1534-35 (regarding the provisional agreement with Mexico). Such agreements were generally intended to resolve overlapping 200-mile exclusive fishery zone claims, but the three treaties made it clear that the negotiated boundaries applied as well to overlapping continental shelf claims. The Treaty on Maritime Boundaries Between the United States of America and the United Mexican States, S. Exec. Doc. F, 96th Cong., 1st Sess. (1979); Maritime Boundary Agreement Between the United States of America and the Republic of Cuba, S. Exec. Doc. H, 96th Cong., 1st Sess. (1979); Maritime Boundary Treaty Between the United States of America and the Republic of Venezuela, done March 28, 1978, United States - Venezuela, T.I.A.S. 9890. For a review of these treaties and two later ones involving general boundary lines out to 200 miles, see Feldman and Colson, "The Maritime Boundaries of the United States," 75 Am. J. Int'l L. 729, 740-49 (1981).

Another action by the Department of State is highly relevant in this connection. In response to Canada's announcement of a 200-mile fishery conservation zone in June of 1976, to be effective January 1, 1977, the U.S. issued the coordinates determining its claimed boundaries with Canada in the Gulf of Maine, Strait of Juan de Fuca, Dixon Entrance, and Beaufort Sea, which would apply with respect to the U.S. 200-mile exclusive fisheries zone to come into effect on March 1, 1977. 41 Fed.

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only follow from the fact that Congress, like the Department, understood the OCS definition to vary depending upon the current extent of U.S. jurisdiction.56/

From the foregoing analysis, it is be clear that the definition of "OCS" contained in the OCSLA, has no implied limitation on its express terms. It, thus, remains to be determined what submerged lands appertaining to the United States are currently within United States jurisdiction and control and, so, are within the scope of this OCS definition today.

III. The Extent of U.S. "Jurisdiction and Control" Defines the Outer Limit of the OCS

The sources for determining the outer reaches of U.S. jurisdiction and control over the 200-mile zone are customary international law and conventions binding upon the United States.57/ These two sources will be reviewed in some depth, in the order indicated.58/ Since Presidential determinations of the extent of U.S. jurisdiction are clearly relevant to these issues,

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Reg. 48,619 (1976). (The Juan de Fuca area is north of the Gorda Ridge, but the topography and bathymetry of the two areas are similar.) The U. S. claim lines, in addition to applying to fisheries jurisdiction, were also to constitute the lateral limits within which the U.S. would "exercise . . . its sovereign rights over the continental shelf for the purpose of exploring it and exploiting its natural resources in accordance with international law." Id. The lines asserted were without prejudice to U. S. claims to continental shelf jurisdiction beyond 200 miles. Id. at 48,620 n. 2. Congress was aware, then, of several U.S. continental shelf claims out to 200 miles, yet saw no need to amend the definition of "OCS." For the Canadian Order-in-Council of November 1, 1976, see 110 Canada Gazette Extra No. 101 (1976), reprinted in 15 Int'l Legal Materials 1372 (1976).

56/ See also H.R. Rep. No. 95-590, supra note 51.

57/ Canada/U. S. Boundary Case, supra note 7, at 290-91 (rendered by a five-member chamber of the court). See generally Report of the Special Subcomm., supra note 45, at 17, in which it was recognized that in order to determine the outer limits of a coastal state's jurisdiction over the adjacent continental shelf, it was necessary to consider not only the 1958 Convention, but also customary international law.

58/ In discussing these two sources of international law, judicial decisions and the opinions "of the most highly qualified publicists of the various nations" are a well recognized means of determining such principles. See Art. 38(1)(d), Statute of the International Court of Justice ("I.C.J.").

the 1983 Presidential Proclamation by the United States of a 200-mile Exclusive Economic Zone will also be discussed in this context.

A. Customary International Law

Customary international law generally is binding upon all nations. Essentially, customary international law consists of those legal principles that have become accepted as part of general practice by the international community. 59/ As such, these legal principles comprise "a limited set of norms for ensuring the co-existence and vital cooperation of the members of the international community, together with a set of customary rules . . . ."60/

Customary international law is recognized as having two discrete elements. First, there must be a "general practice" among nations which is preponderant, but not necessarily universal.61/ Second, customary law is evidenced by its acceptance as law. Stated differently, there is a requirement of opinio juris, the existence of a general belief and expectation that a nation will

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59/ This manner of phrasing the definition of customary international law is based on Article 38(1) of the Statute of the International Court of Justice, which requires the court to apply not only "international conventions, whether general or particular" in deciding the disputes submitted to it, but also "(b) international custom, as evidence of a general practice accepted as law; [and] (c) the general principles of law recognized by civilized nations . . . ." Some argue that this article expresses a hierarchy of sources for determining international law. Such a question becomes important if a conflict exists between a treaty provision and customary international law.

All members of the United Nations are parties to the Statute of the I.C.J., by virtue of Article 93 of the U. N. Charter. The Charter of the U.N. and the Statute of the I.C.J. are set forth at 59 Stat. 1033 (1945).

60/ Canada/U. S. Boundary Case, supra note 7, at 299.

61/ The I.C.J. has stated that "a very widespread and representative participation . . . might suffice of itself, provided it included that of States whose interests were specially affected." North Sea Continental Shelf Cases, supra note 33, at 42, 8 Int'l Legal Materials at 376. This quoted passage concerned the court's consideration of the degree of participation in the 1958 Convention, which the court found insufficient to evidence by itself customary international law. Id. (There were then 39 ratifications or accessions to the 1958 Convention.) Id. at 25, 8 Int'l Legal Materials at 359.

behave in the prescribed manner. The International Court of Justice ("I.C.J.")[62] has phrased this test in the following manner:

> [I]n order to achieve this result [and constitute opinio juris], two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. [63]

The existence of such principles in the opinio juris of states has been said to be subject to inductive demonstration "based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas."[64] Obviously, the reaction of other states to a particular practice is clearly relevant to the existence or nonexistence of a principle in opinio juris.[65] [66]

The International Court of Justice has laid down some guidelines for determining whether a given principle has become part of customary international law in the context of the continental

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[62] The International Court of Justice, is the principal judicial organ of the United Nations. The I.C.J.'s main function is to decide the cases submitted to it, but the I.C.J. also serves an important function in the development of international laws. C. Colombos, The International Law of the Sea § 5 (1967) [hereinafter cited as Colombos]. The I.C.J. is one of the most important judicial bodies interpreting issues of customary international law; and for this reason, its pronouncements are accorded great weight.

[63] North Sea Continental Shelf Cases, supra note 33, at 44, 8 Int'l Legal Materials at 376.

[64] Canada/U.S. Boundary Case, supra note 7, at 299.

[65] The formulation of the elements required to establish customary international law varies. See, e. g., A. D'Amato, The Concept of Custom in International Law 47-102 (1971); Z. Slouka, International Custom and the Continental Shelf 5-18, 20-32 (1968) (discussing the wide range of interpretations represented among legal theorists); L. Oppenheim, International Law: A Treatise §§ 11-12 (Lauterpacht ed. 1955) (". . . common consent is the basis of all law").

[66] Accepted sources used to establish the existence of a principle in customary international law include state papers, diplomatic materials, treaties, the work of international legal bodies, and decisions of international and national tribunals and arbitration proceedings, as well as the writings of international legal authorities. Colombos, supra note 62, at § 6.

shelf doctrine.67/ In the North Sea Continental Shelf Cases, the I.C.J. was asked to determine the principles to be applied under customary international law to the delimitation between the parties (the Federal Republic of Germany as against Denmark and The Netherlands) of certain areas of the continental shelf underlying the North Sea. 68/ Since the 1958 Convention was not binding upon the Federal Republic of Germany, the question before the court was whether Article 6 of the 1958 Convention on the Continental Shelf, the provision applying to boundary delimitations between adjacent or opposite states,69/ had become binding upon Germany through force of customary international law. 70/

67/ All of these cases involved the delimitation of the continental shelf. Not until the Canada/U.S. Boundary Case did the I.C.J. address the problem of delimiting not only the continental shelf, but also exclusive fisheries zones by a single boundary. Canada/U.S. Boundary Case, supra note 7, at 267.

68/ North Sea Continental Shelf Cases, supra note 33, at 12-13, 8 Int'l Legal Materials at 346-47. The two joined cases were submitted to the ICJ under special agreements, which defined the issue before the Court in substantially the same language:

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

Id. at 6, 8 Int'l Legal Materials at 343-44. The area of the North Sea which was the subject of this litigation involved depths of less than 200 meters; so, there was no question of determining the outer edge of the continental shelf in these cases. Id. at 14-15, 8 Int'l Legal Materials at 347.

69/ Article 6(1) of the 1958 Convention, supra note 8, provides that in the absence of agreement between such opposite states, "and unless another boundary is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured." Substantially the same provision applies with respect to adjacent states under Section 6(2). Thus, the principle of equidistance is to be applied in the absence of special circumstances. Generally, this formulation may be referred to as "the equisdistance-special circumstances" rule.

70/ North Sea Continental Shelf Cases, supra note 33, at 28, 8 Int'l Legal Materials at 362. It was also argued that the Federal Republic had unilaterally assumed the obligations of the

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The court, in analyzing this issue, first considered whether the equidistance provision of the 1958 Convention was originally expressive of existing customary law. The court considered the origin and basic attributes of the doctrine of the continental shelf, the preparatory work of the International Law Commission, and the wording of the 1958 Convention, concluding that this equidistance concept was not "an inherent necessity" of the doctrine, unlike other aspects. 71/

The I.C.J. then considered whether the equidistance-special circumstances rule had since become part of customary international law. The court analyzed the language of the provision, however, and concluded that it was not of a "norm-creating" nature; because, as drafted in the 1958 Convention, the primary obligation of the disputants under the article was to negotiate a delimitation agreement and only secondarily to apply the equidistance-special circumstances rule. The court also held that the equidistance standard had not found sufficient acceptance in general practice to constitute a principle of customary international law. 72/

In the Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), the I.C.J. was once again asked to delimit the parties' respective rights to the continental shelf adjacent to two nations' coasts. 73/ Neither Tunisia nor Libya was a party to the 1958 Convention, so the court was required to apply generally accepted principles of international law to the delimitation.

The agreement submitting this case to the I.C.J. required the court to take into account "equitable principles and relevant circumstances which characterize the areas, as well as the recent trends admitted at the Third Conference on the Law of the Sea." 74/ The first two factors, equitable principles and relevant circumstances, were consistent with the principles

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Convention, but the I.C.J. found that the facts did not justify such a finding. Id. at 25-27, 8 Int'l Legal Materials at 358-59.

71/ Id. at 33-41, 8 Int'l Legal Materials at 366-73.

72/ Id. at 41-45, 8 Int'l Legal Materials at 373-77. The court did find that customary international law recognized an obligation to settle such delimitation disputes by agreement and, failing agreement, to do so in accordance with equitable principles, which might in a particular case entail application of equidistance. Id. at 46-47, 8 Int'l Legal Materials at 378; accord, Canada/U.S. Boundary Case, supra note 7, at 299-300, 302-03.

73/ Tunisia/Libyan Case, supra note 33, at 18, 21 Int'l Legal Materials at 225.

74/ Id. at 21, 21 Int'l Legal Materials at 227.

governing delimitation under customary law, as determined by the court in the North Sea Continental Shelf Cases. 75/ The latter consideration, the recent trends at UNCLOS III, would have been considered by the court in any event, the court noted, to determine whether such a draft provision was "binding upon all members of the international community because it embodies or crystallizes a pre-existing or emergent rule of customary law." 76/ With these principles and guidelines in mind, it is appropriate to consider next whether customary international law vests the U.S. with continental shelf jurisdiction to a minimum distance of 200 miles from its coasts.

B. The Continental Shelf and EEZ in Customary International Law

The issue to be addressed is whether under customary international law the continental shelf doctrine now affords a coastal nation sovereign rights over its offshore subsoil and seabed for a minimum distance of 200 nautical miles from the baselines used to delimit the territorial sea, irrespective of physical features within this zone. 77/ This question, in turn, overlaps with the conceptually distinct issue of whether the 200-mile EEZ is now recognized in customary international law and invests the coastal state with such jurisdiction independently of the continental shelf doctrine.

Based on the analyses by the I.C.J. in the North Sea Continental Shelf Cases and the Tunisia/Libyan Case, discussed above, the following factors should be considered in such a review: 1) the development of the legal concepts of the continental shelf and the EEZ, including the preparatory work for UNCLOS III; 2) the provisions of the U. N. Convention on the Law of the Sea and the nature of the principles in question as "norm-creating"; 3) state practice with respect to such doctrines; and 4) the United States declaration of an EEZ as consistent with customary international

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75/ Id. at 37, 21 Int'l Legal Materials at 235.

76/ Id. at 38, 21 Int'l Legal Materials at 235. In considering the trends reflected in the UNCLOS III draft Convention, the court noted that the exploitability standard used to define the continental shelf under the 1958 Convention had been rejected in favor of a new two-pronged definition. The first portion of this new definition was based on the natural prolongation of the land mass; the second, on a minimum distance of two hundred nautical miles from the coast. The court noted that this second criterion of distance might have been relevant to the decision in the case before it; but since neither party had advanced an argument based on this trend, the court declined to consider this issue further. Id. at 47-49, 21 Int'l Legal Materials at 240-41.

77/ Because the Minerals Management Service has set a seaward limit of 200 miles with respect to the Gorda Ridge area, there is no need to address the question of the extent to which customary international law may support a claim to a continental shelf extending beyond this minimum 200-mile zone.

law. Thus, the starting point for an analysis of whether a minimum 200-mile continental shelf is now accepted in international law is to review the development of the doctrine of the continental shelf and, in particular, the separation of the legal definition from the geographical concept.

1. Development of the Legal Concepts

The doctrine of the continental shelf was first codified as an emerging principle of customary international law by the International Law Commission during the period from 1950 to 1956. 78/ By 1956, approximately 25 countries had made some form of unilateral claim to exclusive control of the natural resources of their continental shelves, but the concepts and labels employed for this purpose varied widely. There was no pattern of defining such claims in terms of any particular water depth or other criterion during this early period. Indeed, the pattern between 1945 and 1956 was not to define "continental shelf" at all. 79/ Later, the doctrine of the continental shelf was recognized and embodied in the 1958 Convention on the Continental Shelf, 80/ although customary international law continued to develop independently of the 1958 Convention's provisions. 81/ In any event, as its name implies, the 1958 Convention was

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78/ For a comprehensive review of this early work of the I.L.C., see McDougal and Burke, supra note 11, at 695-99; 4 Whiteman, supra note 19, at 829-37.

79/ McDougal and Burke, supra note 11, at 669. For a survey of such claims, see Lauterpacht, "Sovereignty over Submarine Areas," 27 Brit. Y.B. Int'l L. 376, 379-87 (1950).

80/ The definition employed in this 1958 Convention was substantially the same as that recommended by the I.L.C. in 1956, except that the 1958 Convention's definition extended the I.L.C.'s language to include the seabed and subsoil of such submerged lands off the coasts of islands. For the text of the definition contained in the 1956 I.L.C. report to the U.N. General Assembly and the accompanying commentary, see Report of the International Law Commission Covering the Work of Its Eighth Session, 11 U.N. G.A.O.R., Supp. (No. 9) 41-42, U.N. Doc. A/3159 (1956), [1956] 2 Y.B. Int'l L. Comm'n 253, 296-97, reprinted in 51 Am. J. Int'l L. 154, 243 (1957), quoted in 4 Whiteman, supra note 19, at 829-32.

81/ Jennings, "The Limits of Continental Shelf Jurisdiction: Some Possible Implications of the North Sea Case Judgment," 18 Int'l and Comp. L. 819 (1969), reprinted in "Hearings Before the Special Subcomm.," supra note 41, at 273 (Appendix). See also "Outer Continental Shelf: Hearings Before the Subcomm. on Minerals, Materials, and Fuels of the Sen. Comm. on Interior and Insular Affairs," 91st Cong., 2d Sess. 5-9 (1970) (statement of Mr. Northcutt Ely) [hereinafter cited as "Hearings Before the Subcomm. on Minerals].

limited to the seabed and its subsoil.82/

The doctrine of the continental shelf consistently recognized the coastal state's jurisdiction over the full expanse of the geographical continental shelf, although not necessarily the slope and the margin, but under various formulations of what that shelf might be. 83/ The issue of the minimum extent of the legal continental shelf arose in cases in which there was a complete absence of a geographical shelf or where the shelf was very narrow.

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

> "It would appear, accordingly, that so far as most of the relevant proclamations and enactments are concerned [sic] the expression 'continental shelf' is no more than a general indication of title to areas of indeterminate extent. This is so for the reason that the concept of the continental shelf, viewed as a term of geography, is itself unsatisfactory and somewhat arbitrary inasmuch as it is limited to the depth of 600 feet. Even if this were not so, the usefulness of the concept of the continental shelf, thus limited, would be impaired for the additional reason that its literal application would result in some states having no continental shelf at all, or practically none, while the continental shelf of others might extend for hundreds of miles almost up to the immediate vicinity of the territorial waters of other states." 84/

82/ Canada/U.S. Boundary Case, supra note 7, at 291. For a more detailed discussion of the development of the recognized rights of the coastal state in its continental shelf, see 4 Whiteman, supra note 19, at 842.

83/ Article 76(5) and (6) of the U.N. Convention on the Law of the Sea would impose limits on such jurisdiction, however. U.N. Convention on the Law of Sea, done at Montego Bay, Jamaica, Dec. 10, 1982, 21 Int'l Legal Materials 1261 (1982) [hereinafter cited as U.N. Convention].

84/ Lauterpacht, "Sovereignty over Submarine Areas," 27 Brit. Y.B. Int'l L. 376, 383-87 (1950), quoted in 4 Whiteman, supra note 19, at 822 (1965).

Although this divergence between the legal and geographical concepts of the continental shelf was clearly exacerbated by the problem of defining the geographical limits of the shelf,85/ it was also a consequence of the vagaries in the formulation of the concept in international practice at that time 86/ and a function of the growing international pressure to recognize the coastal state's jurisdiction over ever increasing marine areas.

In the Tunisia/Libyan Case in 1982, the I.C.J. noted how far international law had departed from the geological concept of the shelf:

> It was the continental shelf as 'an area physically extending the territory of most coastal States into a species of platform' which 'attracted the attention first of geographers and hydrographers and then of jurists' (I.C.J. Reports 1969, p. 51, para.

85/ The problems in defining the geological or geographical continental shelf are well recognized. See, e.g., Gutteridge, "The 1958 Geneva Convention on the Continental Shelf," 35 Brit. Y.B. Int'l L. 102, 103 n.5 (1959); Young, "The Legal Status of Submarine Areas Beneath the High Seas," 45 Am. J. Int'l L. 225, 233-35 (1951), cited in 4 Whiteman, supra note 19, at 835. It is no easier to define the outer limit of the continental rise. See Emery, "Geological Limits of the 'Continental Shelf,'" 10 Ocean Deve. & Int'l L. 1, 8-10 (1981).

Another aspect of this problem is the difficulty in defining what is meant by "natural prolongation," often said to be one of the main principles underlying the doctrine of the continental shelf. Id. at 4. For examples of differing arguments as to the application of the principle of natural prolongation, see North Sea Continental Shelf Cases, supra note 33, at 31-32, 8 Int'l Legal Materials at 365; Tunisia/Libyan Case, supra note 33, at 44, 50-53, 21 Int'l Legal Materials at 238, 241-43. In North Sea Continental Shelf Cases, supra note 33, at 32, 8 Int'l Legal Materials at 365-66, and in the Tunisia/Libyan Case, supra note 33, at 46, 58, 21 Int'l Legal Materials at 239, 245, the I.C.J. declined to apply the various theories regarding natural prolongation, concluding that this concept alone could not be used to delimit a shelf whose natural prolongation was common to both state claimants.

86/ Gutteridge, "The 1958 Geneva Convention on the Continental Shelf," 35 Brit. Y.B. Int'l L. 102, 104 (1959). During the 1958 session in Geneva, various alternatives for defining the legal continental shelf were considered. One of these proposals was to define the shelf in terms of an arbitrary distance from the coastline. Such an approach clearly had no relationship to geography nor to the ability of the coastal state to develop such resources. However, the proposal was abandoned at that time in favor of the 200-meter depth contour and the exploitability test. Id. at 106-07.

> 95); but the Court notes that at a very early stage in the development of the continental shelf as a concept of law, it acquired a more extensive connotation, so as eventually to embrace any sea-bed area possessing a particular relationship with the coastline of a neighboring State, whether or not such area presented the specific characteristics which a geographer would recognize as those of what he would classify as 'continental shelf'. This widening of the concept for legal purposes, evident particularly in the use of the criterion of exploitability for determining the seaward extent of shelf rights, is clearly apparent in the records of the International Law Commission and other travaux preparatoires of the 1958 Geneva Convention on the Continental Shelf.
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> The fact that the legal concept, while it derived from the natural phenomenon, pursued its own development, is implicit in the whole discussion by the Court in that case [the North Sea Continental Shelf Case] of the legal rules and principles applicable to it. 87/

The distinction between these two concepts, the legal and the geographical, was thus clear by 1958. While some remnant of this geographical concept remains, 88/ it is only one facet of the

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87/ Tunisia/Libyan Case, supra note 33, at 45-46, 21 Int'l Legal Materials at 239.

In its 1956 report, the International Law Commission stated in the commentary on its draft Article 67, defining the continental shelf, that the proposed definition should not be understood to require the existence of a continental shelf in the geographical sense. [1956] 2 Y.B. Int'l L. Comm'n 253, 296-97, reprinted in 51 Am. J. Int'l. L. 154, 245 (1957) [hereinafter cited as 1956 Report of the I.L.C.]. This commentary was cited in the "Hearings before the Special Subcomm.," supra note 41, at 59-60. See also 4 Whiteman, supra note 19, at 838, quoting from the statement of Dr. Garcia-Amador of Cuba, 11 U.N. G.A.O.R. 27, U.N. Doc. A/C.6/SR. 486 (Nov. 29, 1956); McDougal and Burke, supra note 11, at 672-73.

88/ In commenting on Article 68, which described such rights as "sovereign rights for the purpose of exploring and exploiting its natural resources," the I.L.C. stated in its 1956 report as follows: "Neither is it possible to disregard the geographical phenomenon whatever the term - propinquity, contiguity, geographical continuity, appurtenance or identity - used to define the relationship between the submarine areas in question and the adjacent non-submerged land." 1956 Report of the I.L.C.,

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doctrine, albeit an important one, and is not necessarily definitive. 89/ 90/

That some attributes of the doctrine of the continental shelf have emerged as customary international law is settled. As discussed by the I.C.J. in the North Sea Continental Shelf Cases, the fundamental attributes of the continental shelf doctrine then established in customary international law were that the coastal state had "an original, natural, and exclusive (in short a vested) right to the continental shelf off its shores . . . ."91/ As a consequence, no legislation was or is required to vest jurisdiction and control over the subsoil and seabed of the continental shelf in the United States, under customary international law. Such rights are recognized as exclusive and inherent, requiring no assertion or other action on the part of

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supra note 87, at 297, 51 Am. J. Int'l L. at 247. The continuing importance of this geographical concept is demonstrated by the inclusion of the concept of natural prolongation in Article 76 of the U.N. Convention, supra note 83.

89/ The North Sea Continental Shelf judgment, although the one "which has made the greatest contribution to the formation of customary law in this field," is "well known to have attributed more marked importance to the link between the legal institution of the continental shelf and the physical fact of the natural prolongation" than has since been the case. Canada/U.S. Boundary Case, supra note 7, at 293. Also, the definitional problems surrounding the geographical limits of the shelf are a factor. See supra note 85.

90/ Another basis for the coastal state's jurisdiction over the continental shelf, which is occasionally argued as a discrete principle separate and apart from natural prolongation, is that of geographical adjacency. Under this line of reasoning, the designated submerged lands would appertain to the state nearest to them. The International Court of Justice recently dismissed this view summarily, stating that "the mere fact of adjacency" did not produce any legal consequences. Canada/U.S. Boundary Case, supra note 7, at 296-97.

91/North Sea Continental Shelf Cases, supra note 33, at 33, 8 Int'l Legal Materials at 366-67. It is also well established that delimitation between states should be by agreement and, failing agreement, should be accomplished in accordance with equitable principles. Canada/U.S. Boundary Case, supra note 7, at 299-300. Note in this connection that the Department, acting through the Minerals Management Service, has asserted such jurisdiction over the Gorda Ridge area. 47 Fed. Reg. 55,313 (Dec. 8, 1982), amended by 48 Fed. Reg. 2450 (Jan. 19, 1983).

the coastal nation in order to vest. Thus, the absence of any specific assertion of jurisdiction over the continental shelf is not determinative.

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

The impetus for jurisdictional claims to exclusive fisheries zones also sprang from a 1945 Truman Proclamation. 92/ This proclamation's purpose was not to assert an exclusive zone, as such, but United States authority to regulate fisheries conservation and activities.

The Truman Proclamations of 1945 on the continental shelf and fisheries resources led to unilateral claims by other nations, though these varied substantially. Of particular note were the claims by Chile and Peru to national sovereignty over a 200-mile zone 93/ and the 1952 Santiago Declaration, in which Equador, Chile, and Peru asserted "sole sovereignty and jurisdiction" over this 200-mile zone, while recognizing a right of innocent passage, but not of overflight. 94/ Claims of jurisdiction over living and non-living resources in a zone beyond the territorial sea spread rapidly in South America, the Caribbean, and Africa. 95/

92/ Pres. Procl. No. 2668, 3 C.F.R. 68 (1943-48 Compilation), 59 Stat. 884 (1945) ("Policy of the United States with Respect to Coastal Fisheries in Certain Areas of the High Seas"), accompanied by Exec. Order No. 9634, 3 C.F.R. 437 (1943-48 Compilation) ("Providing for the Establishment of Fisheries Conservation Zones"). This Proclamation on coastal fisheries was a companion to the Truman Proclamation, supra note 11.

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

94/ Agreements Between Chile, Ecuador, and Peru, signed at the First Conference on the Exploitation and Conservation of the Maritime Resources of the South Pacific, Santiago, Chile, Aug. 18, 1952, Declarations on the Maritime Zone, U.N. Doc. A/AC 135/10/Rev. 1, at 11-12 (1968), reprinted in English in [1956] 1 Y.B. Int'l L. Comm'n 257.

95/ For a discussion of the evolution of such claims, see Krueger, "The Evolution of the 200-Mile Exclusive Economic Zone: State Practice in the Pacific Basin," 19 Va. J. Int'l L. 321, 325-28 (1979); Clingan, "Emerging Law of the Sea: The Economic

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During this period, there developed a consensus that a country possessed limited jurisdiction over a zone contiguous to its territorial sea granting jurisdiction for the purpose of punishing or preventing infringement of regulations in the nation's territory or territorial sea. 96/ Later, international law recognized that the coastal state also had exclusive fishery jurisdiction within at least this zone 97/ and that beyond it,

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Zone Dilemma," 14 San Diego L. Rev. 530, 538-39 (1977); Hollick, "The Origins of 200-Mile Offshore Zones," 71 Am. J. Int'l L. 494 (1977).

The continental shelf doctrine affords the coastal state rights in the seabed and subsoil of submerged lands, subject to the restriction that the exercise of such rights may not infringe or unjustifiably interfere with navigation or the exercise of rights and freedoms of other states as recognized in customary international law. The coastal state's rights over the continental shelf do not affect the status of the water column or the air space above. The EEZ doctrine also legitimizes claims to the living resources of the water column above the continental shelf within 200 miles of the coast together with certain other rights; but such waters are still subject to many of the traditional freedoms of the high seas. Consequently, claims of sovereignty over the 200-mile zone exceeding those recognized under the EEZ and continental shelf doctrines have consistently met with the disapproval of the world community. It is therefore important to distinguish 200-mile territorial sea or "patrimonial" sea claims from claims to limited sovereign rights over the continental shelf and EEZ.

96/ This concept of the contiguous zone was first codified in Article 24 of the Convention on the Territorial Sea and Contiguous Zone, supra note 5, as a zone of up to 12 miles from the territorial sea baselines. (The United States asserted a 12-mile contiguous zone, in accordance with this treaty.) An early negotiating text in UNCLOS III would have permitted the assertion of up to a 12-mile contiguous zone beyond a 12-mile territorial sea. Informal Composite Negotiating Text, U.N. Doc. A/CONF.62/WP. 10/Rev. 1 (1979), reprinted in 10 New Directions in the Law of the Sea 134 (1980). A provision permitting a contiguous zone of up to 24 miles beyond the baselines delimiting the territorial sea is included in the U.N. Convention on the Law of the Sea. Art. 33, U.N. Convention, supra note 83.

97/ In the Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland), [1974] I.C.J. Reports 175, 191-92, the I.C.J. stated as follows:

> The 1960 Conference failed by one vote to adopt a text governing the two questions of the breadth of the territorial sea and the extent of fishery

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the coastal state had certain preferential, but not exclusive, rights with respect to fisheries.98/

By the time the early preparatory work of UNCLOS III was completed 99/ and the second session convened in Caracas on June 20, 1974, the basic concept of the 200-mile Exclusive Economic Zone had gained definition, although it had not yet been accepted in customary international law. 100/ By 1974, the trend of extending fisheries jurisdiction had become firmly

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

In this case, the I.C.J. held that Iceland had acted in violation of international law as to the Federal Republic of Germany by unilaterally adopting an exclusive fisheries zone of 50 nautical miles in 1972, although the court also found that Iceland had preferential rights in that zone. Id. at 205-6.

98/ Id. at 195.

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

100/ Krueger, "The Evolution of the 200-Mile Exclusive Economic Zone: State Practice in the Pacific Basin," 19 Va. J. Int'l L. 321, 325-28 (1979); Clingan, "Emerging Law of the Sea: The Economic Zone Dilemma," 14 San Diego L. Rev. 530, 539 (1977); Pollard, "The Exclusive Economic Zone: The Elusive Consensus," 12 San Diego L. Rev. 600, 614 (1975). Aguilar, "The Patrimonial Sea or Economic Zone Concept," 11 San Diego L. Rev. 579, 581 (1974).

rooted in state practice: 33 nations had asserted some form of exclusive fisheries jurisdiction beyond the 12-mile contiguous zone. 101/

The provision that the legal continental shelf should include a minimum breadth of 200 nautical miles, irrespective of the physical attributes of the submerged lands in question, had also gained respectability by 1976.102/ The Revised Single Negotiating Text, which was the result of the 1976 session of UNCLOS III, included such a provision,103/ as did each of the draft conventions that followed. The emerging consensus regarding the 200-mile EEZ and the minimum 200-mile continental shelf 104/ is further revealed by the similarities between the

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101/ Mexico's declaration of a 200-mile Exclusive Economic Zone became effective June 6, 1976. For a defense of this early claim, see Szekely, "Mexico's Unilateral Claim to a 200-Mile Exclusive Economic Zone: Its International Significance," 4 Ocean Development & Int'l L. 195 (1977).

Effective March 1, 1977, the United States asserted a 200-mile fishery conservation zone. The Fishery Conservation and Management Act of 1976, 16 U.S.C. § 1801 et seq. (1982), as amended by Pub. L. No. 98-623, §404 (Nov. 8, 1984). For the coordinates determining the United States current 200-mile limit, see 42 Fed. Reg. 12,937 (1977), as amended by 42 Fed. Reg. 24,134 (1977), 43 Fed. Reg. 1658 (1978), 43 Fed. Reg. 8606 (1978), 44 Fed. Reg. 74,956 (1979), 49 Fed. Reg. 43,676 (1984).

102/M. Nash, Digest of United States Practice in International Law 1979 § 1, at 989, 990 (1983). See Report of the Comptroller General of the United States, The Law of the Sea Conference--Status of the Issues, 1978 24-25 (March 9, 1979) (stating that during the 1974 Caracas session, "there was extensive support" for an EEZ of 200 miles, but that there was some division over the outer limit of the continental shelf beyond 200 miles); U. S. Delegation Report, The Third United Nations Conference on the Law of the Sea (New York, March 15-May 7, 1976), at "National Ocean Policy: Hearings Before the Subcomm. on Oceanography and the House Comm. on Merchant Marine and Fisheries," 94th Cong., 2d Sess. 169 (1976). But see Fleischer, "The Right to a 200-Mile Exclusive Economic Zone or a Special Fishery Zone," 14 San Diego L. Rev. 548, 565 (1977).

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

104/Other aspects of the EEZ doctrine were not so easily resolved. For an overview, see Report of the Comptroller General of the United States, The Law of the Sea Conference--Status of the Issues, 1978 24 (March 9, 1979). For a discussion of the early difficulties in formulating this concept, see Clingan, "The Emerging Law of the Sea: The Economic Zone Dilemma," 14 San

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various negotiating texts of UNCLOS III on these two issues. 105/ 106/

2. The 1982 Law of the Sea Convention

The U. N. Law of the Sea Convention has now been finalized in form.107/ The language of its core provisions on the EEZ are little changed from earlier drafts, 108/ as is the case with regard to the minimum 200-mile provision of the definition of the continental shelf. However, on July 9, 1982, the United States announced that it would not sign the U.N. Convention on the Law

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Diego L. Rev. 530, 539-44 (1977). During this same period, UNCLOS III also struggled with the problem of how to define the seaward limit of the continental shelf when it extends beyond 200 miles under the Irish formula, marine scientific research and installations within this same zone, and high seas freedoms in the continental shelf zone. See "Hearings Before the Subcomm. on Mines and Mining of the House Comm. on Interior and Insular Affairs," 96th Cong., 1st. Sess. 172-73 (1979) (the United States Delegation Report on the 8th Session of UNCLOS III in Geneva, March 19 - April 27, 1979).

105/ See Informal Single Negotiating Text, U.N. Doc. A/Conf.62/WP.8/Pt. II, arts. 45-61 (1975), reprinted in 14 Int'l Legal Materials 682 (1975); Revised Single Negotiating Text, 5 Official Records of the Third United Nations Conference on the Law of the Sea 125, U.N. Doc. A/Conf.62/WP.8/Rev. 1/Pt. II, arts. 44-45, 64 (1976); Informal Composite Negotiating Text, 8 Official Records of the Third United Nations Conference on the Law of the Sea 1, U.N. Doc. A/Conf.62/WP.10/Rev. 1/Pt. V (1979); Informal Composite Negotiating Text, Revision 2, U.N. Doc. A/Conf.62/WP.10/Rev. 2 (1980), reprinted in H. Knight, The Law of the Sea: Cases, Documents, and Readings 9 (1980); Draft Convention on the Law of the Sea (Informal Text), U.N. Doc. A/Conf.62/WP.10/Rev. 3 (1980).

106/ As of March 1, 1977, the U.S. asserted one line as its 200-mile fishery conservation zone boundary and continental shelf boundary with respect to its four boundaries with Canada. The official notice proclaimed that the seaward limit of the U.S. continental shelf would extend beyond 200 miles, where the continental shelf did so and international law so permitted "and in a direction determined by application of the principles by which the described boundary segment is determined." 41 Fed. Reg. 18,619; 18,620 n.2 (1976).

107/ U.N. Convention, supra note 83.

108/ See supra note 105 for citations to earlier draft convention documents.

of the Sea.109/ The principal reason for this decision was that the deep seabed regime to be established under the Convention would not meet the fundamental objectives and interests of the United States.110/ Thus, this U.N. Convention will not become binding upon the United States as a matter of treaty law. However, to the extent the Convention embodies customary international law, such provisions are binding upon non-parties to the U. N. Convention.

UNCLOS III took place over a ten-year period. Approximately 150 nations took part in this mammoth international negotiation. One hundred fifty-nine nations and other entities signed the U.N. Convention by the closing date of December 9, 1984, although only sixteen have ratified it. 111/ The scope of this tremendous undertaking, involving, as it did, such a widespread participation, has produced a document which represents the consensus of the world community with respect to many of its non-deep seabed mining provisions. On this basis alone, the proposed U.N. Convention could be viewed as codifying to a large extent customary international law with respect to the EEZ and the continental shelf. 112/

109/ 18 Weekly Comp. of Pres. Doc. 887 (1982). Great Britain and West Germany announced in late 1984 that they also would not sign the 1982 Convention. Other states and qualified entities that declined to sign the Convention are Albania, Equador, the Holy See, Israel, Jordan, Kiribati, Peru, San Marino, Syrian Arab Republic, Tonga, Turkey, Venezuela, Trust Territory of the Pacific Islands, and the West Indies Associated States. Office of the Special Representative of the Secretary-General for the Law of the Sea, Law of the Sea Bulletin 2-6 (Feb. 1985) (Pub. No. 85-03744) [hereinafter cited as LOS Bulletin No. 4].

110/ For a statement of U.S. policy on the U.N. Convention on the Law of the Sea, see Malone, "Freedom and Opportunity: The Foundation for a Dynamic National Oceans Policy," address delivered to the 19th Annual Conference of the Law of the Sea Institute, San Francisco, California, on September 24, 1984.

111/ The fifteen states that have ratified the U.N. Convention as of March 1, 1985 are the Bahamas, Belize, Cuba, Egypt, Fiji, Gambia, Ghana, Ivory Coast, Jamaica, Mexico, the Philippines, Senegal, Sudan, Tunisia, and Zambia. The U.N. Council for Namibia is the sixteenth entity which has ratified the Convention. LOS Bulletin No. 4, supra note 109, at 1-6. Sixty states and other recognized entities must ratify or accede to the Convention before it will enter into force. Art. 308(1), U. N. Convention, supra note 83.

112/ A widespread and representative participation of states in a convention as parties may be sufficient to constitute the opinio juris and the scope of general state practice required to establish a principle as customary international law. North Sea Continental Shelf Cases, supra note 33, at 42, 8 Int'l Legal

(footnote continued)

A chamber of the International Court of Justice recently stressed the importance of the consensus achieved during UNCLOS III regarding the continental shelf and EEZ:

> [T]he Chamber notes in the first place that the Convention adopted at the end of the Conference has not yet come into force and that a number of States do not appear inclined to ratify it. This, however, in no way detracts from the consensus reached on large portions of the instrument and, above all, cannot invalidate the observation that certain provisions of the Convention, concerning the continental shelf and the exclusive economic zone, which may, in fact, be relevant to the present case, were adopted without any objections. . . . This concordance of views [between the U.S. and Canada regarding the recognition of the EEZ in customary international law] is worthy of note, even though the present Judgement is not directed to the delimitation of the exclusive economic zone as such. In the Chamber's opinion, these provisions, even if in some respects they bear the mark of the compromise surrounding their adoption, may nevertheless be regarded as consonant at present with general international law on the question.113/

In addition to recognizing that the U.N. Convention codifies to some unstated extent customary international law with respect to these two doctrines, this passage also indicates the opinion of the court that the EEZ doctrine has entered customary international law.

As reflected in the above passage, the early consensus in UNCLOS III regarding the fundamental attributes of the EEZ114/ and the minimum 200-mile breadth of the continental shelf are evidence that the final articles of the U.N. Convention are expressive of customary international law. A review of the basic attributes of these two doctrines, as codified in the U.N. Convention, and the degree of their objective acceptance by the international community follows.

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Materials at 374. However, if such a convention fails to gain the necessary parties to enter into force, although for reasons related to a severable portion of the treaty, it is more difficult to conclude that the generally accepted provisions of the convention represent opinio juris, by virtue of the participation of so many nations in the negotiations leading to the final text. This conclusion follows particularly where there were, as in the case of the U. N. Convention, substantial trade-offs and compromises during the negotiations.

113/ Canada/U.S. Boundary Case, supra note 7, at 294.

114/ The rights of land-locked (Article 69) and geographically disadvantaged states (Article 70) are peculiarly creatures of the U.N. Convention. Such provisions are clearly not expressive of existing customary international law.

Article 56 of the U. N. Convention describes such rights over the EEZ generally as including "sovereign rights for the purpose of exploring and exploiting, conserving and managing" the living or non-living natural resources of the sea-bed and subsoil and their superjacent waters. Subject to the requirement that the coastal state have "due regard to the rights and duties of other States . . .," the coastal state also has specially defined jurisdiction with respect to "the establishment and use of artificial islands, installations and structures;" marine scientific research; the protection and preservation of the marine environment; and other rights and duties as specified in the Convention. Article 56 concludes with the statement that the coastal state's rights with respect to the seabed and subsoil must be exercised in accordance with Part VI, the portion of the Convention dealing with the Continental Shelf doctrine. 115/ Article 57 of the Convention adds that the coastal state may assert such jurisdiction over an EEZ of up to 200 nautical miles.

The emergence of the EEZ doctrine afforded the coastal state rights in the superjacent waters of the EEZ beyond those previously recognized in the contiguous zone with respect to living resources.116/ However, the EEZ doctrine also reaffirms the coastal state's jurisdiction over the natural resources of the zone's seabed and subsoil for the purpose of exploration and exploitation. Similar "sovereign rights" are, of course, also conferred by the continental shelf doctrine, although the source of the rights claimed remains important.117/ Indeed, Article

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115/ Art. 56, U.N. Convention, supra note 83.

116/ More specifically, Article 61 and Article 62, respectively, give the coastal state extensive rights concerning fisheries conservation and utilization. U. N. Convention, supra note 83.

117/ There are differences in these two concepts beyond the obvious ones. For example, with respect to the natural resources of the subsoil and seabed in the EEZ, the U.N. Convention's provisions apply to all living and non-living resources. Art. 56 (1)(a), U.N. Convention, supra note 83. The continental shelf provisions apply only to non-living resources and "living organisms belonging to sedentary species . . .." Art. 77(4), U.N. Convention, supra note 83. Furthermore, the EEZ doctrine does recognize certain rights with respect to the water column, as such, while the continental shelf doctrine does not; thus, the EEZ doctrine restricts the traditional freedoms of the high seas more extensively than does the continental shelf doctrine as to the 200-mile zone. See Arts. 58, 78, 86, 87-120, U. N. Convention, supra note 83. On the other hand, the coastal state's rights regarding artificial islands, installations, and structures (Articles 60 and 80) and the principles for delimiting overlapping claims between opposite and adjacent states (Articles 74 and 83) are the same for the EEZ and the continental shelf. U.N. Convention, supra note 83. However, the boundaries delimiting overlapping EEZ and continental shelf jurisdictions

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56(3) of the Convention, quoted above, provides that such general rights with respect to non-living resources in the EEZ must be exercised in accordance with Part VI, the section of the U.N. Convention dealing with the continental shelf.

Article 77 of the U.N. Convention on the Law of the Sea restates the basic doctrine of the continental shelf and codifies it: namely, that the coastal state has exclusive and inherent "sovereign rights" over its shelf for the purpose of exploring and exploiting its natural resources. This authority is subject to the general obligation to refrain from unreasonably interfering with freedom of navigation and the laying and maintenance of submarine cables. 118/

The principal definition of the continental shelf in the U.N. Convention on the Law of the Sea is contained in Article 76(1):

> The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.119/

This definition specifies a minimum distance for a continental shelf that is the same as the maximum distance for the EEZ: 200 nautical miles from the baselines used to determine the territorial sea. Where the outer edge of the continental margin 120/ exceeds 200 miles, it is used as the edge of the legal shelf. 121/ As such, this general provision embraces the

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within 200 miles of each state's coast may be different. See Canada/U.S. Boundary Case, supra note 7, at 267.

118/ See North Sea Continental Shelf Cases, supra note 33, at 32-33, 39, 8 Int'l Legal Materials at 366, 372.

119/Art. 76(1), U.N. Convention, supra note 83.

120/ "Continental margin" is defined as "the submerged prolongation of the land mass of the coastal State," consisting of the "sea-bed and subsoil of the shelf, the slope and the rise," excluding "the deep ocean floor with its oceanic ridges . . .." Art. 76(3), U.N. Convention, supra note 83.

121/ The coastal state has the responsibility for establishing the outer edge of the continental margin beyond the 200-mile zone under one of two approaches, under the so-called Irish Formula:
(footnote continued)

basic concept of the continental shelf extending throughout the natural prolongation of the coastal nation's land mass, although the Convention imposes some maximum limits on such jurisdiction. 122/

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> (i) a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope; or
>
> (ii) a line delineated in accordance with paragraph 7 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope.
>
> (b) In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base.

Art. 76(4), U.N. Convention, supra note 83.

122/ Arts. 76(2), 76(5), 76(6), U.N. Convention, supra note 83. Article 76(5), the so-called "biscuit" formula, provides as follows:

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

Subsection 6 contains a further limitation:

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

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

Articles 56(1)(a) and 57 and Articles 76(1) and 77 are, thus, the basic provisions which define the general rights of the coastal state to a 200-mile EEZ and a minimum 200-mile continental shelf. By their express terms, they are fundamentally norm-creating, so that they may form the basis of a general rule of customary law: that is, these provisions are not so detailed that they are unlikely to emerge as principles of international law. Both are "primary" in their provisions and definite in their language. 123/

3. State Practice with Respect to Continental Shelf and EEZ Claims

Unilateral acts on the part of states, not followed by protests from other states, may be so numerous and consistent in practice as to evidence customary law. 124/ Such acts must represent something more than the will of the states in question, however, even if tacitly accepted by the international community. 125/ An additional element is required. Not only must such acts "amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it." 126/

Article 57 of the U.N. Convention permits a state to claim up to a 200-mile EEZ; a state is not required to do so nor does a state have such rights in the absence of a claim. Article 77, on the other hand, restates the settled principle of customary international law that rights over the continental shelf are inherent and exclusive, requiring no action or assertion on the part of the state to vest. Thus, this requirement for customary international law of a sense of legal obligation may not necessarily be revealed directly by an overt claim in the case of continental shelf jurisdiction, but indirectly through the

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123/ Cf. North Sea Continental Shelf Cases, supra note 33, at 41-42, 8 Int'l Legal Materials at 374, finding that Article 6 of the 1958 Convention on the Continental Shelf was not "fundamentally norm-creating."

124/ Amin, "The Regime of the Sea-Bed and Ocean Floor: A Legal Analysis," 1 Jur. Rev. 51, 62-63 (1983); "Memorandum on the Regime of the High Seas," prepared by the Secretariat, U.N. Doc. A/CN.4/32 (July 14, 1950), [1950] 2 Y.B. Int'l L. Comm'n 104, cited in 4 Whiteman, supra note 19, at 810-11 (Unilateral acts are "one of the means by which international custom is formed"); Lauterpacht, "Sovereignty over Submarine Areas," 27 Brit. Y.B. Int'l L. 393-94 (1950). Bilateral agreements may also reflect state practice, of course.

125/ Sorenson, "Law of the Sea," 520 Int'l Conciliation 195, 226-27 (1958), cited in 4 Whiteman, supra note 19, at 811-12.

126/ North Sea Continental Shelf Cases, supra note 33, at 44, and 8 Int'l Legal Materials at 376.

acceptance of such 200-mile claims by other nations and by the recognition of the existence of an element of reciprocity. On the other hand, since an assertion of a 200-mile EEZ, required to protect such rights, carries with it an assertion of rights over the continental shelf within the 200-mile EEZ, such a declaration and pattern of respecting reciprocal declarations would indicate not just acceptance of the EEZ in customary international law, but also acceptance of a 200-mile minimum limit for the continental shelf in international law. 127/

The rapid evolution of state practice with respect to exclusive zones is striking. UNCLOS III is recognized as having accelerated the acceptance of the EEZ and the 200-mile minimum continental shelf concept, primarily through education and enhanced communication. As a consequence, state practice in this area has changed rapidly, as these parallel concepts have become widely accepted. 128/

There are three broad categories of exclusive jurisdiction asserted over the 200-mile belt: declarations of exclusive fishery zones, EEZ's, and territorial sea claims, in increasing order of the degree of jurisdiction involved. Figures vary; however, by September 1, 1977, approximately 65 nations claimed exclusive fisheries zones of 15 miles or more, of which 51 states claimed zones of 200 miles breadth. Such 200-mile fisheries zone claimants then included the United States, Canada, Iceland, Norway, the U.S.S.R., the United Kingdom, and other countries of the European Economic Community. 129/

By November 1978, these figures had changed dramatically. Fourteen countries claimed 200-mile territorial seas; 31 additional states claimed 200-mile exclusive fisheries zones, while seven others claimed 15 to 150 mile zones; and another 37 claimed at least 200-mile EEZ's, while three other states claimed EEZ's of lesser widths. Thus, 82 nations claimed exclusive

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127/ As of late 1983, 19 states asserted jurisdiction over their continental shelves on the basis of a distance of 200 miles or less; but, of these, only four did not already claim a 200-mile EEZ. Fifty-one states still formally adopted the formula of 200 meters plus exploitability, and an additional state used exploitation alone. Law of the Sea Bulletin, supra note 5, at iii - vi. For a compilation of continental shelf claims as of January 1, 1982, see R. Churchill & A. Lowe, The Law of the Sea (1983) (Appendix).

128/ See Law of the Sea Bulletin, supra note 5, at ii.

129/ G. Knight, The Law of the Sea; Cases, Documents, and Readings 12-60 (1980). But see Hollick, "The Origins of 200-Mile Offshore Zones," 71 Am. J. Int'l L. 494, 494 n.2 (stating that as of March, 1977, 27 countries claimed 200-mile fisheries zones).

fisheries jurisdiction, directly or indirectly, over a 200-mile zone; and 51 states asserted exclusive resource jurisdiction over this zone. 130/

As of July 15, 1979, 42 countries claimed 200-mile fisheries zones, 24 additional countries asserted 200-mile EEZ's and 14 additional states claimed 200-mile territorial seas. 131/ Thus, at that time, 80 states claimed some form of exclusive fisheries jurisdiction over zones of 200 miles, while 38 of these states asserted exclusive jurisdiction over the resources of the subsoil and seabed within a 200-mile.

As of December 1983, the weight of practice was even more apparent. Thirteen nations still claimed a 200-mile territorial sea, and 11 others claimed territorial seas with breadths of 15 miles to 200 miles. Fifty-five nations claimed 200-mile EEZ's or less, 132/ and another 26 claimed 200-mile exclusive fisheries zones or less. Seventy-seven nations claimed jurisdiction over 200-mile exclusive fisheries zones, directly or indirectly; and 67 claimed 200-mile EEZ's or even more extensive jurisdiction within the 200-mile zone. 133/ Thus, while allowing for some

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130/ Krueger, "The Evolution of the 200-Mile Exclusive Economic Zone: State Practice in the Pacific Basin," 19 Va. J. Int'l L. 321, 390-99 (1979); but compare Appendix "A" at 373, indicating 32 nations claimed 200-mile fishery zones and another 47 had 200-mile EEZ's. For a review of state practice as of January 1, 1977, see R. Churchill, M. Nordquist, & S. Lay, 6 New Directions in the Law of the Sea 843-84 (1977). The variations in the various compilations of national claims are due to differing identifications of the states surveyed and the paucity of information with respect to the maritime claims of some coastal states.

131/ 10 New Directions in the Law of the Sea 478 (1980).

132/ The U.S.S.R. was not included in these figures, because the Soviet Union did not assert a 200-mile EEZ until February 28, 1984. LOS Bulletin No. 4, supra note 109, at 32.

133/ Law of the Sea Bulletin, supra note 5, at VI. For an in depth survey of national practice with respect to 137 of the 141 coastal nations, see II-V. Compare National Advisory Committee on Oceans and Atmosphere, The Exclusive Economic Zone of the United States: Some Immediate Policy Issues 25-27 (May 1984), stating that 59 nations then claimed EEZ's, 57 of which extended for 200-miles.

There are coastal states with significant fisheries and offshore natural resources that have not yet asserted a 200-mile EEZ. These states include Australia*, Canada*, Finland, the German Democratic Republic, the Federal Republic of Germany*, Greece, Japan*, The Netherlands*, the Republic of Korea, Sweden, and the United Kingdom*. Those states followed by an asterisk claim an

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differences in tabulation, by late 1983, 67 nations claimed at least 200-mile EEZ jurisdiction, as against 38 in mid-1979.

Based on the wide early acceptance of the basic attributes of the EEZ and continental shelf during UNCLOS III and the widespread adoption and recognition of such principles in state practice, it is clear that customary international law currently affords a coastal nation sovereign rights over the seabed and subsoil in a 200-mile zone by virtue of the continental shelf doctrine and through the doctrine of the Exclusive Economic Zone. The assertions by the Department of State in 1976 and the Department of the Interior in 1982-1983 regarding U.S. continental shelf jurisdiction for a minimum of 200 miles were thus well founded.134/

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

4. The Presidental Proclamation on the EEZ

On March 10, 1983, President Reagan issued a Proclamation declaring a 200-mile Exclusive Economic Zone for the United States.135/ This Proclamation provided, in relevant part, as follows:

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exclusive 200-mile fisheries zone, however. Of the states listed, all but Korea and Japan still claim continental shelf jurisdiction based on the exploitability formulation of the 1958 Convention on the Continental Shelf.

134/ Regarding the referenced action by the Department of State, see supra note 55; with regard to the actions of the Department of the Interior, see discussion infra note 149.

135/ Pres. Procl. 5030, 3 C.F.R. 22, 19 Weekly Comp. Pres. Doc. 384 (1983) ("Exclusive Economic Zone of the United States of America")[hereinafter cited as Pres. Procl. 5030]. The outer limits of the EEZ are presently the same as the limits of the 200-mile fishery conservation zone. For a description of these limits, see supra note 101.

Until the issuance of this Proclamation, the United States did not officially recognize EEZ's, as such. However, the United States had negotiated and signed treaties delimiting overlapping maritime claims out to 200 miles with the Cook Islands, Cuba, Mexico, New Zealand (concerning Tokelau), and Venezuela and had submitted the issue of its overlapping claims with Canada in the Gulf of Maine out to 200 miles to the I.C.J. See supra note 7.

> NOW, THEREFORE, I, RONALD REAGAN . . . do hereby proclaim the sovereign rights and jurisdiction of the United States of America and confirm also the rights and freedoms of all States within an Exclusive Economic Zone, as described herein.
>
> The Exclusive Economic Zone of the United States is a zone contiguous to the territorial sea, including zones contiguous to the territorial sea of the United States, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands (to the extent consistent with the Covenant and the United Nations Trusteeship Agreement), and United States overseas territories and possessions. The Exclusive Economic Zone extends to a distance 200 nautical miles from the baseline from which the breadth of the territorial sea is measured. . . .
>
> Within the Exclusive Economic Zone, the United States has, to the extent permitted by international law, (a) sovereign rights for the purpose of exploring, exploiting, conserving and managing natural resources, both living and non-living, of the seabed and subsoil and the superjacent waters and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; and (b) jurisdiction with regard to the establishment and use of artificial islands, and installations and structures having economic purposes, and the protection and preservation of the marine environment. 136/

136/ Pres. Procl. 5030, supra note 135 (emphasis added). The last paragraph of the Proclamation quoted above is almost identical to the text of Article 57(1)(a) and (b) of the U.N. Convention, supra note 83, although references in Article 56 to the more detailed provisions of the Convention were omitted in favor of the Proclamation's general avowal that the rights claimed are limited to those "permitted by international law." During the proceedings in the Canada/U.S. Boundary Case, supra note 7, Judge Gros asked whether the phrase in the EEZ Proclamation "to the extent permitted by international law" should be construed in light of the guidelines reflected in the U.N. Convention on the Law of the Sea, to which the U.S. representative, Davis Robinson, responded affirmatively. Verbatim record, International Court of Justice C 1/CR 84/23, 9 May 1984, pp. 9-14, reprinted in Briscoe, "Federal/ State Offshore Boundary Disputes: The State Perspective," speech

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

Further, the Proclamation itself stressed that it was based on recognized principles of international law.137/ The accompanying Statement provided that the proposed U.N. Convention contained "provisions with respect to traditional uses of the oceans which generally confirm existing maritime law and practice and fairly balance the interests of all States." The EEZ declaration was said to be "consistent with those fair and balanced results in the Convention and international law."138/

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delivered before the 18th Annual Law of the Sea Institute Conference, San Francisco, Calif. (Sept. 26, 1984). See also Malone, "The United States and the Law of the Sea," 24 Va. J. Int'l L. 785, 802 (1984), stressing that the U.N. Convention reflects, but is "entirely independent of," customary international law.

137/ The preamble to the Proclamation stated as follows:

> WHEREAS the Government of the United States of America desires to facilitate the wise development and use of the oceans consistent with international law;
> WHEREAS international law recognizes that, in a zone beyond its territory and adjacent to its territorial sea, known as the Exclusive Economic Zone, a coastal State may assert certain sovereign rights over natural resources and related jurisdiction; and
> WHEREAS the establishment of an Exclusive Economic Zone by the United States will advance the development of ocean resources and promote the protection of the marine environment, while not affecting other lawful uses of the zone, including the freedoms of navigation and overflight, by other States . . ..

Pres. Procl. 5030, supra note 135. The Proclamation further provided that the rights asserted would be exercised in accordance with "the rules of international law." Id. At the same time, the Proclamation reaffirmed the right of all states to exercise "the high seas freedom of navigation, overflight, the laying of submarine cables and pipelines, and other internationally lawful uses of the seas" within this zone.

138/ Statement by the President, 19 Weekly Comp. Pres. Doc. 383, (footnote continued)

The Fact Sheet stated as follows:

> The concept of the EEZ is already recognized in international law and the President's Proclamation is consistent with existing international law. Over 50 countries have proclaimed some form of EEZ; some of these are consistent with international law and others are not.
>
> The concept of an EEZ was developed further in the recently concluded Law of the Sea negotiations and is reflected in that Convention. The EEZ is a maritime area in which the coastal state may exercise certain limited powers as recognized under international law. . . .
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> . . . The President has also established clear guidelines for United States oceans policy by stating that the United States is prepared to accept and act in accordance with international law as reflected in the results of the Law of the Sea Convention that relate to traditional uses of the oceans, such as navigation and overflight. The United States is willing to respect the maritime claims of others, including economic zones, that are consistent with international law as reflected in the Convention, if U.S. rights and freedoms in such areas under international law are respected by the coastal state. 139/

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

The reaction of other states to the United States assertion of an EEZ as being consistent with customary international law is, of course, significant. In this case, although several nations raised concerns regarding the timing of the Proclamation and its

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22 Int'l Legal Materials 464 (1983). Such provisions did not include those dealing with deep seabed mining.

139/ The White House Fact Sheet, 22 Int'l Legal Materials 461, 462 (1983). This passage clearly reveals the element of reciprocity required for opinio juris, that is, the acceptance of duties as well as the claim of rights, which is discussed more fully infra.

possible impact on the negotiations then taking place in UNCLOS III, no state protested this declaration as being contrary to international law.140/

It is clear that the submerged lands of the EEZ off the states of the Union do "appertain" to the United States141/ and have been declared by Presidential Proclamation to be subject to United States "jurisdiction and control," as consistent with international law.142/ This Presidential assertion alone is clearly sufficient to bring such submerged lands within the jurisdictional provision of the OCSLA.143/

140/These states included Australia, Canada, New Zealand, Iceland, and The Netherlands. "11 States Okay U.S. Plan for EEZ: Canada Australia Object: U.S.S.R. Mum," 1983 Platt's Oilgram News, Feb. 22, 1983. In the Canada/U.S. Boundary Case, Canada accepted the legitimacy of the United States assertion of this EEZ, even though Canada has not elected to assert such maritime jurisdiction. See Canada/U.S. Boundary Case, supra note 7, at 294.

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

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

143/ This was the result intended by the President. In his State of the Union Address on January 25, 1984, President Reagan stated that "the Department of the Interior will encourage careful, selective exploration and production of our vital resources in an exclusive economic zone within the 200-mile limit off our coasts . . .." 20 Weekly Comp. Pres. Doc. 87, 91 (Jan. 26, 1984).

Some have argued that not all of the EEZ off the 50 states should be considered part of the OCS. In support of this argument, they point to certain statements in the Proclamation and in the accompanying Statement, concluding that the President's Proclamation left a gap in administrative authority:

> [T]he legal effect of the President's EEZ Proclamation was to assert U.S. sovereign rights over seabed mineral resources out to 200 nautical miles for international purposes, while leaving to legislative action the details of the legal system

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The Presidential Proclamation of the EEZ stated that it would "not change existing United States policies concerning the continental shelf, marine mammals and fisheries, including highly migratory species of tuna which are not subject to United States jurisdiction . . . .." 144/ The accompanying Statement by the President also declared that the newly announced EEZ policy would "not affect the application of existing United States law concerning the high seas or existing authorities of any United States government agency." 145/

In further clarification, the Fact Sheet distributed in conjunction with the announcement of the EEZ included a statement that the proclamation did not alter "existing policies with respect to the outer continental shelf and fisheries within the

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that would apply to domestic exploration and exploitation of those resources which lie in the geographic area seaward of the continental margin yet inside the United States EEZ.

Letter from Chairman Walter B. Jones, Comm. on Merchant Marine and Fisheries, et al., to Secretary William P. Clark (March 15, 1984). Having examined these statements, I must respectfully disagree with the Chairman's interpretation.

144/ Pres. Procl. 5030, supra note 135. With respect to the Proclamation's stated absence of effect on U.S. fisheries policies, the White House Fact Sheet accompanying the Presidential Proclamation and Statement describes the United States exercise of fisheries management and conservation authority within the zone since 1976, under the Fishery Conservation and Management Act, 16 U.S.C. § 1801 et seq., mentioning that the U.S. had exercised certain other types of limited jurisdiction within the 200-mile zone. The Fact Sheet, like the Proclamation, only specifically described U.S. fisheries policy with respect to highly migratory species of tuna, over which the U.S. neither asserts nor recognizes coastal state jurisdiction. The White House Fact Sheet, 22 Int'l Legal Materials 461-63 (1983).

145/ Statement by the President, 19 Weekly Comp. Pres. Doc. 383 (Mar. 14, 1983), 22 Int'l Legal Materials 464 (1983). This Statement by the President referred to two specific areas of U.S. policy which would not be affected by the Proclamation: jurisdiction over marine scientific research within the EEZ and the United States commitment to continue to work through the International Maritime Organization "and other appropriate international organizations" on the problem of the protection of the marine environment. The Statement also declared that the United States would continue to participate in international negotiations to develop a deep seabed mining regime, reasserting that deep seabed mining was a freedom of the high seas and that U.S. companies would be permitted to continue the exploration and exploitation of such resources.

U.S. zone." After referring to the 1945 Truman Proclamation and the enactment of the Outer Continental Shelf Lands Act in 1953, the Fact Sheet stated that "[t]he President's proclamation today incorporates existing jurisdiction over the continental shelf."146/

This reference to the incorporation of "existing jurisdiction over the continental shelf," together with the statements that the application of existing policies and governmental agency authorities also would be unaffected by the Proclamation, have led some to argue that the jurisdictional provision of the OCSLA should not be construed as being enlarged in any manner by this declaration of jurisdiction and control over the EEZ. 147/ However, this argument misconstrues the intent behind these statements.

The statement that existing jurisdiction over the continental shelf was incorporated in the EEZ Proclamation deserves further consideration. First, "incorporation" does not in any sense imply "limitation." Rather, the statement was intended to clarify the fact that jurisdiction exercised by the U.S. under the OCSLA was entirely consistent with the broader rights being claimed by the U.S. over the EEZ (such as living resources).148/

Second, the President's declaration of an EEZ did not actually expand the limits of the Department's jurisdiction under the OCSLA. Indeed, no change in the statutory language defining the OCS was necessary to accomplish this purpose, since the United States already had "jurisdiction and control" over this 200-mile

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146/ The White House Fact Sheet, 22 Int'l Legal Materials 461 (1983).

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

148/ The Fact Sheet and Statement accompanying the Proclamation contain similar statements that the Proclamation provided for U.S. jurisdiction over all mineral resources "out to 200 miles that are not on the continental shelf." Statement by the President, 19 Weekly Comp. Pres. Doc. 383, reprinted in 22 Int'l Legal Materials 464 (1983); accord, The White House Fact Sheet, 22 Int'l Legal Materials 461 (1983). Such statements have suggested to some that the Department lacks jurisdiction over the Gorda Ridge. However, as previously discussed, customary international law recognizes the principle that every coastal state has, as a minimum, a legal continental shelf of 200 nautical miles irrespective of the physical shelf and that such sovereign rights are inherent. Since minerals within 200 miles of the coastline would be on the legal "continental shelf," the term "continental shelf," as used in the Fact Sheet and the accompanying Statement, cannot have been used in its legal sense.

zone by virtue of the U.S. inherent rights under the continental shelf doctrine. Furthermore, the Department had elected to assert jurisdiction over this 200-mile zone in the Gorda Ridge area prior to the EEZ Proclamation.149/ Thus, even if the Proclamation could somehow be construed as freezing agency authority, the Department had such jurisdiction prior to the Proclamation.

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

C. International Treaties: The 1958 Convention on the Continental Shelf

The 1958 Convention on the Continental Shelf is the only multilateral treaty which applies to the delimitation of the outer edge of the continental shelf and is binding upon the United States.150/ This treaty entered into force on June 10, 1964.151/ The effect of the 1958 Convention as to parties is to

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149/ Prior to the issuance of the EEZ Proclamation and specifically with reference to mineral exploitation in the Gorda Ridge Area, the Minerals Management Service issued a notice of jurisdiction asserting regulatory authority over the subsoil and seabed of the submerged lands seaward of the territorial sea up to and including those lands "which admit of the exploitation of the natural resources of such submarine areas." However, such areas were construed as limited to the 200-mile zone, pending completion of a Department of Interior study on the limits of such authority. 47 Fed. Reg. 55,313 (Dec. 8, 1982), amended by 48 Fed. Reg. 2450 (Jan. 19, 1983).

150/ 1958 Convention, supra note 8. Fifty-four states are parties to this convention. U.S. Dep't of State, Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 1985 (1985).

151/ A self-executing treaty is the supreme law of the land under Article VI, Clause 2, of the U.S. Constitution, without any further legislative action being required; and, as such, it supersedes prior inconsistent domestic legislation. Cook v. United States, 288 U.S. 102, 118-19 (1933). Congress may supersede an international agreement for purposes of domestic law if such an intention is clearly expressed; but such an action will not affect the international obligations of the U.S. under the treaty. Id. at 120. Accord, Reid v. Covert, 354 U.S. 1, 18 (1957); Art. 27, Vienna Convention on the Law of Treaties, entered into force Jan. 27, 1980, A/CONF.39/27; Restatement (Second) of Foreign Relations Law of the United States § 145

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define their claims to jurisdiction over the continental shelf. 152/ It should be stressed, however, that the Convention, by its own terms, does not limit claims under the EEZ doctrine in any manner.153/

The question therefore arises as to the meaning of the 1958 Convention's provision defining the legal shelf, since that provision binds the U.S. and other parties. The pertinent definition in the 1958 Convention on the Continental Shelf is as follows:

> For the purpose of these articles, the term "continental shelf" is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands. 154/

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(1965); 14 M. Whiteman, Digest of International Law § 30, at 316 (1970). However, as discussed more fully, infra, no such inconsistency exists between the 1958 Convention, customary international law, and the OCSLA.

Two federal cases have considered the extent of U.S. jurisdiction over the outer Continental Shelf under the OCSLA, but in very limited contexts. See U.S. v. Ray, 423 F. 2d 16 (5th Cir. 1970) (coral reefs on the U.S. continental shelf were held to be part of the seabed for purposes of the OCSLA and, therefore, within the exclusive jurisdiction of the United States to explore and exploit); Treasure Salvors v. Abandoned Sailing Vessel, 569 F.2d 330 (5th Cir. 1978) (a sunken vessel on the outer Continental Shelf was found not to be the type of "natural resource" of the seabed and subsoil subject to exclusive exploitation by the Federal Government under the OCSLA and, for this reason, not to be within the protection of the Antiquities Act, as being on lands owned or controlled by the United States).

152/ For the 1958 Convention to have a wider application, the provisions in question would have to be accepted as customary international law.

153/ Canada/U.S. Boundary Case, supra note 7, at 303.

154/ Art. 1, 1958 Convention, supra note 8, at 473. For the history of this provision, see 1956 Report of the I.L.C., supra note 87; McDougal & Burke, supra note 11, at 695-99; 4 Whiteman, supra note 19, at 829-42.

The Convention further provides that the coastal state's "sovereign rights" over the continental shelf are for the purpose of exploration and exploitation of its natural resources. 155/ Such rights are stated to be exclusive and inherent in the coastal state, requiring no assertion of jurisdiction to vest. 156/

The 1958 Convention's use of the 200-meter depth contour did not provide the measure of certainty that had been anticipated. 157/ By 1970, technological advances had already permitted exploitation in water depths well beyond 200 meters. 158/ As a result, the 200-meter definitional provision of the 1958 Convention had become "as obsolete as the dirigible" and with "neither geologic nor technologic nor legal significance . . .." 159/ Thus, the alternative standard of exploitability has controlled since 1970, and has defined the outermost limits of the legal definition of the continental shelf under the 1958 Convention.

155/ Art. 2(1), 1958 Convention, supra note 8, at 473.

156/Arts. 2(2) and 2(3), 1958 Convention, supra note 8, at 473.

157/Concern regarding the impact of technological development on the usefulness of an exploitability standard was voiced during the proceedings of the Sixth Committee of the General Assembly in 1956, but these warnings were dismissed. See 4 Whiteman, supra note 19, at 839.

The 200-meter depth contour also presented definitional problems. See Trumbull, "Definitions of the Continental Shelf and Allied Features," paper prepared by the U.S. Geological Survey for use by the Department of State at the Geneva Conference on the Law of the Sea, 1958, US/CLS/SP 5 (Jan. 27, 1958) pp. 3-5 (1958), cited in 4 Whiteman, supra note 19, at 815-20.

158/ In 1969, a U.S. oil company had drilled an exploratory well at 395 meters. For a review of the United States technical capabilities and practices at that time, see "Hearings Before the Sen. Comm. on Commerce," supra note 44, at 83-84 ("Coastal-State Mineral Jurisdiction and the Continental Margin: Survey of National Practice") and at 102-04 (statement of Hon. Russell E. Train, Under Secretary, Department of Interior) (Sept. 24, 1969). In 1970 after these hearings concluded, Exxon drilled a well in 456 meters of water off the California coast. By 1983, Shell had drilled a well in the Atlantic Ocean in 1,965 meters of water. "Offshore Drilling Water Depth Records," dated 1984, prepared by Exxon Company, U.S.A., on file with the Minerals Management Service.

159/ "Hearings Before the Subcomm. on Minerals," supra note 81, at 9. For a discussion of the exploitability standard and the problems it engendered, see Z. Slouka, International Custom and the Continental Shelf 101-21 (1968).

The rapid technological advances of the 1960's and 1970's made it apparent that exploitation of the deep seabed of the ocean floors would soon be possible.160/ These advances made it critical to determine whether there was some implied limitation on the exploitability test of the 1958 Convention. Phrased differently, was the application of the exploitability test limited to the continental margin or to some other limit, so that the coastal state would not be entitled to claim dominion over the natural resources of the deep seabed under the 1958 Convention? 161/ This question quickly narrowed to concern with the "adjacency" language of the 1958 Convention's definition: did the requirement of "adjacency" imply such a geographical restriction on this definition of the continental shelf or did "adjacency" represent no more than a general requirement that the claimant state be the one (or one of the ones) contiguous to the submerged lands in question?

Generally, legal authorities interpreted "adjacency" as embodying the principle of the natural prolongation of the continental land mass of the coastal nation, to conclude that there was a fundamental geographical limitation. 162/ Of these authorities, some argued that this limit was the edge of the continental

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

161/ The 1970 Report of the Committee on Deep-Sea Mining of the International Law Association stated as follows: "'The determination of the boundary between the continental shelf and ocean floor is urgent, because any further delay, taking into account the rapid progress of technology especially with regard to exploitation at greater depths, will result in large parts of the ocean floor coming within the scope of Article II owing to the operation of the exploitability test.'" International Law Association, Report of the Comm. on Deep-Sea Mining 11, in Report of the Special Subcomm., supra note 44, at 110.

162/ For example, the Interim Report of the Committee on Deep Sea Mineral Resources of the American Branch of the International Law Association ("I.L.A.") adopted this view and rejected any need to amend the 1958 Convention's definition. Report of the Special Subcomm., supra note 44, at 79-80 (Appendix E). The National Petroleum Council also interpreted "adjacency" as requiring the exclusion of the abyssal ocean floor from the continental shelf's definition under the 1958 Convention. "Hearings Before the Sen. Comm. on Commerce," supra note 44, at 93 (1969). The American Bar Association's position was similar to that of the Interim Report of the I.L.A. "Hearings Before the Special Subcomm.," supra note 40, at 10 (Dec. 17, 1969).

margin,163/ while others maintained that the limit should be something less. 164/ Yet others suggested that "adjacency" might add no meaningful limitation at all. 165/

Questions raised by the 1958 Convention's somewhat ambiguous language166/ and the resultant proliferation of unilateral and varied national claims167/ led to the desire for a new

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163/ The Report of the Special Subcommittee on the Outer Continental Shelf, as well as the American Branch of the I.L.A., concluded that "adjacency" would limit the ultimate reach of the exploitability test "at any given time" to "encompass the entire continental margin." Report of the Special Subcomm., supra note 46, at 3.

164/ This Interim Report of the I.L.A. Committee on the Deep Sea Mineral Resources stated that "[a]s a general rule, the limit of adjacency may reasonably be regarded as coinciding with the foot of the submerged portion of the continental land mass." The report then suggested equating this line with the 2,500 meter isobath, because of the difficulty of determining the foot of the submerged land mass "from direct observation." Id. at 80. However, the 1970 Report of the Deep-Sea Mining Committee of the I.L.A. stated that the committee was unable to make any recommendation as to the proper outer limit of the continental shelf under the 1958 Convention. Id. at 103. See also Finlay, "Realism vs. Idealism as the Key to the Determination of the Limits of National Jurisdiction over the Continental Shelf," Limits to National Jurisdiction Over the Sea 75, 111-12 (1974), concluding that the effect of the adjacency requirement was to limit the outer edge of the Continental Shelf to the continental terrace (the shelf and slope).

165/ For a discussion of some of the various theories and the 1969 position of the Department of the Interior, see "Hearings Before the Sen. Comm. on Commerce," supra note 46, at 106-11 (Sept. 24, 1969).

166/ For a brief discussion of some of the problems regarding application of the exploitability definition, see Goldie, "Delimiting Continental Shelf Boundaries," in Limits to National Jurisdiction Over the Sea I, 47-48 (G. Yates and J. Young eds. 1974).

167/ Thirty-nine nations had ratified the 1958 Convention as of September, 1969. Another eight nations had adopted the Convention's definition for some purposes, and another three had adopted some form of the exploitability test. However, thirty-eight countries had adopted different definitions or no definition at all. "Hearings Before the Sen. Comm. on Commerce," supra note 46, at 80. Unilateral assertions of jurisdiction continued; and throughout the legislative record of this period, there are expressions of concern that such unilateral claims would impinge upon the freedom of the high seas with respect to

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international agreement to establish a fixed outer limit for the continental shelf. 168/ This desire, coupled with the failure of the 1958 Convention to deal adequately with fisheries jurisdiction, the lack of an agreed maximum breadth for the territorial sea, the problem of navigational rights in international straits, and the perceived need to establish an international deep seabed mining regime, led to the Third United Nations Conference on the Law of the Sea. 169/

The 140-odd nations attending UNCLOS III quickly rejected the exploitability test of the 1958 Convention in favor of a different approach to defining the continental shelf. However, there still remains the question of how the exploitability test should be construed as to parties to the 1958 Convention, such as the United States.170/ Certain basic principles of treaty construction embodied in the Vienna Convention on the Law of Treaties are of assistance. 171/

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the water column. See, e.g., "Hearings Before the Sen. Comm. on Commerce," supra note 46, at 22-23 (statement of the Hon. G. Warren Nutter, Assistant Secretary of Defense for International Security Affairs, Department of Defense: "These are all observable examples of the growing chaos in the law of the sea.").

168/ See "Hearings Before the Sen. Comm. on Commerce," supra note 44, at 106-11 (statement of Hon. Russell E. Train, Under Secretary, Department of the Interior: "In any event, a precise boundary must be agreed upon if the development of a set of substantive rules related to exploration and exploitation of deep seabed resources is to be a productive exercise.") and at 4 (statement of Joseph N. Green, Jr., Deputy Assistant Secretary for International Organization Affairs, Department of State). Accordingly, the State Department recommended that no Congressional action be taken at that time. Id. at 7-8; accord, "Hearings Before the Sen. Comm. on Commerce," supra note 44, at 23 (G. Warren Nutter, Assistant Secretary of Defense for International Security Affairs).

169/ See Nye, "Political Lessons of the New Law of the Sea Regime," Law of the Sea: U.S. Policy Dilemma 113, 135 (1983).

170/ The relationship of the 1958 Convention to the U.N. Convention on the Law of the Sea, in the event it becomes effective, is the subject of some uncertainty. For a brief discussion of some of the issues involved, see Gamble, "The Significance of Signature to the 1982 Montego Bay Convention of the Law of the Sea," 14 Ocean Development & Int'l L. 121 (1984).

171/ Vienna Convention on the Law of Treaties, U.N.T.S. ____, Reg. No. 18232, entered into force January 27, 1980, A/CONF.39/27, reprinted in 8 Int'l Legal Materials 679 (1969) [hereinafter cited as Vienna Convention]. The Vienna Convention
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The Vienna Convention on the Law of Treaties codifies the principal rules of interpretation of treaties as recognized in customary international law.172/ Subsection 1 of Article 31 of the Vienna Convention provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." 173/ Subsection 3 further requires that, in addition to any subsequent agreements between the parties, account be taken of "(b) any subsequent practice in

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was the result of a 110-nation conference spanning many years and one in which the U. S. took a very active role. The treaty was signed by the U.S. on April 24, 1970 and submitted to the Senate in late 1971. However, it has not been ratified due to two principal concerns: the convention's treatment of executive agreements as indistinquishable from treaties ratified by the Senate, posing constitutional concerns, and uncertainties regarding the jus cogens doctrine as embodied in the convention. Congressional Research Service, 98th Cong., 2d Sess., Treaties and Other International Agreements: The Role of the United States Senate 15-16 (Sen. Print 98-205 1984) [hereinafter cited as Treaties and Other International Agreements].

The U. S. generally recognizes that the Vienna Convention codifies customary international law. Id. In the President's transmittal letter to the Senate, dated November 22, 1971, reprinted in 11 Int'l Legal Materials 234 (1972), it was stated that this convention satisfied the need for "clear, well-defined, and readily ascertainable rules of international law applicable to treaties . . . ." As of May 10, 1984, 63 countries had ratified or acceded to the Vienna Convention. Treaties and Other International Agreements, supra, at 312-313; Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1982 13-14 (1983) (U.N. Pub. Sales No. E.83.V.6).

172/ Arbitral Tribunal for German External Debts: Judgment in the Case of Belgium, France, Switzerland, the United Kingdom and the United States v. the Federal Republic of Germany, May 16, 1980, reprinted in 19 Int'l Legal Materials 1357, 1370 (1980). Although the United States is not a party to this convention, the U.S. has accepted this general proposition. Id. The Vienna Convention is binding to the extent it codifies customary international law, but it is not otherwise controlling as to nonparties or retroactive.

173/ Vienna Convention, supra note 171, at 691-92. The proper construction of ambiguous treaty provisions is that "the reasonable meaning is preferred to the unreasonable, the more reasonable to the less reasonable, the consistent meaning to the meaning inconsistent with generally recognized principles of International Law and with previous treaty obligations towards third States." 1 L. Oppenheim, International Law: A Treatise, 952-53 (H. Lauterpacht ed. 1955), cited in 14 Whiteman, supra note 151, at 385.

the application of the treaty which establishes the agreement of the parties regarding its interpretation; [and] (c) any relevant rules of international law applicable in the relations between the parties." 174/

With respect to subsequent practice as evidencing the parties' agreement as to the meaning of a treaty provision, it is sufficient under the Vienna Convention to establish that each party has at least tacitly accepted the practice. 175/ Applying this principle, if all the parties to the 1958 Convention had subsequently accepted the 200-mile zone of the EEZ and continental shelf doctrines, even implicitly, this would evidence their agreement as to the proper interpretation of the 1958 Convention's definition of the continental shelf. However, since not all of the parties to the 1958 Convention may be said to have acted in such a manner,176/ the subsequent practice of the parties to the 1958 Convention will not directly resolve this question.

174/ Vienna Convention, supra note 171, at 692. Compare Restatement (Second) of Foreign Relations Law of the United States § 147 (1965), listing factors (in no particular order) to be taken into account when interpreting a treaty. Item (h) of the Restatement's list is "the compatability of alternative interpretations of the agreement with (i) the obligations of the parties to other states under general international law and other international agreements of the parties . . .." Item (f) is "the subsequent practice of the parties in the performance of the agreement, or the subsequent practice of one party, if the other party or parties knew or had reason to know of it."

Article 32 of the Vienna Convention provides that "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its inclusion," may be used to confirm a treaty construction. Vienna Convention, supra note 171, at 692. Since at the time of the preparatory work for the 1958 Convention, the EEZ doctrine was only in very early stages of development, as was the concept of a minimum breadth for the continental shelf, resort to such supplementary materials is not particularly helpful in this case.

175/ T. Elias, The Modern Law of Treaties 76 (1974). The 1980 Draft of the Restatement (Second) Foreign Relations Law of the United States of the American Law Institute adopts a contrary position, denying that subsequent practice may modify a treaty.

176/ As of January 1, 1984, 54 countries were parties to the 1958 Convention. Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force January 1, 1984 258 (1984). Of these, 26 have asserted EEZ's or have signed or otherwise acceded to the U. N. Convention. Thus, almost half of the parties to the 1958 Convention have recognized the coastal nation's rights to a minimum 200-mile continental shelf and EEZ.

Customary international law must be considered when interpreting the meaning of an ambiguous term in a treaty, such as the term "adjacent" in 1958 Convention's exploitability definition.177/ In a recent case, a chamber of the I.C.J. stated that general conventions codifying the law of the sea "must, moreover, be seen against the background of customary international law and interpreted in its light."178/ Furthermore, it is settled that the customary international law standard against which the 1958 Convention's definition must be construed is that which prevails at the time of interpretation, not that which existed as of the effective date. The International Court of Justice addressed this problem in another context:

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

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177/ 1 L. Oppenheim, International Law: A Treatise 952-53 (H. Lauterpacht ed. 1955); 1 Schwarzenberger, International Law 529 (1957); Restatement (Second) of Foreign Relations Law of the United States § 147, comment (h), at 454 ("International agreements are to be interpreted within the general framework of the international legal order"). The application of customary international law in construing an ambiguous treaty provision under the principles of general international law is distinct from the question of whether subsequent developments in customary international law may terminate or modify a conflicting treaty provision. Note, in this connection, that some authorities have adopted the position that later developments in customary international law will supersede such inconsistent treaty provisions. Restatement (Second) of Foreign Relations Law of the United States § 102, comment j, at 28 (Tent. Draft No. 1, 1980); contra, Chessman, "On Treaties and Custom: A Commentary on the Draft Restatement," 18 Int'l Law. 421, 437 (1984).

178/ Canada/U.S. Boundary Case, supra note 7, at 292.

framework of the entire legal system prevailing at the time of the interpretation. 179/

When customary international law is employed in this manner to construe the otherwise ambiguous exploitability term, a manifestly reasonable result is reached. 180/ As previously discussed, customary international law has recognized for many years that the concept of natural prolongation of the coastal state's land mass is a basic principle underlying the continental shelf doctrine.181/ However, this doctrine also includes the 200-mile minimum breadth concept.182/ Thus, when the principles of customary international law regarding the continental shelf are read into the exploitability/adjacency definition of the 1958 Convention, the continental shelf, as defined by the 1958 Convention, extends for a minimum distance of 200 nautical miles from the coast and beyond to the extent such lands admit of exploitation and are within the maximum permissible limit of the continental shelf, if any, under customary international law. Through this interpretative process, the 1958 Convention's

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179/ Legal Consequences for States of the Continental Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, [1971] I.C.J. Reports 16, 31-32 (emphasis added); accord, T. Elias, The Modern Law of Treaties 77 (1974). Compare Restatement (Second) of Foreign Relations Law of the United States § 147, comment (h), at 454 (1965), stating that international agreements "are to be interpreted within the general framework of the international legal order."

180/ Customary international law is also part of the domestic law of the U.S., at least as such international law "is universally recognized or has at any rate received the assent of the United States . . .." L. Oppenheim, International Law: A Treatise § 21a at 38-39 (H. Lauterpacht ed. 1937). This statement is subject to the proviso that customary international law may be superseded by act of Congress with respect to its domestic application. Id. Employing this principle, any domestic statute using the language of an international agreement binding upon the U. S. directly or indirectly should be construed as consistent with customary international law, absent the clear intention to supersede international law domestically.

181/ See Tunisia/Libya Case, supra note 33, at 43-54, 21 Int'l Legal Materials at 238-43; North Sea Continental Shelf Cases, supra note 33, at 31-32, 8 Int'l Legal Materials at 364-66. While arguably this limit may not be defined in customary international law at this time, Article 76 of the U.N. Convention furnishes the only broadly recognized legal definition of this concept.

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

definition of the continental shelf accords with customary international law, recognizing United States "jurisdiction and control" over the 200-mile zone off its shores.

IV. Domestic Statutes Using the Exploitability Standard

The construction placed on the exploitability definition of the 1958 Convention is of particular significance in the domestic context, since various domestic statutes employ the same or a substantially similar definition. A review of such legislation demonstrates that applying customary international law to construe such exploitability language in the same manner as the 1958 Convention does not result in any statutory inconsistency.183/ Indeed, by using customary international law in this fashion, two otherwise seemingly disparate definitions, the exploitability definition and the understanding of the continental shelf in international law, are rendered consistent for purposes of such domestic statutes, as they are in the international context.

There are three ways in which domestic statutes have defined a legal continental shelf: by using the OCSLA's definition,184/ by using the 1958 Convention's definition or similar language, and by employing the term "continental shelf" or "outer continental shelf" without providing a precise definition. 185/ Three

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183/ Pursuant to the recommendation of the National Advisory Committee on Oceans and Atmosphere ("NACOA"), a comprehensive inter-agency review of the effect of the EEZ Proclamation on existing legislation is currently taking place. See NACOA, The Exclusive Economic Zone of the United States: Some Immediate Policy Issues 17 (May, 1984).

184/ The legal continental shelf is defined using the OCSLA definition in a wide variety of statutes. See, e.g., Natural Gas Policy Act of 1978, 15 U.S.C. § 3301 (35) (1982); Coastal Zone Management Act, 16 U.S.C. § 1453(13) (1982); Fair Labor Standards Act, 29 U.S.C. § 213(f) (1982); Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 402(b) (1982); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 630(i) (1982); Occupational Health and Safety Act of 1970, 29 U.S.C. § 653(a) (1982); Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1002(10) (1982); Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 1702(10) (1982); Service Contract Act of 1965, 41 U.S.C. § 357(d) (1982); Civil Rights Act, 42 U.S.C. § 2000e(i) (1982); Energy Policy and Conservation Act, 42 U.S.C. § 6202(6) (1982); Withdrawal, Reservation, or Restriction of Public Lands for Defense Purposes, 43 U.S.C. § 155(1) (1982). The analysis of the OCSLA's definition of the "outer Continental Shelf" applies to these statutes, as well.

185/ See, e.g., Coast Guard Aids to Navigation, 14 U.S.C. § 81 (1982) (authorizing the Coast Guard to establish aids to navigation other than electronic aids only within the U.S., "the waters above the Continental Shelf," and certain other listed

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statutes adopt the second approach, utilizing an exploitability definition: the Deep Seabed Hard Mineral Resources Act, the Marine Protection, Research and Sanctuaries Act, and the Magnuson Fishery Conservation and Management Act. 186/ A review of these statutes follows.

A. The Deep Seabed Hard Mineral Resources Act

The Deep Seabed Hard Mineral Resources Act ("DSHMRA") 187/ was enacted in 1980 primarily to establish a domestic regime "to encourage and regulate the development of hard mineral resources

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locations); Federal Energy Administration Act, 15 U.S.C. § 774(a) (1982) (requiring submittal by the Administrator of the Federal Energy Administration of a report of oil and gas reserves and resources in the U.S. "and its Outer Continental Shelf"); Marine Resources and Engineering Development Act of 1966, 33 U.S.C. § 1107 (1982) ("marine science" defined in relation to "marine environment," which in turn is defined to include "the Continental Shelf of the United States"; Ocean Thermal Energy Conversion Act of 1980, 42 U.S.C. § 9101(b) (1982) ("nothing in this chapter shall be construed to affect the legal status of the high seas, the superjacent airspace, or the seabed and subsoil, including the Continental Shelf"); Internal Revenue Service Code, 26 U.S.C. § 956(b)(2) (1982) (excluding certain movable property "used on the Continental Shelf" of the U.S. from the definition of "United States property" for purposes of computing the amount of earnings of a controlled foreign corporation in U.S. property). None of these statutes would be adversely affected by interpretation of either "Continental Shelf" or "OCS" as harmonious with existing customary international law.

The Internal Revenue Service Code uses varied approaches to define the continental shelf. See 26 U.S.C. § 48(a)(2)(B)(vi) (1982) (excluding certain property used in exploration, removal, or transportation of resources from the OCS, as defined in the OCSLA, from the meaning of "section 38 property"); 26 U.S.C. § 4496(c) & (d) (1982) (defining "deep seabed" and "Continental Shelf" in the same manner as the Deep Seabed Hard Mineral Resources Act, for purposes of determining the tax on the removal of hard mineral resources from the deep seabed).

186/ Marine Protection, Research and Sanctuaries Act, 16 U.S.C. § 1432(a) (1982); Magnuson Fishery Conservation and Management Act, 16 U.S.C. § 1802(3) (1982); Deep Seabed Hard Mineral Resources Act, 30 U.S.C. § 1403(2) (1982).

187/ 30 U.S.C. § 1401 et seq. (1982).

of the deep seabed by United States citizens . . .." 188/ The clear legislative intention was that this statutory regime should be an interim one, effective only until UNCLOS III should reach a comprehensive agreement on deep seabed mining binding upon the United States or until the United States should enter into some other multilateral treaty concerning deep seabed mining. 189/

The basic regulatory scheme of the Act imposes the requirement that U.S. citizens obtain certain licenses and permits from the National Oceanic and Atmospheric Administration ("NOAA") before mining hard minerals of the deep seabed.190/ Specifically, the DSHMRA authorizes NOAA to issue licenses for exploration lasting 10 years and "permits for commercial recovery" of hard minerals lasting a minimum of 20 years.191/ These licenses and permits are "exclusive," in the sense that NOAA may not issue a license or permit for the same area to more than one applicant; however, such licenses and permits must be honored only by United States citizens and citizens of nations whose laws respect the licenses

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188/ H.R. Rep. No. 96-411, Part I, 96th Cong., 1st Sess. 1 (1979) (House Comm. on Interior and Insular Affairs) [hereinafter cited as H.R. Rep. No. 96-411, Pt. I]; accord, 30 U.S.C. §1401(b)(3) (1982). H.R. 2759 was enacted as the Deep Seabed Hard Mineral Resources Act, in lieu of the corresponding bill in the Senate, S. 493. For the legislative history of this Act, see [1980] U.S. Code Cong. & Ad. News 1600.

189/ 30 U.S.C. §§ 1401(a)(16), 1401(b)(3) (1982); H.R. Rep. No. 96-411, Pt. I, supra note 188, at 24, 26, 37-38; H.R. Rep. No. 96-411, Pt. II, 96th Cong., 1st Sess. 25-26, 40-42 (Aug. 17, 1979) (Comm. on Merchant Marine and Fisheries), [1980] U.S. Code Cong. & Ad. News 1649-50, 1664-66 [hereinafter cited as H.R. Rep. No. 96-411, Pt. II].

The United States accepted the general proposition that the hard mineral resources of the deep seabed constituted the common heritage of mankind, but that this principle would only be given definition by a comprehensive Law of the Sea Convention. 30 U.S.C. § 1401(a)(7) (1982). However, until that time, it was stated in the DSHMRA to be "the legal opinion of the United States that exploration for and commercial recovery of hard mineral resources of the deep seabed are freedoms of the high seas subject to a duty of reasonable regard to the interests of other states in their exercise of those and other freedoms recognized by general principles of international law . . .." 30 U.S.C. § 1401(a)(12) (1982).

190/ A "hard mineral resource" is "any deposit or accretion on, or just below, the surface of the deep seabed of nodules which include one or more minerals, at least one of which contains manganese, nickel, cobalt, or copper." 30 U.S.C. § 1403(6) (1982).

191/ 30 U.S.C. §§ 1412, 1417 (1982).

or permits issued under the Act.192/ The DSHMRA does not authorize NOAA to collect any bonus payment or royalty for the rights conferred by the license or permit. Instead, NOAA may assess an "administrative fee," reflecting "the reasonable administrative costs incurred in reviewing and processing the application [for a license or permit]."193/

The Act, by its terms, applies to the "deep seabed." As in the case of the OCSLA's definition of the "outer Continental Shelf," the term "deep seabed" is not defined in the DSHMRA by reference to geology, geomorphology, or submarine topography. The DSHMRA defines the "deep seabed" as the area outside of "(A) the Continental Shelf of any nation; and (B) any area of national resource jurisdiction of any foreign nation, if such area extends beyond the Continental Shelf of such nation and such jurisdiction is recognized by the United States . . .." 194/ The Act, in turn, defines "Continental Shelf" by borrowing the definition from the 1958 Convention on the Continental Shelf:195/

192/ These nations are called "reciprocating states" and are designated by NOAA in consultation with the Secretary of State. 30 U.S.C. §§ 1403(11), 1428 (1982). Others may compete with the American licensee or permittee, as an exercise of the freedom of the high seas. 30 U.S.C. § 1401(12) (1982).

193/ 30 U.S.C. § 1414 (1982).

194/ 30 U.S.C. § 1403 (4) (1982). The origin of this definition of the "Continental Shelf" was a proposed amendment of S. 493 made by Juanita M. Kreps, Secretary of Commerce. S. Rep. No. 96-307, 96th Cong., 1st. Sess. 63 (1979) [hereinafter cited as S. Rep. No. 96-307].

195/ In 1979, the 200-mile EEZ was, at the least, well established as a principle of emerging customary international law, as was the minimum 200-mile breadth of the continental shelf. The basic provisions of the draft treaty being negotiated in UNCLOS III recognized this general acceptance, as Congress was aware. H.R. Rep. No. 96-411, Pt. IV, 96th Cong., 1st Sess. 28 (May 15, 1980), [1980] Code Cong. & Ad. News 1716. However, the text defining these provisions was then only a negotiating document and could not be assumed to be in final form. For this evident reason, Congress chose to define "Continental Shelf" for purposes of the DSHMRA in the language of the 1958 Convention on the Continental Shelf. 30 U.S.C. § 1403(2) (1982).

S. 2053 of the 95th Congress, a precursor to the Deep Seabed Hard Mineral Resources Act of 1980, provided in Section 4(2) that the definition of "Continental Shelf" was only to be effective "until such time as a new definition of the limits of national jurisdiction over seabed mineral resources of the continental margin may be agreed to as part of a comprehensive Law of the Sea Treaty which enters into force for the United States . . .." (S.

(footnote continued)

> "Continental Shelf" means . . . the seabed and subsoil of the submarine areas adjacent to the coast, but outside the area of the territorial sea, to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of such submarine area 196/

As previously discussed, the 1958 Convention has subsumed within it the customary international law's principle that any coastal nation, including the United States, has inherent continental shelf jurisdiction out to a minimum of 200 nautical miles. It follows with equal force that a domestic statute employing the same definition as the international agreement should be interpreted in the same manner for domestic purposes, when, as here, the intention behind enactment of the act in question was to harmonize international and domestic law.197/

Applying customary international law in this manner, the "deep seabed" beyond the "Continental Shelf" could not apply closer than 200 miles to the coast. Consequently, leasing the Gorda Ridge area out to a maximum of 200 miles from the coast would not conflict with the authority of NOAA to regulate deep seabed mining.198/

(footnote continued from previous page)
2053's definition otherwise paralleled that of the DSHMRA.) "Hearings Before the Subcomm. on Arms Control, Oceans and International Environment of the Sen. Comm. on Foreign Relations on S. 2053," 95th Cong., 2d Sess. 57-58 (1978). This same language was included in S. 493 of the 96th Congress, the "Deep Seabed Mineral Resources Act," which was substantially similar to S. 2053 and which was, in turn, similar to H.R. 2759, which became the DSHMRA. "Joint Hearings Before the Subcomm. on Energy Resources and Materials Production of the Sen. Comm. on Energy and Natural Resources and the Sen. Comm. on Commerce, Science, and Transportation on S. 493," 96th Cong., 1st Sess. 13-14 (1979).

196/ 30 U.S.C. § 1403(2) (1982).

197/ "Hearings Before the Subcomm. on Oceanography of the House Comm. on Merchant Marine and Fisheries," 96th Cong., 1st Sess. 206 (1979) (statement of Ambassador Elliot Richardson, Ambassador at Large and Special Representative of the President for the Law of the Sea Conference: "The legislation now pending before Congress is designed to be compatible with the eventual ratification and entry into force for the United States of a Law of the Sea treaty.")

198/ The Center for Law and Social Policy, by letter to the Department of the Interior dated December 8, 1983, adopted the position that "the correct delimitation of the continental shelf [under the 1958 Convention, DSHMRA, and OCSLA] is on a

(footnote continued)

The principal justification for the establishment of this domestic regime under the DSHMRA was to exercise one of the freedoms of the high seas.199/ The Senate Report on S. 493, a precursor to the DSHMRA, contained a discussion of the objectives of the bill known as the "Deep Seabed Mineral Resources Act":

> As indicated in both the findings and purposes in section 2, S. 493 addresses a subject which has associated with it numerous international legal and diplomatic issues. The purpose of section 3 is to firmly establish the congressional intent as to how S. 493 relates to or impacts upon those issues.
>
> Subsection (a) contains a disclaimer of extraterritorial sovereignty by the United States. . . .[T]he subsection also contains the firm statement that the United States by this act does not assert any sovereignty or sovereign or exclusive rights over, or the ownership of, any areas of the deep seabed. This disclaimer and the other provisions of this subsection are in keeping with the customary international law doctrines of freedom of the seas and res nullius (that resources are the property of no one, that they are subject to appropriation by anyone, and that their ownership exists only after they are reduced to possession). 200/

The doctrine of res nullius does not apply to the submerged lands of the continental shelf or the EEZ. Under customary international law, the coastal state's rights to the natural

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geomorphological basis." As a consequence of such a construction, the coastward edge of the "deep seabed" off the U.S. would not coincide with the legal continental shelf under the OCSLA or international law. The Department, for the reasons stated, respectfully disagrees. Congress clearly did not intend for the "outer Continental Shelf" under the OCSLA and the "deep seabed" under the DSHMRA to overlap; nor did Congress intend to create a regulatory gap. At the same time, there is no evidence of a Congressional intention to modify the "OCS" definition in any manner; and there was a very plainly stated desire to coordinate the regulatory scheme of the DSHMRA with the emerging UNCLOS Convention, which was intended to codify emerging and emergent customary international law.

199/ 30 U.S.C. §§ 1401(a)(12), 1402(a)(1) (1982).

200/ S. Rep. No. 96-307, supra note 194, at 9.

resources of its continental shelf are exclusive, as are such rights to the seabed and subsoil within the EEZ. Thus, no state may engage in offshore mining in such areas without the express consent of the coastal state.

Suppose that the application of the "exploitability" standard could result in defining an outer edge of the "Continental Shelf" under the DSHMRA that would be within the EEZ or continental shelf, as otherwise recognized under customary international law. The area seaward of this line would then be "deep seabed" under the DSHMRA. However, paradoxically, the non-living natural resources within the portion of this area overlapping the EEZ or continental shelf would not be high seas, in which the deep seabed's resources belong to no one; thus, the doctrine of res nullius could not be applicable to such areas, in contravention of the Senate report.201/ Furthermore, the paradox remains if one views this problem from the opposite perspective. One cannot suppose that Congress envisioned foreign nations engaging in hard minerals mining operations within our 200-mile EEZ. Yet this would be the result if the DSHMRA applied within 200 miles of the U.S. coast, for those nations could claim their activities were protected as a freedom of the high seas. In such a case, the foreign state could be in competition with a U.S. licensee, neither of whom would have to make any bonus or royalty payments to the U.S. Government.202/

There is a further basis for believing that Congress did not intend the DSHMRA definition to be other than harmonious with international law. The DSHMRA was interim in nature: it was

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201/ The DSHMRA expressly disclaims any intention to assert sovereignty or any form of sovereign or exclusive rights over the deep seabed. 30 U.S.C. § 1402(a)(2) (1982). H.R. Rep. No. 96-411, Pt. II, supra note 189, at 46, stated as follows:

> No nation has the right to assert sovereignty or any form of sovereign jurisdiction or ownership over any area or in situ resources of the deep seabed. The subsection [(a) of Section 102] states unequivocally that the United States is not making any such claim.

202/ One of the major provisions of the DSHMRA established the Deep Seabed Revenue Sharing Trust Fund, 30 U.S.C. § 1472(a), to supply required contributions for revenue sharing from deep seabed mining under an international treaty ratified and in effect with respect to the U.S. by March 1, 1990. 30 U.S.C. §1472(d) (1982). If the DSHMRA applied to portions of the seabed within the EEZ, then this account would be partially funded by revenues from resources in areas subject to exclusive U. S. jurisdiction and with respect to which no such international obligation exists. Congress plainly did not intend such a result.

intended to be superseded by the treaty to emerge from UNCLOS III, if the United States elected to become a party.203/ If the U. N. Convention's terms were not consistent with those of the DSHMRA, this expected transference of regimes and responsibilities would be rendered all the more complex.

The Congressional intention in enacting the DSHMRA was clearly to preserve the Department of the Interior's authority over the continental shelf, as that concept might development in international law, while giving the National Oceanic and Atmospheric Administration regulatory authority over nodules of the deep seabed, seaward of the legal continental shelf. To accomplish this fundamental purpose, the exploitability test of the DSHMRA must be interpreted, as in the case of the 1958 Convention's definition, consistent with the customary international law's concept of the continental shelf. This solution resolves the potential inconsistency between the DSHMRA and the OCSLA, accords with the Congressional purpose and justification for the enactment of the DSHMRA, and is consistent with international law and the proper construction of the 1958 Convention .

2. The Marine Sanctuaries Act

The Marine Sanctuaries Act204/ permits the Secretary of Commerce to designate certain areas of ocean waters as marine sanctuaries whenever the Secretary determines, after specified consultations and Presidential approval, that such a step is necessary "for the purpose of preserving or restoring such areas for their conservation, recreational, ecological, or esthetic values."205/ The Act provides that marine sanctuaries may be "as far seaward as the outer edge of the Continental Shelf, as defined in the Convention on the Continental Shelf . . . ."206/ This language clearly incorporates the 1958 Convention's continental shelf definition, not just the same or similar language. Therefore, the appropriate construction of this definition is identical to the interpretation of the 1958 Convention's definition in international law.207/

203/ H.R. Rep. No. 96-411, Pt. I, supra note 190, at 37.

204/ 16 U.S.C. § 1431 et seq. (1982).

205/ 16 U.S.C. § 1432(a) (1982).

206/ Id.

207/ The Act expressly requires that all regulations promulgated to implement the terms of the designation of a marine sanctuary must "be applied in accordance with recognized principles of international law, including treaties, conventions, and other agreements to which the United States is signatory." To the extent that the application of such regulations would not accord

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3. The Magnuson Fishery Conservation and Management Act

The Magnuson Fishery Conservation and Management Act ("FCMA") was enacted in 1976 primarily to establish a 200-mile exclusive fisheries conservation zone off the coast of the U.S.208/ The Act, by its own terms, applies to all fish, except highly migratory species of tuna, within this 200-mile zone, but also asserts exclusive fishery management authority beyond the 200-mile zone over anadromous species and all "Continental Shelf fishery resources."209/ The FCMA prohibits foreign fishing for such stocks, unless authorized under the Act, conducted pursuant to permit, and not otherwise prohibited.210/

The FCMA defines the fishery conservation zone as having as its inner boundary "a line coterminous with the seaward boundary of each of the coastal States" and extending to an outer boundary "200 nautical miles from the baseline from which the territorial sea is measured."211/ The term "Continental Shelf" is defined by

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with such principles or would not be authorized by special agreement, such regulations are applicable solely to persons who are citizens of the U.S. 16 U.S.C. § 1432(g) (1982).

208/ 16 U.S.C. § 1801 et seq. (1982), as amended by Pub. L. No. 98-623, § 404 (Nov. 8, 1984). Enacted April 13, 1976, the Act was effective March 1, 1977.

209/ 16 U.S.C. § 1812 (1982). "Continental Shelf fishery resources" is defined as including species designated in the Act plus any "living organisms of any other sedentary species" which are procedurally determined to be, at the harvestable stage, "immobile on or under the seabed" or "unable to move except in constant physical contact with the seabed or subsoil, of the Continental Shelf which appertains to the United States . . . ." 16 U.S.C. § 1802(4) (1982). With respect to anadromous species, management authority is not asserted during the time such species are within the territorial sea or fishery conservation zone of another nation, to the extent recognized by the U.S. 16 U.S.C. § 1812(2) (1982).

210/ 16 U.S.C. § 1821(a) (1982). An exception exists for foreign fishing conducted pursuant to international agreements or for recreation. 16 U.S.C. § 1821(b), (c), and (j) (1982).

211/ The inner boundary of this zone defining Federal/State fisheries regulatory authority is not identical to the outer limit of the territorial sea, since the seaward boundary of a state of the Union is defined by the Submerged Lands Act. For example, in some cases this Federal/State jurisdictional line under the Submerged Lands Act is three marine leagues offshore, not three nautical miles. There is another distinction. The Magnuson Act generally extends the fisheries jurisdiction of the (footnote continued)

the Act, in silent accord with the terms of the 1958 Convention, as the seabed and subsoil of submerged lands beyond the territorial sea of U. S. "to a depth of 200 meters or, beyond that limit, to where the depth of superjacent waters admits of the exploitation of the natural resources of such areas."212/

Since the FCMA applies generally to the 200-mile zone, the construction of "Continental Shelf" as including such a minimum area could not cause any inconsistency or ambiguity. Indeed, the FCMA envisions the continental shelf as possibly extending beyond 200 miles.213/

From this review of the domestic statutes employing an exploitability definition of the continental shelf, it is apparent that the interpretation of such language in light of developments in customary international law yields a manifestly reasonable result. Thus, in the domestic as in the international context, the exploitability definition incorporates the generally accepted principles of the continental shelf doctrine.

V. Conclusion

The United States has "jurisdiction and control" over the submerged lands extending seaward for a distance of 200 miles by virtue of the 1983 Presidential Proclamation of the EEZ and by virtue of the United States inherent rights over its continental shelf for a minimum distance of 200 nautical miles. As a consequence, such lands clearly appertain to the United States. The submerged lands within this 200-mile zone contiguous to those ceded to the states under the Submerged Lands Act are within the OCSLA's definition of the "outer Continental Shelf." Therefore,

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adjacent state to enclaves of waters within the EEZ that are surrounded by the territorial sea of the U. S. and to designated areas in Nantucket Sound and southeastern Alaska. 16 U.S.C. § 1856(a) (1982), as amended by Pub. L. No. 98-623, § 404 (Nov. 8, 1984).

212/ 16 U.S.C. § 1802(3) (1982). "High seas" is defined as all waters beyond the territorial sea of the U. S. and other nations, to the extent recognized by the U. S. 16 U.S.C. § 1802(13) (1982).

213/ See 16 U.S.C. § 1812 (1982). This Act was also concerned with developments in UNCLOS III. A provision was included that if the U. S. ratified the U.N. treaty, the Secretary of Commerce would be authorized to make any interim adjustments in the regulations promulgated under the Act necessary and appropriate pending the effective date of the treaty as to the U. S. 16 U.S.C. § 1881 (1982). The FCMA also has extensive provisions regarding the negotiation of international fishery agreements. See 16 U.S.C. § 1822 (1982).

they are within the Department of the Interior's present leasing authority under the OCSLA. The Department has the authority under the OCSLA to lease polymetallic sulfides in the Gorda Ridge area within the 200-mile zone.